REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 2 OF 2004

UNITED MILLERS LIMITED ……APPELLANT

VERSUS

YANO OMORO OINDO ……RESPONDENT

[Appeal from the judgment of the Chief Magistrate's Court at Kisii CMCC number 220 of 2002]

JUDGMENT

This appeal arises from a judgment in a fatal accident claim, Kisii C. M. C. C. Number 220 of 2002, in which the Respondent was awarded a sum of Shs. 265,000/=, as damages, in respect of the death of his 36 year old son one Simeon Odhiambo Yona (the deceased).

The deceased was, on or about the 7th day of May 2002, cycling along the Kisii – Kisumu Road when he was knocked down by the Appellant's Motor Vehicle registration number KAL 440 K. He died on the spot. The case was decided on the evidence of one eye witness and that of the Appellant's driver both of whom gave different accounts as to how the accident occurred, particularly the point of impact, the speed at which the motor vehicle was moving, the time and the manner in which the accident occurred. The claim was brought under both the Fatal Accidents Act (Chapter 32 of the Laws of Kenya

the Law Reform Act (Chapter 26). The Respondent was the only person stated in the Plaint as the person for whose benefit the claim under the Fatal Accidents Act was made, the deceased having been unmarried.

In the memorandum of appeal dated 15th January 2004, the appellant has set out 11 Grounds of Appeal but while arguing the same counsel for the appellant, Mr. Siganga consolidated and argued the said grounds under four heads as follows:

I. Appeal against finding on liability : Grounds 2 – 5

II. Appeal against award under the Law Reform Act: Grounds 6 and 7

III. Appeal against the Award under the Fatal Accidents Act: Ground 8

IV. Appeal against award of Special damages: Ground 9

Regarding liability Mr. Siganga submitted that the learned trial magistrate misdirected himself in

finding the appellant's driver 80% liable for the accident based on a presumption or finding that was not supported by the evidence adduced in court as to whether the deceased was hit when crossing the road or not. It is common ground that there was stationary motor vehicle in the path of the defendant's driver near the place that the deceased cyclist was killed. The only eye witness, PW2, told the trial court that the deceased was not crossing the road but the Appellant's driver, DW1, testified that the former was hit he

" **suddenly emerged from the front of (a) parked motor vehicle onto the road"** and that he was crossing the road. In this regard, the learned trial magistrate made a finding that such a state of affairs is only possible during the day time. The trial magistrate went on to find as follows:

" **At night a motor vehicle approach is known from very far due to its lights. The stretch of road is not busy at times and if indeed the deceased was crossing from the side of the parked motor vehicle he would have seen the lights and not just got onto the road. The evidence of PW2 is therefore more plausible that the deceased was hit not on DW1's side but on the left while facing Awassi. Though PW2 stated that deceased was off tarmac she also admitted that he fell on the road and that motor vehicle moved on but still on the tarmac. I therefore find that the deceased was on the tarmac and also did not have lights".**

Evidence as to whether the stretch of the road where the accident occurred was busy or not was not at the material time was not tendered in evidence at all. At a glance, the above findings by the learned trial magistrate would perhaps lead one to think that the court would have found the driver's evidence more credible as to the point of impact and that the Defendant's motor vehicle never left its side the road as suggested by DW1. More so because the learned trial magistrate went further to find that

"… deceased was on the tarmac and also did not have lights".

PW2 said the stationary vehicle was "**half on road, half off".** DW1 said that it was parked off the road to his left. The learned trial magistrate having believed the driver's testimony that he never left the road, it is surprising that the court proceeded to find the evidence of PW2 more plausible even when she had testified that the cyclist was cycling towards Awassi and off the tarmac and that he was not crossing the road, yet the court appears to have differed with her. If the DW1, who was approaching from the opposite direction, never left the road as found by the learned trial magistrate, then the deceased, unless he got into the motor vehicle's path, would not have been hit. In the circumstances I am inclined, to accept the appellant's contention that the finding of 80:20 blame against the appellant was wrong in view of the evidence tendered at the trial. I find that deceased contributed substantially to the accident and would find him, on a balance of probabilities, 40% to blame. I refuse to accept submission by counsel for the Respondent that the finding of 80/20 was based on sound evidence.

Regarding the claims under the Fatal Accidents Act, counsel for the appellant submitted that the award is not supported by documentary evidence and that the Respondent himself said he did not know how much the deceased was earning. It is not disputed that the deceased was in the business of selling wares. Whether he owned a Kiosk from which he sold the wares, as testified by the Respondent, or whether he hawked those wares, as stated by PW2 is, in my view immaterial. A sum of Shs. 2,000/= was allowed as a reasonable monthly income for the purposes of computing the deceased's earnings. I am of the same view as the Court of Appeal in **JACOB AYIGA MARUJA & ANOTHER =VS= SIMEON OBAYO (KISUMU CIV. APPEAL NO. 167 OF 2002)** that a claimant need not strictly prove earnings by documentary evidence and that a reasonable figure, given the nature of occupation (Shs. 2,000/= in this case) is acceptable. The figure of Shs. 2,000/= was actually proposed by the appellant at the trial.

In assessing the damages, the lower court did not give any reasons or make any findings as to whether the Respondent was, in the court's view, entitled to the claims under both the Fatal Accidents Act or the Law Reform Act. The learned trial magistrate did not state in the judgment whether account was taken of the award under the Law Reform Act when assessing the award under the Fatal Accidents Act as is required by the law when the person or persons entitled to the deceased's estate is/are the same person/persons for whose benefit the action under the Fatal Accidents Act is brought. The reason for this requirement, as explained in the Court of Appeal decision in **KEMFRO AFRICA T/A MERU EXPRESS SERVICES & ANOTHER =VS= A. M. LUBIA & OLIVE LUBIA [1982 – 88] 1 KAR** ,is to avoid overlapping and/or overcompensation. The Court of Appeal held, and I am bound to agree with its holding, that in view of the provisions of Section 2 (5) of the Law Reform Act which provides, as stated in the said authority, that

"The right of claim where the cause of action survives the deceased shall be in addition to and not in derogation of rights conferred upon the estate under …. The Fatal Accidents Act",

a claimant is entitled to bring an action under both statutes, subject however to due consideration being made of the net amount inherited by the same dependant under the Law Reform Act as earlier provided. The Court of Appeal in the **KEMFRO AFRICA** case held that to take account does not necessarily mean to deduct but rather to ensure that loss suffered under the Fatal Accidents Act is off-set by the gain from the estate under the Law Reform Act.

Damages recoverable under the Law Reform Act are, basically, the loss that the deceased himself would have been entitled to had he not died. Section 2 (2) (c) clearly provides that the damages recoverable for the benefit of the estate shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum of funeral expenses may be included. Loss of expectation of life is what is payable and as clearly evident from the court of Appeal decision above cited, damages for pain and suffering are not available in the case of instantaneous death. Evidence having been tendered and not disputed that the deceased in the present case died immediately after he collision the award of Shs. 10,000/= for pain and suffering ought not to have been made.

Regarding the claim under the Fatal Accidents Act, I am of the view that the deceased, having been unmarried and the applicant, being a surviving parent, and having provided his particulars of dependency as required under Section 8 of the Act was entitled to the award under this head.

Regarding the assessment, counsel for the Respondent has submitted that the award of Shs. 100,000/= under the Law Reform Act was a global award. The learned trial magistrate said in the judgment that the same was awarded having taken into account the submissions by counsel and the authorities placed by them before the Court.

The appellant has submitted that in view of the misdirection by the trial magistrate in arriving at the award of Shs. 265,000/=, the appeal should be allowed and the judgment be substituted with one dismissing the suit. Having found the Appellants driver 60% negligent the only course open to this court is to consider and determine how that finding affects the award made by the lower Court. The Respondent has rightly submitted through counsel and on the basis of the decision in **KEMFRO AFRICA LTD** that an appellate Court may only interfere with the quantum of a lower court when and only if the court is satisfied that in assessing the damages the lower court took into account an irrelevant factor or left out of account a relevant one or that the award itself is so inordinately low or so inordinately high that it must be a **wholly** erroneous estimate of the damages.

A wrong finding in liability obviously does affect the amount awarded. However I am of the view that

the same goes only to the arithmetic calculation and not the assessment itself. The arithmetical element of the award, is an issue to be left purely within the mandate of the trial court.

The judgment of the lower court does not seem to have addressed itself to the requirement that the award under the Law Reform Act must be taken into account when assessing the amount payable under the Fatal Accidents Act. My study of the assessment and the award reveals however that the sum of Shs. 100,000/= for loss of expectation of life appears to have been left out when arriving at the final figure. Had it been included the total sum would have been Shs. 365,000/= not Shs. 265,000/=. There being no cross – appeal, and in the absence of any submission in that regard, I do not consider it within my mandate to correct the oversight. Given the age of the deceased and there being no suggestion that he would not have led a normal life to full expectation, I do not think the multiplier of 15 years was unreasonable as the same would give the deceased 51 years, which is clearly below the normal retirement age. Again there is nothing to suggest that the deceased would not have continued with his hawking business well beyond the normal retirement age. Having noted the consensus between the parties to this appeal, that proven specials of Shs. 18,100/= ought to have been awarded and not the Shs. 15,000/= as was awarded by the learned trial magistrate, I see no reason why such an adjustment cannot be made. I note from the judgment that the learned trial magistrate reduced the total sum including the special damages, by 20% in view of the trial court's finding on contributory negligence. This should not have been the case since contributory negligence only affects the general damages.

I do not find the award under the Fatal Accident Act excessive. Neither do I find the same to have been wrongly arrived at. However, in view of my finding on liability, and having noted my observation regarding and finding the sum of Shs. 100,000/= in respect of loss of expectation of life I now find that this appeal succeeds on liability. Accordingly I allow the same and enter judgment for the Respondent in the sum of Shs. 162,100/= being 60% of Shs. 240,000/= plus the specials of Shs. 18,100/= . The Respondent will have costs of the suit in the lower court and interest on the said sum from the date of filing suit until payment in full. The appeal having succeeded only in part, the appellant shall have half the costs thereof.

Orders accordingly.

Dated and delivered at Kisumu this 18th day of July 2007.

M. G. MUGO

JUDGE

MGM/aao