



MAYFAIR HOLDINGS LTDAPPELLANT

VERSUS

**SAMUEL OBILO ADHIAMBO (Suing as the legal administrator
And personal representative of the estate of
FELIX OCHOLA OBILO (Deceased)
.....RESPONDENT**

JUDGMENT

The appellant's Memorandum of Appeal is composed of nine grounds namely:-

- 1. The learned trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability before her 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 grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.**
- 4. The learned trial Magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.**
- 5. The learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the Appellant.**
- 6. The learned trial Magistrate erred by awarding the Respondent damages that were so inordinately high and thus the said damages were not in the public interest.**
- 7. The learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.**
- 8. The learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.**
- 9. The learned trial Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived a decision unsustainable in law.**

When this matter come up for hearing the appellants counsel abandoned the ground on quantum and his appeal was therefore basically on the other grounds.

From the evidence before the trial court, the deceased death was caused by the road accident which occurred on 14th November 2004 along Kisumu Ahero road. The only eye witness was PW2.

PW2 Dan Obodo told the trial court that the accident occurred around 4:00 p.m. He saw the accident occur 80 meters from where he was. He said that the deceased was riding a bicycle on the right side of him. According to his evidence the motor vehicle left the road and hit the cyclist. When he reached the scene, the deceased was lying off the road.

His evidence was not controverted. The appellant didn't call any witness and the court found that the deceased was 30% liable.

It was argued by **Mr. Aringo** that this contradicts the pleadings. The plaint paragraph 4 states that the deceased was walking along Kisumu Ahero road whereas PW2 said that the deceased was riding a bicycle. I have perused the police abstract exhibit P3 and the same equally state that the accident involved motor vehicle registration number KAK 804 P and a cyclist. The court rightly concluded that the accident involved a cyclist.

The issue for determination is whether this inconsistency in the pleadings and the evidence goes into the root of the case. My answer is no. There is no doubt that an accident occurred. All indications point out to the fact that the appellant did not challenge this fact. Assuming that the deceased was walking still the trial court was generous enough to attribute 30% liability against the appellant. The respondents are contented with this as they did not cross appeal.

In my humble opinion this was a small issue which the appellant need not blow out of proportion. An accident occurred which was caused by its servants and or agent. They are in fact lucky as no traffic charges seemed to have been preferred against it despite the accident being fatal. The upshot of this is that the same does not go into the root of the case. No prejudice in any event has been suffered by the appellant whether if the deceased was walking or cycling. In any case as earlier stated the court attributed negligence against the deceased while the appellant offered no evidence.

The appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Kisumu this 29th day of February 2012

H. K. CHEMITEI
JUDGE

In the presence of:

..... **Advocate for Applicant**
..... **Advocate for Respondents**

HKC/aao