



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 252 OF 2010

1. SOLOMON J. MURIUNGI 1ST APPELLANT
2. AKAMBA PUBLIC ROAD SERVICES LTD.....2ND APPELLANT

VERSUS

1. CARREN ATIENO AUMA (SUING AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF LAMECK ODUOR ODUNGA..... ..1ST RESPONDENT
2. GOLDEN STAR BUS COMPANY.....2ND RESPONDENT
3. ZEPHANIA MABERE MARANDO.....3RD RESPONDENT

*(Appeal from the Judgment of the Honourable Mr. N. Njagi Resident Magistrate delivered on the
17th August 2010 in Naivasha PMCC 244 of 2009)*

JUDGMENT

1. The appeal arises from the judgment of Hon. N. Njagi delivered on the 17th August 2010 in **Naivasha PMCC No. 244 of 2009**. The Appellant had sued the Defendants jointly and severally for compensation in both general and special damages following the fatal injuries sustained by her husband who was a fare paying passenger in **Motor Vehicle Registration NO. KAL 621B** the property of the 2nd appellant.

The appellants instituted 3rd party proceedings against the 3rd party Respondents, the owner of **Motor Vehicle Registration KAR 017P** that was in collision with the 2nd appellant's vehicle. Upon being served with 3rd party notice by the 2nd appellant, the first 3rd party failed to appear or file his statement of defence. The appellant did not apply or obtain judgment against the 3rd parties.

Upon full hearing of the case, and in the absence of the 3rd parties, the court found the appellants jointly and severally wholly to blame for the accident and assessed general damages in favour of the first Respondent in the sum of Kshs.857,592/= and Kshs.40,000/= in special damages.

2. The appeal is against both liability and *quantum* of damages and is premised on the following grounds:

- (1) The learned Magistrate erred in law in finding that the Appellants failed to seek

judgment in default of appearance against the second Respondent and/or Third Respondent when such a procedure is not provided in law.

(2) The learned magistrate erred in law by finding the Appellants 100% liable to the 1st Respondent.

(3) The learned Magistrate erred in law by failing to apportion liability between the Appellants and Second Respondent and/or Third Respondent pursuant to the directions given.

(4) The learned Magistrate erred in law by failing to appreciate the law relating to the Third Party proceedings.

(5) The Learned magistrate erred in law and in fact by finding the Appellants 100% liable when there was no evidence to support any negligence on behalf of the Appellants.

(6) The learned Magistrate erred in law and in fact by adopting an income of Kshs.17,029/= per month which was inordinately high taking into consideration statutory deductions and other relevant factors.

(7) The Learned magistrate erred in law and in fact by awarding a multiplier of six years which was inordinately high considering the age of the deceased and all other relevant facts.

(8) The Learned Magistrate erred in law and in fact by awarding special Damages which were neither particularised nor pleaded.

The above grounds shall be summarised and dealt with in three groups.

Grounds 1, 3, 4, on third party proceedings

Grounds 2, 5 on liability

Grounds 6, 7, and 8 on quantum of damages

The parties to the appeal have filed written submissions.

3. The appellants submissions

On 3rd party proceedings, it was submitted that the trial court failed to appreciate the meaning of **Order 1 Rule 21 (1)** that reads:

“Where a 3rd party makes default in entering an appearance, and the suit is tried and the end result is in favour of the plaintiff, the court may either at or after the trial enter such judgment as the nature of the suit may require for the defendant giving notice against the 3rd party---”

The trial magistrate in his Judgment stated in respect of the above: ***“----- that in the absence of the 3rd party in the proceedings and lack of the defendants to seek judgment against the 3rd party, the court cannot in any way be asked to apportion liability.”***

To the above, the appellant submits that there is no legal requirement of a defendant to seek judgment against a 3rd party in default, and that the trial court ought to have determined the issue of liability and indemnity during the hearing and reflect the same in the judgment.

4. The Respondents on the other hand submitted that the trial Magistrate was correct by making the above observation as the court could not move on its own motion to give Judgment against the 3rd party when such judgment had not been applied for under **Order 1 Rule 21(1)** or under **Order 1 Rule 19 of the Civil Procedure Rules**. It was submitted that under **Order 1 Rule 19 of the Rules**, it is the defendant who may apply for judgment against a 3rd party in default, but only upon satisfying the decree against it in case judgment is passed in favour of the plaintiff. It has been submitted that 3rd party directions on hearing of the case could only have been taken if the 3rd party had appeared.

5. The court has considered the oral submissions on this ground. It is not in dispute that the 3rd parties were served but failed to appear or file their defences. It is also not in dispute that the appellants (then defendants) did not apply for judgment against the 3rd parties in default pursuant to **Order 1 Rule 19**, nor was such judgment entered by the trial court at or after the trial in terms of **Order 1 Rule 21**.

In my considered view, in default of the 3rd parties appearing, the defendants ought to have applied for interlocutory judgment under **Order 1 Rule 19** that states:

“---- Where a 3rd party makes default in entering appearance in the suit, or in delivering any pleading and the defendant giving the notice suffers judgment by default such defendant shall be entitled after causing satisfaction of the decree, against himself, to be entered upon the record, to judgment against the third party to the extent claimed in the third party notice; the court may upon application of the defendant pass such Judgment against the third party before such defendant has satisfied the decree passed against him.”(emphasis mine)

6. The court cannot on its own cause a judgment to be entered. The defendant has two options. Either to satisfy the decree passed upon it and thereafter apply for the Judgment to be entered against the 3rd party, and only after such application would the court pass such judgment against the 3rd party or before satisfying the decree passed before him, apply for such judgment to the extent of the 3rd party notice to be entered against the said 3rd party.

I find no obligation placed upon the court to act *suo moto* and enter judgment against the 3rd party in default. The court must be moved, either before satisfying the decree or after satisfaction of the decree.

The appellants hereof did neither of the two. They stand liable as per the trial courts judgments but subject to the findings on liability and *quantum* below.

7. The appellant's **Motor vehicle Registration NO. KAL 621B** was blamed for the causation of the accident. In the trial court, the only defence witness called was **PC Patrick Mbila (DW1)**. He produced the police file in respect of the accident and the police abstract. He was not the investigating officer. He stated that the case was still under investigation and solely relied on statements by various persons who were never called to testify.

The appellants submitted that statements by the 3rd party driver who, in his statement admitted that his vehicle had a mechanical problem and rammed on the rear of the appellant's vehicle ought to have been found liable. This driver did not testify, nor did the driver of the appellants vehicle. It is trite law that he who alleges must prove. See **Section 107, 108 and 109 of the Evidence Act, Cap 80 , Laws of Kenya**. It is trite that mere statements in a police file cannot be taken to have any evidential value unless the makers testify. The appellants failed to have their driver testify. The trial court was therefore right to conclude that the Appellants had a duty of care to the deceased as a fare paying passenger. There having no evidence tendered before the trial court to absolve the appellant's driver, I find no fault whatsoever in the trial courts finding that the

appellants were wholly to blame and therefore liable in damages.

8.The deceased **Lameck Oduor Odunga was a P1 TSC Teacher** earning a salary of Kshs.17,029/=. Two payslips were produced by his widow as exhibits. They show his total earnings as Kshs.17,929/=. PAYE is indicated as Kshs.1,019. The other deductions were union dues, and, Co-operative loans giving a **Net Salary of Kshs.3,577/=** for the month of April, 2007, and Kshs.6,724 for the month of March, 2007. The appellant submitted that the trial court ought to have applied a net salary of Kshs.3,577/= shown in the April 2007 payslip – in calculations for damages for loss of dependency under the **Fatal Accidents Act**. The Respondent stated that the net salary should be the total earnings less statutory deductions only and that all the other deductions were going into the improvement of the family's welfare like the loans. This court finds the appellants submissions rather naive and misplaced. A persons total earnings, what is called the monthly salary, is the basic pay and fixed allowances less statutory deductions only. Other deductions are a choice of the person. Loans and union dues are optional and are deducted from the salary. It cannot be said that a NET salary is what one takes home after paying off all debts and dues to 3rd parties as that would be gravely erroneous.

As I have stated above, the deceased salary was Ksh.17,929/= less PAYE of Kshs.1019/=, leaving a **NET salary of Kshs.16,910/=**. In my considered view, this is the amount to be applied as the deceased's net salary. Trial court correctly applied the correct salary, with a small adjustment as shall be shown below.

9.It is not in dispute that the deceased was 46 years old as evidenced by his death certificate. He would have, all things being equal, retired at the age of 60 years as a T.S.C Teacher. The trial court's adoption of 6 years as multiplier is not under attack. It will not be disturbed. Thus damages under the Fatal Accident Act are adjusted as follows:

12 X 16,910 X 2/3 X6= Kshs.811,680/=

The trial court's award on this head of Kshs.817,392/= is varied and adjusted accordingly, to Kshs.811,680/=.

10.It is trite law that special damages must be pleaded and proved. The appellant faults the trial court for awarding the plaintiff a sum of Kshs.40,000/= that it says were not pleaded, nor strictly proved.

I have seen the plaint dated 19th March 2009. Particulars of special damages were pleaded in the sum of Kshs.94,050/=. Funeral expenses were stated at Kshs.92,300/=. The deceased widow in her testimony stated that she could not get all receipts for funeral expenses. I have looked at the receipts produced as exhibits. They amounted to Kshs.27,800/=(mortuary fees Kshs.2,800/=and Legal fees Kshs.25,000/ for obtaining Letters of Administration *Ad Corrigenda*.

It is not in dispute that the deceased's body was transported from Naivasha for burial at Siaya as evidenced by the Akamba bus ticket of the day (PEXh a) at a cost. It has been held in numerous decisions that a grieving family, is not practically able to collect and keep for an anticipated case receipts issued to them in preparation of burial for their loved ones. The sum of Kshs.15,000/= towards funeral expenses is a legitimate expense and reasonable in the circumstances. See **C.A No 40 of 2013 – Alfred Opiyo -vs- Lawrence Oduori Khadera (2015) KLR and Ca No 57 of 2014 Paul Momanyi Soire -vs- Caroline Moraa Akuba**.

The sum of Ksh.40,200/= shall not be varied or set aside. In my considered view, the transport element though not strictly proved by production of receipts is a legitimate and reasonable expenditure that in all circumstances of the case ought to be confirmed.

In its totality, the appeal is without merit save for the small adjustment on the award on loss of dependency under the **Fatal Accidents Act** from Kshs.871,392/= to Kshs.811,680/=. The first

Respondent shall have costs of the Appeal.

Dated, signed and delivered in open court this 16th day December of 2015

JANET MULWA

JUDGE