



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO.109 OF 2010**

**WILLIAM RECHA SONGWA (Suing as the father and legal representative of the estate of the late  
MANASE RECHE SONGWA (DECEASED) ..... PLAINTIFF**

**-VS-**

**MULTIPLE HAULIERS (E.A) LTD.....1ST DEFENDANT**

**PETER W. KAMAU.....2ND DEFENDANT**

**CHABADYA WHOLESALERS.....3RD RESPONDENT**

***(Appeal from the judgment and decree of the Honourable E. Cheronu, Principal Magistrate***

***In***

***Webuye Civil Case No.514 of 2007)***

**JUDGMENT**

1. William Recha Songwa, the Appellant herein, was the Plaintiff in SRM CC No.514 of 2007, at Webuye. In his Plaint dated 17/11/2007, which he filed on behalf of the estate of his late son Manase Recha Songwa (hereinafter "*the deceased*"), he pleaded that; on 10/4/2007, an accident occurred along Webuye – Eldroet road involving MV registration Nos.KAV 915 W Trailer No. ZC3463 and KAK 940 H Trailer No.ZB 3091; that as a result of the said accident the deceased who was aboard Mv. Reg. No. KAK 940 H sustained injuries from which he succumbed to death. He pleaded that the said motor vehicles belonged to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents respectively and that the accident occurred as a result of the said vehicles being driven negligently. He set out various particulars of negligence against all the Respondents. In that suit, the 2<sup>nd</sup> Respondent was sued on the allegation that he was the driver of the motor vehicle belonging to the 1<sup>st</sup> Respondent. It was further pleaded that the deceased was aboard Mv KAK 940 H by virtue of being an employee of the 3<sup>rd</sup> Respondent.

2. The Respondents filed their respective defences. They denied all the allegations of the Appellant including the occurrence of the accident; the ownership of the subject motor vehicles as well the negligence attributed to each one of them. They further contended that the deceased was the author of his own misfortune and set out various particulars of negligence against him.

3. At the trial, the Appellant told the court how he was called and informed that the deceased had been involved in an accident near River Nzoia Bridge; that the deceased died in hospital; that the deceased had worked for the 3<sup>rd</sup> Respondent for only one (1) week; that he had a wife and three (3) children.He estimated the deceased's income at Kshs.10,000/= per month. He however, confirmed that he had

nothing to show that the deceased was either married or had children or was working with the 3<sup>rd</sup> Respondent.

4. The Appellant called one other witness in support of his case. PW2 told the court that on the material day, he and the deceased were aboard Mv. Reg. No. KAK 940 H when Mv. Reg. No. KAV 915 W which was being driven at high speed hit their trailer and injured him and his co-workers; that he and deceased had worked for the 3<sup>rd</sup> Respondent for over one (1) year; that they were being paid Kshs.2,000/= per month; he blamed the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for the accident and the 3<sup>rd</sup> Respondent for allowing them to ride on an open trailer.

5. The 2<sup>nd</sup> Respondent testified for himself and the 1<sup>st</sup> Respondent. He admitted that on the material date, he was driving Mv. Reg. No. KAV 915 W belonging to his employer, the 1<sup>st</sup> Respondent; that it is tractor Reg. No.KAK 940 H which hit his trailer; he told the court that although he was charged with a traffic case of causing death by dangerous driving, he was acquitted of the charge; he blamed tractor Reg. No. KAK 940 H for the accident.

6. At the trial various documents were admitted by consent, some of these were; the Police Abstract; Death Certificate; Demand Notices; and the Judgment of the Traffic Court. Upon considering the evidence and submission of counsel, the trial Court dismissed the suit on the ground that; the Appellant had failed to show how the Defendants were to blame for the accident; that the deceased was to blame for his misfortune for riding on the trailer of which he was not supposed to, finally that the Appellant did not prove that the vehicles belonged to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

7. Aggrieved by that decision, the Appellant has appealed to this court setting out a total of 11 grounds of appeal in his Memorandum of Appeal. These can be summarised as follows:-

- a) that the trial Court erred in rejecting the Appellants request to amend his Plaint thereby causing a miscarriage of justice;
- b) that the trial Court erred in failing to find that Mr. Reg. Nos.KAV 915 W and KAK 940 H were in the exclusive use by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and that they were therefore duty bound to accountfor the accident of 10/4/2007;
- c) that the trial Court erred in applying the doctrine of Res Ipsa Loquitur and blaming the deceased as having been the author ofhis own misfortune;
- d) that the trial Court failed to consider the proceedings of the Traffic Court which led to a miscarriage of justice;
- e) that the trial Court erred in failing to quantify the claim.

