**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO. 39 OF 2015**

**PETROCITY ENTERPRISES (U) LTD.....APPELLANT**

**VERSUS**

**1. ROSELINE SIKUDI Suing as legal rep. of the estate of**

**PASCAL NGADI (DECEASED).....1ST RESPONDENT**

**2. DFCU LEASING CO. LTD.....2ND RESPONDENT**

**3. KAGIMU DALAWUSI.....3RD RESPONDENT**

**JUDGEMENT**

1. This is an appeal from the judgement delivered on 9th February, 2015 by C. I. Agutu, Resident Magistrate in Busia Chief Magistrate's Court Civil Case No. 317 of 2013, Roseline Sikundi [suing as a legal representative of the estate of the Pascal Ngadi - deceased] v Petrocity Enterprises (U) Ltd, DFCU Leasing Company Limited and Kaguma Dalawusi.

2. In summary, Pascal Ngadi (the deceased) was on 20th September, 2011 walking along Kisumu - Busia road at Suo River area when motor vehicle registration number UAD 904R pulling tanker registration number UAB 791E burst into a ball of fire burning him in the process. On 21st September, 2011 the deceased succumbed to the injuries at New Nyanza Provincial General Hospital as per the Certificate of Death issued on 11th October, 2012.

3. Subsequently the wife of the deceased commenced the matter which has given rise to this appeal. In her judgement the trial magistrate apportioned liability at 10%:90% between the deceased and the defendants. She then entered judgement as follows:-

**"In summary**

| | |
|---|---|
| **Pain and suffering** | **Kshs. 20,000.00** |
| **Loss of expectation of life** | **Kshs. 150,000.00** |
| **Loss of income** | **Kshs.4,800,000.00** |

**Less 10% contributory negligence** **Kshs. 479,000.00**

**Total** **Kshs.4,473,300.00**

**That is four million four hundred and seventy three thousand plus costs and interests."**

4. Through the Memorandum of Appeal dated 11th November, 2015, the Appellant, Petrocity Enterprises (U) Ltd appeals against the said decision on the following grounds:

**"1. The learned trial magistrate erred in law and fact in finding the appellant liable for the incident when the evidence adduced pointed to the fact that the fire incident was as a result of people who were siphoning fuel from a tanker which had rolled without the permission and or consent and or participation of the appellant.**

**2. The learned trial magistrate erred in law and in fact in finding the appellant liable for the incident when the 1st respondent had failed to establish the relationship if any between the appellant on one hand and the vehicles giving rise to the fire incident.**

**3. The learned trial magistrate erred in law in holding the appellant liable only because the word Petrocity appeared on the body of the tanker.**

**4. The learned trial magistrate erred in law in failing to fully appreciate the evidence adduced and in particular by the police officer and a representative of the appellant herein hence the judgement was against the weight of evidence.**

**5. The learned trial magistrate erred in law and in fact in holding the appellant liable to the 1st respondent when judgement on liability had been entered against the 2nd and 3rd respondents who had failed to enter appearance and or file defence.**

**6. The learned trial magistrate erred in law and in fact in fully relying on the evidence of the 1st respondent which evidence was contradictory and totally unreliable.**

**7. The learned trial magistrate erred in law and in fact in awarding excessive damages that were inordinately high and inconsistent with settled principles in award of damages and in fact beyond the monetary jurisdiction of the Court."**

5. Although the Appellant indicates that the appeal was served on the 1st Respondent's counsel, Kuke and Company Advocates of Kisumu, no response was filed by the 1st Respondent. I must state that the service on the counsel who had acted for the 1st Respondent in the lower court was proper and in accordance with Order 9 Rule 5 of the Civil Procedure Rules, 2010 (CPR) which provides that unless and until a notice of change of advocate is filed, the advocate on record shall be considered the advocate for the party until the final conclusion of the cause or matter, including any review or appeal.

6. Counsel for the Appellant indicated to the Court that he was relying on the submissions dated 27th June, 2016. A perusal of the submissions shows that the Appellant challenges the trial Court's findings on liability and quantum. The Appellant also asserts that the award made was in excess of the Magistrate's jurisdiction.

7. I will proceed to tackle the appeal using the format adopted by the Appellant in making the submissions. Counsel for the Appellant commenced by submitting that as interlocutory judgement had been entered against the 2nd and 3rd respondents, the issue of whom to blame for the accident had been settled and the trial Court erred in law and in fact in holding the Appellant liable to the 1st Respondent. According to the Appellant, it had taken steps to deny the claim and adduced evidence demonstrating that the accident motor vehicle and tanker belonged to the 2nd and 3rd respondents respectively. The

Appellant also asserts that it had established that it did not have an employment contract with the accident driver and there was therefore no basis for holding it vicariously liable for the accident.

