



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 299 of 1999

HASSAN A. DERA

PLAINTIFF

-VERSUS-

SONI FUEL INJECTION CO. LTD

DEFENDANT

JUDGMENT

On 18th September 1997, Habiba Hassan, the deceased who was an employee of Soni Fuel Injection Company Ltd, the defendant was lawfully traveling in the defendant's motor vehicle registration no. KAG 880A along Kisumu Busia Road, but due to the negligence of the driver when the vehicle reached Kisat bridge, it went out of control and it violently overturned inflicting very severe injuries to the deceased who died instantly on the spot.

On 31st August 1999 Hassan Aden Deva, the Administrator of the estate of the deceased filed a suit in this Court against the defendant seeking damages relating to the death of the deceased. The plaintiff averred that the sole cause of the said accident was the negligence of the driver of the said motor vehicle and he gave particulars of it. It was a further averment of the plaintiff that he was going to rely in the doctrine of res ipsa loquitur, the Highway Code and the provisions of the Traffic Act. The deceased at the time of her death was 27 years old and was working for the defendant as Secretary-cum-Computer Operator earning a salary of Kshs 4,600 per month. The plaintiff averred that the dependants of the deceased whom he listed in paragraph 8A of the plaint had suffered a loss as a result of the deceased's death.

On 9th December 1999, the defendant filed a defence denying that the plaintiff had locus standi to institute this suit. It admitted that the deceased was indeed its employee at the time of the accident as pleaded. The defendant also denied that it was the registered owner of the motor vehicle registration no. KAG 880A as alleged. It further denied that on 18th September 1997 the deceased was traveling in the defendant's motor vehicle no. KAG 880A under the authority of the Company and was being escorted during the lunch hour in the aforementioned vehicle when near Kisat bridge the motor vehicle lost control and overturned wherein the deceased died instantly. The defendant also denied all the particulars of negligence attributed to it and averred in alternative that if an accident occurred, it was occasioned by negligence of Fredrick O. Opondo in the manner in which he drove the said vehicle. The defendant gave particulars of negligence it attributed to the said Opondo. As regards the doctrine of res ipsa loquitur the defendant claimed that it was not applicable to the facts and circumstances of this case. In the alternative, the defendant averred that if the deceased was a passenger in the said vehicle, she was a trespasser and

she was to blame for the injuries she sustained as she was on a joy - ride and she assumed the risks voluntarily and exculpated the defendant from any liability. Further the defendant denied that the particulars of the injuries and particulars of special damages set out under paragraphs 7 and 8 of the plaint.

With leave of the Court the plaintiff amended his plaint on 19th May 2005.

In his testimony as PW1, the plaintiff said that he is a police driver and that the deceased was his daughter who was working for the defendant at the time of her death. He added that the deceased died on 18th September 1997 as a result of accident but he admitted that he did not witness the accident. The plaintiff put in as exhibits a death certificate for the deceased a grant of letters for the administration of her estate and a police abstract of the accident. The plaintiff put in as exhibits a death certificate for the deceased a grant of letters for the administration of her estate and a police abstract of the accident. The plaintiff claimed that his daughter used to pay him Kshs 3,600/= every month for maintenance and upkeep of the family consequently when she died he and his family have lost the support. On being cross-examined PW1 said that he had 5 children but the deceased was the eldest. The witness further added that the deceased was also taking care of a child of his brother known as Rashid. The plaintiff did not have a salary slip and did not know the registration of the vehicle which was involved in the accident.

