



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 48 of 2006

MAHMUD SALIM OMAR APPELLANT

AND

M.A. BAYUSUF RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

Mombasa (Mwera, J.) dated 28th October, 2004

in

H.C.C.C. NO. 97 OF 1998)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Mombasa (Mwera, J.) delivered on 28th October, 2004 in which the learned Judge awarded the appellant a sum of Shs.197,000/= as damages arising from an accident between two vehicles on 9th October, 1997.

The appellant herein was the plaintiff in the superior court and he brought the action as the administrator of the estate of the late *Islam Mahmud Salim*. In the plaint filed in the superior court it was pleaded that as the deceased Islam was clearing his employer's truck Reg. No. KAH 145 N which had been parked along Bishop Makarios Road Mbaraki Mombasa, the respondent's driver or agent brought along truck Reg. No. KAE 495K in such a careless and negligent manner that it hit and crashed Islam fatally. The particulars of negligence were set out in the plaint. It was further pleaded that the deceased Islam was aged 22 years, was healthy and working for a living with African-line Transport Company Limited. It was also pleaded that on his death, his estate suffered loss and his father (*appellant*) and mother lost his support. Consequently, the appellant sought damages under the *Law Reform Act* and the *Fatal Accidents Act* plus costs and interest.

A defence was filed admitting the formal parts of the claim and that the said accident, indeed, took place between the two vehicles. It however denied that all that was due to the alleged negligence on the defendant's part. That, instead the accident was caused by the negligent driving, managing and controlling of truck **No. KAH 145N/7B 6254** owned by the deceased's employer. The driver of that truck named as **Said Hadi Abdalla**, was alleged to have driven the motor vehicle at an excessive speed in the circumstances of the case and failed to heed the presence of the respondent's truck.

The hearing of the suit in the superior court commenced before **Waki, J. (as he then was)** on 12th June, 2001 when two witnesses testified. These were the appellant, **Mahmud Salim Omar (PW1)** and **Inspector of Police Ali Ngoni, (PW2)**.

The appellant testified how he was informed about his son's death and how, after the said death, he took out a grant of letters of administration which enabled him to file the suit in the superior court. In the course of his evidence in chief, the appellant stated:"-

"Deceased was my son. He was working with African line. I do not know what he was earning. He was assisting me since I do not do anything. He was giving me KShs.4,000/= per month. After his death I am assisted by neighbours and relatives. There are also orphans in the family. I seek court's help to assist me and the dependants. The deceased was aged about 26 years old."

The significance of the foregoing will become relevant when dealing with the issue of damages later in this judgment.

Inspector Ngoni (PW2) testified how he received the report of this accident on 9th October, 1997 and as a result proceeded to the scene along Mbaraki Road. He carried out investigations and as a result of these investigations recommended that the driver of KAE 495K be charged. After Inspector Ngoni testified, this matter took a long break until 21st July, 2004 when the hearing resumed before Mwera, J. **Cpl. George Kinyanjui (PW3)** testified that he was called to the scene of accident where he found two vehicles. He noticed blood stains belonging to the turn boy who had been crashed between the two trucks. The turn boy was the deceased Islam. **Cpl. Kinyanjui** drew a sketch plan (Exhibit P6) and conducted initial investigations which were completed by **Inspector Ngoni**. The appellant then closed his case. The respondent did not wish to call any witness.

The foregoing is what was placed before the learned Judge for determination. In the course of his judgment the learned Judge said:-

"In this court's view the following award is made under the Law Reform Act:-

Pain & Suffering - K.Shs. 20,000/=

Loss of Expectation of Life - K.Shs. 100,000/=

K.Shs.120,000/=
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Having so stated, the learned Judge then proceeded to deal with damages under the Fatal Accidents Act where he considered loss of dependency. Under this heading, the learned Judge gave an award of **Shs.197,000/=** and in arriving at that figure, he said:-

"In the circumstances it is in order to take a random figure of KShs.2,500/= to represent a turn boy's monthly wage. The deceased was aged 22 years and unmarried when he died. So a multiplier of 18 will do in the circumstances.

(2,500x12x18xone third) = Kshs.180,000/=

As for special damages a sum of Kshs.17,100/= was pleaded for funeral and other expenses. It looks reasonable and is awarded."

The learned Judge concluded his judgment thus:-

“In sum the plaintiff is awarded K.Shs.197,000/= with costs and interest at the lower court rates.”

It is that judgment that provoked this appeal. The appellant’s complaint is essentially that the award of **Shs.197,000/=** was inadequate and that the learned Judge failed to take into account all the relevant facts and circumstances surrounding the entire case.

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusion but remembering that we have neither seen nor heard the witnesses and hence due allowance should be made for this – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD. [1968] E.A. 123** at **p.126** and **WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.1.**

It is in view of the principles stated in the foregoing authorities that we have endeavoured to set out briefly what was before the superior court by way of evidence.

When this appeal came up for hearing before us in Mombasa on 24th January, 2008, Mr. M.F. Khatib appeared for the appellant while Mr. S. Gor appeared for the respondent. In his submission, Mr. Khatib contended that the award of **Shs.197,000/=** was grossly inadequate and that the learned Judge had left out the award of **Shs.120,000/=** which he had entered under the **Law Reform Act**. Mr. Khatib went on to submit that the figure of **Shs.2,500/=** which the superior court considered as the salary of the deceased could not be supported by evidence. On that submission in respect of the salary the deceased was earning at the time of his death, we do not agree with Mr. Khatib when he faults the trial Judge. We note that Mr. Khatib represented the appellant in the superior court and hence it was upon him and his client to provide the exact salary that the deceased was earning. It was the appellant who sued the respondent and the burden of proving the case on the balance of probabilities was upon him. We therefore find no fault on the part of the learned Judge in the manner he assessed damages.

Finally, Mr. Khatib submitted that the learned Judge should have awarded the appellant **Shs.120,000/=** in addition to **Shs.197,000/=**. He therefore asked us to allow this appeal with costs.

On his part, Mr. Gor, in opposing this appeal started by reminding us that the appellant was an old man of **73 years** at the time of the trial in the superior court. He submitted that there was no evidence of the earnings of the deceased and hence Mr. Gor was of the view that **Shs.2,500/=** was reasonable in the circumstances. He pointed out that the appellant was the only dependant of the deceased hence the amount awarded would go to the same person. He asked us to dismiss this appeal.

We have considered this appeal and in our view this appeal relates to quantum of damages only. The facts of the case were simple and straightforward. The respondent was found **100%** liable and this has not been challenged in this appeal. What has been challenged is the quantum of damages. We have carefully considered the judgment of the superior court, the rival submissions by counsel appearing and we are satisfied that this appeal is essentially on assessment of damages. We are being urged to interfere with the awards made by the superior court. As already indicated earlier in this judgment, the appellant’s main complaint is that the award granted by the superior court was grossly inadequate. In **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE GATHOGO KANINI V. A.M. LUBIA AND OLIVE LUBIA (1982 –88) 1 KAR 727 at p. 730** Kneller J.A. said:-

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See **ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419.** This Court follows the same principles.”*

The above stated principles continue to be applied by this Court. From what we have already stated in this judgment, the deceased was the son of the appellant and this claim arose out of an accident in which the respondent was held **100%** vicariously liable. We have set out a brief summary of the evidence before

the learned Judge and how the learned Judge went over the evidence and finally arriving at the figure of **Shs.197,000/=**. We find no justification in interfering with that figure since in our view the learned Judge had the correct principles in mind as he embarked on the exercise of assessing the damages to be awarded. We would however point out that the figure of **Shs.120,000/=** should also be awarded to the appellant. We say so in view of the appellant's evidence, which we reproduced earlier in this judgment to the effect that he was seeking compensation on his own behalf and also on behalf of other dependants. There was no concrete evidence that damages awarded under the **Law Reform Act** and **Fatal Accident Act** would solely go to the appellant.

In view of the foregoing, this appeal is allowed and the judgment of the superior court is set aside and in its place we enter judgment as follows:-

Damages under the Law Reform Act – Shs.120,000/=

Damages under the **Fatal Accident's Act** for loss of dependency **Shs.197,000/=**. This gives a total of **Shs. 317,000/=**. The appellant is accordingly awarded a total of **Shs.317,000/=** instead of **Shs.197,000/=**.

In view of the foregoing, we would give the appellant the costs of this appeal. **It is so ordered.**

Dated and delivered at NAIROBI this 8th day of February, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR