



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 912 OF 2004**

**IAN CHIUNGU IRUNGU**

**FIRST AMERICAN BANK (K) LIMITED.....APPELLANTS**

**VERSUS**

**JOHN GITHIRA CHEGE.....RESPONDENT**

***(Being an appeal from the judgment and decree of the Honourable Mrs. H. Omondi Chief Magistrate in Nairobi CMCC 3435 OF 2003)***

**JUDGMENT**

The appellants herein, had been sued by the Respondent being the administrator of the estate of Thomas Mwangi Chege (the Deceased) who passed away following injuries sustained in a road traffic accident along the Jogoo Road on the 20<sup>th</sup> August 1995. The 2<sup>nd</sup> appellant's motor vehicle Reg. No. KZN 671 driven and/controlled by the 1<sup>st</sup> Appellant hit and knocked down the deceased who was lawfully standing by the roadside attempting to rescue other injured people following an earlier accident at the same spot. The Respondent contended that the said motor vehicle was so carelessly or recklessly driven, managed and/or controlled such that it went out of control, veered off the road and knocked down the deceased thereby occasioning him fatal injuries.

The Respondent therefore filed suit against the appellant praying for general as well as special damages.

The appellant filed a statement of defence denying the claim and contending that if the accident occurred as alleged, then the same was wholly occasioned and/or substantially contributed to by the negligence of the deceased. The appellant therefore prayed for the dismissal of the suit.

After a full trial, Judgment was thereafter entered in the lower court for the Respondent. Aggrieved by the orders made in the said judgment, the appellants lodged this appeal citing the following grounds in their memorandum of appeal filed on 25<sup>th</sup> October 2004 –

- i. That the learned Magistrate erred in law and fact in finding, against the weight of the evidence, that the Defendants were liable to the Plaintiff;
- ii. That the learned Magistrate erred in law and fact in making an award for dependency under the Fatal Accidents Act when in fact there were no dependants;
- iii. That the Learned Magistrate erred in law and fact in awarding special damages that were not strictly proven.

The appeal was heard by way of written submissions. Those on behalf of the Appellants were filed on 11<sup>th</sup> November 2010 while the Respondent's were filed on 22<sup>nd</sup> November 2010.

The obligation of this court after having heard the rival arguments is to reconsider the evidence afresh and make its own conclusion taking into account the trial court had the advantage of seeing and hearing the witnesses. The appellant did not lead any evidence during the trial.

This means that the appellants, apart from denying liability in their defence, did not attempt to rebut the evidence of the Respondent. Further, PW4 an eyewitness to the accident adduced evidence on how the accident occurred which evidence was corroborated by PW5 the Investigating Officer who also visited the scene. This was sufficient to point to negligence on the part of the 1<sup>st</sup> Appellant as motor-vehicles don't ordinarily veer off the road and hit pedestrians. As earlier stated, the Appellants did not call or lead any evidence to rebut the testimonies of the two witnesses for the Respondent. It was therefore justifiable accurate for the Learned Magistrate to attribute 100% negligence on the appellants.

The Appellants also claim that the Respondent did not establish ownership of motor-vehicle KZN 671 as the only document produced to prove ownership was the police abstract. A perusal of the defence shows that the Appellants did not deny ownership of the motor-vehicle nor did they challenge it in evidence as they did not lead any. In **Wellington Nganga Muthiora vs Akamba Public Road Services Limited & Another Court of Appeal No. 260 of 2004 [2010]Eklr** it was held –

***“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases...”***

The trial Magistrate was therefore correct in her finding that the 2<sup>nd</sup> Appellant was the owner of motor vehicle KZN 671 and was therefore vicariously liable for the acts of the 1<sup>st</sup> Appellant who was its agent. There having been no evidence offered to contradict this fact, the Respondent established on a balance of probabilities that the said motor-vehicle was owned by the 2<sup>nd</sup> Appellant. Therefore, ground one of the appeal has no merits and must fail.

On ground two of the appeal, Damages under the Fatal Accidents Act must be for the benefit only of the wife, husband and child of the deceased person. See section 4(1) of the Act. The deceased was survived by his mother. The claim made by his siblings cannot therefore stand. In order to assess damages under the Fatal Accidents Act, the Deceased's income, the extent of his dependants' dependency and the multiplier to be used must be determined. The lower court awarded the mother to the deceased Kshs. 500,000/= for loss of dependency. However, as rightly pointed out by the appellants, when the deceased mother died in the course of trial, the estate of the deceased was left with no dependant. In these circumstances ground two of the appeal must therefore be allowed.

On whether the special damages were proven, the third witness for the Plaintiff (PW3) produced relevant documentary evidence (receipts) for treatment expenses at Kenyatta National Hospital; Kshs. 402, 186.90/= (Exhibit 5), Kshs. 88,685/- (Exhibit 6) and funeral expenses amounting to Kshs. 40,099/- (Exhibit 7). The Appellants did not object to the production of these receipts and they cannot now do so in the appeal. Based on this, ground three must fail.

In the end this appeal must fail save for ground 2 relating to the award to the mother.

The respondent shall have the costs of the appeal limited to two thirds of the agreed sum or award made by the taxing master.

Orders accordingly.

**Dated and delivered at Nairobi this 24<sup>th</sup> Day of March, 2015.**

**A.MBOGHOLI MSAGHA**

**JUDGE**