REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.13 OF 2014

BETWEEN

DR. GEORGE OMBAKHO.....1ST APPELLANT

FRANCIS OUNDO.....2ND APPELLANT

AND

FIDELIS MAYENDE.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Principal Magistrate's Court Civil Case No. 115 of 2010 by Hon. I.T Maisiba – Senior Resident Magistrate).

JUDGMENT

1. The appellants herein, were the defendants in the Busia Chief Magistrate's Court Civil Case Number 155 of 2010. They had been sued by the respondent for special and general damages following a road traffic accident which involved motor vehicle KAC 703G Kombi Volkswagen where Roda Baraza, the deceased was fatally injured. The 1st defendant was the registered owner of motor vehicle KAC 703G while the 2nd appellant was the driver of the said motor vehicle. The 2nd appellant was blamed for the accident and the 1st appellant was held vicariously liable for the accident.

2. In his judgment, the learned trial magistrate made an award as follows:

a. Pain and suffering and loss of amenities Kshs. 1,000,000/=

b. Special damages Kshs. 169,805/=

The total award was therefore Kshs.1, 169,805. The appellants were aggrieved by the judgment which was delivered on 26th June 2013 and filed this appeal. The appellants were represented by the firm of Magare & Company advocates. They raised the following grounds of appeal:

a. The learned trial magistrate erred in law and in fact by failing to find that by operation of the Law Reform Act, the respondent and the deceased's claim abated and did not survive the death of the deceased.

b. The learned trial magistrate erred in law and in fact in failing to find that the leave obtained to file suit out of time was improper and a breach of sections 27 and 28 of the Limitations of Actions Act.

c. The learned trial magistrate erred in law and in fact in not considering the appellants' defence.

d. The learned trial magistrate erred in law and in fact in awarding damages which were inordinately high in the circumstances.

e. The learned trial magistrate erred in law and in fact in failing to properly appreciate evidence on quantum and liability.

f. The learned trial magistrate erred in law and in fact in disregarding the appellants' submissions on quantum and liability.

g. The learned trial magistrate erred in law and in fact in failing to find that the suit was time barred.

h. The learned trial magistrate failed to analyze the facts and evidence on record in determining the quantum of damages.

3. The respondent was represented by the firm of Shitsama & Company Advocates. He opposed the appeal on the grounds:

a. That leave to file the suit out of time was granted.

b. That a grant was issued to the respondent.

c. The court arrived at the correct decision on liability and quantum of damages.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Three issues arise from this appeal. These are:

a. Whether the respondent had capacity to institute and maintain the suit;

b. Whether the suit was time barred;

c. Whether the respondent proved liability on the part of the appellants; and

d. Whether the award was inordinately high.

6. On 25th May 2009, the respondent herein obtained a grant of letters of administration in respect of the estate of Barasa Roda Adalla, who is the subject of this case. The plaint in Busia Chief Magistrate's Court Civil Case Number 155 of 2010 was filed on 8th March 2010. In the case of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88)1 KAR** the Court of Appeal held:

> **The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception.**

This therefore means that at the time of filing of the suit the respondent had capacity to do so for the estate of the deceased.

7. I have been urged to find that the suit was time barred. The appellant has argued that the leave that the respondent obtained was not in agreement with section 27 (2) of the Limitations of Actions Act. The section provides as follows:

> **The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—**
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> > **(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and**
> >
> > **(b) in either case, was a date not earlier than one year before the date on which the action was brought.**

The appellants have contended that all the facts as disclosed in the evidence were known to the respondent. In my view this argument comes late in the day. The appellants ought to have raised the same upon service by way of a preliminary objection or by appealing the order that extended time. It cannot form the basis of the appeal. The suit was properly filed after the respondent obtained a valid court order.

8. In their answer to the plaint, the appellants denied liability. Dr. George Ombakho, the first respondent denied ownership of the accident motor vehicle. The only evidence on record was what the respondent testified in reference to what was indicated in the police abstract. This is what he said:

> **It shows the motor vehicle involved was registered number KAC 703G. It indicates Francis Oundo as the owner of the motor vehicle but I later established he was the driver and the owner was Dr. George Ombakho.**

Since there was no other evidence to prove ownership of the accident motor vehicle, I find that the ownership of the same was not proved. The basis of enjoining Dr. George Ombakho to the case was not laid. I allow the appeal by the first appellant with costs.

