



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 231 OF 2005

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

VERSUS

MICHAEL OPIYO OKIRO(Suing as the personal representative of SHEM OOKO OPIYO
Deceased.....RESPONDENT

JUDGMENT

1. This matter started as a plaint in the Principal magistrate's court at Kisii in which the plaintiff was **Michael Opiyo Okiro**, suing then as a personal and legal representative of **Shem Ooko Opiyo**-deceased. He brought this suit against South Nyanza Sugar Co. ltd. It stated in paragraph 5, thereof as follows:-
2. On or about the 26th October, 2003, the deceased was lawfully walking off the verge of Migori-Oyani Road when Defendant's driver/servant/agent in driving, managing and/or controlling motor vehicle KAA 963P that he negligently and/or recklessly drove, managed and/or controlled motor vehicle KAA 963P that he caused or permitted the same to violently knock or hit the deceased with the deceased in consequence whereof the deceased Shem Ooko Opiyo sustained fatal injuries and died. Negligence of the defendant's driver/servant/agent were particularized as follows:-
 - a. *Driving motor vehicle KAA 963P too fast in the circumstances.*
 - b. *Failing to exercise or maintain any or any proper control of motor vehicle KAA 963P.*
 - c. *Failing to keep any proper look out or to have any sufficient regard to other road users on the said road and/or*
 - d. *Driving motor vehicle KAA 963P without any or any due attention case at all and/or.*
 - e. *Loosing control of motor vehicle KAA 963P and knocking down or hitting the deceased.*
 - f. *Failing to exercise care, skill and/or prudence or at all in driving motor vehicle KAA 963P and/or*
 - g. *Causing and/or permitting motor vehicle KAA 963P to hit the deceased.*
 - h. *Failing to give any or any adequate warning of his approach.*
 - i. *Failing to see or heed the presence of the deceased well in sufficient time to avoid hitting and/or knocking him down.*
 - j. *Failing to exercise care, prudence and diligence of a driver.*
 - k. *Failing to stop, slow down to break to swerve or any other way so as to avoid hitting and/or knocking down the deceased.*
3. The defendant statement of defence denied the contents of the plaint and put the plaintiff to strict proof thereof but, in the alternative, the defendant stated that the plaintiff was solely or substantially caused and or contributed to by the negligence of the deceased, Shem Ooko Opiyo. The defendant particularized the negligence of the deceased as follows:-

- a. *Failing to keep any or any proper lookout.*
- b. *Failing to walk on a proper course on the said road*
- c. *Walking along the said road without due care and attention.*
- d. *Suddenly emerging into, running across and or walking on the road when it was not reasonable to do so.*
- e. *Carelessly and recklessly walking into the path of the road legally being utilized by the defendant at the time and thus causing the said accident.*
- f. *Walking and or attempting to cross the road at a point where and when it was dangerous to do so.*
- g. *Failing to check/look on both side of the road to ensure his own safety before attempting to walk and or cross the said road.*
- h. *Failing to observe the traffic code and rules before walking/crossing the said road at the said time.*

4. On 18th February, 2005, an amended plaint was duly filed. Motor vehicle number was amended to read: Motor Vehicle KAA 938P, instead of KAA 963P. Special damages were pleaded as:

- a. *Police Abstract.....Kshs. 100.00*
- b. *Death Certificate.....Kshs. 50.00*
- c. *Funeral Expenses.....Kshs.20,000.00*
- d. *Cost of KISII HCC.SUCC.CAUSE NO. 81 OF 2004.....Kshs.8,000.00*

5. **During the hearing.**

In his judgment the learned trial magistrate found the driver of the tractor negligent, and wholly to blame for driving at high speed and losing control of the tractor. He said the driver ought to have had the presence of minor(s) to slow down as he approached a turning. He also failed to see the minor meaning that he did not keep a clear and good look out. The magistrate consequently held the defendant vicariously liable in negligence. On quantum and assessment of general damages, the court gave a global sum of kshs. 500,000. He also awarded kshs.19,000, thus the damages were: 519,000.

6. Now the appellant, South Nyanza Sugar Company Limited appeals against this judgment and Decree of Hon. Mr. Aurthur Ingutya, Senior Resident Magistrate Kisii, CMCC. NO. 538 of 2004 dated and delivered on 25th August, 2005.

7. By their memo of appeal, the appellant sets out the following grounds of appeal:-

1. *The learned magistrate erred in law and fact in holding that the defendant was 100% liable for the accident and or at all.*
2. *The learned magistrate erred in law and fact in failing to appreciate the impeccable evidence of DW1 and thereby arriving at a wrong and erroneous conclusion condemning the defendant to 100% liability and or at all.*
3. *The learned magistrate erred in law and fact in awarding damages under the Fatal Accidents Act without any legal and or evidential justification.*
4. *The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.*
5. *The learned magistrate erred in law and fact in failing to appreciate as follows:-*
 - i. *That the pleadings filed by the plaintiff were incompetent, in shambles and defective.*
 - ii. *That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings, contradictory and discreditable.*
 - iii. *That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining any award of damages.*
6. *The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant inspite of the plaintiff's miserable failure to establish her case on a balance of probability.*
7. *The learned magistrate erred in law and fact in failing to appreciate the legal position that there*

could be no liable without fault. The court award is unreasonable and excessive in the circumstances.

8. The learned magistrate erred in law by awarding excessive damages beyond the scope evidence and or legal entitlement.

The appeal asks that the appeal court orders for:

- a. That the appeal to be allowed with costs.
 - b. That the judgment of the subordinate court and consequential orders be set aside with costs to the appellants both in the lower court and on Appeal.
8. This court being conscious of its role as the first appellate court as stated in **Selle vs. Associated Motor Boat Co. Ltd [1968] E.A. 123**, has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.
 9. DW1- the driver of the tractor- admitted in cross-examination that the said tractor did not have a side mirror. He said he could not see what was happening behind him. He also admitted in his evidence in chief that road to Mzee Opiyo's farm was narrow. The width of the road was smaller than the width of the tractor. And the side has sisal and under cover maize.
 10. PW2 who witnessed the accident said the tractor was going at top speed. The tractor (then) made a sharp turn and hit one of those children who died instantly. This child was Shem Ooko. The driver did not hoot, nor apply brakes. PW2 was at visible distance of 40 metres in view.
 11. Therefore on issue of liability the court will uphold the finding of the trial magistrate that the defendant bears 100% liability. On the issue of general damages, the court is guided by the judicial principle annunciated as follows:-

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern A.F.C. to be that it must be satisfied that earlier the judge, in assessing damages, took into account an irrelevant or left out an account relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages”.

12. It was not demonstrated by the appellant that an award of Kshs. 500,000 was inordinately high nor was it shown that the learned trial magistrate look into account an irrelevant fact in his assessment of the damages. In such circumstances, this court will not interfere with the exercise of discretion of the trial magistrate.

13. Consequently, I dismiss this appeal and grant costs thereof to the respondent.

Dated and delivered at KISII this 23rd day of January, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Okong'o Olago –not present for the appellant.

Bunde present for the respondent

Edwin Mongare Court Clerk.

