REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 148 OF 2007

SAMSON ONGICHA BANJA
(Suing as a legal representative of
DORIS ACHIENG ONGICHA **(Deceased)** ….……..……..APPELLANT

-VERSUS-

PHILLIP KIPKORIR NGENY ……..……..1st RESPONDENT
TABITHA MORAA MOKAYA ……..…..2nd RESPONDENT

JUDGMENT

(Being an appeal from the original Judgment and decree by C.G Mbogo SPM on 5th July, 2007 at Kisii CC No. 225 of 2006)

This is a first appeal. **Doris Achieng Ongicha**, now deceased commenced civil proceedings before the chief magistrate's court at Kisii seeking general and special damages for the injuries she sustained following a road traffic accident involving her and motor vehicle registration number KAS 793M on 31st October, 2005 along Narok-Bomet road. In the plaint dated 22nd March, 2006, the deceased averred that the subject motor vehicle was owned by the 2nd respondent and was being driven at the material time by the 1st respondent. Apparently, the deceased was a passenger therein when at about 12.20a.m. the 1st respondent so negligently drove, managed and controlled the said motor vehicle that he caused the same to veer off the road, overturn and roll thereby occasioning the deceased grevious injuries. The appellant particularized the manner in which the 1st respondent was negligent, namely, that he drove the motor vehicle at an excessive speed in the circumstances and during the night, failed to exercise or maintain any or any proper sufficient or adequate control of the motor vehicle, failed to slow down, swerve, stop or in any manner so to manage the motor vehicle, permitted the motor vehicle to veer off the road and to overturn, that he drove the motor vehicle whilst fatigued and exhausted and thus loosing control of the same. Further and in the alternative the appellant invoked the doctrine of ***Res Ipsa Loquitor***. The injuries sustained by the deceased were crushed forearm that led to its amputation, cuts on the anterior neck and fracture of the cervical spine and shock.

The suit was met with a joint statement of defence from the respondent. They categorically denied the averments in the plaint by the appellant. In any event they argued that if indeed the said accident occurred as alleged, then they were not liable as the same was provoked or induced by circumstances beyond their control. The injuries sustained loss and damage suffered by the deceased as a result of the accident were all denied.

The hearing of the suit commenced before **G. G Mbogo SPM** on 15th March, 2007. First to take the stand was **Dr. Okello**. He testified that on 31st January, 2006 he examined the deceased and the major injuries he detected were loss of consciousness for 24 hours, crushed forearm, the mid ulna and radius bones were amputated, there were cuts on the anterior part of the neck, there were penetrating metal objects on the neck. The abdomen, right trunk too had injuries. X-ray taken revealed a fracture of the neck at level 3. He assessed permanent disability at 45%. He prepared a medical report which he tendered in evidence. He charged the deceased Kshs. 3,000/= for the service.

The deceased testified that on 30th October, 2005 she was on her way to Homabay from Nairobi aboard motor vehicle registration KAS 793M. At around 12.20a.m. on the night of 31st October, 2005 between Tenwek and Bomet, the motor vehicle overturned. She lost consciousness only to come to whilst at Tenwek Hospital. She had lost one hand and had injuries to the neck and leg. She was admitted and

treated at the said Hospital for 3 days. She was later transferred to Homabay District Hospital. She paid Kshs. 7,000/= and 4,000/= respectively at those hospitals. She later reported the accident to the police and was issued with a police abstract for which she paid Kshs. 200/=. She was a businesswoman who used to prepare and sell porridge at Homabay in a premises she had rented from one, **Lawrence**. She would earn Kshs. 300/= to 400/= per day. She blamed the accident on the driver of the motor vehicle as he started speeding immediately after passing a police road block. The engine sound of the motor vehicle suddenly changed before it overturned.

Cross-examined, she stated that the accident happened suddenly. Since the accident she had been unable to run her business aforesaid effectively.

The 3rd witness called by the appellant was Inspector **Welson Masai,** a base commander, Bomet District. His records showed that an accident occurred on 31st October, 2005 involving motor vehicle registration number KAS 793M. There were 5 fatal injuries while others suffered personal injuries and were all taken to various hospitals. Among them was the deceased. He issued her with a police abstract. Apparently, the 1st respondent claimed that the head lights of the motor vehicle went off.

Cross-examined, he stated that he was not the one who prepared the police abstract. The investigating officer drew the sketch plan. As at the time he was testifying the driver of the ill fated motor vehicle had gone underground and therefore could not be traced, arrested and charged.

The last witness called by the deceased was, **Samson Ongicha Mbaja,** now the appellant. He was the husband of the deceased. He confirmed that the deceased used to sell porridge in Soko Mjinga, Homabay earning roughly Kshs. 200 to 300/= daily. He confirmed that the deceased was involved in the accident on the material day. He paid the hospital bills at both Tenwek and Homabay hospitals. The deceased's right hand was amputated and as a result she was forced to hire some help for her business at a cost of Kshs. 100/= per day. The deceased used to cook and wash clothes for him. She could no longer do so. He was therefore forced to hire a house help at a monthly pay of Kshs. 1,000/=

When it came to defence case, **Mr. Mboya** learned counsel holding brief for **Mr. Mose** for the respondent informed the court that the defence had no evidence to offer. On that basis he closed the defence case. Thereafter parties filed and exchanged written submissions. In a reserved judgment delivered on 13th July, 2007, the learned magistrate dismissed the appellant's suit on account of his failure to produce in evidence a certificate of official search from the registrar of motor vehicles showing ownership of motor vehicle KAS 783M. In reaching this conclusion, the learned magistrate relied heavily on the court of appeal decision in the case of **Thuranira Karauri –vs- Agnes Ncheche NYR C.A No. 192 of 1996 (UR)**. Otherwise had he found in favour of the appellant he would have awarded her Kshs. 500,000/= as general damages and special damages of Kshs. 19,068/=.

The deceased was aggrieved by the decision of the learned magistrate and opted to challenge the same on appeal. She cited 5 reasons or grounds upon which the learned magistrate's decision could be faulted. These are;

"1. The learned trial magistrate misdirected himself on several matters of law and in fact in that :

a. He failed to acknowledge that liability in the tort of trespass to person arising from a road traffic accident is not only based on proof of negligence.

b. He failed to appraise himself with the proper applicable law and thereby arrive (sic) at an erroneous decision (sic).

2. The learned trial magistrate erred in law in failing to appreciate that the doctrine of res ipsa loquitor was applicable to the circumstances.

3. The learned trial magistrate erred in law of evidence in holding that by failure to produce a certificate of search showing ownership of the vehicle the plaintiff had failed to prove that the defendant was liable for the tort committed by the driver of the subject-motor vehicle.

4. The learned trial magistrate erred in law in failing to properly appreciate the doctrines of vicarious liability and res ipsa loquitur.

5. The learned trial magistrate erred in law in awarding damages which were so grossly inadequate as to amount to injustice to the appellant."

On or about 11th October, 2007, the deceased passed on whilst her appeal was pending hearing. Her husband now the appellant, petitioned and obtained a Limited grant of Letters of Administration Ad Litem to enable him pursue this appeal. He was duly made a party to this appeal in place of his deceased wife, the original appellant.

When the appeal came up for hearing before me on 16th July, 2010 the respondents and or their

advocates were absent though served with the hearing notice. I therefore directed that the appeal be heard, the absence of the respondents and or their counsel notwithstanding. The appellant elected to canvass the appeal by way of written submissions which I have carefully read and considered.

Much as the respondents did not canvass the appeal, it is still my duty to re-asses the evidence tendered before the trial court and reach my own independent decision in terms of **Peters –vs- Sunday Post (1958) E.A 424.**

It must be recalled that the respondents did not call any evidence in support of their defence. In the absence of such evidence, the defence put on by the respondents remained mere allegations including the issue as to the ownership of the motor vehicle. Much as the issue of ownership of the offending motor vehicle was made the subject of defence, no evidence was presented by the respondent's to back up the claim. The learned magistrate with tremendous respect erred in proceeding as though the deceased had not presented evidence to prove ownership of the motor vehicle. He made no reference at all to the police abstract report which the deceased had tendered in evidence. In the said police abstract report whose admission in evidence was not objected to by the respondents it was indicated therein that the motor vehicle was owned by the 2nd respondent and at the material time was being driven by the 1st respondent. This information was not at all challenged by the respondents. That being the case, the learned magistrate ought to have acted on the evidence and found that on the balance of probability there was sufficient evidence on record as regards ownership of the motor vehicle. The issue of ownership of the motor vehicle was raised in the respondents' written submissions before the trial court. In absence of any credible evidence on the issue, I do not think that it was open to the learned magistrate to deal with the issue on the basis of written submissions which amounted to evidence being adduced from the bar. The case of **Thuranira** (Supra) relied on heavily by the learned magistrate does not categorically state that ownership of a motor vehicle can only be proved by a certificate of search signed by the Registrar of Motor vehicles if the later decision of the same court of appeal in the case of **Ibrahim Wandera –vs- P.N Mashru Ltd, KSM C.A No. 333 of 2003 (UR)** is anything to go by. In this case the court of appeal delivered itself thus ***"…..the learned Judge, with due respect to him did not at all make any reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P.O Box 98728 Mombasa owner. This fact was not challenged. The appellant was not cross-examined on it. It means the respondent was satisfied with that evidence …".*** The same situation obtains here. It is instructive that **Thuranira's** case was decided on 16th May, 1997 whereas the **Wandera** case was decided on 20th June, 2007. It is therefore more recent than **Thuranira's** case. I would imagine that it reflects the current thinking of the court of appeal on the issue and which is a complete departure from the **Thuranira's** case. In my view it resonates well with current practice and the law of Evidence and I am so guided by it.

Notwithstanding the foregoing, an application was made albeit successfully under order XLI rule 22 (1) (b) and 23 of the **Civil Procedure rules** for further evidence to be adduced on appeal. An order was made and a certificate of search of the subject motor vehicle was adduced in evidence. That certificate shows that the 2nd respondent and D.T Kenya were registered as owners of the motor vehicle. There is therefore sufficient proof of ownership of the motor vehicle.

With regard to liability, there is unchallenged evidence of the deceased that the 1st respondent started speeding after he passed the police road block. Infact thereafter the sound of the engine suddenly changed. Then there was the evidence of the base commander that the driver claimed that the headlights of the subject vehicle went off just before the accident. His further evidence was that the 1st respondent had gone underground and could not therefore be traced, arrested and charged. This points to the 1st respondents culpability. He was to be charged according to the police abstract with the traffic offence of causing death by dangerous driving. In any event the deceased had pleaded ***Res Ipsa Loquitor*** in her plaint. That being the case the burden of proof shifted to the respondents to show that the motor vehicle was properly maintained at the time. If the sound of the engine changed before the motor vehicle overturned, is it possible that the motor vehicle was not properly maintained and was unroadworthy? Perhaps! Further investigations revealed that the headlights went off before the vehicle veered off the road and overturned. This was just after midnight. Does this again point to lack of proper maintenance of the motor vehicle and or negligence on the part of the respondents. May be! All in all these evidence is supportive of ***res ipsa loquitor.*** See **Kago –vs- Njenga (1981) KLR 186**. In the absence of any other evidence in rebuttal of the appellant's evidence with regard to how the accident occurred, the court could only accept and act on the said evidence. The respondents were thus solely liable for the accident.

The 1st respondent was an employee of the 2nd respondent. The accident occurred whilst he was driving the subject motor vehicle. Therefore the 2nd respondent must be held vicariously liable for the 1st respondent's actions. No evidence was tendered suggestive of the fact that the 1st respondent was not an employee of the 2nd respondent and or being such an employee he had gone on a frolic of his own

On quantum, there is no doubt at all that the deceased suffered serious injuries. She lost consciousness for 24 hours. She suffered crushed forearm which was surgically amputated, had cuts on the anterior neck due to fragments of glass, pricking wound at the knee joint caused by penetrating metal and fracture of 3rd cervical spine. The doctor assessed the degree of permanent disability at 45%. As a result of the accident she had been unable to engage in her daily chores of preparing and selling porridge from which she used to make Kshs. 200 to 300/= daily. She had to employ an assistant to help her in the trade. On the basis of all the foregoing the deceased asked to be compensated in the total sum of Kshs. 1,676,769/= made up as follows:-

- Pain, suffering and loss of amenities Kshs. 700,000.00/=
- Artificial arm fitting Kshs. 250,000.00/=
- Loss of earnings Kshs. 240,000.00/=
- Future domestic assistance Kshs. 460,000.00/=
- Special damages proven Kshs. 26,737.00/=

TOTAL **Kshs. 1,676,739.00/=**

On the other hand the respondents counter proposed Kshs. 250,000/= on the basis of the authorities cited.

It should be noted that the deceased passed on shortly after the judgment was delivered. Indeed the judgment was delivered on 13th July, 2007 whereas the deceased died on 11th October, 2007. There is nothing on record to suggest that the deceased passed on as a result of complications arising from the after effects of the accident. In fact from the death certificate, it is indicated that the cause of death was Pneumonia. I cannot therefore assess damages under the **Law Reform Act** and **Fatal Accidents Act** as suggested by the appellant. Considering the injuries sustained a sum of Kshs. 700,000/= for pain, suffering and loss of amenities suggested by the deceased in her written submissions before the trial court was in order. As for loss of earnings, that can only be for 3 months that is between 13th July, 2007 and 11th October, 2007. She used to earn Kshs. 200/= to 300/= per day from her business. I think that most probably she used to earn Kshs. 200/= per day. On the overall she would therefore earn Kshs. 6,000/= per month. There must have been other expenses involved that ate into the Kshs. 6,000/=. I would therefore estimate her loss of earning at Kshs. 2,000/= per month. For 3 months therefore she lost in total Kshs. 6,000/= in earnings. Having passed on, the need for artificial arm fitting and future domestic assistance went with her. Proven special damages were 19,068/= which is awardable.

In the result I allow the appeal with costs. I set aside the judgment and decree of the learned magistrate. In substitution I enter judgment in favour of the appellant as against the respondents jointly and severally. Total Damages payable are Kshs. 725,068/= made up as follow:-

- For pain suffering and loss of amenities Kshs. 700,000.00
- Loss of earnings Kshs. 6,000.00
- Special damages Kshs. 19,068.00

Total **Kshs. 725,068.00**

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The appellant shall also have costs of the suit and interest as well as this appeal. These shall be the orders in this appeal.

Judgment dated, signed and **delivered** in Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE