REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 109 OF 2011

ABDALLA JOSEPH.....1ST APPELLANT

VICTOR ONYANGO OGUTA.....2ND APPELLANT

VERSUS

ELIAZARO ALALA OLOO *(suing as administrator & legal representative of)*

DORQUEENS ANYANGO.....DECEASED

J U D G M E N T

1). The Memorandum of Appeal herein stems from the decision of the lower court which it awarded the respondent a sum of Kshs. 955,000/= being damages pursuant to the road traffic accident that occurred on the 15th March 2009 along Kisumu – Ahero road at a place called Molem where one **Dorqueens Anyango** was fatally wounded. The said accident was caused by the 2nd appellant who was driving motor vehicle Reg. No. KAS 384H owned by the 1st appellant.

After listening to all the parties the trial court concluded that the cause of the accident was the 2nd appellant and was therefore 100% liable.

2). The appellants have filed a total of 19 grounds in support of their appeal. The same can easily be reduced as follows:

1. **Whether the deceased died as a result of the said accident.**
2. **Whether the appellant caused the accident.**
3. **Whether the 1st appellant was the actual owner of the motor vehicle.**
4. **Whether the court award was within the law and if so whether the same was manifestly excessive.**

3). Both parties agreed to proceed by way of written submissions which they have filed and attached several authorities in support and in opposition of this appeal.

4). The first issue to determine is whether the deceased died as a result of the said accident. It is contended by the appellant that although the accident occurred, the only victim of the alleged accident was a male and not a female. According to the appellant non of the witnesses claimed to have seen a female victim and neither the police when they came to the scene saw such female victim.

5). **PW1, Peterson Njogu** a police officer was notified of the accident at around 7. 30 p.m. He told the

court that when he went to the scene he only found the vehicle but not the deceased bodies. He however went to the hospital where he found bodies of the two. On cross examination he maintained that he saw two bodies at the hospital. He was not obviously a witness to the accident.

6). PW2, George Omondi Okelo was an eye witness who told the court:

> **"I and members of the public put the two victims in a vehicle and they were taken to hospital. The lady was hit and pushed off the road while the man was trapped under the vehicle KAS. We first took the lady to hospital then removed the body of the man from under the vehicle and took him to hospital".**

7). On cross examination he maintained that he saw the vehicle hit the deceased lady at the same time. He further said that when the police came the lady had been taken to hospital. This corroborates what PW1 told the court.

The parties relied also on the traffic proceedings (**Case No. 736 of 2009 – Kisumu CMCC)** in which the witnesses equally confirmed seeing a lady being hit.

8). My finding therefore is that contrary to the assertion by the appellant the deceased was a victim of the accident. The sequence of events upto and including the postmortem report which showed the cause of death clearly does point that she was involved in a car traffic accident.

9). Was she a victim of a hit and run accident as postulated by the appellant? I do not think so. The witnesses testified of what they saw. The police officer PW1 infact proceeded to the hospital where he found that the two victims had died. As much as the 2nd appellant claims that he saw only one person crossing the road and hit his windscreen the circumstances obtaining at that time clearly appeared so confusing that his witness DW2 in the criminal case who was his wife testifies to this.

10). In regard to the liability the trial court found that the appellants were 100% liable. I do not think this is disputed. The appellant in any event did not enjoin the driver of motor vehicle Reg. No. KAQ 625H in the suit so as to apportion liability if any.

11). The traffic case squarely found the 2nd appellant guilty and was sentenced appropriately. The appellant contended that there is an appeal pending and for that reason the trial court ought not to have relied heavily on the appellant's conviction.

Section 47 of the Evidence Act was clearly applied by the trial court. As long as the same has not been overturned then it remains a sound judgment of the court.

12). Although section 109 of the Evidence Act places the burden on the appellant to discharge himself of any liability, I do not find that he sufficiently discharged himself during the hearing of the case.

Evidence was led to show that he was driving without any due regard to other road users especially motor vehicle Reg. No. KAQ 625H which he hit from behind and therefore veered off the road and hit the two deceased persons. Consequently, I do find that the appellant caused the said accident and the trial court's finding ought not to be disturbed.

13). The other issue to be determined is the ownership of the motor vehicle. It is alleged by the appellant that the true owner of the motor vehicle is one Abdalla Joseph and not the 1st appellant. The appellant produced the search records from the Registrar of Motor Vehicles to support this contention.

14). The trial court found this a typographical error. Upon perusing the evidence of DW1 he told the court during cross examination that the vehicle belonged to his uncle called Joseph Abdalla.

The police abstract shows the policy holder to be one J.O. Abala. In terms of actual possession of the vehicle the appellants do not dispute the fact that they had the vehicle. The 1st appellant did not dispute

the evidence adduced by the 1st appellant that he had authorised the 2nd appellant to have the vehicle. Most certainly therefore, the vehicle belonged to the 1st appellant but was driven by the 2nd appellant under the express authority of the 1st appellant.

Section 100 of the Civil Procedure Act empowers the court to carry out any amendment that shall be necessary for the purpose of determining the real question or issue in the proceedings.

15). Respectfully, I do not think the assertion by the appellant that the trial court was wrong is true. The probability of the word Aballa being typed as Abdalla is not very remote.

In any case the respondent established and as alluded above, that it was the appellant who owned and drove the vehicle.

16). Turning now to the question of quantum, I have perused the various authorities relied on by the parties in their submissions. Nyarangi JA in Sheikh **Mustag Hassan -VS- Nathan Mwangi Kamau Transporters & Others [1982-88] K AR 954** said:

> **"In general, in Kenya, children are expected to provide and do provide for their parents when the children are able to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various Africa and Asian communities in Kenya".**

17). The deceased was a college student undertaking a certificate course in Community Health at Great Lakes University. She also had a 3 year old daughter whom she was taking care of. The parents equally expected that she would take up employment and be able to support them in future.

18). On the analysis of the facts before the trial court, I do not think the sum of Kshs. 800,000/= was excessive at all taking into consideration the whole question of inflation.

In any case the court awarded damages under this heading based on the lost years.

19). Consequently, I do not find the appeal meritorious and for the reasons adduced above in particular that the deceased died as a result of the appellant's negligence. I shall dismiss the same with costs to the respondent.

Dated, signed and delivered at Kisumu this 6th day of February, 2014.

H.K. CHEMITEI
JUDGE