



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Appeal 54 of 2004

MOSES CHEBOIT NYERERE APPELLANT

VERSUS

1. CHARLES KINYANJUI KANGETHE)

2. PAUL WANYOIKE KIMANI) RESPONDENTS

(From the Judgment of the learned Senior Resident

Magistrate at Kilgoris SRM CCCC.NO.88 of 2003 by

Mr. M'masi)

JUDGMENT

By a plaint filed on 16th May, 2003, the appellant, whom I shall refer to as “*the plaintiff*” filed a suit as a personal representative of the estate of Benjamin Cheboit Moses (deceased). The plaintiff is the father of the deceased and brought the suit pursuant to the provisions of the Fatal Accidents Act and the Law Reform Act. Prior to the filing of the suit, the plaintiff had been issued with a Limited Grant of Letters of Administration of Ad Colligenda bona in Kisii Succession Cause No.130 of 2003. The said Grant had the following words at the bottom:

*“For the purpose of filing suit in court to recover
damages due to the said estate arising from a road
traffic accident in which the deceased died.”*

The plaintiff averred that the first respondent whom I shall refer to as “*the first defendant*”, was the owner of a motor vehicle registration No.KAH 182Y, Isuzu canter, while the second respondent, hereinafter referred to as “*the second defendant*”, was the authorized driver, agent and/or servant of the first defendant. It was alleged that on or about the 22nd day of September, 2002 while the deceased was lawfully walking off the road along Olesentu Murram Private road, the first defendant’s motor vehicle was so carelessly, recklessly and/or negligently driven by the second defendant that it veered off the road and violently knocked the deceased thereby occasioning him fatal injuries.

The particulars of negligence that were alleged against the second defendant were:

- (a) Driving at an excessive speed in the circumstances.
- (b) Failing to have control of the said motor vehicle.
- (c) Driving the said motor vehicle recklessly and without due regard to other road users and pedestrians particularly the deceased.

The deceased was said to have been a 12 years old boy at the time of his death. He was a student and enjoyed good health. The plaintiff prayed for general and special damages.

The defendants filed a joint statement of defence. The first defendant denied that he was the registered owner of motor vehicle registration number KAH 182Y and further denied the occurrence of an accident involving the said motor vehicle and the deceased. Alternatively, the defendants averred that the said accident “*was inevitable and wholly caused by the deceased’s negligence in that, without any intentions, negligence or default on the 1st defendant’s part or that of his driver, servant or agent while driving prudently and carefully the deceased suddenly and in a suicidal manner swerved onto the way and side of the motor vehicle hitting the defendant’s motor vehicle in a likely premeditated action to injure himself and bring this suit, but died in the process.*”

The particulars of negligence as against the deceased were set out as hereunder:

- “(i) *failing to heed to the defendant’s driver’s warning of his approach.*
- (ii) *walking onto the way and side of the defendant’s motor vehicle.*
- (iii) *Deliberately knocking himself onto the vehicle in a premeditated design.*
- (iv) *Moving in a zigzag manner and in the middle of the road.*
- (v) *Being under the influence of alcohol.*”

The defendants further stated that the plaintiff had no locus to bring the suit because he had not taken out letters of administration of the deceased’s estate. They urged the court to dismiss the suit.

During the hearing, Naomi Kerubo Patrick Ziwa, PW2, testified that on 22/9/2002 she was at her home which is about 60 metres from the road on which the subject motor vehicle was being driven. She saw the lorry approaching at a fast speed. It hit the deceased who was about 2 metres off the road. The deceased fell at the edge of the road and died.

In cross-examination, the witness reiterated that she saw the lorry hitting the deceased who was on its left side. She denied having seen any children climbing on lorries that were being driven on the said road. PW2 was the only

eye-witnesses to the said accident.

The plaintiff testified and produced the deceased’s Death Certificate. He also produced a Copy of

Records in respect of the lorry registration No.KAH 182Y. It showed that the same was jointly owned by the first defendant and N.I.C. Bank as financiers. The plaintiff further testified that the deceased was in class 4 at Olesentu Primary School and was academically a good student as demonstrated by his report card that was also produced as an exhibit. The deceased was the plaintiff's first born.

The plaintiff also called Inspector William Kintai, PW3, the base commander at Kilgoris Police Station. He produced the Police abstract in respect of the accident. In cross-examination, PW3 stated that he was not at the station when the accidental occurred and had therefore not carried out any investigations. But according to the sketch plan of the scene of the accident, the deceased's body lay on the left side of the road facing the river where the lorry was coming from. The lorry stopped 284.4 metres from the scene of the accident. No skid marks were observed at the scene. The lorry had pre-accident defects.

PW3 added that according to a statement allegedly recorded by PW2, she knew about the accident when she was informed by her daughter about it. However, that statement was not produced as an exhibit. The investigating officer had recommended that the driver of the lorry be charged with reckless driving, driving an unlicensed motor vehicle and driving an uninspected vehicle. The duplicate file was forwarded to the area D.C.I.O. However, it appears that no charges were preferred against the driver.

The first defendant testified that on 22nd September, 2002 he received a report that his driver, the second defendant, had been arrested following the said accident. He went to Kilgoris Police Station. He was asked to pay funeral expenses amounting to Kshs.15,000/=. He said he paid the said sum so that his motor vehicle could be released, not because he admitted liability.

The second defendant testified that on the material day he was transporting sand from a place known as Olesentu. He decided to stop at the local shopping center to take a soda at a shop of a person known as John. After about 10 minutes, a 12 year old boy arrived and told John that a certain boy had jumped off the lorry which the second defendant was driving and he had sustained fatal injuries. The defendant went and reported the matter to the police. He denied having hit the deceased. He also denied that he had driven the lorry at a high speed. Neither John nor the boy who allegedly gave him the report regarding the deceased were called as witnesses.

In cross-examination, the second defendant denied all the particulars of negligence that were stated in the statement of defence against the deceased.

Thereafter counsel proceeded to make their submissions and the court delivered its judgment. It dismissed the claim under the Law Reform Act because the plaintiff had relied on a grant of letters of administration ad colligenda bona defuncti and not a full grant of letters of administration or a grant of letters of administration ad Litem. The court further held that dependency had not been proved. It was further held that the plaintiff had not proved his claim of negligence against the defendants and the entire suit was dismissed with costs. The learned trial magistrate did not indicate what he would have awarded as damages had the plaintiff proved his case. I should mention here that it is a legal requirement that a trial court assesses damages in a running down case even where it is of the view that the claim has not been proved.

In his memorandum of appeal, the appellant set out four grounds of appeal as hereunder:

“1. The learned trial magistrate erred both in law and in fact in dismissing the entire suit against the weight of the evidence.

2. The learned trial magistrate erred both in law and in fact in holding that the applicant had no

authority to bring the suit on behalf of the estate of the deceased.

3. *The learned trial magistrate erred in both law and fact in not setting out the points for determination and the reasons for the court's decision on each point.*
4. *The learned trial magistrate erred in both law and in fact in wholly believing the evidence of the defendant and disregarding that of the plaintiff."*

I have carefully perused the record of appeal and considered the submissions made by the advocates for the parties. The mandate of a first appellate court was well stated by the Court of Appeal in PETERS VS. SUNDAY POST LTD [1958] EA 412. An appellate court has jurisdiction to review the evidence that was adduced before the trial court to determine whether the conclusions reached there should stand. If there is no evidence to support a particular conclusion or if it is shown that the trial court had failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide otherwise.

It is not in dispute that a fatal accident involving the deceased and motor vehicle registration No.KAH 182Y occurred on 22nd September 2002. The said motor vehicle was jointly owned by the 1st respondent and N.I.C. Bank who were its financiers. At the time of the said accident the motor vehicle was being driven by the 2nd defendant.

The plaintiff stated that he was the Administrator of the estate of the deceased. He had, however, obtained a limited grant of letters of administration ad colligenda bona and not a full grant.

Ideally, the plaintiff should have obtained either a full grant of letters of administration or letters of administration ad litem prior to the filing of the suit. That notwithstanding, the limited grant of the letters of administration ad colligenda bona which had been issued to the plaintiff stated that it was for the purpose of filing suit to recover damages due to the estate of the deceased arising from a road traffic accident. The trial court held that the High Court Registry at Kisii had no jurisdiction to issue such a grant. The trial magistrate referred to the provisions of Rule 36(2) of the Probate and Administration Rules, although I believe he intended to refer to sub rule (3) thereof. The trial magistrate may not have been aware of legal notice No.39 of 2002 vide which the High court registries of Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos and Bungoma were empowered to issue limited grants of letters of administration ad colligenda bona.

The learned trial magistrate was right in holding that the purpose of a grant of letters of administration ad colligenda bona is to collect the property of a deceased person where it is of a perishable or precarious nature where regular probate and administration cannot be granted at once. But given the specific words that were added to the said limited grant, it was not right to hold that the plaintiff had no locus to institute the suit. The Court of Appeal dealt with a similar issue in MORJARIA VS ABDALLA [1984] KLR 490. In that case, the High Court had granted two limited grants in favour of one of the parties. One of the grants was a limited grant of letters of administration ad Colligenda bona and the other one empowered the party, among other things "*to represent the deceased in this appeal*". The respondent's advocate opposed an application for substitution on the ground that Rule 96 of the Court of Appeal Rules only

permitted the substitution of a party to whom a full grant of Probate or Letters of Administration had been issued and not a limited grant. The court, at pages 497 and 498 held, inter alia:

“...we do not think that the appointment of a person ‘ad colligenda bona’ can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. ... Notwithstanding the foregoing, the grant of February 24 is specifically limited to ‘the purpose only’ of representing the deceased, that is to say Ranchod, in the present appeal. In our judgment, therefore, it is those words which should be looked at for the purpose of determining this part of the application. In themselves, they constitute a valid grant pursuant to rule 14, and we are prepared to regard them as such. There is no need to result to the earlier part of the grant, which in our view is surplusage”.

In this appeal, I adopt the above reasoning and hold that the trial court should have looked at and given regard to the words

“for the purpose of filing suit in court to recover damages due to the said estate arising from a road traffic accident in which the deceased died” that we contained in the Limited grant. If the above highlighted words had not been added to the limited grant, it would have been totally unsuitable as an enabling tool by the plaintiff for purposes of instituting the suit.

Regarding the issue of proof of negligence, the trial court held that the plaintiff did not sufficiently prove the same. The learned trial magistrate was of the view that the evidence of PW2, who had testified as an eye-witness, was discredited by the evidence of PW3. However, the trial court did not take into account that the alleged statement of PW2, which was not even produced, was ambiguous. It was said that she recorded that she knew about the accident when she was informed by her daughter about it, yet in

the same statement PW2 claimed that she had witnessed the accident.

The witness had testified under oath how the accident occurred, saying that she was an eye witness to the same. Police investigations pointed to the fact that the driver of the lorry was to blame for the occurrence of the said accident. It was not clear why the police released an unlicensed and unsuspected lorry without preferring any charge against the owner and the driver of the same. According to DW1, he was quick to pay Kshs.15,000/= which was demanded for funeral expenses so that he could secure the release of his lorry. The trial court should also have considered that the defendants made a material departure from their pleadings by denying their averments as to how the accident had occurred and advancing a totally different argument.

The trial court, having held that the plaintiff had no locus standi and had not proved her case on a balance of probabilities, did not proceed to state the quantum of general and special damages that it would have awarded had the plaintiff succeeded in her case. The court was under an obligation to quantify such damages, even after having dismissed the case; see DANIEL NGANGA KANYI VS SOSPHINAF COMPANY LTD & ANOTHER, Civil Appeal No.52 of 1999.

All in all, I find that the trial court erred in its analysis of the law and facts and in failing to quantify damages, irrespective of its findings on liability. In the circumstances, I allow the appeal, set aside the judgment by the trial court and direct that the suit be remitted to the Senior Resident Magistrate's court at Kilgoris for a retrial. The respondents shall bear the costs of this appeal

DATED, SIGNED and DELIVERED at KISII this 30th day of May, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Nyambati HB for Mrs. Asati for the Appellant

N/A for the respondents

D. MUSINGA

JUDGE