REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 234 OF 2005

JAMAL RAMADHAN YUSUF) .....1ST APPELLANT

CARPENTO CRAFT CO. LTD).....2ND APPELLANT

-VERSUS-

RUTH ACHIENG ONDITI).....1ST RESPONDENT

JOSHUA ODERO WAGUNDO).....2nd RESPONDENT

JUDGMENT

(an appeal from Judgment and Decree of Soita P.M. in Kisii CMCC.no. 703 of 2002 delivered on 13th September, 2005

By an amended plaint dated 2nd November, 2000 and filed in this court on 6th November, 2000 the 1st respondent then as the plaintiff claimed as against **Joshua Odero Wagundo, James Ramadhan Yusuf** and **Carpenterocraft Company Ltd** then as defendants and now 2nd respondent, 1st and 2nd appellants herein respectively the sum of Kshs. 16,460/- being special damages, General damages, costs and interest. The suit was necessited by an accident which occurred on the 25th July, 1997 at about 5.45 p.m along Rongo-Awendo road near Kanga School. The 2nd respondent was the registered owner and or driver of motor vehicle registration number KAA 608 Toyota Hiace whereas the 2nd appellant was the registered owner of motor vehicle registration number KUX 355 Isuzu lorry which at the time was being driven by the 1st appellant as its employee, servant and or agent.

The 1st respondent at the material time was married to one J**ohn Odhiambo Abongo**, deceased. On the said date, time and place, the deceased was lawfully travelling as a fare paying passenger in the 2nd respondent's said vehicle when it collided with the 2nd appellant's motor vehicle aforesaid which at the time was being driven by the 1st appellant. As a result of the accident, the deceased suffered bodily

injuries from which he died an hour or so later at St Joseph's Mission hospital, Ombo. The 1st respondent, then initiated the suit against the 2nd respondent, 1st and 2nd appellants jointly and severally on her own behalf and on behalf of the dependants of the deceased pursuant to the fatal Accidents Act and the Law Reform Act having obtained Letters of Administration to the estate of the deceased. She blamed the death of her husband on the negligence on the part of the 2nd respondent, or 1st the appellant and or both in the manner they controlled, managed and drove their respective motor vehicles aforesaid on the material day. She went on to give particulars of negligence she attributed to each one of them. By reason of the death of the deceased, his estate and dependants had suffered loss and damage. At the time of his death the deceased was aged 36 years, working as a Divisional Fisheries Officer in charge of Awendo Division, earned a monthly salary of Kshs.4,355/= with good prospects of advancement and promotion. Apart from his job, the deceased supplemented his salary by leasing farms and planting maize which he later sold for a profit. He also used to engage in the purchase and sell of cereals. From these extra businesses he would earn roughly Kshs. 12,400/=. He would use the money to support his family which was wholly dependant on him. But for the accident, the deceased enjoyed good health and lived a happy and vigorous life and was expected to live upto a very advanced age. By reason of the said death his expectation of a long and happy life was considerably shortened and his estate thereby suffered. In terms of special damages, the estate spent a total sum of Kshs. 16,460/= that included cost of a coffin, clothing, preparing the grave, Death Certificate, Police abstract and court fees on application for grant of letters of Administration which she too claimed from the appellants as well as the 2nd respondent.

Upon being served with the suit papers, the appellants and the 2nd respondent duly filed their defences. In the defence filed on 16th June, 2000 by the 2nd respondent he denied that the 1st respondent had locus standi to prosecute the suit. He also denied negligence and particulars thereof attributed to him, vicariously or otherwise. He also denied that the deceased was a passenger in his vehicle. Finally he averred that the accident if at all was wholly or substantially contributed to by the negligence of the 1st appellant.

As for the appellants, they put in a joint defence. They denied each and every allegation in the plaint as concerned them. They denied that the 2nd appellant was the registered owner of motor vehicle registration number KUX 355 and that it was being driven by the 1st appellant at the material time. In the alternative they pleaded that if there was such an accident, then the 2nd respondent was wholly to blame and gave the particulars of negligence thereof. Finally they pleaded that the court lacked jurisdiction to entertain and adjudicate upon the suit and they intended to raise the issue as a preliminary objection.

Following closure of pleadings, the suit was set down for hearing severally but for one reason or another it failed to take off. On 30th September, 2002, a consent order transferring the suit to the Chief Magistrates, court, Kisii for hearing and final determination was recorded before **ICC Wambilyanga J.** Eventually, the hearing commenced before **SMS. Soita P.M** on 26th January, 2005. In support of her case, only the 1st respondent testified.

In a nutshell her evidence was that she got married to the deceased in 1988. They were blessed with 3 children, **C.A, A.A** and **D.A**. They were all born between 1988 and 1996. The deceased was working with the Fisheries Department having been employed thereat in 1985. He had studied up to Form four. At the time of his death his salary was Kshs. 4,355/=. She tendered in evidence the birth certificates of the three children, school certificates as well as pay slips of the deceased. The deceased was involved in a road traffic accident on 25th July, 1997 as he was coming from Rongo. The accident was next to Kanga as one goes downhill. She did not witness the accident though. She reported the accident to the police. She later buried the deceased at Kabondo. In the process she incurred several expenses in hiring the motor vehicle to ferry the deceased, bought coffin, animals to slaughter, police abstract, death certificate and obtained a Limited Grant. According to the information she received, her husband was in a Nissan matatu KAA 608W which collided with a lorry KUX 355. She had found the vehicles at the scene. Whereas the matatu was on the right side the lorry was on the left side as one faced Migori direction. The deceased was aged 36 years old at the time of death and was in good health. Other than his salary he had opened for her a kiosk. He also used to buy and sell maize in schools. He had a licence for the business which she tendered

in evidence. Apart from his immediate family, he also used to take care of his brothers and sisters as he was the first born. She was at the time aged 28years old and had not re-married since the death of her husband.

She was cross-examined on her evidence by **Mr. Ongeri**, learned counsel then appearing for the appellants. She conceded that she never witnessed the accident. She was also not sure whether she had sought damages for loss of consortium. The deceased never used to take beer as he was a staunch Christian. She could not tell from his salary how much he used on himself.

The record is not clear as to the circumstances under which the case proceeded in the absence of the 2nd respondent and or his counsel. Anyhow following the testimony of the 1st respondent, she closed her case.

On 23rd March, 2005, the 1st appellant took the stand. He testified that on 25th July 1997 he was driving the lorry KUX 355 from Kisii to Migori. Near Kanga area and as he was going downhill a matatu appeared from Migori direction on a Yellow line. He moved to the left but the matatu hit the body of his lorry. He was driving on his side of the road doing about 40KPH. 3 people died on the spot. Police came and took measurements. He was later charged in Migori with traffic offence of dangerous driving but he was acquitted. He blamed the matatu driver for the accident as he did the best to avoid the accident.

Cross –examined by **Mr. Okoth**, learned counsel for the 1st respondent, he stated that the slope was very steep and there is a curve to the right. When the police came to the scene, he showed them skid marks that were about 3 metres. The matatu did not brake at all. The lorry belonged to the 2nd appellant. Though he was subsequently charged, he was nonetheless acquitted. The matatu driver never testified. Before the accident the matatu had crossed the yellow line. He denied that it was him who drove on the wrong side of the road.
With that the appellants closed their case.
In a reserved judgment delivered on 13th September, 2005, the learned magistrate found in favour of the 1st respondent holding thus :-

"……the defendant called Jamal Ramadhan Yusuf who was driving lorry registration number KUX 355. He said it is the Nissan matatu which crossed the yellow line and hit the body of the lorry he was driving. He said he was charged at Homa Bay court but was acquitted. He blamed the driver of the matatu for that accident.

I have carefully appraised the evidence on record. From the evidence before (sic) it is clear the deceased died following a road traffic accident. The collusion involved two motor vehicles. The 1st defendant did not appear at the hearing. The only evidence of what transpired was adduced by his 2nd defendant but his evidence started falling apart when he was cross examined by Mr. Okoth. He was infact charged but the matter was not fully prosecuted. I am minded to apportion liability between the 1st defendant on one hand and the second and third defendant (sic) on the others. (sic) This will be 20% to 80%.
The plaintiff exhibited the pay slip of her deceased husband. It was for Kshs. 4355/-. He was also running a family business. I will take the figure of the Kshs. 2,500/= as his estimated earning a month. His total earnings will be Kshs. 6,866/-. I am minded to use a multiplier of 15 with a two thirds ratio which will work as follows for loss of dependancy 6866 x 12x15x 2/3 =823,920.
This is the sum I will award and an apportionment the first defendant shall bear Kshs. 164,784/= while the second and third defendant shall bear kshs.659,136/=

On loss life I will award the conventional sum of Kshs. 100,000/= on apportionment the 1st defendant shall bear Kshs. 20,000/= while the second and third defendants shall bear Ks. 80,000/=.

As for special damages the amount proven is Kshs. 15,000/= which I will award. This when apportion (sic) will leave the 1st defendant to bear and third defendants shall bear Ksh. 12,000/=
The prayer for loss o consortium was pleaded in paragraph 9. I will award Kshs. 50,000/=. On

apportionment the first defendant shall bear Kshs. 10,000/= while the second and third defendants shall bear Kshs. 40,000/=.
The Plaintiff shall also have cost of the suit and interest. Judgment accordingly……..”

Aggrieved by the aforesaid judgment, the appellants lodged the instant appeal. They advanced 9 grounds of appeal in their memorandum of appeal dated 28th September, 2005 and filed in the court on the following day. These were:

“1. THAT the learned trial magistrate erred in Law and fact in making the award in the said judgment as the same was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the injured.

2. THAT the learned trial magistrate erred in law and fact basing his judgment on conjectures and suppositions, which were not on record.

3. THAT the learned trial magistrate erred in law and fact in entering judgment for the plaintiff without considering the credible evidence by the defence.

4. THAT the learned trial magistrate erred in law and fact in apportioning liability.

5. THAT the learned trial magistrate erred in law and fact in awarding General Damages under heads not pleaded and/or proved a (sic) required by law.

6. THAT the learned trial magistrate erred in law and fact in awarding General Damages by taking into account irrelevant and non-legal considerations.

7. THAT the learned trial magistrate did not resolve the conflicts in evidence before him and thereby reached the wrong conclusions.

8. THAT the learned trial magistrate erred in law and fact in not applying the evidence before him to the pleadings of the parties.

9. THAT the learned trial magistrate erred in law and fact in failing to find that the plaintiff had not discharged the burden of proof in relation to her cause of action.

When the appeal came up for hearing, parties agreed to canvass the same by the way of written submissions. Subsequently the said written submission were filed and exchanged. I have carefully read and considered them.

It is the jurisdiction of the first appellate court to review the evidence tendered in the trial court in order to determine whether the conclusion originally reached upon the evidence should stand. However it is a jurisdiction which should be exercised with caution; and it is not enough that the appellate court might have come to a different conclusion. See **Peters V Sunday Post Ltd (1958) E.A 424 and Geoffrey Kihunyu Wanjura V. Gichihi Kifura and Anvher, C.A No 67 1997 (UR**).

It is common ground that an accident occurred involving motor vehicle registration numbers KAA 608 and KUX number 355 along Kisii – Migori road near Kanga on 25th July,1997 at about 5.45p.m. It is also common ground that motor vehicle KAA 608W belonged to the second respondent whereas KUX 355 belonged to the 2nd appellant and was at the material time being driven by the 1st appellant. It is instructive however to note that in their defence the appellants had initially denied the occurrence of the accident, the ownership of motor vehicle KUX 355 and the fact that the 1st appellant was an agent, driver and servant of the 2nd appellant. However in his own testimony the 1st appellant confirmed to the contrary all the foregoing. It is also common ground that as a result of the said accident, the deceased passed on whilst aged 36 years and was then working as a civil servant in the fisheries department. Finally, it is also common ground that the deceased left behind dependants set out in the plaint.

It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ***ipso facto*** must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove. In this case the 1st responded was minded to prove that the accident was caused by the negligence of the appellants, or 2nd respondent and or both. As stated in the case of **Mount Elgon Hardware V United Millers C.A No. 19 of 1996 (UR)**

"……It is still the duty of a party -alleging negligence to prove it". Similarly in the case of **Mwaura Mwalo V Akamba Public Road Services Ltd, NVI HCCC NO. 5 of 1989 (UR),** it was held that the burden of proving negligence is on the plaintiff on a balance of probabilities and that evidence should support the pleadings. So that it is not enough to allege negligence and give particulars thereof but offer no or call no evidence in support of the particulars thereof. This is what happened in the circumstances of this case.

The 1st respondent was the sole witness in her case. However the record shows that she did not witness the accident. Indeed in her own testimony she says as much. She did not call any witness who might have observed, witnessed or was involved in the accident. There must have been witnesses to the accident. Even if she could not trace any such witnesses, the evidence suggests that the police came to the scene and investigated the case leading to the 1st appellant being charged with a traffic offence. However the record shows that the traffic case never saw the light of day. According to the learned magistrate, ***"…..he was infact charged but the matter was not fully presented". (sic)*** However according to the 1st appellant he stated ***"…..the case was at Homa bay court, I was acquitted…."*** This goes to show that the police were involved in the investigations of the accident. Why then could the 1st respondent not avail them or any one of them to testify as to the results of their investigations. At least the investigating officer should have been summoned to testify and perhaps support the 1st respondent's case with regard to the alleged negligence and the results of the investigations into the accident. This was not done with the consequence that whatever the 1st respondent said about negligence if at all was basically what she was told thus, it was hearsay and inadmissible. Indeed she said nothing with regard to the particulars of negligence she attributed to the appellants and or 2nd respondent with regard to the accident. All she could testify was ***"…..I was told two vehicles were involved in the accident ……. My husband was in a Nissan Matatu Reg. No. KAA 608W. The collusion was between this vehicle and the lorry Reg. no. KUX 355 …… when I arrived both vehicles had been removed from the road…."*** Under cross-examination she stated ***"…..I did not witness the accident happening, I went to the scene after 30 minutes. I cannot tell if the vehicle had been moved….."*** As can be seen from the foregoing there is completely no reference at all to the negligence and the particulars thereof attributable to the appellants. In his judgment, the learned magistrate too did not bother to establish whether negligence attributed to the appellants was proved. Yet it is the duty of the magistrate in a road traffic accident to reach such a conclusion. See **Abubakar Haji V Murair Freight Agencies Ltd KAR 474**. Infact in his entire judgment he never discussed or addressed the issue of negligence, contributory or otherwise. I am thus unable to understand the basis upon which he found the appellant's liable or even the basis for apportionment of liability between them and the 2nd respondent. He seems to have proceeded on the basis that merely because there had been a collision involving the two motor vehicles, then both drivers were to blame and proceeded to apportion liability on the basis of 20% as against the 2nd respondent and 80% as against the appellants. One is hard pressed to understand the basis of this apportionment considering that the 2nd respondent never offered evidence in support of his defence. Indeed he never at all appeared at the hearing. On the other hand the 1st appellant testified on his own behalf and on behalf of the 2nd appellant. He testified as to how the accident occurred. He said that as he was driving on his side of the road and on reaching Kanga area going down hill a Nissan matatu appeared from Migori direction driving on a yellow line. He moved to the left and that matatu came and hit the body of his lorry on the right. He was driving at about 40 KPH. Despite vigorous cross-examination, this appellants evidence was not shaken. I note though that in his judgment, the learned magistrate was of the view that the witnesses' evidence started to fall apart under cross-examination. However that conclusion is not borne out by the record. There was no evidence to rebut the 1st appellant's evidence from both the respondents therefore. Accordingly, that evidence remained unchallenged with regard as to how the accident

occurred. He was apparently the only witness to the accident though a victim and or suspect. From this evidence, the blame was squarely on the 2nd respondent. There was therefore no basis for the learned magistrate to have apportioned liability as aforesaid. Had there been no direct or no evidence at all as to how the accident may have occurred then perhaps the learned magistrate may have been right in his conclusions. For in the case of **Berkley Steward V Waiyaki, 1KAR 1118** it was held that where there is no direct evidence as to how the accident took place then both drivers are to blame. This was not the case here. The appellants adduced evidence that ousted them from the seat of liability. In the case of **Edward Muuga V Nathaniel D. Schuller (C.A. No 23 of 1997 (UR),** the Court of Appeal also observed that where a defendant does not adduce evidence the plaintiffs' evidence is to be believed. In this case I would replace the term Plaintiff with respondents. The respondents herein did not adduce any evidence as to what precipitated or circumstances leading to the accident. That evidence was given by the 1stappellant and it was never rebutted. It must therefore be believed. The situation here is not like the ones that prevailed in the cases of **Mwana Sokoni V Kenya Bus Services Ltd** and **3 others (1982-88) 1KAR 87** and **M.M. Jabare V. Highstone B. Olenja (1982-88) 1KAR 982** cited by counsel for the 1st respondent.

Finally, it would appear that the learned magistrate may have been moved by the fact that the 1st appellant was after the accident arrested and charged with a traffic offence to conclude that he was substantially to blame for the accident. However from the evidence on record, that conclusion has no basis at all since the appellant himself said that he was acquitted of the charge and indeed the learned magistrate himself concluded that ***"He was infact charged but the matter was not fully presented… "***

On the whole therefore I find that there was no evidence that the appellants solely caused the accident and or substantially contributed to the same. The evidence on record was insufficient to prove that the appellants were negligent and caused the accident. The negligence pleaded and particulars thereof given were not at all proved. Accordingly the learned magistrate erred in attributing the accident to the appellants to the extent of 80%. There was no basis for such apportionment.
This finding alone is sufficient to dispose off this appeal. Accordingly I allow the appeal, set aside the judgment and decree of the subordinate court and substitute therefore with an order dismissing the 1st respondent's suit with costs. The appellants too shall have the costs of this appeal.

Had I however dismissed the appeal, I would not have interfered with the award of damages as it was correctly and properly computed by the learned magistrate.

Judgment dated, **signed** and **delivered** at Kisii this 17th June, 2010.

ASIKE-MAKHANDIA

JUDGE