Fredrick Okeyo Opondo, PW2 said that on 18th September 1997 at about 1 pm he was riding his bicycle along Busia Kisumu road towards Kisumu and was on the left side of the as one faces Kisumu before reaching Butere Railway crossing where there are big tree on both sides of the road when he heard a sound of a vehicle behind him. He said that suddenly he was hit by a vehicle which was on a very high speed and had left the tarmac and off the road. He said that when he was hit he fell down. He claimed that the vehicle which was a white small Datsun pick - up registration no. KAG 880A hit a tree on the left side of the road. PW2 added that he sustained injuries and that a lady which was on top of the pick-up was thrown and she hit the tree on her head and she died instantly. According to PW2 the lady of African Muslim as he could see from her dressing. PW2 said that when he was hit he was coming from home in Siaya to Kisumu. He denied that he caused the said accident and that the road is good with no potholes and there were no vehicles on the road at that time. He said he saw the vehicle hit the tree and stop. PW2 said that after the accident he did not move to the vehicle because he had been injured but he heard people wailing and saying Abiba had died.

PC. Joseph Rotich testified as PW3 and produced the police file relating to the said accident. He added that the accident occurred along Kisumu - Busia road near Kisat bridge which involved a motor vehicle no. KAG 880A and that on Abiba Hassan Aden died while other passengers in the vehicle and a cyclist were injured. PW3 said the vehicle was traveling from Kisumu and that on reaching the scene it lost control and it went off the road and hit a tree. PW3 said that he did not investigate the case.

The defendant did not offer any evidence.

The first issue that arises in respect to this case is that the plaintiff did not obtain either a full grant of letters of administration or a limited grant under schedule 5 of the Law of Succession Act which would have conferred on him locus standi to institute this suit against the defendant for and on behalf of the estate of the deceased. The grant which was issued to the plaintiff on a date which is not shown is a limited grant of letters of administration ad colligenda bona under Section 67 (1) of the Act. I agree that that grant being expressly given for purposes of collection and preservation of the estate of a deceased person pending an issue of a proper grant did not give the plaintiff authority to file the suit. The case is therefore fatally defective.

I also note that the defendant in paragraph 5 of the defence denied that it was the registered owner of the motor vehicle registration no. KAG 880A. The plaintiff did not produce a certified copy of the register of the said vehicle from the Registrar of the Motor Vehicles. The plaintiff has also failed to discharge his onus on this issue.

In the result, this suit fails on those two grounds examined above.

In case I am wrong in holding that the plaintiff had no locus standi to institute this case and that the ownership of the vehicle which caused the accident was not established to the required standard, I would proceed to assess the damages that would compensate the plaintiff.

Under the Law Reform Act, the plaintiff would be entitled to the following damages:-

a) Pain and Suffering:

- There is evidence that the deceased died instantly. I award the plaintiff Kshs 10,000/=;

b) Loss of Expectation of Life:

- Under this head, a conventional award is normally made. I award Kshs 100,000/=;

c) Lost Years:

- The deceased was 27 years and it is reasonable that an award for loss of dependency under the Fatal Accident should be made instead of that of lost years. No award is therefore made.

d) Loss of Dependency:

- The award under this head is under the Fatal Accidents Act. The deceased was 27 years old when she died and that she was working as a Secretary-cum-Computer Operator. PW1 was not able to bring a pay slip so as to confirm her salary. In the circumstances I would assume that her monthly salary was Kshs 3,900/=. She was a single young woman who was living with her parents. It is also stated that she took care of a young boy known as Rashid. I would therefore hold that the portion of her pay which would be available to her father is 2/3 (two third) of Kshs 3,900/= which came to Kshs 2,600/=. The deceased would have had 28 years working period before attaining an age of 55 years. Taking into consideration the normal imponderables in life, I would accept a multiplier of 20. The amount lost by the plaintiff is $Kshs\ 2,600 \times 20 \times 12 = Kshs\ 624,000/=$.

The plaintiff is awarded as follows:-

- a) Pain and Suffering Kshs 10,000/=;
- b) Loss of Expectation of Life Kshs 100,000/=;
- c) Loss of Dependency Kshs 624,000/=;

Kshs 734,000/=

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The suit is therefore dismissed with costs to the defendant.

This Judgment was written by Justice B. K. Tanui and it was delivered by Justice Tanui on this 30th day of March, 2006.

JUDGE