



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.11 OF 2010

CHABHADIA ENTERPRISES LTDAPPELLANT

VERSUS

JOHN OTANGA NAKHOBIRESPONDENT

(An Appeal arising out of the decision of E.H. Keago SRM delivered on 11/3/2010 in Busia civil case no.250 of 2007)

J U D G M E N T

1. Augustine Alfred Ominde (the Deceased) met his death on 29/02/2001 in a road traffic accident involving motor vehicle tractor registration KAK 947H towing Trailer Registration ZB 4812. The tractor and trailer are said to belong to the Appellant.
2. In Busia CMCC 250 of 2007 (**John Otanga Nakhobi –vs- Chabadia Enterprises**) the Respondent herein, in his capacity as the legal representative of the Deceased, sued the Appellant in respect to the loss and damage suffered in the accident. At the close of the hearing the Learned Magistrate apportioned liability at 50%:50% as between the Deceased and the Appellant and awarded damages of ksh.720,000/= which were subjected to the said contribution.
3. At trial the Plaintiffs case constituted of three witnesses. The Respondent (PW1) was the father of the Deceased. He learnt that his son died on 29th August 2001 as a result of a road traffic accident that occurred at Suo River along Busia – Kisumu Road. His son was a Fields clerk with the Appellant but he thought that he was driving tractor registration KAK 947H at the time of the accident. He could not tell why the Deceased was asked to drive the tractor. He blamed the Appellant for this.
4. Amir Ibrahim (PW3) witnessed the accident happen. It was about midday on 29th August 2001 (see handwritten proceedings) when he saw a tractor come from his back heading in the Nambale direction. The tractor started to zig zag and lost control. It overturned and landed into Suo river. Into the river also landed the person driving the tractor. He thought that the driver was a young person and was alone on the tractor at the time of the accident. Details of that accident were captured in the police abstract produced Gerald Kiriri (PW2).
5. In Defence, Gabriel Khatete spoke on behalf of the Appellant. He is the office supervisor with that company. He knew the Deceased to be employed as a Field clerk with the Appellant. The driver of the offending tractor was Alfred Aboga. The Driver, just like the Deceased, died in the accident. It was his evidence that the Deceased drove the tractor on his own volition.
6. This Appeal raises the following grounds:-

“1. The learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.

2. **The Learned Trial Magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the Appellant.**

3. **The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.**

4. **The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant**

5. **The Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the Appellant while the onus of proof lay with the Respondent.**

6. **The Learned Trial Magistrate misdirected himself in not taking into consideration the nature of the Respondent's injuries at the time of assessing damages."**

In written arguments filed on its behalf the Appellant argued that the Amended Plaintiff contained no prayers and what the Plaintiff sought was not known. That would be an additional ground of attack. But, I am afraid that I will not consider this argument as it does not relate to any of the grounds of Appeal set out in Memorandum of Appeal.

7. In support of the matters specifically raised in the Appeal the thrust of the Appellants case was that the Deceased was acting outside the scope of his employment and was wholly to blame for his misfortune. In addition, the accident was caused solely by the negligence of the Deceased in management of the motor tractor. On quantum it was the Appellants view that it was excessive and ought to have been in the region of the ksh.240,000/=.
8. The Appeal was resisted by the Respondent who argued that the Deceased was forced to perform duties he was not employed to perform and was thereby exposed to danger.
9. As an Appellant Court entertaining a first Appeal I am required to re-assess the evidence afresh and make my findings on it, keeping in mind that I did not hear and see the witnesses testify and I would have to give some allowance for this. (**Selle -vs- Associated Motor Boat Company Limited** [1968] EA 123.
10. It is common ground, so it seems, that the Deceased was employed as a Field clerk by the Appellant. There is also evidence of PW 3 that suggested that at the time of the accident the Deceased was driving the offending motor tractor. That would be outside the scope of what he was employed to do.
11. What is in contention is how that came to be. Was he forced or in the words used in the plaint "coerced" to drive or was he on his own frolic? And the Learned Magistrate identified this to be the question for determination. He framed it as follows:-

"In the case the issue for determination is whether the deceased voluntarily drove the tractor and thereby caused an accident and therefore the defendants are not to blame, or it was the defendants who allocated him the duty to drive the motor tractor."

12. It must be remembered that he who alleges must prove. The backbone to the claim on liability was that the Deceased was forced to drive the tractor when he was not employed as a driver and this exposed him to danger. In the alternative it had been alleged that the Appellant was negligent by permitting the Deceased to drive the tractor. Both allegations were expressly refuted by the Appellant in its Defence.
13. It then fell to the Respondent to prove his allegations. None of the claimant's witnesses gave evidence of how the Deceased was forced to drive the motor tractor. Indeed there was no evidence of how the Deceased came to find himself on the driver's seat. If however, it is to be assumed that the principle of *Res Ipsa Loquitur* is applicable then the Appellant was under an

obligation to proffer an explanation. The Appellant's only witness gave evidence that the driver assigned to the accident tractor was Alfred Aboga. Indeed Alfred died in that accident. So, Alfred and the Deceased were on the tractor at the time of the accident. If by a consensual arrangement Alfred permitted the Deceased to drive the tractor then the Deceased would be entirely to blame for his own misfortune. If on the other hand, Alfred forced the Deceased to drive the tractor, then it cannot be said that Alfred did so while acting within the scope of his authority as a driver for the Appellant company. The misdeed of Alfred cannot be visited on the Appellant. Whichever way I look at it, I am unable to find any blame that is attributable to the Appellant. For that reason I would not reach the same decision as that of the Learned Trial Magistrate and would allow the Appeal on liability.

14. Although I shall be allowing the Appeal, it behoves me to give my views on the question of damages as invited by the Appellant. The Court was asked to interfere with the award of damages made by the Lower Court. It had been submitted that the award was excessive. This Court can only interfere with the award if satisfied that it was based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred (see **Kemfro African Limited & Another -vs- Lubia & Another No.2** [1967] KLR 30).

15. It was not contested that the Deceased earned a monthly salary of ksh.6000/= and that he died at the age of 25 years. In his lifetime, his wife and one daughter depended on him. It seems that after his death, his wife left and the child remained in the custody and care of the Respondent. I am unable to fault the Learned Magistrates application of a multiplicand of ksh.6000/=, a multiplier of 30 and a dependency ratio of 2/3. I would not interfere with the Learned Magistrates finding on quantum.

16. But because of reasons given on the question of liability, I hereby allow the Appeal, set aside the Learned Magistrate's judgment of 11/03/2010. Costs of the Appeal to the Appellant.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 17TH DAY OF FEBRUARY 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR THE APPELLANT

.....FOR RESPONDENT