



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO.27 OF 2016**

**BETWEEN**

**MUMIAS OUTGROWERS COMPANY LIMITED ..... APPELLANT**

**AND**

**REGINA ACHIENG OKOTH**

**suing as legal representatives of estate of**

**JOSEPH ODHIAMBO JALANGO (DECEASED) ..... RESPONDENT**

***(Being an appeal from the Judgment and Order of Hon. T. Obutu , PM at the Chief***

***Magistrates Court at Kisumu in Civil Case No. 483 of 2012 dated 18<sup>th</sup> March 2016)***

**JUDGMENT**

1. Before the subordinate court, the appellant was found fully liable for an accident that took place on 29<sup>th</sup> October 2011 in which the deceased died. The plaint alleged that the deceased was walking along the Muhoroni - Tamu Road when the appellant's driver negligently drove Holland tractor registration number KAW 818Y causing it to veer off the road and hit the deceased. Thereafter the deceased's estate and dependants filed suit under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** and were awarded a total of Kshs. 1,880,000/-.

2. The respondent denied the accident and pleaded in the alternative that if the accident did take place then the deceased was wholly or substantially to blame as he was intoxicated and was crossing the road needlessly without checking whether the road was clear and that he failed to take care of his own safety despite the tractor flashing lights and warning him by blowing the horn. It also alleged that the deceased was attempting to steal sugarcane from the moving tractor and was a result injured. The respondent further pleaded in the alternative that if the accident took place, it occurred despite the driver exercising all reasonable skill care and diligence.

3. This appeal is on liability and quantum and being a first appeal, this court is required to re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. The court should bear in mind that it neither saw nor heard the witnesses testify (see ***Peters v Sunday Post Ltd [1958] E.A 424***).

4. I will deal with the issue of liability first. The respondent's key witness was Robert Ouko Ogembo (PW 2) who recalled that on 29<sup>th</sup> October 2011 at about 7.30pm, he was along the Tamu-Muhoroni Road when

a motorcycle passed him. He saw a tractor coming from the opposite side with no lights and a Pick-up vehicle following it. He told the court that cyclist was on the left side and moved further left. At the same time, the Pick-up wanted to overtake the tractor. The tractor moved on the motorcyclist's side and ran over the rider. He testified that the lady pillion passenger was hit and thrown off the road and the man died on the spot. Both vehicles did not stop.

5. Kennedy Ochieng (DW 1) recalled that on the material day he was transporting sugarcane on the tractor. He met a motorcycle on the way carrying two pillion passengers. 30 minutes later, 3 motorbike riders came to inform him that he had caused the accident. He stated that the road was wide enough and that he did not cause the accident. He further stated that he was not charged with any offence.

6. The thrust of the appellant's case on the issue of liability, set out in the memorandum of appeal dated 18<sup>th</sup> April 2016, is that the trial magistrate misdirected himself in treating the evidence and submissions on liability superficially and consequently came to the wrong conclusion. Mr Ondego, counsel for the appellant, submitted that the trial magistrate failed to consider the fact that the respondent's evidence conflicted with the pleadings. In response, Mr Singahachi, counsel for the respondent, submitted that there was no dispute that an accident took place and that it involved the tractor driven by the appellant's driver. In his view, there was sufficient evidence upon which the trial magistrate could properly conclude that the appellant was liable.

7. The issue raised in this case concerns the purpose of pleadings. In ***Esso Petroleum Company Limited v Southport Corporation [1956] AC 218***, Lord Normand observed that, "*The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them.*" The Court of Appeal in ***Dakianga Distributors (K) Ltd v Kenya Seed Co., Ltd KSM CA Civil Appeal No. 168 of 2011 [2015]eKLR*** quoted with approval the following passage from ***Bullen and Leake and Jacob's Precedents of Pleadings (12<sup>th</sup> Edition, London, Sweet & Maxwell (The Common Law Library No. 5))*** on the importance of pleadings:

*The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.*

8. Since the pleadings define of the contest before the trial court, the parties are not permitted to depart from their pleadings unless an amendment is allowed or it appears from the course of the proceedings that the parties have left an unpleaded issue for determination by the court (see ***Odd Jobs v Mubia [1970] EA 476***). In ***Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others NRB CA Civil Appeal No. 219 of 2013 [2014]*** the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in ***Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLCSC 91/2002*** where Adereji, JSC expressed himself thus on the importance and place of pleadings:

*[I]t is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.*

While William, JSC, in the same case, stated that:

*In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*

9. In ***Simon Muchemi Atako and Another v Gordon Osore NRB CA Civil Appael No. 180 of 2005***

[2013]eKLR, the Court of Appeal, citing *Uganda Breweries Ltd Vs Uganda Railways Corporation* [2002]2EA 634, accepted the view that departure from pleadings that did not cause a failure of justice was acceptable where the party had a fair notice of the case it had to meet and the departure was a mere irregularity.

10. In this case the appellant pleaded in the plaint that, “[T]he deceased was a lawful pedestrian” and her key witness, PW 2, testified that the deceased was a motor cycle rider. In the judgment, the trial magistrate did not consider this the evidence vis-à-vis the pleading and clear submissions by the appellant on this point. Can departure from the pleadings be said to be a mere irregularity? I must answer in the negative. The appellant defended the case on the basis that the deceased was a pedestrian and its evidence was led on the basis. The issue was specifically raised in the appellant’s submissions before the subordinate court hence the issue could not be said to be minor or trivial. The trial magistrate did not deal with this aspect of the case. I therefore find and hold that the respondent’s evidence was a departure from the pleadings and the suit must therefore fail.

11. On the issue of damages, the evidence before the court was that the deceased was aged 37 years at the time of his death. PW 1 testified that he was a motorbike rider although no documentary evidence was adduced to support this assertion. Based on the minimum wage, the trial magistrate used a multiplicand of Kshs. 11,000.00 and a multiplier of 20 years. Since the deceased was supporting a family the court adopted a dependency ration of 2/3. The total award of Kshs. 1,880,000.00 made up as follows;

Pain and Suffering under the <i>Law Reform Act</i>	Kshs. 20,000.00
Loss of expectation of life under the <i>Law Reform Act</i>	Kshs. 100,000.00
Loss of dependency under the <i>Fatal Accidents Act</i> (11,000 X 12 X 20 X 2/3)	Kshs. 1,760,000.00

12. The appellant complained the multiplier applied by the court was on the higher side and suggested that a multiplier of 18 years was more appropriate. The Court of Appeal in *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life of the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. In this case, the trial magistrate calculated the multiplier on the basis that the appellant would be in business until he was 57 years.

13. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan* [1981] KLR 349). **In arriving at the multiplier, the trial magistrate did not explain how he arrived at the figure of 20.** I find that a multiplier of 20 years on the higher side. I would reduce the same to 15 years.

14. In view of the finding I have reached on liability, I allow the appeal and substitute the judgment of the subordinate court with an order dismissing the suit. The appellant shall have costs of the suit and of this appeal.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Ondego instructed by L. G. Menezes and Company Advocates for the appellant.

Mr Singahachi instructed by Kuke and Company Advocates for the respondent.