REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CIVIL APPEAL NO. 13 OF 2006

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

BHUPENDRA M. PATEL (Suing as the personal and legal representative of the

Estate of **MANIBHAI PATEL** (Deceased)**....…….....……..... APPELLANT**

AND

GEORGE OMWANZA KINANGA.……...…….....…...…….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Musinga, J.) dated on 26th day of January, 2004

in

H. C. C. C. No. 29 OF 1999)

****

JUDGMENT OF THE COURT

1. The appeal before us raises the sole issue of dependency under the ***Fatal Accidents Act,*** Cap 32. Laws of Kenya which was rejected by the High Court **(Musinga Ag. J.** (as he then was) in his judgment delivered on 26th January 2004 in a road traffic accident matter. The facts are simple and largely common ground.

2. On the 20th November 1996, 76 year-old **Manibhai Patel** (the deceased) was lawfully walking along Kenyatta Avenue in Nakuru town when he was knocked down by a motor cycle ridden and controlled by **George Omwanza Kinanga** (the respondent). Despite flying out the deceased to Nairobi for specialized attention to his injuries, he died soon after. The deceased was adjudged to have been 40% negligent while 60% negligence was apportioned to the respondent. There is no challenge to the apportionment of liability as it was consensual.

3. The special damages incurred through medical and interment bills were proved and judgment given for them at Sh. 196,970. Again there is no challenge to that finding. So too about damages for loss of expectation of life and pain and suffering assessed at Sh.60,000 and Sh. 10,000 respectively under the **Law Reform Act.** There was no challenge.

4. The suit was filed by **Bhupedra Patel (**the appellant), the elder of the two sons of the deceased who was his legal representative. In respect of the claim for loss of dependency, he testified that the deceased was a pensioner earning £ 3,333.45 monthly from the British Government as he was a former colonial policeman. He also testified that the deceased was a Director of a Company in the United States of America which in the year 1996 paid him $ 38,782.

5. Here in Kenya, the deceased was the Managing Director of a private company known as Timberland (Kenya) Ltd, which carried on sawmill business and where the appellant was the only other Director and shareholder, each of them holding one share. In 1996 the company made a profit of Sh.64,451 and Directors' fees of Sh. 72,000 was paid out. That company, according to the appellant, stopped its operations soon after the death of the deceased since he was the driving force. He testified that he assisted the deceased at home and in the business since their mother died in 1974 and in return the deceased supported him fully. He was thus wholly dependent on the deceased's income and his demise had occasioned total loss to him.

6. The amazing part was that the appellant was a 56 year-old bachelor although his witness, **Mafad Patel** (PW2) testified that he was once married but separated. The trial Judge who saw and heard him testify had this to say before rejecting his claim for dependency on account of the Kenyan company:

> ***"The 56 years (sic) old plaintiff painted a picture of somebody who was totally dependent on his father. He said that since his mother died in 1974 he was the one who was solely helping the deceased in the house and in the business and in return his father took care of all his living expenses…….The plaintiff's evidence sounded unbelievable. The company had been in operation since 1975 and 21 years later after the death of his old father, a healthy, energetic and intelligent person says that he is unable to run the business and since 1997 he closed the company and has been doing nothing! As far as loss of dependency due to the closure of the company is concerned, a company does not have to stop its operations because one of its directors has died. I therefore hold that on that account, no loss of dependence has been proved."***

7. The learned Judge also rejected the claim in respect of the pension because it was against the law, stating thus:-

> ***"This argument cannot stand in light of the express provisions of Section 17 (b)(i) of the Pensions Act Cap 189 of the Laws of Kenya which clearly provides that a dependant's pension or a share thereof is not payable to any child who has attained the age of 21 years unless the child is receiving full time education at a University, College, School or other educational establishment. The plaintiff is 56 years old and a pension is not assignable or transferable except as provided for under the Act."***

8. Finally, on the claim based on the American company, the learned Judge found no evidence to support the claim that the deceased was either a shareholder /director or he was earning any regular income from that company.

9. In submissions before us, learned counsel for the appellant **Mr. Aim Yoni** instructed by the Firm of **M/S Odhiambo & Odhiambo Advocates** emphasized through written and oral submissions, that dependency meant "*one who relies on another for support; one not able to exist or sustain oneself without the power or aid of someone else*". It was a question of fact to be decided on the circumstances of each case. He cited ***Black's law Dictionary*** and the case of ***Jane Chelagat vs. Andrew Otieno Onduu & Others [1990] 2 KAR 288*** in support of those submissions. In his view, the appellant had proved that he was wholly dependent on his late father who was the brains behind the Kenyan company. Counsel blamed

the trial Judge for being influenced by the age of the appellant, forgetting that age did not feature in the definition of dependency. It was possible, in his view, for the appellant to have known nothing about the operations of the Kenyan company since he was not actively engaged in its management and it would not be surprising that he could not continue with the business of the company after the death of his father.

10. No submissions were made in respect of the findings relating to the pension income or the American company income and we take it that they were abandoned. Citing the case of ***Kassam vs. Kampala Aerated Water Co. Ltd [1965] EA 585***, counsel asked us to interfere with the discretion of the trial Judge in awarding damages on the ground that the Judge *'acted on a wrong principle of law, misapprehended the facts and the decision was wholly erroneous'*.

11. Opposing the appeal, learned counsel **Miss Nasimiyu** instructed by **M/S Mukite Musangi & Company Advocates** filed no written submissions but a list of authorities. She submitted orally that there was no proof of dependency as by law required. All that was before the court were audited accounts of the Kenyan company for one year showing a profit made by the company at Sh. 68,000 and some fees payable to Directors at Sh. 72,000. In counsel's view, if it was the company that was paying the appellant then he was dependent on the company and not the deceased. In counsel's submission, it was not believable that the company stopped operations because of the appellant's inability to run it. In the appellant's own evidence, it was not wound up and he was able to continue once he substitutes another shareholder/Director. The appeal was therefore for dismissal.

12. We have considered the issue of dependency which is one of fact and law and which on a first appeal we have the jurisdiction to re-appraise on the basis of the evidence on record, in order to arrive at our own conclusions. In that exercise, we shall not lightly differ from the findings of fact of the trial judge who had the benefit of seeing and hearing the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. See ***Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.***

13. We agree with learned counsel for the appellant, Mr. Yoni, on the definition of dependency and the submission that it is a question of fact. The age of the dependant would not therefore be relevant. But proof there must be on a balance of probability that indeed the claimant was a dependant of the deceased.

14. Dependency was pleaded in this matter as follows:-

> ***"5. The particulars of persons for whose benefit this suit is brought pursuant to the Fatal Accidents Act are as hereunder:-***
>
> ***(a) Bhupendra M. Patel – son***
>
> ***(b) Dileep M. Patel***
>
> ***6. The deceased died at the age of 76 years and his life was considerably shortened by the accident thereby causing loss and damages to his dependents and estate. He was the proprietor of Timber Land Limited and received income of over Kshs 200,000/- per month."***

15. The onus was on the appellant to satisfy the court on that pleading, but what did he say in evidence? It turned out that his younger brother, **Dileep Patel** who was named as a dependant, was a 54 year-old married doctor living and working in the United States of America and was not a dependant of the deceased. On the contrary, according to the appellant, it was the brother and other relatives who were sending him money for his upkeep. Furthermore, there was no evidence to support the pleading that the deceased was earning Sh. 200,000 per month and what proportion, if any, went to the maintenance of the appellant. As stated earlier, the income related to pension and the American company was rejected by the trial Judge and we agree with that rejection as it was based on sound reasoning. In any event, it was not pursued in this appeal. Which left for proof the income relating to the Kenya Company, but on this, only one figure extracted from the balance sheet for the year 1996 was presented as evidence showing that the

company expended Sh. 72,000 on Directors' fees. There was no evidence as to whether the fees was shared by the Directors, including the appellant, or what proportion, if any, the deceased spent on the appellant as his dependant. It seems therefore that the appellant was dependant on the company rather than the deceased.

16. According to the balance sheet as at 31st January 1996, the company was a going concern with considerable assets, both moveable and immovable. The appellant did not say, as suggested by counsel, that he knew nothing about the operations of the company, hence his inability to continue running it. On the contrary, he testified that he assisted his father at home and in the running of the business. He added;

"The company has not been wound up. If I got another director, I can reopen the business"

It seems to us therefore that the picture initially drawn by the appellant that he was wholly dependent on his 76 year-old father, and was good for nothing else, may well have been exaggerated and we do not blame the trial judge for his skepticism on that claim.

17. Simply put, dependency was not proved as pleaded or at all, and the claim was justifiably rejected. The appeal has no merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nakuru this 2nd day of February, 2017

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR