REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.58 OF 2012

J O O (SUING AS THE PERSONAL REPRESENTATIVE ON

BEHALF OF THE ESTATE OF P O O)……..……..……...APPELLANT

VERSUS

VINCENT OUMA OMONDI ……...……..1ST RESPONDENT

MATHIAS O. OLIECH ……..…….…….2ND RESPONDENT

(An appeal arising out of the judgment of SPM C.C. No.250 of 2010 delivered by Hon. M. Munyekenye – SRM on28th September 2012).

J U D G M E N T

1. P O O met his death on 7th November 2009 after he sustained fatal injuries in a Road Traffic Accident along Busia – Kisumu road near Legio area. In his capacity as the Legal representative of the Deceased, J O O (the **Appellant**) took out Civil Proceedings against Vincent Ouma Omondi (the 1st Respondent) and Mathias O. Oliech (the 2nd Respondent).
2. In those proceedings, the Appellant alleged that the accident was caused by the negligence and/or careless of the 1st Respondent in the management and control of motor vehicle registration KBA 745F. In the Plaint, the Appellant set out the particulars of negligence. The 2nd Respondent is said to have been the registered owner of the said motor vehicle at the material time. The Appellant sought General Damages under the Fatal Accidents Act and Law Reform Act and Special Damages of Kenya Shillings Fifty Eight Thousand Four Hundred and Fifty (kshs.58,450/=).
3. In a joint Defence filed by the Respondents on 25th June 2010, the Respondents denied that the accident occurred at all or that it occurred as a result of the negligence on the part of the 1st Respondent. In the alternative the Respondents averred that the accident occurred as a result of the sole or substantial negligence attributable to the Deceased. The particulars of negligence were set out in the Defence.
4. At trial the Claimant and a Police officer testified. The claimant is a son of the Deceased. On 7/11/09, he received the sad news of the passing of his father. The news was that the Deceased had been involved in a road traffic accident as he rode to work. On the day following, he saw the body of the Deceased as it lay at Busia District Hospital Mortuary. The Deceased was later laid to rest in his home at Ikonzo Sub Location. The witness produced various receipts in respect to mortuary expenses, transport and other funeral expenses. He also produced a receipt for Kenya Shillings Twenty Thousand (ksh.20,000/=) in respect to professional fees paid to his advocates.
5. Before his unfortunate demise, the deceased was married to R O and left behind that widow and four children, namely D, E, N and the Claimant. It was the Claimants' evidence that the Deceased

was a Security Officer at Amukura and earned a monthly salary of Kenya Shillings Five Thousand (Kshs. 5,000/-). With this money he paid school fees for his children E and N who were primary school going and bought food and met medical expenses for his wife.

6. Police Constable Kennedy Chebii (PW1) was at the time of Trial attached to Busia Traffic Office. Although he did not investigate the accident which was the subject matter of the Civil Proceedings, he made reference to the file in respect thereof in his evidence. He then testified that the accident occurred on 7th November 2009 at about 2.30p.m along Busia – Kisumu road near Legio involving motor vehicle registration KBA 745F. The vehicle was driven by the 1st Respondent. PW1 also testified that after investigations, the driver was charged with the offence of causing death by dangerous driving in traffic case No.1094/2009. He was aware that the case was concluded and the driver convicted and sentenced to a fine of Kenya Shillings Fifteen Thousand (ksh.15,000/=) and in default to a prison term of 6 months. He produced the Abstract to the accident.
7. At the close of the Plaintiffs case, the Defence did not call any evidence. In a judgment delivered on 28th September 2012, the Learned Trial Magistrate dismissed the claim in its entirety upon returning a finding that the Appellant had not proved liability on the part of Respondents. The Appellant is aggrieved by that decision and raises the following grounds of Appeal in his Petition to this Court:-

1. **The Principal Magistrate erred in law and fact failing to find and hold that the appellant had proved his claim on a balance of probabilities.**
2. **The Principal Magistrate erred in law and fact in failing to frame, consider and determine all the issues before her.**
3. **The Principal Magistrate erred in law and fact in predicating her judgment on theories and hypothesis that flew in the face of the evidence before her.**
4. **The Principal Magistrate erred in law and fact in raising, considering and deciding issues that were not before her with regard to the respondents liability.**
5. **The Principal Magistrate erred in law and fact in altering and raising the standard of proof in a civil case to beyond reasonable doubt with regard to issues that were before her.**
6. **The Principal Magistrate erred in law and fact in awarding the appellants damages that were too low in the circumstances as to amount to wrongful exercise of a discretion.**

8. At the Appeal, Counsel for the parties agreed to dispose of the Appeal by way of written submissions. On liability, it was argued that the Appellant had discharged his onus. It was submitted that PW1,

> **"……informed the Court that the 1st Respondent had by then been convicted by the Court. The Defence did not dispute this fact either by own evidence or cross-examination. The record shows that on 18th August 2011(page 68) a different Court had declined to hear the case upon realizing that it had convicted the Defendant (Respondent) in "a traffic case."**

That this evidence was not disproved by the Defence and the Trial Court ought to have found that the 1st Respondent was negligent.

