No. 2747

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 324 OF 2004

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

MARY AKELO DEDA (Suing as Administrator of the Estate of DALMAS DEDA CHOL - deceased).....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of the Hon. Ezra Awino Senior Resident Magistrate at Migori, in SRMCCNo. 472 of 2000, delivered on 23rd November, 2004)

The appellant was the 1st defendant whereas the respondent was the plaintiff in a suit commenced by the respondent in the Senior Principal Magistrate's Court at Migori. The respondent filed the suit in his capacity as the personal representative of the estate of the late **Dalmas Deda Chol** (deceased) who passed on following a road traffic accident involving him and motor vehicle registration number KAB 414B. The accident occurred on 13th March, 1999 near Opoya market. The offending motor vehicle aforesaid according to the plaint filed, belonged to the appellant and was at the material time in the lawful control of its driver, agent, servant and or employee, one, **Miah Ongalo Odim** who was sued as the 2nd defendant. The circumstances of the accident were that, the deceased was lawfully travelling aboard the said motor vehicle when the appellant's driver, servant, or agent aforesaid so recklessly and negligently drove, managed and or controlled the motor vehicle aforesaid that he caused or permitted it to toss out and roll over the deceased as a consequence whereof the deceased sustained fatal injuries from which he subsequently succumbed to. The respondent attributed the accident wholly to the negligence of the appellant's driver, servant and or agent and gave the particulars thereof.

At the time of his death, the deceased left behind six beneficiaries to wit, **Mary Akello Deda,** widow aged 43 years, **Dismas Okello**, son aged 13 years, **Lilian Akinyi**, Daughter aged 11 years, **Jackson Odhiambo**, son aged 7 years, **Anjelina Awour**, Daughter aged 5 years and **Charles Odhiambo**, son aged 1 year. The respondent brought the suit pursuant to the provisions of the **Fatal Accidents Act** as well as **Law Reform Act**.

The appellant denied the respondent's claim and put her to strict proof thereof. In particular it denied that the person sued as the 2nd defendant was its driver, agent and or servant. It went on further to aver that the deceased without lawfully authority by it or its servants or agents boarded the said motor vehicle. Further it denied that the 2nd defendant negligently drove and or controlled the said motor vehicle. It denied the occurrence of the accident, negligence and the particulars thereof attributed to it and its drivers, servant or agent. In the alternative it averred that if at all an accident occurred, the same was solely occasioned by the negligence of the deceased and proceeded to give particulars thereof.

At the hearing of the suit, the respondent testified that the deceased was her husband. He had died on 13th March, 1999. She had obtained a grant of letters of administration intestate for the estate of her deceased's husband thus enabling her to institute the suit on its behalf. She stated that the deceased used to work at Sony – cutting sugar cane and used to earn Kshs. 12,000/= per month. On the night of 13th March, 1999 she was informed by **Mr. Obule**, a sub-contractor who had since died, that her husband was involved in an accident with a tractor. The body had been taken to Migori District Hospital. She later collected the body for burial. She saw the body at the mortuary and noted that the head was cracked. She did not know the age of her husband. He had left her with children whose names she gave. She testified that her husband used to assist her by paying school fees and buying clothes for their children. He also used to meet all household expenses as she did not work. She and her children entirely depended on him. She prayed for compensation as her husband had died in the hands of the defendant.

Cross-examined, she stated that she was not told how the accident occurred. She did not know who to blame. She did not know the registration number of the motor vehicle involved. Though the deceased used to earn Kshs. 6,000/= every after two weeks as a cane cutter for the appellant she had nothing to show for her contention. She also did not know whether he was working for a contractor. She did not even know whether a post mortem had been carried out on his body. The police abstract was subsequently admitted in evidence by consent and the respondent then closed her case.

When it came to the defence case, the appellant opted to close this case without calling any witnesses. They had no evidence to tender. The learned magistrate, **Ezra O. Awino** SRM having duly considered the entire evidence on record concluded that:

"…The defendant offered no defence to controvert the plaintiff's case. I am satisfied that the deceased was lawfully travelling as a passenger and I would hold the defendants liable at 100%. As a cane cutter I would find that the deceased was earning about Kshs. 5,000/= per month. The death certificate shows that he died while aged 51 years, he had 4 years of active working life and I would consider a multiplier of 4 years. I would now make the following award.

<u>Under the Law Reform Act</u>
a. Loss of expectation of life Kshs. 50,000/=

b. Pain and suffering Kshs. 10,000/=

<u>Under the Fatal Accident Act</u>

c. Loss of Dependency

5,000/= x 4 x 2/3 x 12 Kshs. 160,000/=

d. Special damages

Probate and Funeral, police abstract Kshs. 11.100/=

Total award Kshs. 231,100/=

I now award Kshs. 231,100/= as general damages with costs and interest".

The appellant was aggrieved by the judgment and decree aforesaid and hence lodged the instant appeal. He advanced six (6) grounds in support thereof to wit:-

"1. The learned trial magistrate erred in law and infact in holding that the deceased a cane cutter by profession was earning kshs. 5,000/= per month when there was no evidence led in that regard upon which he could have arrived at such a finding and in proceeding to award the sum of kshs. 160,000/= as loss of dependency to the plaintiff.

2. The learned trial magistrate erred in law and in fact in awarding to the plaintiff special damages in the sum of kshs. 11,100/= when none was infact pleaded and specifically proved at the trial.

3. The learned trial magistrate erred infact and in law in holding that the appellant was 100% liable in negligence for the occurrence of the accident when infact no evidence was led in that regard.

4. The learned trial magistrate erred in law and infact in failing to dismiss the respondent's claim against the appellant.

5. The learned trial magistrate erred in law and infact in awarding to the respondents damages under the law reform act without sufficient proof being led in that regard.

6. The learned trial magistrate erred in both law and infact in deciding the case against the weight of evidence..".

When the appeal came up before me for directions on 6th October, 2010, parties agreed among other

directions that this appeal be canvassed by way of written submissions. Subsequently the submissions were filed and exchanged. I have carefully read and considered them.

As a first appellate court, it is my duty to re-appraise and re-evaluate the evidence offered at the trial by parties involved so as to reach my own independent decision as to whether the judgment and subsequent decree can stand. In the circumstances of this case however, it is only the evidence of the respondent that shall count since the appellant offered no evidence in its defence during the trial.

Some basic facts in this appeal are not in dispute. These are:-

- **That the deceased passed on in road traffic accident.**

- **That the suit in the trial court was commenced on behalf of the deceased by the respondent as a wife, personal and legal representative. Prior to the institution of the suit, she had sought and obtained a grant of letters of administration intestate. Thus his capacity to mount the suit was not in doubt.**

- **At the time of the accident, the ownership of the offending motor vehicle was not clear.**

- **That the deceased left behind dependants as pleaded in the plaint.**

Although the appellant has set out six grounds of appeal, going through them and the written submissions it becomes apparent that basically there are two broad grounds namely, findings on liability and quantum.

Did the respondent establish that the appellant and or its driver were liable for the accident? I do not think so. Unlike the learned magistrate, I am unable to find on the evidence on record that liability falls on the shoulders of the appellant for the accident. The only evidence led in the case was that of the widow of the deceased, the respondent. She was nowhere near the scene of the alleged accident. She conceded that she did not even know how the accident occurred and who was to blame for the same if at all. In her amended plaint, the respondent had blamed the appellant for the accident on the grounds that its driver drove the motor vehicle too fast in the circumstances, drove it without due care or without the welfare of the occupants in his mind, drove off without ascertaining whether it was safe to do so, failed to stop, break or swerve so as to avoid rolling over the deceased and failed to have a proper look out of those around him. In law what is pleaded in a plaint is not evidence. They are mere allegations which must be proved subsequently by trial and on evidence. Having made those allegations of negligence in the plaint, it was upto her to subsequently marshall sufficient and credible evidence to prove the particulars of negligence she alleged against the appellant or either of them. The evidence on record falls far too short to prove any negligence on the part of the appellant and the particulars thereof attributed to it and or its driver. There is no evidence that the deceased was aboard motor vehicle registration number KAB 414B in the first place, there is no evidence that the appellant's driver drove the vehicle recklessly and or negligently with the result that it tossed out and rolled over the deceased. There is no evidence that the appellant driver, agent and or servant drove the motor vehicle fast, without due care or attention and or failed to keep a proper look out.

The respondent tendered in evidence, the police abstract. However the same cannot be a replacement of credible evidence on liability. In any event the said police abstract other than giving particulars asked for and or ordinarily required, does not say that the appellant or its driver was to blame for the accident. If anything it suggests that after the accident, an inquest was ordered being inquest number 4 of 1999. We

do not know what became of the inquest. What was so difficult with the respondent tendering the results of the inquest if at all into evidence. Why did the respondent even call as a witness the police officer who investigated the case? He/she was in a better position to shade light on the circumstances of the accident and his conclusions upon investigations. He would have been able to say who was to blame for the accident. Accordingly much as the respondent's evidence was uncontroverted, it failed miserably to support a finding of liability against the appellant. Of course, this court is not oblivious to the fact that in civil cases the plaintiff has to prove his case on a balance of probabilities. However the respondent failed to do so in the circumstances of this case. It matters not that the appellant did not call evidence to back up its defence. The mere fact that the appellant did not call any evidence does not make it liable as counsel for the respondent seems to suggest in his submissions. It is trite law that the burden of proof of any fact or allegation is on the plaintiff and he must prove causal link between the defendant's negligence and his injury; he must adduce evidence from which, on balance of probability, a connection between the two may be drawn, so that not every injury is necessarily a result of someone's negligence. An injury perse is not sufficient to hold someone liable for the same in negligence. Supposing someone throws himself on the road in the face of oncoming traffic in a bid to commit suicide, why should the driver of such oncoming vehicle who crushes him in the process and grants him his wish be held to account. That is why it was necessary that the respondent leads evidence to connect her husband's death to an act or omission on the part of the appellant. We have not yet reached the stage of the blame without fault.

It is tragic that the respondent lost her husband in those circumstances, but on the basis of the evidence on record, I do not think that the trial court was right in concluding that the appellant was blame worthy for the accident. In sum therefore the trial court ought to have dismissed the suit on non-proof of liability. This appeal must be allowed on that basis.

Had I dismissed the appeal I would still have interfered with the award of damages under the head of loss of expectation of life. The practice being that where a claimant gets awards under both the **Fatal Accident** and **Law Reform Acts**, when computing that, under the **Fatal Accidents Act**, regard usually by way of deduction is had so that the claimant does not benefit twice by the award under the **Law Reform Act**. In other words, I will have knocked off from the final award the sum of Kshs. 50,000/= for loss of expectation of life.

Otherwise, I allow the appeal, set aside the judgment and decree of the court dated 23rd November, 2004 and substitute it with an order dismissing the suit with costs to the appellant. The appellant shall also have costs of this appeal.

Judgment dated, signed and **delivered** at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE