IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, MUSINGA & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 31 OF 2006

BETWEEN

JAMES MUKOLO ELISHA …….. 1ST APPELLANT

EAST AFRICA ROAD SERVICES LIMITED …....……..... 2ND APPELLANT

AND

THOMAS MARTIN KIBISU ……..……....…… RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Rawal, J) dated the 29th November, 2001

in

HCCC NO. 2859 OF 1990)

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JUDGMENT OF THE COURT

On 13th June 1987, the respondent, THOMAS MARTIN KIBISU and his wife, *TABITHA MUSEMBE KIBISU (the deceased)*, were travelling as fare paying passengers in a bus driven by the 1st Appellant, *JAMES MUKOLO ELISHA* and belonging to 2nd Appellant, *EAST AFRICAN ROAD SERVICES LTD (the appellants)*. Tabitha sustained grave injuries from which she succumbed, and her husband filed suit in the High Court, by way of a plaint dated 12th June 1990, in which he sought:

a) Special damages in the sum of KShs.107,360.00;

b) Damages under the Fatal Accidents Act for the deceased's dependants;

c) Costs of the suit; and

d) Interest on the above sums at court rates.

Consent on liability was entered by the parties on 25th January, 1999 whereby it was agreed that liability be apportioned at 90% against the appellants and 10% against the respondent.

The matter proceeded for assessment of damages before Rawal, J. *(as she then was)*. The plaintiff's case was presented by the respondent. He testified that the deceased was his wife and that she was a farmer and was looking after the family. He averred that she used to take care of his 150 acre farm where she was growing pyrethrum, maize and wheat. She also kept dairy cows and sheep. In his estimation, the annual return from the farming was on average KShs.200,000.00 from maize, KShs.50,000.00 from pyrethrum and KShs.150,000.00 from wheat. Evidence was adduced of accounts with cereal companies,

all of which were in the respondent's name. On cross examination, the respondent testified that this was as a result of the fact that he opened the accounts with the cereal companies as the title deed in respect of the farm was registered in his name.

The respondent further testified that at the time of the deceased's death, they had seven children and two grandchildren. Six of the children were of majority age, but were being supported by the deceased, he alleged. She was also paying school fees for some of their children and also their two grandchildren. However, no documentary evidence was adduced in support of the claim for loss of dependency.

The respondent also stated that he incurred various expenses in preparation for the deceased's funeral. These were transportation costs, the embalming of the body at KShs.21,800.00, the purchase of the coffin at KShs.4,000.00 and KShs.1,000.00 for transport to Nakuru. A hearse was also hired at the cost of KShs.21,600.00 and dressing of the body at KShs.2,900.00. Mourners were transported at the cost of KShs.20,000.00. The respondent also testified that the death of his wife necessitated the hiring of three workers, that is, a maid, a cook and a farm manager, all at the cost of KShs.3,900.00 a month.

In his testimony, the respondent stated that it was the deceased who was the bread winner of the family, as he spent most of his time engaging in political affairs. He estimated his contribution to the household at 30%.

In his submission, the respondent argued that as the deceased was young and active she could have lived another 12 years during which she would have been productive. He urged the court to use a multiplier of 12, and award general damages of KShs.205,000.00. He, therefore, prayed for a total award of KShs.2,265,714.00 after apportionment of liability, made up

as hereunder:

General damages	*- 205,000 x 12 years*	*KShs.2,460,000/=*
Special Damages	-	*KShs. 57,460/=*
Total	-	*KShs.2,517,460/=*
Less 10% contribution	-	*KShs. 251,746/=*
		KShs.2,265,714/=

The appellants on the other hand, argued that there was no proof that the children listed by the respondent were indeed the children of the deceased, as there were no birth certificates or letters from the chief to attest to this. In the appellants' minds, the respondent, therefore, failed to satisfy dependency as was required of him. On the other hand, the appellants argued that even if the court was to find that these children were the deceased's as had been claimed by the respondent, then his claim must fail because he had failed to prove the financial assistance given through receipts for payment of fees. Further, there was no evidence before the court to prove how long the dependency would have lasted.

The appellants further contended that the claim for dependency was not properly established and proved and, therefore, cannot be relied upon by the court. The appellants, therefore, contend that the dependants referred to did not qualify as dependants within the meaning of the Fatal Accidents Act.

The appellants further faulted the respondent's case on the proof of the deceased's income. The farm was said to be registered in the name of the respondent, and the accounts at the cereal companies were also in

his name. Further, the respondent did not adduce any evidence to support his claim of ownership of the farm. The appellants further contended that the amount that the respondent claimed that the deceased was earning being an average income of KShs.205,000.00, was a gross earning, and did not take into account the tax payable, the costs of running the farm and the deceased's personal expenses.

The appellants finally argued that to assume that the deceased would have lived for another 12 years would be too long, bearing in mind unforeseen circumstances as well as the vicissitudes of life. The appellants suggested that it would be more reasonable to assume that the deceased would have lived another 5 years, and suggested a minimum amount of KShs.10,000.00 as the deceased's annual income for purposes of computing general damages. The respondents further urged that this amount ought to have been reduced by 1/3 to take into account the tax, costs of running the farm and other personal expenses.

After the assessment of the damages, the trial court found it difficult to accept that a farm of 150 acres was run solely by the deceased, stating that:

"it shall be difficult to accept that a farm of 150 acres could be run by the wife single handedly without any help and that she was also looking after the family and the household without any help."

The trial court was also of the opinion that:

"the plaintiff had not proved that there was total dependency by the family members on the deceased."

As a result, the trial court found that the respondent had failed to prove any income from the deceased, nor had he proved that the family members depended on the income of the deceased. The trial court was, therefore, not able to award any damages under the *Fatal Accidents Act* for loss of dependency. The trial court, however, found that the special damages of KShs.57,460.00 had been adequately proved and awarded the same under the Fatal Accidents Act.

The learned judge also made an award of KShs.100,000.00 for loss of expectation of life and KShs.60,000 for pain and suffering in the following terms:

"… although it is not submitted, as the Plaint is filed also under Law Reform Act (sic), I shall grant Kshs 100,000.00 in respect of loss of expectation of life as the deceased was only 41 years old at the time of death. I shall as well grant Kshs 60,000.00 for pain and suffering."

The total award was as follows:

Special damages under the Fatal Accidents Act *KShs.57,460.00*

Under Law Reform Act

(i) Loss of expectation of life *KShs.100,000.00 (ii)* *Pain and suffering* *KShs. 60,000.00*

Total *KShs.217,460.00*

Less 10% contribution *KShs. 21,746.00*

Total award *KShs.195,714.00*

Aggrieved by the said judgment, the appellants preferred the present appeal, setting out various grounds contained in the Memorandum of Appeal dated 14th March 2006. These grounds of appeal are that:

"1. The learned Judge erred in law and fact in making a finding that the Plaintiff was entitled to an

award for loss of expectation of life, pain and suffering when it was not proved at the trial that he held valid letters of administration, or any letters at all;

2. The learned Judge failed to consider that in the Defendants' defence, the Defendants had denied that he suit had been correctly instituted under either the Fatal Accidents Act or the Law Reform Act;

3. The learned Judge also failed to consider that the Defendants in their submissions had submitted that the suit was incorrectly instituted under the Law Reform Act as there was no proof of a Grant of Letters of Administration to the Plaintiff before the institution of the suit;

4. That accordingly the learned Judge erred in law in making an award under the Law Reform Act;

5. The learned Judge erred in law and fact in awarding

damages under the Fatal Accidents Act as the Plaintiff had failed to prove the income from the deceased and dependency of the family members on the income brought in by the deceased. The award given for damages under the Fatal Accidents Act and special damages do merge;

6. The learned Judge erred in law in making an award under the Fatal Accidents Act; and

7. That the learned Judge:

a. Failed to appreciate that the Plaintiff did not have prove [sic] that he held Letters of Administration to the Estate of the deceased and considering the fact that the Plaintiff did not submit on that issue, the Plaintiff ought not to have been entitled to an award under the Law Reform Act;

b. Imputed extraneous matters into her judgment."

The appellants now pray for orders from this Court to:

"a) Set aside the judgment of the High Court or vary it as it deems fit;

b) Allow this appeal;

c) Grant the costs of the appeal to the Appellants; and

d) Any other or further relief the Honourable Court may deem expedient to grant."

The respondent filed a notice of appeal but did not file a cross appeal. The appellants were represented by learned counsel, Mrs. C.W. Githae, while the Respondent was represented by learned counsel, Mr. P. N. Ng'ang'a.

Mrs. Githae argued grounds 1, 3, 4 and 7 together. Learned counsel submitted that the question of dependency is a question of fact, and was never proved. In her view, the learned Judge having properly held that the claim was not proved could not then purport to make an award under the *Fatal Accidents Act*. In her view, the issue that the learned Judge had to establish was whether a claim under the *Law Reform Act* had been pleaded and proved.

The appellants denied the validity of the claim under the *Law Reform Act* from the outset. Learned counsel submitted that the learned Judge misdirected herself in finding that the respondent was the administrator of his late wife's estate as he never alluded to having obtained Letters of Administration.

To buttress her submission that letters of administration must be obtained before filing suit under the Law Reform Act, counsel relied on the case of *TROUISTIK UNION INTERNATIONAL & ANOTHER V JANE MBEYU & ANOTHER, [1993] eKLR* which held that an action under the Law Reform Act could only be

sustained by a Personal Representative. Counsel also referred to the decision in *COAST BUS LIMITED V SAMUEL MBUVI, NAIROBI CIVIL APPEAL NO 8 OF 1996 (Unreported)* which restated the position taken by the judges in the *Troustik Case (supra).*

The appellants' further argument is that the consent on liability was subject to proof of damages. However, there was a clear departure from the pleadings, evidence and the law when the trial judge made an award of KShs.160,000.00, being for loss of expectation of life and for pain and suffering under the Law Reform Act.

Mr. Ng'ang'a on his part conceded that at the time of instituting the suit, the respondent did not have a Grant of Letters of Administration. He also conceded that documents on the representation of the Estate had never been produced. He, however, argued that the appellants are estopped from raising this ground at this stage. In his view, the question of the Letters of Administration is a non-issue as the parties had agreed on liability and proceeded to hearing for assessment of damages. He argued that the focus of the present appeal ought to be on liability.

He argued in the alternative, that if the question of the grant of representation was an issue, it ought to have been raised by way of a preliminary objection, prior to the hearing. He further contended that the respondent was not asked to produce the Letters of Administration during discovery. The defence did not lead any evidence and in actual fact, the issue of the Letters of Administration was only raised during the submissions, when hearing had already been concluded. In his view, this issue should not be entertained at this stage.

Mrs. Githae in response argued that a claim for special damages falls under the Law Reform Act. Moreover, the respondent, as the person who brought the case to court, was obliged to prove his case and produce all the necessary documents. In her view, the submission that the documents were never pleaded amounts to shifting the burden of proof, as the defence did its best in cross examination and cannot be faulted.

She also countered that the respondent was obliged to consider the Law Reform Act and other allied relevant legislation. One such enactment is the Law of Succession Act which came into force in 1981. The suit herein was filed after the provisions of the Law of Succession Act came into effect. As a result, it was incumbent on the respondent to obtain Letters of Administration.

We have considered the rival submissions and the law. This being a first appeal, we are enjoined to:

"revisit the evidence that was before the superior court afresh, analyse it, evaluate it and arrive at our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that."

See the case of *SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD, [1968] EA 123* as was stated by this Court in *Seascapes Limited V Development Finance Company Of Kenya Limited [2009] eKLR.*

An appellate court, before interfering with an award of damages made by a lower court, will only do so where the trial Judge applied a wrong principle of law, or made an award that was so high or so low as to be erroneous. In *ALI V NYAMBU T/A SISERA STORE, [1990] KLR 534* this Court quoted with approval the principle in *LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY LIMITED V KAVOLOTO, (1970) EA 414* thus:

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one);or short of this, that the amount awarded is so inordinately low or so inordinately high that it

must be a wholly erroneous estimate of the damages (Flint v Lovell, [1935] I KB 354) approved by the House Lords in Davies v Powell Duffryn Associated Collievers Ltd. 1941 AC 601."