8. In support of its submissions the Appellant relied on the decision of Tuiyott, J in **Petrocity Enterprises Ltd versus Fredrick Okello Opiyo and 2 others [2016] eKLR.** The cited decision was an appeal against a decision that had found the Appellant liable for the injuries sustained by the 1st Respondent therein in the same accident that led to the claim which is the subject of this appeal. In the cited case, the appellant who is also the Appellant in the instant appeal made a similar argument. Tuiyott, J at Paragraph 26 of his judgement disposed of this particular ground of appeal as follows:-

> **"While the Plaintiff sued three Defendants, only the Appellant entered Appearance and Defended the suit. Having failed to enter Appearance or file Defence, and at the behest of the 1st Respondent, interlocutory judgement was entered against the other two on 12th November 2013. Still, it fell to Plaintiff to formally prove its case against these two Defendants. The possible outcome of the trial would be –**
>
> a. **That all the three Defendants could be held jointly and severally liable.**
>
> b. **Any two could be held jointly and severally liable.**
>
> c. **One could be liable.**
>
> d. **None could be liable.**
>
> **I am unable to agree with the Appellant's counsel that upon interlocutory judgement being entered against the other 2 (two) defendants, then his client was automatically exonerated."**

I agree with the finding of the learned Judge as that is a correct statement of the law

9. Order 10 of the CPR at Rule 7 states that: -

> **"Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders."**

Where interlocutory judgement has been entered against one of several defendants for failure to enter appearance, the case against the defendant(s) who has/have defended the suit shall be heard and damages against the defendant who has not entered appearance shall be assessed at the time of assessing damages against the defendant(s) who has/have entered appearance. A perusal of the record shows that the trial Court followed the procedure set down by Order 10.

10. Although the Magistrate did not pronounce herself that she was entering judgement jointly and severally against the three defendants that were before her, it is clear from her findings that she found the Appellant, the 2nd Respondent and the 3rd Respondent liable for the accident jointly and severally. I therefore find that this particular ground of appeal has no merit and the same fails.

11. On another ground of appeal, counsel for the Appellant submitted that the trial Magistrate erred by reaching the conclusion that the accident motor vehicle and tanker belonged to the Appellant. It is the Appellant's case that it denied ownership of the motor vehicle and the tanker in its statement of defence. Its case is that at the hearing it went ahead to produce two searches from Uganda Revenue Authority showing that motor vehicle UAD 904R belonged to the 2nd Respondent and tanker registration number UAB 791E belonged to the 3rd Respondent.

12. Relying on the decisions of this Court (Ngaah Jairus, J) and the Court of Appeal in **Ruth Wanjiku Muthee v Kenya Sugar Board [2014] eKLR** and **Collins Ochung Ondiek v Walter Ochieng Ogunde, Civil Appeal No. 6 of 2008** respectively, Counsel for the Appellant asserted that where it has not been proved that an accident motor vehicle belongs to the defendant, there is no basis for finding the defendant liable for an accident caused by such a vehicle. Further, that a document from the registrar of motor vehicles showing the ownership of a vehicle is the best evidence. Also that a police abstract is not conclusive evidence of ownership of a motor vehicle.

13. In **Petrocity Enterprises Ltd (supra),** Tuiyott, J who was faced with a similar argument from the Appellant held at paragraph 22 that:

> **"The Appellant had without raising objection or question, accepted the production of a Police Abstract indicating that it was the owner of the Trailer and Truck Head. There was also evidence, not seriously denied by the Defence witness, that the body of the Trailer and Truck Head bore the name of the Appellant. It is on the basis of this evidence that the Trial Magistrate held that the Appellant needed to do more to disassociate itself with the Trailer and Truck Head than to raise a simple denial. I would have to agree with the Trial Court. The Appellant needed to place before Court sufficient evidence that could displace the evidence of the Police Abstract and the writings on the vehicles. This Court finds that the 1st Respondent successfully proved that the Appellant was the beneficial owner of both the Trailer and Truck Head."**

14. Upon review of the record, I with utmost respect, hold a different opinion from my brother Judge. On the liability of the Appellant, the judgement which is the subject of this appeal states:

> **"The accident was however self-involved and the three defendants are equally liable. The 1st defendant is sued as the beneficial owner of the fuel."**

Nothing more is said on liability.

15. In the plaint dated 7th August, 2013 the 1st Respondent asserts:

> **"5. At all material times relevant to this suit, the 1st Defendant has been sued in its capacity as the beneficial owner of both the motor vehicles registration numbers UAD 904R MERCEDES BENZ and UAB 791E MITSUBISHI FUSO while the 2nd and 3rd defendants have been sued in their capacity as the registered owners of motor vehicles Reg. No. UAD 904R MERCEDES BENZ and UAB 791E MITSUBISHI FUSO respectively.**
>
> **6. Further at all times relevant to this suit, the 2nd and 3rd defendants were under a contractual obligation and or agreement with the 1st defendant to ferry and/or transport oil/liquor within and without the Republic of Kenya using the motor vehicles registration numbers UAD 904R MERCEDES BENZ and UAB 791E MITSUBISHI FUSO."**

16. In her testimony the 1st Respondent who testified as PW1 stated that she had sued the Appellant for being vicariously liable when the driver caused the accident. She produced a police abstract showing that the motor vehicle UAD 904R/UAB 791E belonged to Petrocity Company Limited of P. O. Box 1101121 Kampala. The 1st Respondent also produced searches showing that Motor Vehicle Registration No. UAD 904R Mercedes Benz Tractor Head belonged to the 2nd Respondent whereas Motor Vehicle Registration No. UAB 791E Mitsubishi Fuso Truck belonged to the 3rd Respondent.

17. On its part the Appellant adopted the evidence of DW1 Tukhahira Margaret in Busia CMC Civil Suit No. 333 of 2013, Jemima Makhoka (suing as the legal representative of the estate of Jackson Isaac Makhoka-deceased) versus Petrocity Enterprises (U) Ltd & 2 others. I have perused that evidence and find that the same is in agreement with that of the 1st Respondent on the ownership of the accident motor

vehicle as per the records of Uganda Revenue Authority.

18. The parties had therefore placed before the Court documents which were contradictory as to the ownership of the truck head and truck that were involved in the accident. How was the Magistrate supposed to reconcile this evidence? Hear how my brother Ngaah Jairus, J reconciled such evidence in **Ruth Wanjiku Muthee (supra):**

> **"The respondent, through the transport manager, DW1, discounted the appellant's claims and denied that the respondent owned the vehicle in question. In support of the respondent's case, the witness produced an extract from the registrar of the motor vehicles showing that as at 6th February, 2010, when the accident occurred, the vehicle belonged to one Samuel Kang'ethe."**

19. The learned Judge proceeded to analyse various authorities that had been cited before him and concluded that:

> **"I am bound to agree with the learned counsel for the respondent that the police abstract could not, in these circumstances, be taken to be conclusive proof that the respondent was the owner of motor vehicle registration number KAA 223J. In my view, that piece of evidence was rebutted, controverted or challenged to the satisfaction of the trial court. The burden was on the appellant to present something more than a police abstract to prove that the respondent was the owner of motor vehicle registration number KAA 223J at the material time. I hold that she did not discharge this burden, regrettably.**
>
> **It therefore follows that liability was not proved; without proof of ownership of the accident vehicle, there is no basis upon which the respondent could be said to be liable, vicariously or otherwise. The link between the accident and the respondent was not proved on a balance of probabilities."**

20. The reasoning of the Judge ties up well with the statement of the Court of Appeal in **Joel Muga Opila v East African Sea Food Limited [2013] eKLR** (as quoted by Tuiyott, J in **Petrocity Enterprises Ltd (supra)**)that:

> **"In any case in our view an Exhibit is evidence and in this case, the Appellant's evidence is that the Police recorded the Respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with the words to the effect that the owner was East African Sea Food was not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection its contents cannot be later denied."**

21. It must indeed be appreciated that the police abstract showed that the tractor head and the truck it was pulling belonged to the Appellant. There was no resistance to the production of the police abstract and neither was there an attempt to demolish its contents. However, the police abstract was not the only evidence placed before the Court on the ownership of the accident tractor head and truck. There is also undisputed evidence on record that the tractor head and the truck belonged to the 2nd and 3rd respondents respectively. That evidence came by way of record searches conducted with Uganda Revenue Authority by both the 1st Respondent and the Appellant. As stated by the Court of Appeal, the evidence of the Registrar of Motor Vehicles is the best and better evidence. Between a police abstract and the records of the body charged with registering motor vehicles, the evidence of the body charged with registration of motor vehicles in a given country carries more weight. I do not therefore understand why the trial Court opted to rely on the police abstract and not the records of Uganda Revenue Authority. It must be noted that the tractor head and truck had registration plates issued in Uganda and Uganda Revenue Authority was the body mandated to register motor vehicles in Uganda.

22. There was the evidence that the truck was branded with the Appellant's name. In her evidence DW1 Tukhahira Margaret explained the basis of the branding thus:

> **"I am not surprised that these vehicles bore the names of Petrocity. It is just for advertisement purposes only. We have no issues with vehicles bearing our names. They are advertising for us."**

23. That answer was not only plausible but was never rebutted by the 1st Respondent. The use of the Appellant's name was thus well explained.

24. As to the alleged contract for transport of fuel DW1 stated under cross-examination that there was no agreement between it and either the 2nd Respondent or the 3rd Respondent. Again that evidence was not rebutted by the 1st Respondent. It is also noted that there was no evidence tendered at all to connect the driver of the vehicle with the Appellant. Even if the Appellant had contracted the 2nd and 3rd respondents to ferry fuel for it, the 1st Respondent did not explain why the negligence of the driver of the 2nd and 3rd respondents could be blamed on the Appellant.

25. In the end, it is clear that there was no evidence to connect the tractor head and the truck to the Appellant. There was also no evidence adduced to connect the driver and the petrol that was being transported to the Appellant. There was therefore no basis for holding it liable for the fire that caused the injuries that led to the death of the 1st Respondent's husband.

26. Turning to another line of argument, the Appellant asserted that the trial Court erred in finding it negligent yet the deceased was pre-warned of the danger that lurked ahead but nevertheless went and joined the people who were siphoning oil from the truck. It is the Appellant's case that the evidence of PW1, the Plaintiff in Busia CMC Civil Suit No. 354 of 2012 Fredrick Okello Opiyo v Petrocity Company (U) Ltd & 2 others, which was adopted as that of PW2 in the trial leading to this appeal clearly demonstrated that the fire started after people tried to remove the battery of the motor vehicle.

27. In her judgement the Magistrate, without elaborating, held that:

> **"On liability, I find the Plaintiff 10% liable. Exhibit number four indicates that a crowd had gathered around the overturned tanker and were siphoning fuel wherein an explosion occurred and the deceased was burnt and later passed on."**

28. For the deceased to suffer fatal injuries he must have been close to the source of the fire. He was either participating in the siphoning of the fuel or was among the curious crowd milling around the truck. The danger inherent in such circumstances is obvious. Negligence should be attributed to the victims to a reasonable extent.

29. On the other hand, a driver of a truck ferrying fuel is expected to drive with extra care. An accident of such a motor vehicle is likely to be fiery because of the flammable substance being transported. If for example a driver and passengers of a car that was using the road was got up in the inferno, liability on the part of the driver and owner of the tanker would inch closer to 100%. However, where a pedestrian out of curiosity puts himself or herself in danger, liability should be shared equally between the driver and owner of the motor vehicle on the one part and the pedestrian on the other part. I would thus have interfered with apportionment of liability at 10%:90% between the deceased and the Appellant and replaced the same with an apportionment of 40%:60% between the two sides. After all it is assumed that the deceased was entitled to have safe usage of the road and anybody who imperils the use of the road by members of the public must be held liable for any loss occasioned by such negligence. Apportionment of liability will thus depend on the circumstances of each case.

30. Finally, the Appellant took issue with the jurisdiction of the Magistrate. The Appellant also accused the trial Court of failing to comply with the principles governing the award of damages.

31. First, the question of jurisdiction. The Appellant submits that in awarding the sum of Kshs.4,473,000.00 the trial Magistrate who was a resident magistrate at the material time exceeded her pecuniary jurisdiction which was capped at Kshs.2,000,000.00 by the Magistrates' Courts (Amendment) Bill, 2012.

32. The starting point is to note that as provided by Section 7 of the Magistrates Court Act, 2015 which came into operation on 2nd January, 2016, the current jurisdiction of a resident magistrate is five million shillings. At the time the trial Magistrate delivered judgement on 9th February, 2015, the civil jurisdiction of a resident magistrate was two million shillings. This is according to Section 5 of the Magistrates' Courts Act, Cap. 10 as amended by Act No. 12 of 2012.

33. The Appellant is therefore right that C. I. Agutu who was a Resident Magistrate at the time of the delivery of judgement made an award that was in excess of her jurisdiction. The award was therefore unlawful. However, the 1st Respondent would be entitled to any award up to Kshs.2 million as the trial Magistrate had jurisdiction to make such an award.

34. Secondly, the Appellant submits that the Magistrate did not lay a basis for awarding Kshs.4,800,000.00 as loss of income. After analysis of various authorities, the Court of Appeal (Kneller, JA) summarised the principles for award of damages in **Hassan v Nathan Mwangi Kamau Transporters and 4 others, Mombasa CA Civil Appeal No. 123 of 1985** as follows:

> **"My summary of their relevant principles is this:**
>
> i. **A parent cannot insure the life of his child**
>
> ii. **The death of the victim of the negligence does not increase or reduce the damages for the lost years**
>
> iii. **The sum to be awarded is never a conventional one but compensation for a pecuniary loss;**
>
> iv. **It must be assessed justly and with moderation;**
>
> v. **The complaints of insurance companies at the size of such awards should be ignored;**
>
> vi. **Disregard remote inscrutable speculative claims;**
>
> vii. **Deduct the victim's living expenses during 'the lost years' for they would not form part of the estate.**
>
> viii. **A young child's present or future earning in most cases would be nil;**
>
> ix. **An adolescent's would usually be real, assessable and small;**
>
> x. **The amount will vary greatly from case to case for it depends on the facts of each one including the victim's station in life;**
>
> **xi. Calculate the annual gross loss;**
>
> xii. **Apply the multiplier (the estimated number of 'lost working years' accepted as reasonable in each case;**
>
> xiii. **Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her; and**

xiv. **Living expenses include the reasonable cost of housing, heating, food, clothing, insurance, travelling, holidays, entertainment, social activity and so forth."**

35. As I proceed to interrogate the award of the trial Court, I must warn myself that I can only interfere with the same if I find it inordinately high that it represents an erroneous estimate and is not in line with awards for similar claims. The Appellant also needs to convince me that the Magistrate proceeded on the wrong principles or misapprehended the evidence in some material respect-see **Hassan (supra).**

36. In her testimony the 1st Respondent told the trial court that:

> **"The deceased was 28 years old. He was a businessman selling maize in Matayos. I had three children with him. He earned between 30,000.00 and 35,000.00."**

It is not clear from the evidence whether the alleged earnings were on an annual or monthly basis.

37. This is how the Magistrate treated the evidence in her judgement:

> **"The deceased was aged 23 years. He was married to one wife and had a young family. His children, three of them were aged 7 years, 5 years and 4 years. It was testified that the deceased was a businessman and earned Kshs.30,000.00. I reduce this amount to Kshs.15,000.00 because there is no strict proof."**

There is no statement as to whether the earnings were per annum or monthly. The Court reduced the income from Kshs.30,000.00 to Kshs.15,000.00 saying that the same was not strictly proved. On what basis did the Court then pick Kshs.15,000.00? There is no explanation in the judgement.

38. The Court then moves to award Kshs.4,800,000.00 as damages for loss of income without stating the multiplier nor explaining the basis used to arrive at such a multiplier.

39. No human being can tell how long another human being will live. A multiplier is just but a guestimate and in selecting a multiplier it ought to be remembered that it is possible for a claimant not to live to retirement age. In a case like that of the deceased who was aged 28 years at the time of his demise a multiplier of between 15 and 25 years would be reasonable.

40. Without evidence of the source of income and the amount of earnings, a reasonable figure ought to have been picked to represent income. The deceased was also expected to spend part of his earnings on himself. This is what the Court of Appeal in **Hassan (supra)** calls living expenses and those must be deducted from the earnings before the multiplier selected is applied. Given that every human being who is physically fit and of sound mind should at least generate some income, a figure of Kshs.4,000.00 would be reasonable. This is after deducting the deceased's living expenses. The figure would work out as kshs.4,000.00 x 12 x 25 (maximum) which will give a figure of Kshs.1,200,000.00. Add the Kshs.20,000.00 for pain and suffering and Kshs.150,000.00 for loss of expectation of life and you get a total of Kshs.1,370,000.00. Subtract 40% contribution and one gets Kshs.822,000.00. That is the amount I would have awarded the 1st Respondent.

41. However, I have already stated that the finding by the trial Court on the Appellant's liability was erroneous. In the circumstances, I allow the appeal, quash the judgement of the lower Court and set aside the damages awarded. The Appellant shall have the costs for both this appeal and the proceedings in the lower cost.

**Dated, signed and delivered at Busia this 9th day of March, 2017**

**W.KORIR,**

**JUDGE OF THE HIGH COURT**