



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 185 OF 2007**

TOMBE TEA FACTORY LTD.....
.....APPELLANT
-VERSUS-
SAMUEL O. ARAKA.....
.....RESPONDENT
JUDGMENT

(Being an appeal from the judgment and decree of Hon. Soita PM, dated the 5th day of September, 2007 in Kisii Chief Magistrate’s Court Civil Case NO. 325 of 2006).

The respondent sued the appellant in the chief Magistrate’s court at Kisii in Civil case number 325 of 2006. In the said suit, the respondent sought general as well as special damages, costs and interest. The suit was anchored on an alleged road traffic accident that occurred on or about 10th May, 2003 involving a tractor registration number KAK 734, Massey Ferguson, and one, **Johnson Onchoga Kerogi “deceased”**. The tractor, it was claimed belonged to the appellant, and the deceased was a casual employee of the appellant as a conductor and or turn boy. His duties included collecting tea leaves from tea buying centres with a lorry belonging to the appellant. Apparently, on the aforesaid date, the deceased had been to various tea buying centres collecting tea leaves in the appellant’s lorry. On their way back with the driver, the lorry got stuck in mud at Nyabioto area. The tractor was roped in to pull out the stuck lorry. The deceased in the company of the driver went to the appellant’s factory to collect the tractor so as to tow the stuck lorry. In the process the driver, servant and or employee of the said tractor negligently and or carelessly drove the same within the appellant’s tea factory compound as the deceased was boarding the same and as a result he fell off and the tractor hit him fatally injuring him. He was rushed to Kisii District Hospital for treatment but passed on, on the way.

The respondent who described himself as the administrator of the estate of the deceased blamed the appellant for the death of the deceased on the grounds of its negligence in that the tractor was driven without due care, attention and proper look out, driving the same at a speed that was excessive in the circumstances, failed to stop, slow down or in any other way to manage and control the said tractor and finally causing or permitting the accident to occur.

The respondent further averred that the deceased was at the time of death a healthy and industrious young man aged 21 years old. He enjoyed good health and lived a happy and vigorous life working for the appellant as a casual. His life was thus considerably shortened thereby causing his estate to suffer loss and damage. The respondent together with other dependants; **Nyakambi Kerosi, Silviah Kerosi, Hellen Kerosi, Dauglas Kerosi and Torvin Kerosi** who were all brothers and sisters of the deceased lost reasonable expectation of financial support from him in the process. The respondent thus claimed general damages both under the **Fatal Accidents** and the **Law Reform Acts**. As for special damages he pleaded that he had incurred a total sum of Kshs. 35,709/= in terms of the police abstract, Death certificate, funeral expenses and expenses incurred in obtaining a limited grant.

The appellant as expected denied the respondent’s claim including the fact that the respondent was the administrator of the deceased’s estate, the statutes under which he had based his claim, that the deceased worked for the appellant as a casual and that there was an accident on 10th may, 2003. In the alternative, the appellant pleaded that if any such accident occurred, then the same was solely occasioned and or substantially contributed to by the negligence of the deceased in that he was careless, negligent and reckless whilst engaged in his duties, stood in the way of the tractor, exposed himself to the risk, boarding the tractor without the presence of mind and or without any proper look out. The appellant too denied that

the deceased passed on as a result of the accident. Alternatively he argued that if any accident occurred then the same was an “**ACT OF GOD**”. Finally, he pleaded that the suit was totally defective and ought to be struck out as it offended the mandatory provisions of the law and there was also non-joinder of the parties to the suit. The respondent did not file a reply to the appellant’s statement of defence. The significance of this observation will become apparent later in this judgment.

The hearing of the case formally commenced before **Hon. S.M.S Soita**, the then Ag. SPM. The respondent testified that the deceased was a son of his brother, **Gabriel**, deceased as well. The deceased was thus his nephew. The nephew died as he worked for the appellant as a turn boy. He received information whilst at home that his nephew had died after being hit by a tractor within the appellant’s factory. He incurred burial expenses in terms of funeral announcements, vehicles hired to collect the body, mortuary fees and coffin all totaling Kshs. 20,000/=. The deceased had 5 siblings whom he took care of. He reported the accident to the police and was issued with a police abstract at a fee. He also obtained a death certificate as well as a limited grant of letters of administration for which he paid the advocate involved Kshs. 15,000/=. He saw the tractor that caused the accident at Nyamira police station and its registration number was KAK 734X.

Cross-examined by one, **Ingogi**, learned counsel then acting for the appellant, he confirmed that he did not witness the accident. Rather 2 people came from the appellant’s factory and informed him about the accident on 17th may, 2003 at about 10 a.m. He also confirmed that the deceased was not married. The dependants were his brothers and sisters.

Next to testify was **Nashon Ondicho Orwori**. He was a cousin of the respondent. On 10th May, 2003 whilst at Tombe market at about 10 p.m, he heard screams and ran towards the factory where he found a tractor having knocked the deceased down. He found him under the left rear tyre of the tractor. They pushed the tractor and freed him. He was rushed to Kisii general hospital where he later died.

Under cross-examination, he stated that the deceased had spoken to him immediately they freed him from underneath the tractor. He had told him how the accident occurred.

The last witness called by the respondent was **P.C. Kipkoech Keter**. He confirmed that an accident occurred on 10th May, 2003 involving the tractor and the deceased at Tombe Tea Factory. The deceased later passed on at Kisii District Hospital.

Cross-examined, he stated that he was the investigating officer. Nobody had been charged with a traffic offence as a result. He was told that the deceased climbed a moving tractor and as a result the accident occurred. He could not however blame the appellant for the accident.

When it came to defence hearing, the appellant was unable to tender any evidence. On the day of the defence hearing, the representative from the appellant did not appear in court to testify. Counsel for the appellant sought an adjournment which was denied. The appellant was then compelled to close its case.

In a reserved judgment delivered on 5th September, 2007, the learned magistrate found for the respondent on both liability and quantum. On liability, it was his view that the appellant was 100% liable to the respondent. On quantum, the learned magistrate made the following awards:-

- Pain and suffering	Kshs. 10,000.00
- Loss of life	Kshs. 100,000.00
- Loss of Dependency	Kshs. 426,000.00
- Special Damages	Kshs. 21,559.00

Total

Kshs 557,559.00

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That judgment and decree triggered this appeal. Though **Messrs Kalya & Company Advocates** the appellant faulted the learned magistrate on the following grounds:-

“1. The learned magistrate erred both in law and fact in Pronouncing judgment in favour of the respondent on liability when there was no legal or otherwise basis of doing so in light of there being no sufficient evidence adduced before him.

2. The learned magistrate erred both in fact and law by pronouncing judgment in favour of the respondent whereas the respondent had not proved appellant’s liability on a balance of probabilities.

3. The learned magistrate erred both in fact and law by failing to take into account all material and

relevant facts as to the causation of the accident and as a result thereof he reached a wrong decision by holding the appellant 100% liable for the accident.

4. The learned magistrate erred both in fact and law by holding that the respondent had proved negligence as against the appellant on a balance of probabilities and finding the appellant 100% to blame for the accident in light of the evidence adduced.

5. The learned magistrate erred both in fact and law by pronouncing judgment in favour of the respondent for loss of dependency in the absence of dependants in total disregard of the provisions of the Fatal Accidents Act.

6. The learned magistrate erred both in fact and law by proceeding to award damages for loss of dependency in the absence of proof of the same and any evidence or pleading as to deceased's income.

7. The learned magistrate erred both in fact and law by failing to apply or applying wrong principles in assessment of damages thus awarding damages that were so excessive in the circumstances.

8. The learned magistrate erred both in fact and law by awarding special damages not specifically pleaded and proved as per law required.

9. The learned magistrate erred both in fact and law by proceeding to pronounce judgment in favour of the respondent in total disregard of the appellant's submissions.

10. The learned magistrate erred both in law by failing to state in the judgment the statement of the case, the points for determination, the decision thereon and the reasons for such decision.

