IN THE COURT OF APPEAL

AT KISUMU

(Coram: Omolo, O'Kubasu & Keiwua JJ A)

CIVIL APPEAL NO 49 OF 2000

DILIP ASAL …….. APPELLANT

VERSUS

HERMA MUGE

DIOCESE OF ELDORET, CHURCH OF THE PROVINCE OF KENYA [C.P.K.]…...RESPONDENTS

(Appeal against the judgment and decree of the High Court at Kakamega

(Tanui J) dated 9 July 1997 in Kak HCCC No 351 of 1994)

JUDGMENT

Herma Muge, the respondent herein, is the widow of the late Bishop Alexander Kipsang Muge of the Anglican Church of Kenya, Eldoret Diocese. That illustrious son of Kenya died in a road accident on 14th August, 1990. At the time of his death, the late Bishop Muge was driving his motor vehicle registration number KAA 405 S, along the Webuye- Eldoret Road. The Bishop's vehicle was involved in the accident when it was hit, apparently head on, by a Mitsubishi Fuso lorry registration number KYR 128. The lorry, at the time of the accident was being driven by one Nicanori Munai Omukoba. According to the "FURTHER FURTHER AMENDED PLAINT" filed by Mrs Muge in Kakamega, the vehicle her late husband was driving was owned, not by Bishop Muge but by his employer, the Diocese of Eldoret. The vehicle driven by Omukoba, that is, the Mitsubishi Fuso lorry registration number KYR 128 was owned by Dilip Asal, the appellant herein and Omukoba was merely driving the vehicle as a servant or agent of the appellant.

Following the accident, Omukoba was charged with the traffic offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act, Cap 403, Laws of Kenya. He was tried on that charge before a Principal Magistrate at Eldoret, who in a 97 typed page judgment, convicted him of the offence, sentenced him to seven years imprisonment and ordered him disqualified from driving for a period of five years from the date of his release from prison. Omukoba appealed to the High Court against his conviction and sentence, but before his appeal could be heard, the Almighty Himself intervened and he

joined Bishop Muge in death. Accordingly the conviction recorded against him while he was still with us here on earth still stands to this day.

Now the late Bishop Muge had a wife and children. He had his mother and other relatives and they depended on him. There was no dispute that he was paid a salary, allowances and other benefits by the Anglican Church in Kenya or the Church of the Province of Kenya as it was called during the time of Bishop Muge. Following his death at the relatively young age of 42 years, Herma, her four children, Bishop Muge's mother and his other relatives lost the support which the Bishop had hitherto provided to them. Herma took out a grant of letters of administration and having done so, she sued Omukoba and finally Dilip Asal, alleging negligence against Omukoba and as Omukoba was said to be a servant or agent of Dilip Asal, the latter was alleged to be vicariously liable for the negligence of Omukoba. The suit was brought for the benefit of Herma herself, her four children, the other dependants of Bishop Muge and his estate. When the suit was filed first on 1st November, 1991, it was then thought that motor vehicle registration number KAA 405 S Peugeot 405 saloon was the property of the Bishop and Herma claimed damages for it. But it was subsequently found that the vehicle had in fact belonged to the Diocese of Eldoret and hence the "further further amended plaint" of 1995. Mr Menezes who argued the appeal on behalf of Dilip said the claim of the Diocese was time-barred under the Limitation of Actions Act, but we are unable to accede to this contention because the claim over the vehicle had always been there right from the beginning and the only amendment brought in 1995 was to change the party making the claim. This could not have caused any injustice at all to the appellant, as the only change the amendment made in 1995 was that instead of paying the value of the vehicle to Mrs Muge, the appellant was asked to pay it to the Diocese of Eldoret. In any case when the hearing of the case opened before Tanui, J Mr Menezes raised as a preliminary objection, the issue of the claim by the Diocese of Eldoret being statute-barred. The matter was argued at length and the learned judge had to adjourn the matter for one whole week after which he delivered his considered ruling. No appeal was brought against that ruling and it is now too late in the day for the appellant to complain about it.

Dilip, the appellant and Omukoba of course denied negligence and in the alternative pleaded contributory negligence. These issues were tried before Tanui, J and in a considered judgment dated 9th July, 1997, the learned judge found and held that the late Omukoba was wholly to blame for the accident and the learned judge rejected the contention by the appellant that the late Bishop was contributorily negligent. The appellant challenged these findings before us.

We readily agree with Mr Menezes, learned counsel for the appellant, that the mere fact that Omukoba was convicted of the charge of dangerous driving does not bar the appellant from raising the issue of contributory negligence. That is now old hat since 1971 when the case of *Robson v Oluoch* [1971] EA 376 was decided. In that case, the Court of Appeal for East Africa said at page 378, letters B to D:

"The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving in relation to the accident, was negligent. But that is a very different matter from saying, as Mr Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what s 47A [of the Evidence Act] states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident, that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. ..."

In the present appeal, Omukoba had claimed at his trial for the offence of causing death by dangerous driving that it was Bishop Muge who had been overtaking another vehicle or other vehicles in the face of on-coming traffic among which was Omukoba's own lorry. The trial magistrate found as a fact that it was Omukoba's lorry which moved to the side of the Bishop's car and there, the lorry *"*ploughed*"* into the car. The magistrate found at page 92 of her judgment:

"Secondly, having heeded the warning from the Fuso flash-lights and also bearing in mind the fact that the deceased was not drunk I do not think that he could have attempted to overtake in the light of the on-coming Fuso and I so find that he did not attempt to overtake."

The learned judge for his part, accepted the evidence of one John Onyango Owino (PW6) and the burden of this witness' evidence was that Omukoba's lorry which had been moving at a high speed with its head-lights flashing, hit the vehicle of Bishop Muge which had been following another lorry. The witness denied that Bishop Muge had been attempting to overtake the lorry in front of him.

What was the nature of the contributory negligence being alleged against Bishop Muge" It was that he had been overtaking a lorry in the face of Omukoba's on-coming vehicle. If that had been true, then the late Bishop would have been the sole cause of the accident and we do not see how the question of contributory negligence would arise. But that contention was rejected by the magistrate who convicted Omukoba on the charge of causing death by dangerous driving. The conviction, unfortunately for the appellant, has not been set aside and could not have been set aside as Omukoba has died. The learned judge as we have seen, accepted the evidence of John Onyango Owino and rejected the evidence that the late Bishop had been overtaking another vehicle when the accident occurred. In the face of these findings, we do not find any basis upon which we can find, in this appeal, that the late Bishop Muge contributed to the accident in which he lost his life. We accordingly reject the appellant's grounds of appeal which challenge the learned judge's findings that Omukoba was wholly to blame for the accident.

What of damages awarded to the respondent" We remind ourselves that the assessment of damages is essentially an exercise of discretion and the grounds on which this Court will interfere with the exercise of a discretion by a trial judge are now well known and we need not repeat all of them in this judgment. The only one we wish to deal with in this appeal is that the learned judge may have applied a wrong principle when he awarded to

Herma:

(i) loss of dependency - KShs 2,592,000/=

and

(ii) lost years - KShs 525,600/=

On this aspect of the matter, the learned judge seems to have had the correct principles in his mind for he said:

"It is evident that the award made under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the former Act are the same beneficiaries of the estate of the deceased in the latter Act. Although Section 2 (5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act we cannot ignore the fact that the same parties benefit from awards made under both Acts. This is not done then there is a danger of duplication of awards. *...*"

This Court itself put the matter thus in the case of *Maina Kaniaru & another v Josephat Muriuki Wangondu,* Civil Appeal No 14 OF 1989 (unreported):

“The rights conferred by Section 2 (5) of the Law Reform Act (Cap 26, Laws of Kenya) for the benefit of the estates of deceased persons are stated to be “in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act”. This does not mean that damages can be recovered twice over but that if damages recovered under the Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act. ..”

The learned judge awarded to the dependants of Bishop Muge Kshs 2,592,000/= for loss of dependency and this was obviously under the Fatal Accidents Act. Then the learned judge, proceeded to award to the estate of the late Bishop Kshs 525,600/= as damages for lost years, obviously under the Law Reform Act. This latter sum would obviously go to the same dependants who were the beneficiaries of the estate. Whether one designates it as failing to take into account the fact that Kshs 2,592,000/= had been awarded to the dependants or whether one designates it as a failure to apply the correct principle by the learned judge, it is a matter which certainly entitles the Court to interfere with the award made by the learned judge. We accordingly interfere and set aside in its entirety the award of Kshs 525,600/= given by the trial judge as damages for lost years, with the result that the total award of KShs 3,217,750/= given by the learned judge is reduced by KShs 525,600 to Kshs 2,592,150/=. To that extent, the appeal is allowed and we award to the appellant one third of the costs of the appeal. Those shall be the orders of this Court.

Dated and Delivered at Kisumu this 21st day of December, 2001

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL