REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL 107 OF 2007

JOSEPH KIMUTAI CHEMUREN …..…..…….. APPELLANT

V E R S U S

ALFRED ASUNGA MUREVE ….…….…… RESPONDENT

J U D G E M E N T

The appellant was the registered owner of motor vehicle registration number KAL 038 H Toyota Station Wagon. On the 5th of December 2004 the said vehicle was involved in a road traffic accident with a pedestrian along the Chavakali – Kapsabet road. The pedestrian was a minor by the name **Benvictor Indeche Asunga** aged 5 years and suffered fatal injuries.

The respondent is the father of the deceased and sued the appellant at the Hamisi Resident Magistrate Court. He claimed damages both under the Law Reform Act (Cap 26) and The Fatal Accident Act (Cap 32 Laws of Kenya). Parties agreed on liability at 20% in favour of the plaintiff. The respondent was the only witness who testified and the appellant did not call any witness as liability had already been agreed upon.

The learned magistrate made an award in favour of the respondent as follows:-

1. Under the Law Reform Act.

(a) loss of expectation of life - KShs.80,000/=

(b) pain and suffering - KShs.25,000/=

2. Under the Fatal Accident Act

Lost years - KShs.351,700/=

Special damages were assessed at - KShs.43,300/=, making a total award of ***KShs.500,000/= less 20%*** contribution totaling ***KShs.100,000/=.*** This made the net award to be ***KShs.400,000/=.***

Being dissatisfied with the decision of the learned magistrate, the appellant preferred this appeal and listed the following three grounds of Appeal.

1. The trial magistrate erred in law and fact in awarding manifestly excessive and undeserved

general damages under the Fatal Accidents Act for lost years of KShs.351,700/= noting that the deceased was only 5½ years old at the time of his death.

2. The trial magistrate erred in law and fact in failing to discount the award under the Law Reform Act in toto from the ultimate award thereby making a double award to the Respondent who both a personal representative of the estate of the deceased and dependant of the deceased.

3. The trial magistrate erred in law and fact in not taking into account or considering the submissions of the Appellant and evidence adduced.

Mr. Were, counsel for the appellant submitted that the deceased was **5½** years old and the award of ***KShs.371,700/=*** under the Fatal Accident Act was excessive and that the court ought to have awarded a lesser amount. Counsel further contended that the lower court failed to discount the award under the Law Reform Act and that damages cannot be recovered twice, counsel submitted that the lower court did not address itself to the above issues and urged this court to reduce the award. Mr. Were submitted that the appellant's submissions were not taken into account by the lower court. Counsel relied on the authority of **KENYA BREWERIES LTD. VS SARO (CIVIL APPEAL NO. 144 OF 1990, MOMBASA). ASAL VS MUGE & ANOTHER (KLR 2001, 2002,** and **KEMFRO AFRICA LTD. T/A MERU EXPRESS SERVICES (1976) & ANOTHER VS LUBIA & ANOTHER – 1987 KLR, 30.**

Mr. Magare, counsel for the respondent opposed the appeal. Counsel submitted that the lower court took into account the award it had already made under the Fatal Accident Act when making an award under the Law Reform Act. The appellant's submissions were considered by the lower court. Counsel further submitted that the award under the Law Reform Act ought not to be reduced from that made under the fatal Accident Act. The court only has to take into account the award under the Fatal Accident Act. Counsel contended that the award is not excessive and relied on the cases of **SOUTH NYANZA SUGAR CO. LTD. –VS- JAMES MARTIN MATOKE, KISUMU CIVIL APPEAL NO. 91 OF 1997, HASSAN –VS- NATHAN MWANGI TRANSPORTERS and 4 OTHERS 1986, KLR 457, SALIM GOLAMALI T/A KALENJIN AUTO SPARES –VS- LUCAS OKOA NYONGESA – BUSIA HCCC NO.52 OF 2001 and FLORENCE KAVUTHA MALUSI –VS- TRANSEMI (K) LTD. – MOMBASA HCCC NO.43 OF 2002.**

The only issues for determination in this appeal is whether the lower court applied the correct principals in making the award and whether the award is excessive. The overriding principle in Fatal Accident claims as stated in both the case of Kemfro Africa Ltd. t/a "*Meru Express Services (1976)"* & another –vs- Lubia & Another (No.2) and the case of South Nyanza Sugar Co. Ltd. –vs- James Martin Matoke is that in reaching the amount awarded under the Fatal Accidents Act, the trial court should take into account what it has awarded under the Law Reform Act, specifically where the damage being recovered devolve on the same dependants.

Section 2 (5) of the Law Reform Act states that "***The rights conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accident Act."***

The established legal position is that the family of a fatal accident victim can file suit both under the Fatal Accident Act and the Law Reform Act. I have noted from the judgment of the lower court that the learned magistrate in the judgement took into account the award made under the Law Reform Act when awarding damages under the Fatal Accident Act. I do find that the trial court applied the correct legal principles in making its award.

Is the award excessive. Counsel for the appellant contended that the award of ***KShs.371,700/=*** under the Fatal Accident Act is excessive. In the written submissions filed by the plaintiff before the lower court, the plaintiff proposed a sum of ***KShs.100,000/=*** as sufficient. The plaintiff relied on the case of **GRACE WAIRIMU MWANGI –VS- JOSEPH MWANGI GITUNDU, MACHAKOS CIVIL CASE NO. 162 OF 1994 WHERE KSHS.70,000/=** was awarded for an 18 year old student. On the other hand the respondent relied on the case of **MOHAMED ABDINOOR & ANOTHER –VS- WILSON**

WARULA & ANOTHER – HCCC NO.1525 OF 2002 (NRB) where KShs.720,000/= was awarded for lost years to a 10 year old child.

The general principle in an appeal of this nature is not to interfere with the award by the trial court unless it can clearly be established that the award is indeed excessive. Damages in fatal accident claim do not exactly replace the life that has been lost. This does not mean that courts should award exorbitant amounts but when the award seems to be reasonable, the appellate court should ordinarily not interfere with the same. I do find that the award of ***KShs.371,700/=*** for a five year old child in 2007 was not excessive.

The trial court did consider both parties submissions and this is reflected in the judgement. The learned magistrate considered the appellant's authorities in reaching at the judgement. The award is not excessive in the circumstances. Indeed the learned magistrate in page 2 of the judgement noted that he would have given more damages had he not given damages under the Law Reform Act as the beneficiaries are the same.

In the end, I do find that this Appeal has no merit and the same is dismissed with costs to the respondent. The award of ***KShs.500,000/= less 20%*** contribution by the trial court shall not be interfered with.

Delivered, Dated and Signed at Kakamega this 1st day of October, 2009

SAID J. CHITEMBWE

J U D G E