8. In his submissions, Mr. Onchiri, learned counsel for the Appellant submitted that the trial Court misapplied the doctrine of res ipsa Loquitur since it was the custom within the sugar belt for owners of factories to provide the employees with alternative means of transport; that the 2<sup>nd</sup> Respondent had admitted in theTraffic Court that he was an employee of the 1<sup>st</sup> Respondent and was driving Mv. Reg. No. KAV 915 W which was involved in the accident; that the PoliceAbstract had revealed that Mv. Reg. No of KAK 940 H belonged to the 3<sup>rd</sup> Respondent; that the trial Court should have quantified the claim.

9. Mr. Muhoro, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent supported the trial Court's application of the doctrine of *res ipsa loquitur* and added that likewise the doctrine of *volenti non fit injuria* applied to the case; that the trial Court was right in holding that the ownership of the motor vehicles had not been established; that failure to quantify the Appellant's claim was not fatal to thejudgment of the trial Court. Counsel concluded that at no time the trial Court was never called upon to decide on any application for aamendment and rejected the same.

10. Counsel for the 3<sup>rd</sup> Respondent submitted that since the 2<sup>nd</sup> Respondent was the one charged with the traffic case, the driver of Mv. Reg. No. KAK 940 H had been absorbed of blame; that the doctrine of *res ipsa loquitor* was properly applied; that ownership of Mv. Reg. No. KAK 940 H was never proved and that the trial Court was right in not quantifying the claim since it had arrived at the conclusion that no liability attached. Counsels for the Respondents urged that the Appeal be dismissed.

11. I have considered the record, the written submissions of the parties and oral highlights. This is a first Appeal. It therefore behoves this court to re-evaluate the evidence afresh but in so doing be very slow to disturb the findings of fact arrived at by the trial Court, **Peters -vs- Sunday Park Ltd [1958] EA 424.** This court therefore must examine whether the findings of fact by the trial Court were not based on evidence before it, or whether there was a misapprehension of the evidence or the trial Court acted entirely on wrong principles in arriving at those findings of fact. I will determine the appeal on the basis of the grounds of appeal as summarised in paragraph 7 above.

12. The trial Court was criticised for rejecting the Appellant's application to amend his Plea. I have perused the judgment of the trial Court in detail. I have not found any finding by the Trial Court rejecting an application for amendment. A perusal of the record shows that at no time the trial Court reserved the issue of amendment of the Plea for determination at the judgment. As correctly submitted by the Respondents; there was no formal application that was placed before the trial Court for determination which the court rejected as contended by the Appellant.

13. However, the record of the proceedings shows that the Appellant closed his case on 27/2/2009. Then on 12/7/10 when the matter came up for defence hearing, Mr. Onchiri applied for an adjournment for him to make a substantive application to join another Defendant to the proceedings. The application for adjournment was opposed by the Respondents and the trial Court dismissed the same. Leave to appeal against the refusal to adjourn was granted by the court and was to be exercised within 14 days. That right of appeal does not seem to have been exercised. The Record of appeal contains a Chamber Summons application dated 10/07/10 and filed in court on 12/7/10 but the record does not show that the application was ever listed for hearing. Accordingly, I reject that ground.

14. The second ground is that the trial Court erred in applying the doctrine of *Res Ipsa Loquitor* and thereby blaming the deceased as having been the author of his own misfortune. The Appellant submitted that that was a wrong finding since in the sugar belt area, employers always provided alternative means of transport to their employees.

15. The evidence on record was that the deceased was employed as a loader. According to PW2, they were involved in loading sugar cane to the Defendant's trucks. PW2 when being cross-examined by counsel for the 3<sup>rd</sup> Respondent testified that the deceased and his co-workers were instructed by the 3<sup>rd</sup> Respondent to board Mv. Reg. No. KAK 940 H. That being the case, applying the provisions of **Section 107** of the Evidence Act, which provides that he who alleges must prove, I think there was evidence on record to show that the deceased was aboard that vehicle with authority. The trial Court in my view erred when it applied the doctrine of *Res Ipsa Loquitor*. That ground is meritorious and it succeeds.

17. The other ground is that the trial court erred in failing to find that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents were in exclusive control of Mv. Reg. Nos. KAV 915 W and KAK 940 H and that they should therefore have been held to account for the accident. Collorally to this ground is the criticism levelled against the trial Court of failing to consider the judgment of the Traffic Court and thereby leading to a miscarriage of justice.

18. The judgment in the Traffic Case was produced at the trial without any objection. In that judgment as well as the testimony of DW1 the 2<sup>nd</sup> Respondent, it was clear that the 2<sup>nd</sup> Respondent was the driver of Mv. Reg. No. KAV 915 W and that it was owned by the 1<sup>st</sup> Respondent. To that extent, the trial Court was in error in holding that the Appellant had failed to prove that the Mv Reg. No. KAV 915 W belonged to the 1<sup>st</sup> Respondent. It was wrong for the trial Court to insist that a certificate of search from the Registrar of Motor Vehicles should have been produced. The evidence on record was sufficient to show

that Motor vehicle Reg. No. KAV 915 W belonged to the 1<sup>st</sup> Respondent. It is also this court's finding that the trial Court was in error in failing to refer to the judgment in the Traffic Case in its evaluation of the evidence. The issue however is whether such a failure led to a miscarriage of justice. I will come to this issue later on in this judgment.

19. As regards ownership of KAK 940 H, although the Police Abstract that was admitted by consent indicated that the 3<sup>rd</sup> Respondent was the owner, other evidence on record showed the contrary. The Chamber Summons application filed in court on 12/7/10 that sought leave to amend the Plaintiff's application and join another Defendant was supported by the Appellant's Affidavit. That Affidavit indicated that the owner of Mv Reg. No. KAK 940 H was MARK TRANSPORTERS. It produced a certificate of search from the Registrar of Motor Vehicles dated 15/6/10 which indicated clearly that as at 10/4/2007 when the accident occurred, KAK 940 H was owned by Mark Transporters and not the 3<sup>rd</sup> Respondent.

20. Accordingly, although the trial Court had not properly evaluated the evidence as regards the ownership of the later motor vehicle, this court finds that the evidence on record pointed towards the Appellant not having proved that the said motor vehicle was owned by the 3<sup>rd</sup> Respondent. On this basis, the case against the 3<sup>rd</sup> Respondent could not stand.

21. On whether the failure by the court to refer to the judgment of the traffic case led to a miscarriage of justice, this court finds that it did not. PW2 who testified on behalf of the Appellant was unable to show that the 2<sup>nd</sup> Respondent was to blame for the accident. His testimony was contradictory and could not be relied on.

He stated:

***“At the river Nzoia bridge, I saw a trailer coming to overtake us. It was KAV 915 W. It hit our trailer from behind. I fell in the river..... I then found myself at the Webuye District Hospital.”***

22. The witness did not state who or how he got out of water. His last statement suggests that he may have fell unconscious on falling into the river and only found himself at the Webuye District Hospital. However, on cross-examination he stated:-

***“I was looking ahead, Eldoet direction. When I heard the trailer hooting, I looked behind. We were then on the bridge, about 200 meters from where we had entered the highway. It is our trailer that was hit by the other vehicle..... the mercedes truck passed and stopped after crossing the bridge. I did not see it later but it was not damaged.”***

If PW2 fell into the river and then found himself at the Webuye District Hospital. How did he know that the Mercedes truck passed and stopped after crossing the river. To my mind, his evidence was suspect.

23. On the other hand, the 2<sup>nd</sup> Respondent testified both in the Traffic Case and before the trial Court. His evidence seems to have been consistent that it was the driver of KAK 940 H who caused the accident. From the foregoing, I am satisfied that the trial Court was right in holding that the Appellant had not proved his case to the required standard.

24. As to the failure by the trial Court to assess the quantum of the claim, I am in agreement with the Appellant that was wrong. There is ample authority to the effect that the trial Court should assess the quantum of damages even if it dismisses a Plaintiff's suit. In the Case of **Moses Cheboi Nyerere vs Charles Kinyanjui Kangethe High Court, Kisii Civil Appeal 54 of 2004 [2008] EKLK** court held:-

***“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 Sosphine Company Ltd & Another, Civil Appeal No.52 of 1999.”***

In the instant case, the trial Court should have proceeded to assess the quantum after dismissing the suit. This error however is not sufficient to lead to the nullification or setting aside of that judgment.

25. This court has the jurisdiction to assess the quantum. I have considered the evidence on record. It was not clear what income the deceased was making from his employment. The Appellant testified that the deceased had only worked for a week and had not been paid by his employer he could therefore not tell what the deceased was earning. PW2 on the other hand testified that the deceased had worked with him for one (1) year one (1) month and one (1) week. That they were being paid Kshs.2000/= per month. To my mind, there was no satisfactory evidence that was produced to prove any income from the alleged employment of the deceased.

26. There was however, unchallenged evidence of PW1 that the deceased was also a farmer. He testified that the deceased was making Ksh.10,000/= per month. He however did not produce any evidence to prove this fact. On cross-examination, he told the court that the deceased used to harvest 10 bags of maize. Surely, 10 bags of maize cannot translate to Kshs.10,000/= per month for a farmer. That being the case, doing the best I can, I assess loss of dependence at Kshs.2000/= per month. He was aged 22 years and would have been economically active for another 30 years. I will therefore assess damages as follows:-

- a. Lost years  $2000 \times 2/3 \times 12 \times 30 = \text{Kshs.}480,000/=$
- b. Loss of expectation of life I will award a conventional figure of Kshs.150,000/=
- c. Pain and suffering - Kshs100,000/=
- d. Special damages - Kshs975/=

**TOTAL KSHS.730,975/=**

27. In the end, I find the appeal to be without merit and I dismiss the same with costs.

DATED and DELIVERED at Bungoma this 15<sup>th</sup> day of July, 2014.

**A. MABEYA**

**JUDGE**