



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 76 of 2010

ROSE KEMUNTO ASIAGO.....APPELLANT

AND

HUSSEIN DAIRY LTD.....1ST RESPONDENT

STEPHEN FINLAY NYAUCHO.....2ND RESPONDENT

*(Appeal from original judgment in Senior Resident Magistrate court at Kisii in
civil case No.98 of 2008 by G.H. Oduor, SRM-Kisii)*

JUDGMENT

1. The suit in the lower court was initiated by the appellant who sued the respondents seeking damages under the Fatal Accidents Act and the Law Reform Act on account of the death of **BENARD ASIAGO ONDUSO** (deceased). In the amended plaint the appellant (**then Plaintiff**) alleged that the deceased was lawfully travelling in motor vehicle Registration No. KAP 336S Toyota Matatu Hiace along Kisii Keroka Road when he sustained fatal injuries as a result of an accident caused by the alleged negligence of the 1st and 2nd respondents, servants, workers, employees, agents or drivers.
2. The 2nd respondent filed defence in which he denied the appellants claim, specifically denying paragraph 4b of the amended plaint relating to his alleged ownership of motor vehicle KAP 336S Toyota Hiace Matatu. The 2nd defendant also averred that if the accident occurred as alleged then the same was as a result of the negligence of the negligence of the driver of motor vehicle Registration No. KAP 336S.
3. The 1st respondent on their part also denied the appellants claim specifically denying paragraph 4a of the amended plaint relating to its alleged ownership of motor vehicle Registration No.KAX 308Z/ZC0032.
4. At the hearing of the suit the appellant testified that she was a farmer and the deceased was her husband. On 30th August, 2007 she was informed that the deceased had had an accident and had died. She produced a death certificate as PExhibit.1.

She also produced a police abstract from Kisii Police Station showing that motor vehicles KAP 336S and No.KAX 308Z were the ones involved in the accident. She produced letters of administration ad litem which are her authority to sue on behalf of the deceased's estate. She further testified that the deceased was 24 years old, was a motor vehicle conductor on a salary of 6,000/- per month, had no payslips and produced a letter from the deceased's employer confirming his employment. She further testified that the deceased had 4 children aged 10, 8, 2 and 4-years respectively, that the children depended on the deceased for support as she only had a small farm. She further produced a motor vehicle search that confirmed that Motor vehicle Registration No. KAX 308ZRC0032 FAW was owned by the 1st respondent. She stated that she did not witness the accident; she was 22 years old and prayed for general and special damages, costs and interest.

5. On cross-examination the appellant stated that she did not carry her identity card, but that she got married to the deceased in church. They lived together for 10 years. She further stated that she was 6 months pregnant before the deceased died with their last born child, that the deceased died at the age of 24 years but as per the death certificate he was 34 years and the deceased profession was not also mentioned in the death certificate.

6. On further cross –examination by the 2nd respondent's advocate the appellant stated that there were 4 motor vehicles involved in the accident but she could not tell which one the deceased was in. The motor vehicles involved in the accident included Registration No.KAH 464D, KAT 302Q and KAP 336S and she did not know who had telephoned her to inform her of the deceased death. She further stated that she had no documentary proof of her husband's employment except a letter his employer wrote. She further stated that she had birth certificates for her children but had not carried them to court. She said she got married to the deceased in Nyankoba S.D.A. church in 2003, and by the time of the deceased's death, she had been married for 10 years to the deceased. The appellant testified that she had not carried any form of identification, although she claimed she was 22 years old and was born in 1978.

7. On re-examination the appellant stated that she was not asked about her husband's occupation when the death certificate was filled.

8. PW2 was **Wycliff Mwangi Kamau** from Kisii Traffic Office. He testified that he was not the investigating officer in this case and that the investigating officer was in Kisumu. He confirmed that the signature on the police abstract was for one of the investigating officers one **Inspector William Adenyo**. As per the abstract a motor vehicle registration KAX 308Z with a trailer 200032 was involved in the accident together with motor vehicle Registration No. KAP 336S. There was also motor vehicle Registration No. KAW 464P and KAT 302Q.

9. On cross examination by 1st respondent, PW2 maintained that he was not the investigating officer and that he only came to court to produce the abstract, though the abstract does not show the motor vehicle in which the deceased was travelling. PW2 stated that he did not carry the investigation file with him, though he confirmed that he knew the handwriting of CIP Adenyo. PW2 admitted that he was not a handwriting expert. He further stated that he did not know whether the driver of Motor vehicle Registration No. KAZ 3082-20032 was charged, but what he could confirm was that the matter was subject to an inquest.

10. On cross examination by the 2nd respondent's counsel, PW2 maintained that the police abstract did not show which motor vehicle the deceased was travelling in, he did not know the inquest number, but confirmed that the accident involved at least 4 motor vehicles though the abstract did not show details of how the vehicles collided.

11. PW3 was **Wycliffe Kaburu Marucha** who established that he was the owner of motor vehicle Registration No. KAX 287, he was deceased's employer, and paid deceased him kshs. 6,000 per month, PW3 produced the deceased's letter of employment as PExhibit.4.

12. On cross examination by counsel of 1st respondent PW3 further stated that he had employed the

deceased for 2 years, paid him 100/- daily and 3,000/- monthly though the deceased did not sign for receipt of salary payments. The deceased badge had his (Employer) details so there was no need for any other record. He further stated that he paid kshs.10,080 as advance tax for motor vehicle sticker and that he did not see the need to register the deceased with the N.S.S.F on cross-examination by the 2nd respondents counsel, he stated his identity card number as 21938296 and maintained that the deceased was his conductor.

13. PW4 was Stella Kemunto Ateka who stated that on 30th September, 2007 she was travelling from town with the deceased going home in a motor vehicle when at Daraja Moja area they got an accident. A trailer from Keroka hit their motor vehicle. She stated that before the accident the trailer had been swerving and she recalled she was in motor vehicle KAP 336S. She was seated at the back of the motor vehicle and could see ahead. She got injured and had filed a separate suit in respect of her injuries. Motor vehicle KAX 308Z was on the wrongside.

14. On cross examination by the 1st respondent's advocate, PW4 produced her identity card but stated that she could not recall the case number and she was yet to testify in her case. She further testified that she knew the deceased as conductor of motor vehicle which she used to board. She stated that on the material day, there were 4 passengers per row and that the deceased occupied the middle row. She said she saw the trailer when it was about 50metres away. According to PW4, the driver of the motor vehicle she was in could not reverse as there were other motor vehicles behind. The motor vehicle ahead was knocked as it tried to evade the trailer and. She further stated that after the accident, their motor vehicle after they were knocked remained on the left hand side as one faces Keroka.

15. On cross-examination by the 2nd respondent's counsel PW4 further stated that the trailer had occupied the whole road with its cabin and that the cabin and the trailer were moving parallel to each other. She further stated that the first matatu had passed the bridge while theirs was on the bridge and could not avoid the trailer as there was nowhere to escape to at the bridge. She further stated that the trailer rested on their motor vehicle after the accident.

16. The Respondents on their part did not call any witnesses.

17. On the 24th March, 2010, the trial court delivered its judgment on the above matter. Regarding ownership of the accident behicles, the learned Senior Resident Magistrate stated the following:-

“On the 1st respondents ownership of motor vehicle Registration KAX 308Z/ZC 0032 he referred to Kisii CMCC.NO.97 of 2008 to obtain evidence of dw1 indicating that indeed the 1st respondents were the owners of the above motor vehicle based on the evidence adduced above, he held the 1st respondent 100% liable for the accident”.

18. On loss of dependency the trial magistrate based his findings on:-

i. *The deceased monthly income at 6,000/- which was supported by PW4 who knew the deceased as a matatu conductor.*

ii. *Details of the mother and 'kids' for whose interest damages were sought were not pleaded in the amended plaint.*

iii. *PW1 testimony that she was the deceased's wife was not credible as she said she was 22 years old, she had 4 children the eldest being 10 years and that she had been married for 10 years.*

iv. *The learned trial magistrate found it rather improbable as it would mean she gave birth while she was 12 years old and got married at 11 years old.*

v. *The plaint gave the age of the deceased as 24 years and PW1's evidence in court also gave the age though the deceased death certificate gave the age of the deceased as 34 years. The trial magistrate*

further stated that the plaintiff/Appellant was represented by counsel who made no efforts to reconcile the anomalies.

19. The trial magistrate then went ahead and awarded a conventional figure of as at Kshs.100,000 for loss of expectation of life and kshs.10,000 for pain and suffering; special damages for police abstract and death certificate at kshs.250/- . The trial court found that there was no proof of other items for special damages. The trial magistrate however awarded the plaintiff/Appellant costs of the suit.

20. It is against this judgment that the Appellant filed a Memorandum of Appeal dated 20th April, 2010 on the following grounds:-

- 1) *That the learned trial magistrate erred in law and in fact in awarding kshs.100,000/- as general damages after making a finding that the applicant had proved her case on a balance of probability.*
- 2) *That the learned trial magistrate erred in law and in fact in awarding kshs.100,000/- when the loss and damages by the applicant were fatal.*
- 3) *That the learned trial magistrate decided the case against the weight of evidence on record.*
- 4) *That the learned trial magistrate erred in law and fact in failing to assess the extent of the damages as sustained by the appellant.*
- 5) *That the learned trial magistrate erred in law and fact by failing to take into consideration the evidence of the appellant as appertains the loss and damages sustained.(sic)*

21. This is a first appeal. On a first appeal this court must reconsider and evaluate the evidence a fresh with a view to reaching its own conclusions in the matter. In doing so, this court must be alive to the fact that it has not had the privilege enjoyed by the trial court of seeing and hearing the witnesses who testified before the trial court. This court is also under a duty to carefully consider and weigh the judgment of the trial court with a view to determining whether the conclusions reached by the trial court should be supported. See generally **Selle & another –vs- Associated Motor Boat Co. ltd & others [1968] EA 123.**