9. The evidence of P.C Josephat Kirwa (PW5) was that the police abstract indicated that the driver of motor vehicle KAC 703G at the time of the accident was the second appellant. He did not tender any evidence to show how he was not liable or how the injured deceased contributed to the accident. The learned trial magistrate cannot be faulted for making a finding that he was 100% liable. Accidents do not happen. Unless the second appellant tendered evidence to show how he was not liable, the *Prima facie* conclusion to arrive at was that he was the one who caused it.

10. The appellants have argued that the award was inordinately high. The Court of Appeal in **Ali vs. Nyambu t/a Sisera Store [1990] KLR 534** at page **538** quoted with approval the principles laid down by the Privy Council in **Nance –vs- British Columbia Electric Railways Co. Ltd. [1951]AC 601** at page **613** where it held that:

> **The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs. Lovell [1935] 1KB 354) approved by the House of Lords in Davis vs. Powell Duffryn Associated Collievers Ltd. [1941]AC 601.**

The evidence of Dr. Hilarious Oyugi Odhiambo (PW4) was that the deceased suffered segmental tibia-fibula compound fractures on both legs. The treatment given was internal splinting and immobilization for 16 months. For these injuries, the learned trial magistrate awarded Kshs. 1, 000, 000. The appellant argued this was on the higher side. During the trial the appellant had proposed an award of Kshs. 60, 000. The respondent proposed Kshs. 1,000, 000/= general damages that the court awarded.

11. In his proposal for the award in general damages the respondent cited ad relied on the case of **Timo Kalevi Jappinen & another vs. Texcal House Service station Ltd HCCC NO. 220 of 1997**. In this case the plaintiff was awarded Kshs.1, 750,000/= as General damages for pain and suffering and loss of amenities. The injuries suffered by the plaintiff were captured in the case of **Kennedy Oseur vs. Musa Locho & 2 others [2009] eKLR** as follows:

> **The Plaintiff aged 40 years suffered a posterior dislocation of the right hip joint with communited fractures of the posterior rim of the acetabulum, compound communited fractures in the lower third of the left tibia and fibula and bruises over the right side of the forehead. He was operated on, screws on the right hip joint were removed and bone grafting done. Also he had about five operations under general anesthesia and was not physiologically prepared for another operation as yet. He developed recurrent infection at the site of the compound fracture wound on the left leg.**
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> **He underwent further operations in Finland where the metal plates and screws on the left leg were removed. The fractured ends of the bones were cleaned and cancellous bone graft laid at the fracture sites to facilitate healing. The leg was immobilized in a plaster of paris post operatively which was removed 2 ½ months. He underwent physiotherapy. Despite this operation the fractures failed to unite. He returned to Kenya in June 1995.**
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> **He had problems with the sciatic nerve and developed angulation deformity at the fracture site on the lower leg. He returned to Finland for further operations of the hip joint for removal of the screws hip joint and bone grafting. His fractures on the tibia and fibula was stabilized by ilizarov frame. He underwent a further operation where the pins were repositioned due to infections at the previous sites.**

12. The plaintiff in the case of **Mary Pamela Oyioma vs. Yess Holdings Limited [2011] eKLR** was awarded Kshs. 900,000.00 for pain suffering and loss of amenities. The plaintiff suffered the following injuries:

a) a comminuted fracture of the right femur;

b) a compound fracture of the right tibia;

c) a fracture of the left tibia;

d) soft tissue injuries of the right shoulder and

e) multiple cut wounds over the whole body.

The plaintiff underwent several operations, hospitalized for several months; she was left with fractured limbs and surgical and traumatic scars.

13. Having perused the above cases, I find that the injuries sustained by the subject of this appeal closely compare with the injuries sustained by the plaintiffs in the above cases. I therefore find no reason to interfere with the award by the learned trial magistrate. The appeal by the second appellant is therefore dismissed with costs.

DELIVERED and **SIGNED** at **BUSIA** this **13**th day of June**, 2019**

KIARIE WAWERU KIARIE

JUDGE