REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL No. 21 OF 2010

AGENES NAFULA

(suing thro' Maurice Werunga Wakoli…..... PLAINTIFF

VERSUS

CHABHADIYA VISHRAM …..... DEFENDANT

JUDGMENT

1. This appeal arises from the Judgment of the Chief Magistrate at Kitale in Kitale CM.CC.No.297 of 2009, in which the appellant, Agnes Nafula Wakoli, sued the respondent Chabhadiya Vishran, for damages arising from a road traffic accident which occurred on the 26TH May 2007, along the Saboti – Baraton road at Lukhome area involving a motor vehicle Reg. No.KAR.043Y Mitsubishi – lorry said to belong to the respondent and which knocked down the deceased herein, Maurice Werunga Wakoli, thereby causing him fatal injuries.

2. In the appellant's plaint dated 27th June, 2009, it was averred that on the material date the deceased was lawfully walking as a pedestrian along the marum road when the respondent negligently drove, managed and / or controlled his said motor vehicle thereby causing it to violently knocked down the deceased and causing him fatal injuries. The Appellant averred that the respondent was negligent in the manner of driving his vehicle and that she suffered loss and damages due to the death of the deceased who was at the time aged thirty six (36) years and in good health, married and with children. The appellant therefore prayed for damages under the Law Reform Act and the Fatal Accidents Act together with special damages for expenses incurred.

3. The respondent denied the appellant's claim on the basis of the averments contained in the statement of defence dated 16th July, 2009. He contended that the appellant had no locus standi to bring the suit and that the alleged accident did not occur. He averred that if the alleged accident indeed occurred that it was wholly caused and / or substantially contributed to by the negligence of the deceased in failing to exercise proper look out along the road among other factors. The respondent therefore prayed for the dismissal of the appellant's case.

4. After trial, the learned trial magistrate found that the respondents ownership of the material vehicle was not established and that the respondent was sued as having been the driver of the vehicle yet the accused driver was said to be one David Shimi Chanzu. The learned trial magistrate noted that there was contradiction with regard to the actual time the accident and eventually held that the appellant's claim had not been proved. The learned trial magistrate failed to assess the claimed damages as was required notwithstanding the dismissal of the appellant's case.

5. Being dissatisfied with the trial's court decision, the appellant preferred this appeal on the basis

of the grounds enumerated in the memorandum of appeal dated 6th July 2010. Further submissions in support and opposition to this appeal were filed by both the appellant and respondent respectively.

Having considered the said submissions in light of the grounds of appeal, the duty of this court was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court has the advantage of seeing and hearing the witnesses.

6. In that regard, the evidence led on behalf of the appellant by herself (PW1), the deceased's wife Rose (PW2), and an eye witness, Richard (PW3), was duly considered. The respondent led no evidence at the hearing of the case.

Having failed to provide any evidence in support of his denial of the appellants claim and his allegations of negligence against the deceased , it followed that the appellants evidence remained on its own in the attempt to establish the circumstances under which the accident occurred and indeed, the culpability of the respondent.

7. From the entire evidence availed before the trial magistrate, this court notes that the occurrence of the accident and the ownership of the material vehicle were factors which were not at all or substantially disputed.

Proof of ownership of the vehicle was on a balance of probabilities attained by the production of the police abstract (P.E.3) as a certificate of registration from the registrar of Motor Vehicles would not be the only means of which ownership may be proved.

8. In any event, there was no evidence from the respondent to consider the police abstract, which showed that he was the owner of the vehicle(see, Lake Flowers vs Cila Francklyn Onyango Nganga & Another Nakuru Civil Appeal No.210 of 2006 (C/A).

Being such owner of the vehicle, the respondent was correctly sued for the negligent actions and / or omission of his agents and/or driver while in the cause of their employment even though the pleadings by the appellant in that regard were not properly crafted. This was however, were of a technical error which did not fatally affect the substance of the case.

9. It was sufficient that this related basic facts were pleaded and evidence led by the appellant to establish ownership of the material motor vehicle. It was from all these that vicarious liability could be inferred as a matter of law.

Indeed, as observed in Dritoo vs Wasi Nile District Administration (1968) E. a. 428

" where it is proved that a car has caused damage by negligence, that in the absence of evidence to the contrary, a presumption arises that it was driven by a person to whose negligence that owner is responsible."

10. Herein, there was enough evidence from Richard (PW3), that the accident occurred at 1.30 p.m in broad daylight. He said that the deceased was on the left side of the road when he was hit and fatally injured by the material vehicle which was at the time being driven at a high speed.

It was thus implied by the witness that the deceased was off the road when he was hit and that the driver of the vehicle was reckless in the manner of driving.

11. The witness (P3) was emphatic that the accident occurred at 1.30 p.m and not 7.30 p.m as indicated in the police abstract. Such contradictions in time of the accident was not material since the occurrence thereof was not disputed . It was also possible that there could have been an error in the recording of the time in the police abstract.

12. Contrary to the findings of the learned trial magistrate on liability, this court would find that

liability was indeed established against the respondent at 100%. the respondent is thus responsible for the consequences of the negligent act on omission of his driver and was therefore liable to the appellant for loss and damages arising therefrom.

13. In regard to damages, the appellant was entitled to proven special damages together with general damages under the Law Reform Act and the Fatal Accident Act. The special damages established by the production of the relevant documents (P.E.1 , 2 & 3) amounted to Kshs.3.900/- only.

14. As per general damages, the deceased was aged 36 years at the time of his death and was said to have been in a business dealing in the buying and selling of maize for his upkeep and that of his Dependants including his wife (appellant) and six (6) children. In the circumstances, a sum of Kshs.100,000/= was reasonable for loss of expectation of life and as to pain and suffering a sum of Kshs.20,000/= would suffice. As to loss of dependency, there was no clear evidence of the deceased's monthly earning from his business. Therefore, the multiply approach in assessing such damages would not be suitable in the present circumstances. This court thus applied a global figure approach and award a sum of Kshs.500,000/= for loss of dependency.

15. In sum, this appeal is allowed to the extent that the Judgment of the trial court is hereby set aside and substituted with a Judgment in favour of the appellant for the total sum of Kshs.623,900/= being both special and general damages together with costs and interest . The appellant shall also be given the costs of the appeal.

I order accordingly.

Delivered and signed this 26th day of May, 2015.

J. R. KARANJA

JUDGE