The first issue for determination is whether the suit was defective for failure of the appellant to obtain Letters of Administration. Related to this is whether the trial judge misdirected herself in making an award under the head of loss of expectation of life and pain and suffering under the Law Reform Act.

A perusal of the Plaint shows that the suit before the High Court was brought under the Law Reform Act and the Fatal Accidents Act although the claim for general damages was sought under the latter Act only. The learned Judge, however, based the award on both the Law Reform Act and the Fatal Accidents Act.

As was stated by the five judge bench of this Court in the *Troustik Case (supra)*, an action under the Law Reform Act cannot be maintained by a person who does not have a grant of Letters of Administration. See also the case of *GERALD MBALE MWEA V KARIKO KIHARA & ANOTHER, (Civil Appeal 112 of 1995) [1997] eKLR* where the court stated:

"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."

The outcome of a suit under this Act is that it is the deceased's estate that benefits; in the words of this Court in *KEMFRO AFRICA LIMITED T/A "MERU EXPRESS SERVICES (1976)" & ANOTHER V LUBIA & ANOTHER,(No 2) (Civil Appeal No 21 of 1984) [1987] eKLR:*

"Under the Law Reform Act, it is the deceased's own cause which survives for the benefit of his estate, so the estate should recover the damages the deceased would have recovered but for his death. Damages for pain, suffering, loss of amenities and earnings are for the period he survived, so if the death is more or less instantaneous the only damage recoverable will be for the deceased's loss of expectation of life."

This is not the case with regard to suits brought under the *Fatal Accidents*

Act. *Section 7 of the Act* provides that:

"7. If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator." [Emphasis added]

See also the *Troustik case* (Supra) where the learned judges of appeal re-affirmed an award of damages made to the widows of the deceased under the Fatal Accidents Act, who had not obtained grant of letters of administration, stating that:

"it was within their legal competence to claim damages for loss of dependency under the Fatal Accidents Act".

Applying these principles to the present appeal, it would be correct to say that the suit was properly filed under the Fatal Accidents Act, but the claim made could not be sustained under the Law Reform Act.

With respect, the learned trial Judge, therefore, clearly misdirected herself in making an award under the Law Reform Act, in the absence of the grant of Letters of Administration. We further note that the learned judge made an award for pain and suffering, yet the deceased died instantly. This was clearly a

misdirection and accordingly, that award must be set aside.

The next issue for consideration is whether the learned judge erred in making an award under the Fatal Accidents Act. The first challenge by the appellants is loss of dependency of the deceased's children on the income of the deceased. In *GERALD MBALE MWEA V KARIKO KIHARA & ANOTHER, [1997] eKLR (supra)* it was correctly stated that:

"The issue of dependency is always a question of fact to be proved by he who asserts it."

The respondent had stated that it was his deceased wife who all along took care of the farm, but did not adduce any evidence to show that after her demise, the farm yields had fallen. In any event, all the documents produced in court indicate that payments for the farm produce were made to the respondent. The trial judge was therefore justified in finding that neither the income of the deceased, nor the dependency of the family members, was proved to the required standard. The respondent did not adduce any documentary evidence to show that any of the persons listed under paragraph 6 of the Plaint were actually dependants of the deceased.

In the result, we allow the appeal and set aside the judgment of the trial court dated 29th November, 2001, as far as the award for general damages under the Law Reform Act and Fatal Accidents Act is concerned. The only award that we shall not interfere with is on account of special damages of KShs.57,460/=, less 10% contribution leaving a net sum of KShs.51,714/= which we hereby award together with interest from the date of the High Court judgment. Since the appellants have succeeded in having the damages substantially reduced, we award them two thirds of the costs of the appeal. The appellants shall, however, bear the costs of the High Court suit.

Dated and delivered at Nairobi this 14th day of February, 2014.

G. B. M. KARIUKI

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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