22. Upon consideration of all the above and upon reading the grounds of appeal the issues that arise for determination are the following:-

- i. *Was it proved that the deceased was travelling in the motor vehicles involved in the accident.*
- ii. *Was the 1st respondent proved to be owner of motor vehicle KAX 308Z/ZC 0032.*
- iii. *Was it proved that the plaintiff/Appellant was the wife of the deceased and therefore dependant?*
- iv. *Did the plaintiff/Appellant prove her claim in accordance with the provisions of the Fatal Accidents Act and the Law Reform(Miscellaneous Provisions) Act.*

23. Regarding the first issue, it was the testimony of the appellant that she was not present when the accidents took place and the only evidence which clearly indicates whether or not the deceased was in the accident was that of PW4 who was an eye witness and also a co-traveller. In the trial proceedings she managed to concisely explain how the accident took place. On the basis of the above, this court accepts that the deceased was travelling in motor vehicle Registration Number KAP 336S when the accident occurred.

24. Secondly on the question as to whether or not the 1st defendant was the owner of Motor vehicle Registration No.KAX 308 Z/ZC 0032 PW1, in her testimony, produced evidence of a certificate of search conducted which confirmed that the first respondent was the owner of Motor Vehicle Registration No.

KAX 308 212C 0032, and indeed upon perusal of the Record of Appeal such certificate named as PExh.3 is included therefore. It is thus clear that the 1st defendant is the owner of Motor vehicle registration No. KAX 308 Z/ZC 0032. On the issue of liability of the 1st respondent and the 2nd respondent, the evidence on record, and particularly the testimony of PW4's clearly indicates that the 2nd respondent was not at fault at all for the accident. This is what PW4 stated in part of her testimony:

“The trailer had filled the road together with its cabin. The cabin and the trailer were moving parallel to each other. The cabin/head seemed disjointed from the trailer. The first matatu had passed the bridge while ours was on the bridge while it was hit. The first motor vehicle was hit while it tried to avoid the trailer. Our motor vehicle could not avoid the trailer as there was nowhere to escape at the bridge.

25. From the above evidence, it appears clear that at the time of the accident, the motor vehicle in which the deceased was travelling was not speeding. It was at a near standstill on the bridge where the collision took place. From the above evidence, I agree with the trial magistrate that the 1st respondent's motor vehicle is the one that was at fault and therefore liability for the same attaches at 100%.

26. Thirdly as to whether PW1 proved to be a (wife) to the deceased is not clear as PW1 testified that she had been married to the deceased for 10 years and their wedding was in an S.D.A. church. However, PW1 did not show evidence of such marriage by production of a marriage certificate and in addition, the issue of their ages is also wanting as she testified that the deceased was aged 24 years at the time of his death while she was aged 22 and that they had been married for 10 years and their first born child was 10 years old! Clearly such evidence is unbelievable as it was **NOT** possible for 2 minors aged 11 years and 12 years to be married in church! It seems that she could have miscalculated her age as she stated that she was born in 1978 but she did not carry her identity card to prove her age. Also the deceased's death certificate showed that he was aged 34 years. It is unfortunate that despite the fact that PW1 was represented by counsel, who also sat in court the whole time and heard the contradictory evidence, counsel did not take any initiative to correct the above anomaly. In the circumstances, and taking the evidence adduced by the appellant, I want to say that on a balance of probability the appellant did not prove to be the wife of the deceased.

27. The fourth issue for determination is whether the plaintiff/Appellant proved her case in accordance with the Fatal Accidents Act and the law Reform(Miscellaneous Provision) Act.

28. PW1 testified that the deceased was a motor vehicle conductor and was earning kshs. 6,000. This evidence was supported by PW3 (Who was the deceased employer) and PW4 who knew the deceased as a conductor. However, the issue of the deceased dependants namely that of PW1, his children and mother was not proved. PW1 did not produce birth certificates regarding the deceased's children nor did she even produce the baptismal certificates showing that the people named were indeed the deceased's children and mother respectively. The appellant she did not also show or adduce evidence of how the deceased was assisting his mother. As a result, I agree with the trial magistrate that the claim for loss of dependency is not tenable and therefore the same is dismissed.

29. In the premises, I agree with the decision of the trial magistrate and I see no reason to interfere with the same on both liability and quantum. I therefore dismiss this appeal with costs to the Respondents.

Dated and delivered at Kisii this 2nd day of November, 2012

RUTH NEKOYE SITATI,

JUDGE

In the presence of:

M/s Ombati Ombati (present) for appellant

Mr. Odhiambo Kanyangi (present) for respondents

Mr. Bibu Court Clerk.

RUTH NEKOYE SITATI,

JUDGE.