



**UNITED MILLERS LTD ..... APPELLANT**

**-VERSUS-**

**EUNICE ADHIAMBO OGOLA** (*suing as the personal Representative and*

*administrator of* **EZEKIEL OMONDI .....PLAINTIFF/RESPONDENT**

### **JUDGMENT**

This is an appeal arising from a disputed judgment of SRM\'s Court Case No. 298 of 2006 delivered on the 25th of July, 2007. In that case the respondent **Eunice Adhiambo Ogola** preferred a suit against the appellant **United Millers Limited** as the personal representative of the estate of the deceased, **Ezekiel Omondi Ogola**. It was her case that the appellant\'s motor vehicle registration number KAR 7703 was on the 18th of December, 2003 driven negligently and/or carelessly losing control and thus knocking down the deceased who as a result received fatal injury. She made her claim under the Fatal Accident\'s Act and the Law Reform Act for loss of expectation of life, loss of dependency and damages. On its part the appellant denied the allegations attributed to it and pleaded contributory negligence.

The trial court found that the deceased contributed to the accident at 20% and awarded damages both under the Law Reform & Fatal Accident Acts. Being dissatisfied with the said judgment the appellant filed the appeal subject matter of this judgment on the following grounds:-

- 1) The trial magistrate erred in law in her evaluation of the evidence adduced and thus arrived at an erroneous finding on the causation of the accident.
- 2) The trial magistrate erred in law in his assessment of damages adapting totally erroneous principles.
- 3) The trial magistrate erred in law in failing to find that the accident was substantially caused by the plaintiff who suddenly and negligently emerged onto the road and path of the appellant\'s driver thus affording to him no opportunities to maneuver.
- 4) The judgment was against the weight of evidence adduced.
- 5) The damages awarded was in any event to exorbitant and exaggerated as to amount to an error in principle .

In its submissions the appellant faulted the trial court for making finding that the appellant\'s driver substantially contributed to the accident, it argued that the court ought not to have assessed damages under the Law Reform Act as the respondent had not obtained grant of representation and that indeed there was no proof of negligence as against the defendant\'s driver.

On the other hand the respondent\'s counsel submitted that there was an admission by the appellant\'s driver that the scene of accident, was a populated place that there was a vehicle ahead, the

said driver was not prudent in his driving therefore causing the accident. Counsel further urged that there was no error in the assessment of damages as the suit was brought under the Law Reform Act and therefore there was no issue as relates to grant of letters of administration.

This being the first appellate court it is required by law to consider the evidence afresh and arrive at an independent opinion. The evidence on record is as follows:-

**PW1 – Eunice Adhiambo Ogola**, mother of the deceased. Gave the age of the deceased as 25 years, unmarried and a trainee welder. He was unemployed but she had high hopes of her first born son. She had no grant of letters of administration but had a letter from the chief.

**PW2 P. C Bernard Mutembei** of Ahero Police Station. He produced an abstract form in reference to the accident involving the deceased **Ezekiel Omondi Ogola** and motor vehicle KAR 770E belonging to United Millers. The abstract form gave the name of owner of the said motor vehicle as United Millers. He was however not the investigating officer.

**PW3 Elsa Awino Ogola** aged 20, a brother of the deceased, he recalled that on the 15th of December, 2003 at 11 am he was with the deceased at Ahero bus stop waiting for a vehicle to Nairobi when the deceased was hit by a vehicle that came from the direction of Kisumu. It was his evidence that after the incident the vehicle which was on high speed stopped a head. He also stated that the area had many people. He disputed that the deceased was hit while crossing the road.

The appellant (defendant) called one witness. **Dr. Wasuna Manase**. In his evidence the said witness stated that on the 18th December, 2003, while driving motor vehicle registration KAR 770E from Kisumu towards Kisii just before Ahero Total Petrol Station and opposite Kobil Petrol Station he spotted a stationary mini bus packed on the left side facing Nairobi direction, with some of its wheels on the road and as he was to overtake the same someone dashed on the road, the distance was so brief that he hit the said person who as a result fell in the middle of the road. It was also his evidence that the area is a market area, and is bumpy however even then he had no ample opportunity to see the person. He gave his speed as having been 30 km.

Having consider the evidence on record and the submissions it is clear that there is no dispute as to whether an accident occurred or not. It is evident that the deceased was hit by the appellant's vehicle. The issue for determination is on negligence, whether it was contributory and the award of damages.

**PW3** who was with the deceased at the time of the accident states they were at a bus stop but does not state that **DW1** was driving off the road meaning he was on the road. On his part **DW1** says there was a stationary vehicle and a person dashed from the side of the road as he was overtaking, he also admitted that the area is a market area.

What I gather from the evidence is that there was a stationary vehicle a head of **DW1** thus obviously hindering a clear vision ahead. The place was busy and **DW1** needed to have been careful. He was the one with a lethal machine which if not properly controlled or driven would have had fatal repercussion which indeed it had. Since **PW3** does not say that the deceased was knocked off the road. I am inclined to take **DW1**'s version of how the accident occurred. The trial magistrate blamed him largely for the accident. I will do so as well for the reasons alluded above. The trial court attributed 80% negligence against the appellant. I find the same reasonable in the circumstances of the case.

As for quantum there is an admission that no grant of letters of administration were taken out. It follows therefore that a claim under Law Reform Act must fail. The trial court therefore erred in awarding under this head. See **Raphael Wanyoro J. Mwanngi vs Catholic Diocese of Muranga HCCC No. 1935 of 1993** – A cause under the Law Reform is not maintainable as the claim was incompetent from its inception. The award of Ksh 120,000/= for loss of expectation of life therefore fails and the award for pain and suffering of Kshs 40,000/= likewise.

The claim under the Fatal Accident Act was based on the fact that the deceased was a trainee

welder, likely to earn a living. The multiplier the court used was 25 years therefore arriving at Kshs 450,000/=.

The pleadings stated that the deceased was a businessman. **PW1** in her evidence however stated that the son was training as a welder and had no income. In all fairness my view is that at 25 years if he was not working, he was going to do so at some point and in an African set up as the first born of his mother, if he worked he would have assisted her. I find therefore that the assessment by the trial court of taking a sum of Kshs 3,000/= at the time was reasonable. The multiplier and multiplicand appear reasonable and I will not interfere with the same. I leave the award at Kshs 450,000/= less contributory negligence of 20%. This therefore means that the appeal succeeds to the extent that claim under the Law Reform Act fails.

The award to the respondent is therefore Kshs 450,000/= and costs less 20% contributory negligence giving a sum of Kshs 360,000/= costs and interest.

**DATED AND DELIVERED THIS 18th DAY OF October 2012.**

ALI-ARONI  
**JUDGE**

**In the presence of:**

..... present for Applicant

.....present for Respondent