9. This Court was referred to a string of cases including **Robinson –vs- Oluoch (1971) EA 376** and **Queens Cleaners & Dryers Ltd –vs- East African Community & others (1922) EA 229** for the proposition that whereas a person convicted in a Traffic Court may plead in Civil Proceedings that any other person was also negligent, such a convict is precluded by dint by Section 47A of the Evidence Act from denying that he was negligent.
10. For the Respondents it was submitted that the Appellant has failed to prove negligence on the part of the Respondents. Counsel for the Respondents argued that the Appellant did not call any witness who actually saw how the accident occurred. The provisions of section 107 of the Evidence Act were emphasized. Those provide:-

"1.Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

Citing many decisions (including **Civil Appeal No. 57 of 2007 Bungoma Nzoia Sugar Company Ltd V David Nalyanya [2008] eKLR, Kisumu Civil Appeal No. 100 'A' of 2007 Walter Onyango V Foam Mattress Ltd [2009] eKLR, Eldoret Civil Appeal No. 43 of 2001 Eastern Produce (K) Ltd V Christopher Atiado Osiro [2006] eKLR)**, the Respondent asserted that there was no evidence upon which the Trial Court could make a finding of negligence against the 1st Respondent.

11. This Court was also reminded that as an Appeal Court, it should be slow in reaching a different conclusion from the Trial Court on a question of fact unless, on a proper analysis of the Evidence, the Trial Court can be said to be plainly wrong. For this accepted proposition, Counsel cited the case of **Kiruga V Kiruga and Another [1988] KLR 348**.
12. How did the Trial Court deal with the aspect of liability? The Trial Court after observing that the Plaintiff neither called an eye-witness to explain the circumstances of the accident nor produced the traffic proceedings found that the liability against the Defendants had not been proved. On the important question of conviction, the Learned Magistrate observed,

> **"The plaintiff as pointed earlier failed to place before the court any evidence to show that the 1st defendant was fined kshs.15,000/= in default 6 months imprisonment. The police abstract produced in court does not reflect that position but rather that the case was still pending before court as of 27th January 2010. The traffic case proceedings were not put before this court to prove that the 1st defendant was convicted of causing death by dangerous driving. PW1 having not been the investigating officer his evidence on the alleged conviction was basically hearsay that cannot be relied upon."**

This Court could not agree more with the holding of the Learned Magistrate. Save for producing the Police Abstract, the witness merely gave an hearsay account. In respect to the conviction the witness testified as follows;

> **"Investigations were conducted and driver charged with the offence of causing death by dangerous driving vide Busia traffic case No. 1094/2009. The case was concluded and the driver fined Kenya Shillings Fifteen Thousand (Kshs. 15,000/) in default 6 months in prison. The driver charged was Vincent Ouma".**

The witness was not the Investigating Officer and does not tell Court that his report of the conviction was a firsthand account.

13) But this Court was urged to find that evidence of PW1 was not the end to the issue of the 1st Respondent conviction. In the course of the Lower

Court proceedings E. H. Keago SRM made the following Order on 18th

August 2011,

> **"The Court has already convicted the Defendant in a Traffic Case. The matter be mentioned before Court 1 (SPM) on 23/8/2011 for a hearing date".**

On this, the Appellants' Counsel submitted thus;

"The record shows that on 18/8/2011 (Page 68) a different court had declined to hear the case upon realizing that it had convicted the Defendant (Respondent) in a traffic case. On

a balance of probabilities therefore, there was sufficient evidence that the 1st Respondent had been charged and convicted. Proceedings would have been necessary if the 1st Respondent had appeared in Court and disputed the evidence of PW1".

14) To be fair to the Learned Trial Magistrate, she may not have had the opportunity of considering the import of Hon. Keago's Order. I have looked at the Lower Court record including the Submissions of both the Plaintiff and Defence and I am satisfied that the Order was never brought to the attention of the Trial Court. Now, Courts of Law reach their decisions on the basis of Law and /or fact. Generally, evidence would comprise of Admitted Facts, Proved Facts or Facts Judicially Noticed or a combination of the three. This Court assumes for a moment, without deciding, that the Order of Hon. E. H. Keago being part of the Court record is proof of the fact of the Order itself and the contents thereof.

15) What are the contents of the Order and what does it prove? In my view, the order proves that the Trial Magistrate convicted one of the Defendants in a Traffic case. But is it to be assumed that the convicted Defendant was the 1st Defendant and not the 2nd Defendant? Is it to be assumed that the Traffic case mentioned in the order was the one mentioned in the Police Abstract? Is it also to be assumed that the conviction was in respect to the offence of causing death by dangerous driving as mentioned in the Abstract?

16) The Order also proves that Hon. Keago disqualified himself from dealing with the running down claim. But what was the basis fordisqualification? Was it because the Magistrate had dealt with Traffic Proceedings related to the claim or was that he felt some discomfort dealing with the claim having convicted one of the Defendants elsewhere? The Order is not clear.

17) The Order as framed invites so many conjectures that it can hardly be said to be prove, on a balance of probabilities, that the 1st Defendant was convicted of the offence of causing death bydangerous driving in respect to the accident that gave rise to the Appellant's claim. This Court has to agree with both the Learned Magistrate and the Respondents' Counsel that the Appellant had failed to prove liability against the 1st Respondent.

18) Commendably, even after making a finding that the Plaintiff had failed to prove its case on liability, the Learned Magistrate gave her views on quantum. That again has been challenged in the Appeal. For some reason, the Respondents said nothing in this regard.

19) The Trial Magistrate declined to make an award under the head of Pain and Suffering as she found that there was conflicting evidence as to the time of the Deceased's death. This conflict was caused by the varying dates of death contained in the Certificate of Death and of the evidence of PW1 and PW2. PW1 said that the Deceased died on 9/11/10 (?) while PW2's evidence was that he died on 7/11/09. However, the Certificate of Death in respect to that death showed the date of death as 7/11/09. In view of the unpromising oral evidence of the two witnesses, some reliance should have been made on the Certificate of Death. The date of death entered in the Certificate of Death would be *Prima facie* evidence as to the date of death of the Deceased (section 26(4) of The Births and Deaths Registration Act, chapter 149 Laws of Kenya). This Court would hold, on the balance of probabilities that the Deceased died on 7th November 2009, the same day as the accident.

20) What is unclear is whether the fatal injuries caused the Deceased to suffer instant death. An action for pain and suffering is an action that survives the Deceased. An award under this head should, strictly, depend upon the Deceased's awareness of pain and the pain suffered before he/she succumbs to the injuries. This would in many instances be difficult, if not impossible, to prove and it is for this reason that some courts invariably give a nominal award. And although I would have on my part made a nominal award, even in the absence of evidence to justify the award, I am unable to fault the Learned Magistrate's dismissal of the claim on the ground that the Plaintiff had failed to prove that the Deceased suffered any pain before his death.

21) On the head of loss of expectation of life, the Learned Magistrate's view was that Kenya Shillings Sixty Thousand (Kshs. 60,000/-) was sufficient. An award under this head is generally a conventional figure. Unless it is shown that the Deceased's expectation of life was so dulled or dampened by say, crippling to poor health, there should be no reason to depart from the conventional figure. From the authorities cited by the Appellant's Counsel the conventional award in 2012, when the Lower Court Judgment was delivered, was in the region of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-). The award of Kenya Shillings Sixty Thousand (Kshs. 60,000/-) proposed by the Learned Magistrate would appear to be so low as to be erroneous.

22) On Loss of Dependency, the Learned Magistrate held,

" As for the widow, the deceased was aged 69 years at the time of his death. He was a night watchman; I find that even if he continued to live and work, he would not have been able to work past the age of 70. I find that the deceased would have used 2/3 of his salary on his widow. For the loss of dependency I would have awarded Kshs. 5,000X12X1x2/3 = Kshs. 40,000/-".

The Appellant does not challenge the Dependency Ratio and Multiplicand adopted by the Trial Court but criticizes the Multiplier of one (1) year. It was suggested that a multiplier of eight (8) years was more reasonable. But this criticism is not justified. There is no evidence put forward by Appellant on the retirement age of the Deceased. For this reason there may be no reason to fault the Learned Magistrate's view that the Deceased, a Security Guard, would probably not have worked past the age of seventy (70).

23)On Special Damages, I would agree with the Appellant that Special Damages that were proved were Kenya Shillings Fifty Three Thousand Two Hundred and Thirty (Kshs. 53,230/-) as against the pleaded sum of Kenya Shillings Fifty Eight Thousand Four Hundred and Fifty (Kshs. 58,450/-). The Learned Magistrate should have made an award for Kenya Shillings Fifty Three Thousand Two Hundred and Thirty (Kshs. 53, 230/-) and not Kenya Shillings Twenty Four Thousand Seven Hundred and Thirty (Kshs. 24, 730/-). Her assessment was therefore erroneous.

24) Notwithstanding my observations on some heads of quantum, the entire Appeal is for dismissal in view of my finding on liability. The result, the entire Appeal is dismissed with costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 18TH DAY OF SEPTEMBER 2014.

IN THE PRESENCE OF:

KADENYI …….COURT CLERK

……FOR APPELLANT

……FOR 1ST RESPONDENT

…….FOR 2ND RESPONDENT