REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 112 of 1995

GERALD MBALE MWEA …….....
……..APPELLANT

AND

KARIKO KIHARA

GICHOMO KIHARA …….....…….
…..RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Machakos (Hon. Mr. Justice J. L. A. Asiemo) dated 17th May, 1995

IN

H. C. C. C. NO. 170 OF 1994

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JUDGMENT OF THE COURT

Margaret Wambui Kihara (hereinafter referred to as "the deceased") was knocked down by a motor vehicle registration number KQE 829, the property of Gerald Mbale Mwea (the appellant). She died as a result of the accident. Her two sons (the repondents) filed suit in the superior court claiming damages under The Law Reform Act and The Fatal Accidents Act (chapters 26 and 32 respectively of The Laws of Kenya). The issue of negligence was, by consent of the parties, agreed. The liability of the appellant was agreed at 65%, that of the deceased being 35%.

The superior court had before it the task of assessing general damages under the two aforesaid Acts, and special damages.

We will first deal with the claim under The Fatal Accidents Acts. The award made thereunder forms the

substance of complaint in grounds 2 and 3 of the memorandum of appeal. The deceased was 75 years old when the accident occurred. The two respondents were aged 52 and 48 at the time of her death. Only the first respondent gave evidence in the superior court. He said he was 54 years old at the time of the trial and that the deceased fed and educated the respondents' children; that they lost her support since her death; that she could have assisted them for a long time; that even the second respondent was helped by the deceased.

When the first respondent was cross-examined he admitted that he has his own farms and his brother (the second respondent) has one farm; that he had ten children aged between 30 years and 9 years one of whom was working in Nairobi. Some of the other Children, he said, were casual labourers and got paid for the work they did. He went on to say that the deceased used to help him pay the school fees of his children from moneys the deceased obtained from the cow she kept and her coffee farm. He said that since the death of the deceased he had been unable to educate his children.

The respondents are in possession of the three acre coffee farm of the deceased. The first respondent was the manager of the coffee farm during the deceased's life time. It can be seen immediately that the respondents were simply bringing in the issue of their being dependent on the deceased to ground their claim under The Fatal Accidents Act. The issue of dependency is always a question of fact to be proved by he who asserts it. We do not see how the two respondents can lawfully claim to have been the dependants of the deceased (who was 75 years old at the time of her death) when they owned their own farms or farm and when the first respondent was the manager of the deceased's coffee farm. If the cow belonging to the deceased was a good source of the deceased's income then there was no need to sell the cow after the deceased's death. Yet this was exactly what the first respondent did.

Whilst applying a multiplier of 4 years and multiplicand of Shs. 48, 000/= the learned judge failed to take into consideration the fact of actual dependency, that is to say: were the respondents the deceased's dependants? We are unable to accept the respondents counsel's argument that a 52 old son and a 48 year old son were the deceased's dependants. Such alleged dependency was in our view a sham. We hold that there was no dependency at all in law which enabled the learned judge to consider the multiplier and the multiplicand. The award made under The Fatal Accidents Act is set aside.

We turn now to the forth and fifth grounds of appeal by which the appellant complains that the learned judge ought not to have awarded any damages under The Law Reform Act as no letters of administration, either ad colligenda bona or final were produced by the respondents in the superior court. Whilst we were not shown any letters of administration, we were given conflicting dates of the issue of the grant of letters ad colligenda bona by counsel. The appellant's counsel said that she was shown a grant made after the date of the filing of the suit. The respondents' counsel said that the grant was made before the suit was filed. It is now settled law that a plaintiff has no locus standi to claim under The Law Reform Act until after he has obtained letters of administration to administer the estate of the deceased concerned. This was decided by a five judge bench of this court in the case of Trouistik Union International & Another vs Mrs. Jane Mbeyu & Another, Civil Appeal No. 145 of 1990, unreported. In the case of a deceased who died intestate, the obtaining of letters of administration after filing of suit does not validate the claim under The Law Reform Act as there is no doctrine of retrospective effect applicable to such a case. It is the duty of counsel for the Plaintiff in such a case, to establish that such letters of administration had been obtained before the suit was filed. If this is not done the claim under The Law Reform Act fails.

Mr. Kihara for the respondents argued that as the issue of liability had been determined by consent, there was no necessity of producing letters of administration. With respect, the issue of liability is in respect of tort. The agreement between the parties as regards liability, decided the question of who was to blame and to what extent, for the accident. It was therefore wrong for Mr. Kihara to take it for granted that merely by the admission of liability the tortfeasor (the appellant) was conceding to the claim under The Law Reform Act in the absence of timely letters of administration. This argument does not help the respondents at all. That claim was incompetent at the date of its inception and an incompetent claim cannot be said to be made competent simply because the issue of tortious liability does not fall to be decided.

The following special damages were pleaded:

Funeral Expenses	Shs. 34000.00
Police abstract	Shs. 100.00
Post Mortem report	Shs. 100.00
Letters of Administration fees	Shs. 15300.00

The first respondent stated in his evidence in the superior court that the following sums were spent for funeral expenses:

(a) For hire of motor vehicle to transport the body of deceased Shs. 8000.00

(b) Clothes for the deceased Shs. 2500.00

(c) K. B. C. Announcement Shs. 1800.00

(d) Mortuary fees Shs. 1200.00

(e) Food Shs. 6000.00

(f) Hire charges for vehicle for funeral convoy Shs. 8000.00

Total Shs. 27,500.00

Miss Waweru for the appellant has not challenged these figures. We allow the same and add thereto the sum of Shs. 200/= for the police abstract fees and post mortem report fees. The claim for fees paid (Shs.15,300/=) for obtaining letters of administration is not substantiated and the first respondent in fact stated that he paid Shs. 1,500/= for the same but produced no receipt. It can be understood if one cannot produce a receipt for a "matatu" journey but when fees are paid to an advocate there ought to be a receipt.

In the circumstances we allow special damages of Shs.18,005/= being 65% of Shs. 27,700/= and reflecting the agreed proportionate liability of the appellant.

This appeal is therefore allowed and the orders made by the trial judge are set aside and we substitute therefor judgment for the respondents against the appellant only in the sum of Shs. 18,005/= with interest thereon at the rate of 12% per annum from 29th day of April, 1994 until date of payment. The respondents' costs in the superior court will be on the scale applicable in the Resident Magistrate's court, as provided for in Schedule VII of the Advocates (Renumeration) Order. The Appellant has succeeded almost wholly in this appeal. He will therefore have 80% of the costs of the appeal.

Miss Waweru sought orders from us for the refund of moneys paid by her clients should the appeal succeed. That is a matter for the superior court as set out in Section 91(1) of the Civil Procedure Act. We make no observations in that regard.

Dated and delivered at Nairobi this 12th day of February, 1997.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL