



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 105 OF 2016

BETWEEN

DANIEL INYANGALA AMBETSA.....APPELLANT

AND

MOSES SIGORIA SHAURI t/a MULTIBRAND MARKETING...RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kakamega , (R.N. Sitati, J.) dated 21<sup>st</sup> April, 2016*

in

HCCA No. 151 of 2011)

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JUDGMENT OF ASIKE- MAKHANDIA, JA

Road traffic accidents are rampant. It follows that the victims of these accidents will seek compensation in terms of damages from the registered owners and drivers of the vehicles responsible for their pain and loss. In this case, the appellant, **Daniel Inyangala Ambetsa** sued the respondent, **Moses Sigoria Shauri t/a Multibrand Marketing** in his capacity as the administrator of the estate of his son, Martin Asira Inyangala, (deceased) who died in an accident that involved the respondent's vehicle. He sought compensation for the loss he suffered following his death.

The appellant in his plaint sought general damages for pain and suffering, general damages, special damages of Kshs. 37,000, costs and interest. It was alleged that at the time of his death the deceased was 25 years old, of good health single and with no children. He was a boda boda rider earning an average of Kshs. 250 per day which translated to Kshs. 10,500 monthly average.

In his statement of defence, the respondent denied all wrong doing and that he was the registered owner of motor vehicle registration No. KAN 996R. It was alleged that if the accident occurred on the material day, it was solely caused by or substantially contributed to by the deceased.

The issue of liability was however, subsequently compromised in the terms 75%: 25% in favour of the appellant. What was left for determination by the trial court was quantum of damages. The trial court in its Judgment awarded the appellant a total of Kshs. 332, 625, made up as follows: loss of expectation of life-100,000; pain and suffering-10,000; special damages-22,500; and lost years 300,000. The trial court also awarded the appellant costs and interest.

The respondent was dissatisfied with the damages awarded and therefore preferred an appeal to the High Court on grounds that the trial court awarded damages not pleaded or proved and that the damages awarded were inordinately high and therefore an error in principle. It contended that a list of dependants of the deceased was not given and as such the appellant's claim under the Fatal Accidents Act was incurably bad in law and the court ought not to have assumed that the appellant was the deceased's dependant.

In response, the appellant submitted that the award by the trial court was within the law and should not be disturbed.

The learned Judge in his judgment held that the appellant should not have benefited under both the Fatal Accidents Act and the Law Reform Act. The appeal was allowed, the judgment of the trial court set aside and in lieu thereof Judgment was entered for the respondent as follows; (a) Liability – 75 to 25% in favour of the respondent, (b) loss of expectation of life-100,000; (c) pain and suffering-10,000; and (d) special

damages-22,500. The appellant was thus awarded Kshs. 99,375 .

Being aggrieved by the Judgment of the High Court, (**Sitati, J.**), the appellant lodged this 2<sup>nd</sup> appeal in which he raised four grounds that the learned Judge erred in holding that; the trial court's judgment had awarded double compensation; that the appellant was not entitled to damages for lost years; that the trial court's award gave compensation to the appellant under both the Fatal Accidents Act and the Law Reform Act; and that the appellant's award was diminished into an amount which deprived the appellant any compensation for the wrongful death of his son, was therefore unequitable and failed to accord the appellant substantial justice.

The appeal was canvassed by way of written submissions by **Mr. Momanyi**, learned counsel for the appellant and **Ms. Asuna**, learned counsel for the respondent.

It was the appellant's submission that the trial court did not commit errors that would have warranted the High Court to overturn its decision such as; failing to take into account particular circumstances or probability, misapplying the applicable law, or that the award was inordinately high or that the evidence adduced did not support the findings. That the finding by the learned Judge that the appellant should not have benefitted from both Acts was in contravention of Section 2(5) of the Law Reform Act which provides that the appellant could benefit from both Acts as long as the Judge took into account both awards.

Opposing the appeal, the respondent reiterated that there was no proof of dependency and as such the appellant was only entitled to damages as awarded by the High Court. That there was no documentary proof of income of Kshs. 250 per day and that the appellant brought the suit in his own name as opposed to as administrator of the estate of the deceased. He faulted the appellant for failing to plead that he was a dependant of the deceased pursuant to Section 8 of the Fatal Accidents Act and the trial court for awarding lost years. He relied on the Nigerian case in **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C 91 OF 2012** and **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2013] eKLR** in emphasizing that a party is bound by its pleadings which in turn limits issues upon which the court may pronounce itself. That the trial court acted out of character and pronounced itself upon speculation. She submitted that the appellant neither pleaded nor provided particulars of dependency. She restated that the High Court was justified in finding that a party should not benefit twice over the same claim. She urged for the dismissing of the appeal.

This is a second appeal. Section 72(1) of the Civil Procedure Act provides the grounds upon which this Court can entertain a second appeal. The grounds should comprise matters of law only. The thrust of this 2<sup>nd</sup> appeal is the intervention of the High court regarding the award of the damages by the trial court on first appeal. It should be appreciated that the award of damages is in the discretion of a trial court and an appellate court is not entitled to interfere with the award unless it is satisfied that the Judge took into account an irrelevant factor or disregarded a relevant one, or that short of this, the amount is inordinately so low or so inordinately high that it must be a wholly erroneous estimate of damages and thus an error of principle.

In the instant case, the learned Judge interfered with the award of damages made by the trial court. She relied on the alternate proposal by the respondent regarding what the appellant should have received. She further took the view that the correct position in law was that a party claiming should not benefit under both the Fatal Accidents Act and the Law Reform Act. We do not think that that is the correct position in law. We shall revert to the issue later in this Judgment.

The respondent contends that the appellant did not adduce evidence of proof of dependency and income and therefore he should not have been awarded lost years. In the case of **Kenya Breweries Limited v Saro [1991] eKLR** this Court stated thus:

***“In our view damages are clearly payable to a parent of a deceased child irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution.”***

This quote puts to rest and settles the submissions by the respondent that the appellant was not entitled to damages for lost years for want of proof of dependency, failure to give particulars of such dependency or that the appellant was bound by his pleadings. Further it also renders authorities relied by the respondent irrelevant. In **Sheikh M Hassan v Kamau Transporters [1982-88] I KAR 946**, the Court laid down guidelines for assessing damages for lost years under the Law Reform Act. Those guidelines are, *inter alia*:

- a) ***“The sum to be awarded is never a conventional one but compensation for a pecuniary loss.***
- b) ***It must be assessed justly and with moderation,***
- c) ***Deduct the victims living expenses during the “lost years” for they would not form part of the estate.***
- d) ***A young child's present or future earnings in most cases would be nil.***
- e) ***An adolescent would usually be real, assessable and small.***
- f) ***Calculate the annual gross loss.***
- g) ***Apply the multiplier (estimated number of “lost working years” accepted as reasonable in each case).***
- h) ***Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her.”***

The claim herein was for damages for lost years payable to the estate of the deceased whose life was shortened by the tortious acts of the respondent. It was not a claim for loss of dependency by the appellant under the Fatal Accidents Act. Therefore, in determining this appeal

on the issue of quantum it is necessary to determine the nature of the appellant's claim. The appellant made claims both under the Fatal Accidents Act and the Law Reform Act which the trial court awarded but on appeal the learned Judge made an award under the Law Reform Act only. I note that claims under these two statutes are distinct. The Fatal Accidents Act was meant to cure a deficiency in the common law where the cause of action did not provide for dependants of a deceased person. Section 4(1) of the Fatal Accidents Act now provides as follows;

**“Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ..... be brought by and in the name of the executor or administrator of the person deceased]”.**

I agree that if the appellant's claim was considered under the Fatal Accidents Act the deceased's father would not be a dependant and the claim would fail. On the other hand, the Law Reform Act was intended to ensure that causes of action survive the death of the deceased hence Section 2(1) thereof provides:

**“Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.”**

The two statutes exist side by side and are not mutually exclusive. Section 2(5) of the Law Reform Act provides as follows:

**2(5) 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 deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).”**

The only limitation in awarding damages under both Acts is that the court should avoid double compensation or duplication of the award as the claim on behalf of the estate of the deceased is, *“in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act”*. In Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR this Court rendered itself thus:

***“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”***

That is to say, if the trial magistrate had considered that the claim for loss of dependency under the Fatal Accidents Act and came to the conclusion that the dependants claiming did not fall within Section 2(1) thereof, and still proceeded to make an award for lost years, this would have amounted to a duplication of awards. However, having awarded lost years, the court could still go ahead award the estate damages under the Law Reform Act as this would not amount to double compensation. Therefore, with due respect to the learned Judge, it was an error in principle on her part to find that the trial court had made an award which amounted to double compensation. In Kenya Breweries v Saro (supra) the court further said:

***“...In Kenya society, at least as regards Africans and Asians, the mere presence in a family of child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact.”***

In Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 the Court held that:

***“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”***

In the premises, the learned Judge erred in holding that the award by the trial court amounted to double compensation. For the foregoing reasons I would allow the appeal to the extent that the award by the High Court for Kshs. 99,375 is set aside and instead reinstate the trial court's award of Kshs. 332,625 which amount shall carry interest at court rates from date of judgment by the trial court. The appellant shall also have the costs of this appeal.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules since Odek, J.A passed on before the Judgment could be delivered. As Kiage J.A concurs, orders accordingly.

**Dated and delivered at Kisumu this 31<sup>st</sup> day of January, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR.**

**JUDGMENT OF KIAGE, J.A**

I have had the advantage of reading in draft the Judgment of my learned brother Makhandia, JA with which I agree and to which I have nothing useful to add.

**Dated and delivered at Kisumu this 31<sup>st</sup> day of January, 2020.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**