



NO. 2934

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 137 OF 2009

BONIFACE OCHIENG

ONONO.....APPELLANT

VERSUS

ANDERSON OGAWO ACHOLA Suing as father and

Administrator of the Estate of

REISA GETURA OGAWO (Deceased).....RESPONDENT

JUDGMENT

Bonface Ochieng Onono, “the appellant” filed this appeal challenging the decision of the subordinate court rendered on 18th June, 2009 in which **Hon. Ezra O. Awino**, then Principal Magistrate at Migori law courts awarded **Anderson Ogawo Achola, “the respondent”** the sum of kshs.540,000/- on account of general as well as special damages respectively under the **Law Reform Act** and **Fatal Accidents Act**. The appellant challenges that decision on both liability and quantum. A total of twelve grounds of appeal are advanced, to wit:-

“1. The learned magistrate erred in law and fact in holding that the defendant was 90% liable for the accident and or at all.

2. The Learned Magistrate erred in law and fact in failing to appreciate the impeccable evidence of the defence and thereby arriving at a wrong and erroneous conclusion condemning the defendant to liability and awarding exaggerated damages and/or high in the circumstances.

3. The learned Magistrate erred in law and fact in awarding damages in favour of the plaintiff without any legal and or evidential justification as to the income of the deceased minor.

4. *The Learned Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving (sic) an erroneous finding/conclusion.*
5. *The Learned Magistrate erred in law and fact in failing to appreciate as follows:*
 - i. *THAT the evidence adduced in support of the Plaintiff's case was incongruous with the pleadings, composes (sic) of hearsays, tendered by incompetent witnesses, contradictory and discreditable.*
 - ii. *THAT the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining any award of damages.*
6. *The learned Magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant inspite of the plaintiff's miserable failure to establish his case on a balance of probability.*
7. *The Learned Magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances and otherwise high.*
8. *The Learned Magistrate erred in law and fact in entering judgment for the plaintiff in total disregard of the exculpatory evidence by the defence and the authorities in submission.*
9. *The Learned magistrate erred in law by awarding excessible damages beyond the scope evidence and or legal entitlement and ignoring the submissions on quantum by the defendant.*
10. *The Learned Magistrate erred in law by awarding the loss of dependence as no evidence to that effect was ever tendered nor the dependants disclosed.*
11. *The Learned Magistrate erred in law by assessing the income of the deceased when no evidence was ever tendered to attest as much.*
12. *The Learned Magistrate erred in fact and law in failing to hold the defendant was never the owner of the Tractor Registration NO. KAV 476B Trailer No.2C4684...".*

By a plaint dated 24th June, 2008, the respondent acting as a father and administrator of the estate of **Reisa Getura Ogawo**, "*the deceased*" sued the appellant claiming damages as a result of the fatal accident involving the deceased and the appellant's tractor registration number, **KAV 476 B** on 11th February, 2008. Apparently on that day at about 6.30p.m, the deceased who was the daughter of the respondent was standing besides **Rapogi-Awendo** road when the appellant's driver so negligently drove, managed and or controlled the aforesaid tractor that he caused it to violently run over the deceased who sustained severe injuries from which she succumbed to on the same day. At the time of her death, the deceased was aged 8 years old and in class one at **Susana Academy, Awendo**. She was a bright student and enjoyed good health, longed to be an electrical engineer and by her death, her expectation of a

healthy and happy life had been considerably shortened and her estate had suffered damage, hence the suit.

The appellant denied the respondent's claim right from ownership of the tractor to negligence and the particulars attributed to him thereof. He took the view that, the respondent was a stranger, a busy body and or incapacitated to institute the suit, the same being fictitious, unavailable and an abuse of the court process. Alternatively, if the alleged accident occurred, then the same was solely and or overwhelmingly occasioned by the recklessness and negligence of the deceased.

However as the suit was pending trial, parties entered a consent on liability in terms that the appellant would bear 90% liability to the respondent's 10%. Thereafter the suit proceeded to hearing by way of assessment of damages. In a reserved judgment, the learned magistrate made the following awards:

Under Law Reform Act

- | | |
|---------------------------------------|---------------|
| a) Loss of expectation of life | 80,000 |
| b) Pain and suffering | 10,000 |

Under Fatal Accident Act

- | | |
|---------------------------------------|----------------|
| a) Loss of expected dependency | 500,000 |
| b) Special damage | 10,000 |
| Total Kshs.600,000 | |

Less 10% contribution Kshs.540,000/-

As already stated, the appellant was aggrieved by that judgment and decree, hence, the appeal.

When the appeal came before me on 5th July, 2011 for directions **Mr. Bosire** and **Mr. Mose** learned counsel for the appellant and respondent respectively agreed as part of directions that the appeal be canvassed by way of written submissions. They subsequently filed and exchanged written submissions together with authorities which I have carefully read and considered.

This appeal is bound to fail for want of competence. An appeal is ordinarily against a degree. Order XL1 rule 1a makes it mandatory that a record of appeal must contain a certified decree appealed from. In the absence of such decree, the appeal is rendered incompetent. In this appeal, there is no copy of certified or uncertified decree. The issue of certified decree not being in the record was brought to the attention of the appellant way back on 28th March, 2011 by a letter from this court to that effect. Yet the appellant took no steps at all to rectify the omission. Indeed the appellant took no steps at all to extract a certified decree

until the appeal was heard. No decree having been extracted to date, there cannot be a valid appeal against a non-existent decree. This appeal is therefore incompetent and liable to be struck out. It is noted also that this issue was raised in the respondent's written submissions at length. Ordinarily, I would have expected some response from the appellant. That response was not all forthcoming. If anything the appellant appears to have given it a wide berth. I do not think that the appellant could have had any response in any event.

The appeal is incompetent. Accordingly, it is struck out with costs to the respondent.

Judgment dated, signed and delivered at Kisii on this 23rd day of September, 2011.

ASIKE – MAKHANDIA

JUDGE