IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O'KUBASU, JJ.A & ONYANGO OTIENO, AG. J.A)

CIVIL APPEAL NO. 159 OF 2002

BETWEEN

SHARDA DWARKADASS LAKHANI)

MEENA DWARKADASS LAKHANI)

MELINDINI DWARKADASS LAKHANI)……APPELLANTS

AND

ISMAIL KAMAU ……..…..RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Khamoni, J.) dated 14.07.2000

in

H.C.C.S. NO. 3442 OF 1990)

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JUDGMENT OF THE COURT

The appellants are the widow and daughters respectively of the deceased Kanji Lakhani who lost his life in a road traffic accident which occurred in Nairobi on 28th March, 1990.

The suit had *been filed under the Fatal Accidents Act Cap 32 Laws of Kenya and the Law Reform Act Cap 26 Laws of Kenya*.

It is apparent from the record that liability was by consent agreed at 70% in favour of the appellants and the multiplier was pegged at four years. The parties to the suit further agreed that the appellants were dependants of the deceased and had lost the value of that dependency through his demise.

In a reserved judgment the learned Judge (Khamoni J) found no dependency having been proved in respect of the daughters, the second and third appellants, and dismissed their claims.

In respect of the widow's claim, the learned Judge held: -

"But the case by the first Plaintiff (widow) against the Defendant (respondent) in terms of prayers

(a), (d) and (e) of the plaint granted in that the Defendant (respondent) is hereby ordered to pay to the First Plaintiff (widow) Kshs.672,000/= being damages under the Fatal Accident Act for the benefit of the First Plaintiff (widow) plus interest at court rate from the date of this judgment."

Dissatisfied with the judgment, the appellants appealed to this Court and have put forward six grounds of appeal the gravamen in the main being that the learned Judge erred in not taking into account the evidence of the deceased's own auditor, Vijay Saujani, who had produced the deceased's company's – Prescott SA – accounts which he had himself prepared as per the information supplied by the deceased who owned 98% of the shares in the company. Mr. Goswami for the appellants submitted that in the absence of any evidence to controvert or rebut the evidence of Saujani the general damages for loss of dependency in respect of all three appellants should be revised upwards after taking into account the deceased's earnings from Prescott SA.

Vijay Saujani had testified that he was a Chartered Accountant and FCA for ten years. His total experience in accounts covered a span of 28 years. He ran his own practice in England. He had been the deceased's accountant for seven years before his death. The last accounts the witness prepared were for the year 1992. Prescott SA was engaged in Export and Import business in general commodity trade worldwide. He produced books of accounts covering 1988 – 1990 (Exhibit 1). The books showed that the income of the deceased was $50,000 in 1988, $80,379 in 1990. However, despite the fact that the witness had prepared the accounts for the deceased, the witness was unable to produce any Bank Statements. In this regard he told the learned Judge in cross-examination.

"Apart from the accounts I have given, I am not able to p roduce Bank Statements. I do not know how often Mr. Lakhani used to come to Kenya. He used to support his family."

The witness further added: -

"Prescott S.A. was registered in Panama which is usually called a Tax Haven."

And again:

"The company coll apsed. 1991 was the last year I did accounts for the company. 1992 shows the company is not operating at all. ……when he (Lakhani) died, the company died."

Furthermore, the widow of the deceased, the first appellant herein, testified that she was not aware whether the deceased had any business in the U.K. She told the trial court: -

"I do not know whether my husband had any business in the U.K. I have never heard of a country called Panama."

Not surprisingly, the learned Judge was not impressed at all by this evidence on the alleged existence of Prescott SA. He held: -

"I must say that the evidence before me as to the existence of Prescott S.A. is not sufficient to convince me that indeed the company existed and could generate an income of 80,379 A merican dollars, a figure inserted in the Plaint after an amendment of the Plaint following the close of the case on both sides but before written submissions were filed for this judgment to be written. The learned Plaintiffs' counsel had seen the evidenc e adduced and the amendment had waited for 10 years."

It is indeed reasonable for the widow to say that she did not know of the existence of all of her deceased husband's properties, especially, those in overseas. This is so because it is common knowledge that a good number of husbands do not disclose all their dealings to their wives. In the case before us the widow was about 70 years old when her husband died and she is not quite literate. Her ignorance of the existence or otherwise of Prescott SA is understandable.

However, for the deceased's accountant Saujani not to have seen Prescott's Bank Statements is an indication that the statements might not have been there in the first place and that the company might not have been in existence at all. The company might have been fake.

It was all too easy to allege that the company had been incorporated in Panama. But no Certificate of Incorporation was tendered to prove its existence. Such a Certificate would ordinarily have been conclusive evidence that the company did indeed exist. In the circumstances we are unable to fault the learned Judge when he entertained doubt about the existence of Prescott SA.

Mr. Goswani urged us to accept the oral testimony of Saujani about the existence of the Bank Statements and of Prescott SA. With respect, Saujani does not say that he witness had in fact seen such records, and if he had done so, he does not say what happened to them subsequently. Further, Saujani did not testify that the documents were lost or that they could not be found. It is necessary that the person giving oral accounts of the contents of a document must have himself seen and read the original documents. See Naran v Hurry Narain 1 CLR 457.

Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost: Read and Another v Price and Another [1909] 2 KB 724. But, there is no suggestion in the matter before us that the Certificate of Incorporation of Prescott SA and its Bank Statements were lost.

From our perusal of the entire evidence on record we agree with the learned Judge that though the second and third appellants were the dependants of the deceased, being his daughters, they did not prove any general damages suffered by them following his demise.

For these reasons the appeal must fail and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 30th day of April, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR