



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 116 OF 2008

WILKISTA ANYANGO ODHIAMBO

JENIPHER AKINYI ODHIAMBO.....APPELLANTS

-VERSUS-

NDUGU TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

This is an appeal preferred from the judgment of **Mr. B. N. Olao**, Chief Magistrate in Kisumu CMCC NO. 182 OF 2006 **Wilkista Anyango & Another vs Ndugu Transport Limited** wherein the plaintiffs sued the defendant arising from an accident where their late husband **Alex Odhiambo Omedi** was fatally injured. Being dissatisfied with the judgment delivered on the 26th November, 2006 the appellants preferred this appeal on the following grounds:-

- **The learned trial Magistrate erred in both law and fact in dismissing the suit solely on grounds that the appellants failed to establish that the defendant is the original suit was the owner of the vehicle in question.**
- **The learned trial magistrate erred in both law and fact in failing to correctly appreciate, interpret and apply the law with respect to proof of ownership of motor vehicles.**
- **The learned trial magistrate erred in both fact and law in delivering a judgment against the weight of evidence adduce on behalf of the appellant.**
- **The learned trial magistrate failed to appreciate submissions made on behalf of the appellants on liability.**
- **The learned trial magistrate erred in both fact and law in arriving at a judgment which is unfair and unjust in the circumstances.**

The appeal was vehemently opposed by the respondent.

In his submission the appellants counsel submitted that the appellants adduced evidence in support of their claim of negligence on the part of the defendant's driver, further that the abstract form produced by consent of the parties confirmed the accident and ownership of the motor vehicle in question. He argued that the Police abstract was sufficient proof of ownership and the defence a mere denial in the absence of evidence in support.

In opposing the respondent's counsel submitted that ownership of the motor vehicle was not proved yet it was an issue raised in the defence.

This being the first appellant court it has the duty to reconsider the evidence afresh, evaluate and analyze the same in order to come to an independent decision having in mind that the trial court heard and saw the witnesses and an allowance must be made for this. See the case of **Selle vs Associated Motor Boat Company (1968)** E. A at 123.

From the record 2 witnesses testified for the plaintiff. The defence did not call any evidence at the close of the plaintiffs case. The P3 form and the abstract form were produced by counsel for the parties meaning that they were admitted unchallenged. The evidence placed before court is that of the 1st plaintiff and the witness. The defence did not call any evidence therefore the statement of defence without any supporting evidence is a mere denial and of no evidential value. The evidence for consideration by the court is that adduced by the 1st plaintiff and her witness and the documents produced by consent.

PW1 the first plaintiff **Wilkista Odhiambo** stated that the deceased died in a road accident at Kisumu Boys round about on 14th July, 2004. The deceased worked for Kenya Power and Lighting Company. On learning of the accident she went to the scene, took the registration number of the vehicle and took the deceased to the Aga Khan Hospital where he died within 10 minutes. The accident occurred at about 8.25 am. She reported the accident at Central Police Station and was issued with an abstract form which she produced as exhibit. She stated further that the deceased had 10 children with her. She obtained grant of letters of administration in order to pursue the case.

She gave the registration number of the motor vehicle in question as **KAB 482L Mitsubishi** and gave details of the owner as Ndugu Transporters. It was her evidence that the name of the owner was written on the vehicle. She gave the age of the deceased at the time of the accident as 53 years. She said that the accused was healthy and earned Kshs 48,000/= for his salary. He worked for Kenya Power & Lighting Company Limited. She produced a copy of his pay slip. It was her evidence that together with their children and the co-wife they all depended on the deceased.

The 1st plaintiff however was not able to attribute negligence on any party but stated that the deceased was a cyclist and that the accident was beside the road although the body when she arrived had been removed from the point of impact. At cross – examination she said that the deceased died upon arrival at the hospital.

PW2 Samson Oduor Okoth stated that he witnessed the accident on the 14th of July, 2004 at about 8.30 am. He was at the B. P Petrol Station opposite the bus stop waiting for his mother. It was his evidence that the deceased was cycling and was hit by a motor vehicle from behind. The deceased was from Kondele cycling towards town. He stated further that the vehicle was heading towards the same direction as the deceased. He blamed the driver of the motor vehicle for the accident. He also stated that the name of the owner i. e Ndugu Transporters was on the door of the vehicle.

In cross – examination he said that he did not know the deceased prior to the accident. That although his name is not on the abstract form he witnessed the accident and gave his telephone number to the deceased wife.

The plaintiffs' counsel in his submission blamed the accident on the driver of the motor vehicle registration number KAB 482L. He submitted that the evidence on the abstract form remains unchallenged.

The defence on the other side submitted that there was no proof of ownership as no search certificate was produced. Further that no negligence was proved, since the only eye witness could not give details of speed of the vehicle at the material time.

In his judgment the learned trial magistrate found as a fact that an accident occurred on the morning of 14th July, 2004 where the deceased was hit by motor vehicle registration no. KAB 482L along Jomo Kenyetta Avenue and as a result the deceased died. The learned magistrate relying on the evidence of **PW1** found that the driver of the said motor vehicle was negligent. Upto this point, I do concur with the findings of the trial court as the only evidence adduce pointed to the negligence of the driver of the lorry that hit the cyclist from behind. I differ with the trial court however as relates to the issue of speed. An ordinary mwananchi standing by the roadside is not expected to tell the exact speed of a vehicle. It was good enough for him to

have observed that the vehicle was being driven with speed and I therefore do consider that piece of evidence.

The trial magistrate then considered liability alongside the issue of ownership. He stated that the police abstract was not sufficient proof of ownership since there was denial in the defence. He was of the opinion that the plaintiff ought to have produced a certificate of search, and on the basis of this he dismissed the case against the defendant. The learned trial magistrate relied on the case of **Thuranira Kariuki vs Agnes Ngecha – C. A. NO. 192 of 1996.**

In the case of **Lake Flowers & Cila Franklyn Onyango Ngonga – Civil Appeal No. 210 of 2006** the Court of Appeal stated in part:-

“without the appellant adducing evidence at the trial to counter what the 1st appellant blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or attempt to partly or wholly blame the 2nd respondent on this appeal. Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the police abstract produced by the 1st respondent which shows it to be the owner of the motor vehicle”

The above authority is on all fours with the case before court. The abstract form was indeed produced by consent meaning that ownership was not challenged at all. Furthermore the court received no other evidence to counter details given by the witnesses and the abstract form relating to ownership. I find that the plaintiffs indeed did prove on a balance of convenience that the vehicle in question belonged to the respondent. Evidence on record is that the deceased was hit from behind. In this regard therefore I hold that the defendant’s driver was wholly to blame for the accident, and as such the defendant is vicariously liable for the accident.

I will adopt the quantum assessed by the trial court as relates to;

- 2/3 dependency ration and
- Multiplier of 3 years.

I do not agree with the trial court’s version of the net pay. The deceased had a gross pay of Kshs 55,486.97. The statutory deduction were Kshs 13,116, the rest of the deductions were loans, interest and memberships. The net pay was Ksh 42,370.97 after statutory deductions.

The deceased died after sometime and the estate ought therefore to be awarded for pain and suffering. The estate also deserves to be paid for loss of expectation of life which should be taken into account in awarding loss of dependency the same should be deducted so that the estate does not benefit twice. Based on the above, the award is as follows:-

1. Loss of expectation of life - Ksh 100,000

2. Pain and suffering - Ksh 50,000

3. Loss of expectation of life -

42,370.97 X 12 X 3 X 2/3 - 1,016,903.30

4. Specials - 200

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TOTAL KSH	= 1,167,103.30
Less (2) above	- 100,000
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	= 1,067,103.30

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5. The costs of the lower courts trial and this appeal.

6. Interest.

The above sums to be distributed to the beneficiaries/survivors of the deceased estate in accordance with the provisions of law of Succession Act.

Dated and delivered in Kisumu on 10th day of June, 2011.

ALI-ARONI

JUDGE

In the presence of:

..... present for Appellant

.....present for Respondent