11. The Judgment of the learned magistrate is in the circumstances unfair and unjust.....”.

When the appeal came up for directions on 16th July, 2010, the parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them as well as cited authorities.

Following my own independent consideration of the evidence a fresh, as I am in law enjoined to do, and as the appellant is entitled to, this being a first appeal, I am of the view that the main issues that confronted the learned magistrate as well as in this appeal is liability and perhaps quantum.

On liability, it is common ground that indeed an accident involving the deceased and the tractor belonging to the appellant occurred. Much as the appellant denied having employed the deceased, it is clear that the deceased was indeed such an employee whether casual or not. If he had not been such an employee, how could he have found himself in the factory at such late hour. If he had not been such an employee, why would have the appellant taken the trouble to rush him to Kisii District hospital. Further there was no evidence that he was treated as a trespasser. If indeed the deceased was not an employee of the appellant, it was up to the appellant to adduce credible evidence to dispute that fact. It did not. Why for instance, could they not call the driver of the fateful tractor and or even of the lorry to come and explain the presence of the deceased in their vehicles? In the absence of any evidence having been adduced by the appellant to show that the deceased was not its employee, I would hold just like the learned magistrate did that the deceased was in fact an employee of the appellant.

It is apparent that none of the witnesses actually witnessed the accident. PW1 merely received information the following day that his nephew had passed on in an accident in the appellant's factory. He conceded in cross-examination that “...**I did not witness the accident**”. On his part PW2 stated that he heard screams and ran towards the factory where he found a tractor having knocked down the deceased. He helped push the tractor off the deceased. He managed to talk to him before he was rushed to hospital. He told him how the accident occurred. However, the witness did not divulge in court what the deceased told him with regard to the circumstances leading to the accident. It is clear from the foregoing that this witness came to the scene after the accident had happened. He did not witness first hand the circumstances leading to the accident. The foregoing notwithstanding, it is the contention of the appellant though, that throughout his evidence, PW2 admitted that he was informed by the deceased how the accident occurred. That evidence was therefore clearly hearsay. I do not however agree with that submission. Had the deceased been alive, and PW2 testified as aforesaid then and only then would the

appellant been entitled to consider such evidence as hearsay.

It should also be noted that the appellant never adduced any evidence to counter that adduced by the respondent. Thus the evidence of the respondent with regard to the accident is unrebutted, unchallenged and uncontroverted. In the absence of any evidence having been adduced by the appellant to show that there was any other cause that could have precipitated the accident other than the negligence of its driver, it has to be inferred that the accident was caused by the negligence of the appellant's driver and perhaps the deceased as well. It was stated by the court of appeal in the case of **Embu Public Road Services Ltd .v. Riimi (1968) EA 22** that:

".....Where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence....." It matters not therefore that no eye witnesses to the accident were called to testify. Of course I am not oblivious to the fact that this being a claim based on negligence, the respondent was duty bound to adduce evidence showing how the accident occurred. In a claim for negligence, there is no liability without fault. In the case of **Muthuku .v. Kenya Cargo Services Ltd (1991) KLR 464**, the court observed ***".....In my view, it was for the appellant to prove, of course upon a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault. The appellant clearly failed to prove any sort of negligence against the respondent and in my respectful view his claim was rightly dismissed....."***

However, the circumstances obtaining in this case are not comparable with those in above case. In this case there are a set of facts which raises prima facie inference that the accident was caused by the negligence of either the appellant, the deceased or both. In the case of **Nandwa .v. Kenya Kazi Ltd (1988) KLR 488**, the court of appeal observed:-

".....In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendants evidence provides some answer adequate to displace that inference..."

In this particular case, there is an uncontested evidence of PW2 that when he came to the scene of the accident, he found the deceased under the tractor tyre. He helped to push the tractor off him. The accident also happened at night within the compound of the appellant. Accidents do not just occur. In my view these are set of facts which point to negligence by either the appellant, the deceased or both. However I am inclined to believe that both the appellant and respondent were equally to blame for the accident. The circumstances that led to the deceased falling off the tractor were not disclosed. Could it be that the driver of the tractor drove off suddenly before ensuring that the deceased had fully boarded the tractor? Or is it possible that the deceased decided to jump off the tractor before it had fully stopped. All these are possibilities in the absence of solid evidence to the contrary.

It should also be recalled that the respondent failed to file any reply to the defence. It can therefore be concluded that the respondent admitted negligence attributed to the deceased and the particulars thereof in the defence in terms of order VI rule 9(1) of **the Civil Procedure rules**. See also **Mount Elgon Hardware.v. United Millers, KSM C.A. NO. 19 OF 1996(UR)**. I am not also oblivious to the fact that PW3 said that he could not blame the appellant for the accident. The totality of the foregoing is that the evidence on record fails to pin down the appellant for the accident on 100% basis. To my mind therefore, I would in the circumstances, hold both the appellant and deceased liable for the accident. In the light of the testimony of the witnesses and failure by the respondent to file a reply, I would at least hold the deceased to blame for the accident as well contrary to the holding by the learned magistrate. As the circumstances leading to the accident are unclear, I would equally hold the deceased and the appellant responsible for the accident. For the appellant, its driver must have been negligent in the manner he drove, managed and controlled the tractor. He must have driven it without due care, attention and without keeping a proper look out. For the deceased I would imagine that he was negligent in the sense that he was careless and reckless in the manner he carried out his duties. He must have been negligent in the manner in which he either boarded or jumped off the tractor.

Everything considered I would apportion liability between the deceased and the appellant at 50%.

On quantum, I note that the learned magistrate awarded Kshs. 426,000/= for loss of dependency. I do not think that there was any basis for that award. Dependents under the Fatal Accidents are expressly defined under section 4(1) thereof. It provides interalia:-

“.....every action brought by virtue of provision of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused....” A brother or sister of a deceased is not a dependant for purposes of the Fatal Accidents Act. Indeed they are excluded. Yet in this case, the alleged dependants set out in the plaint were deceased’s brothers and sisters. The deceased was neither married nor had children. His father had predeceased him. Nothing is said of his mother. Thus the court erred in making such an award. **Angawa J** said the following in the case of **Paul Githaiga .v. Paul Machana Muturi and another. NBI HCCC No. 274 OF 1990 (UR)** “...the deceased’s siblings ages were never disclosed. They in fact were never dependants as described under Section 4 of the Fatal Accidents Act. The only persons entitled are his parents. No mention of wife or children has been made....” The same situation obtains here. In any event no evidence was led as to how the said siblings were dependants on the deceased. In my view therefore the claim for loss of dependency was not proved and ought not to have been granted.

The appellant has faulted the quantum of damages awarded generally, on the grounds that the respondent had no capacity to mount the suit. That the letters of administration *ad colligenda* bona issued to the respondent and which he used to mount the suit were superfluous as they did not say on the face that the respondent was authorized to file suit and that as at the time they were issued, the **Law Of Succession Act** had been amended to provide instead for Letters of Administration AD Litem. My answer to that submission is simple, the issue was never canvassed before the trial court. The respondent had obtained the grant before filing the suit. It was produced in evidence without any objection whatsoever from the appellant. The issue is now being raised for the 1st time in this appeal.

Save for the errors by the learned magistrate in apportioning liability at 100% against the appellant and the award of Kshs. 426,000/= for dependency, I do not think that he can be impugned on other awards. I cannot therefore fault him for awarding the respondent Kshs. 10,000/= for pain and suffering, Kshs. 100,000/= for loss of life and special damages of Kshs. 21,559/=.

This appeal succeeds in part to the extent that

Liability is apportioned on 50% basis against both the appellant and respondent.

The award for loss of dependency is rejected

In the result judgment for the respondent shall be in the following terms:

-Pain and suffering	Kshs. 10,000.00
-Loss of life	Kshs.100, 000.00
-Special damages	Kshs. 21,559.00
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	Kshs. 131,559.00
Less 50%	Kshs. 65,775.00
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Grand total	Kshs. 65,779.50
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To that limited extent the appeal succeeds. However I make no order as to costs. The respondent shall nonetheless have interest on the awarded sum at court rates.

Ruling dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE