

TANZANIA / JUDGMENT

flora bigoko kapizo vs godswill makombe 2012 tzhc 9 14 december 2012

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TZHCDECIDED
14 December 2012

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL CASE NUMBER 204 of 2011
FLORA BIGOKO KAPIZO.....PLAINTIFF VS GODSWILL MAKOMBE.....
DEFENDANT Last Order: 29 10-2012 - Judgment: 14 12-2012 - EX PARTE JUDGMENT JUMA, J. This ex-parte judgment and order arises out of a suit filed by the plaintiff Flora Bigoko Kapizo. As an administrator of the estate her late father, Braulius Bigoko; the plaintiff is suing the defendant Godswill Makombe for causing the death of her father who she described as her sole breadwinner. The plaintiff is praying for Judgment and Decree of a principal sum of Tshs. 414,000,000/=, interest thereon at the bank rate of 31% from 8th December 2011 till the date this judgment is delivered. The plaintiff further prays for interest at the court rate from the date of judgment' till the defendant effects the payment in full. Several attempts by the Plaintiff to effect personal service of court processes on the defendant failed. A substituted service was resorted to, and was published in UHURU newspaper of August 23, 2012. On September 7, 2012 Mr. Massawe, the learned Advocate who was appearing for the Plaintiff, prayed for the suit to be heard ex parte on a date to be specified by the court. I acceded to the request and specified October 29, 2012 as the date for the ex parte proof. The Plaintiff was the only witness (PW1) who testified. The Plaintiffs case was that on 1st day of June 2011, Mr. Makombe while driving his vehicle (Registration Number T106 BMP, Toyota Rav 4), knocked down the motor cycle which the late Braulius Bigoko was riding. Braulius Bigoko died on the spot. The Plaintiff was appointed by the Primary Court of Temeke to administer the estate of her father, the late Braulius Bigoko. Later on, Godswill Makombe was charged in the Resident Magistrate's Court at Kinondoni (Traffic Case No. 648 of 2011). The defendant pleaded guilty to all three counts he faced. Following his conviction and sentence, the defendant opted and paid a total fine of Tshs. 110,000/= instead of going to prison. The Plaintiff insisted that her claim for Tshs. 414,000,000/= is for the pain and suffering for loss of her father, Braulius Bigoko. Apart from her evidence in chief, PW1 also produced exhibits, including her father's Death Certificate No. C 10000 6048 dated 17th August 2011 (Exhibit P1); record of proceedings of the Traffic Case Number 648 of 2011 in which the Defendant was charged on three counts and convicted (Exhibit P2). PW1 also exhibited a copy of a letter of her appointment as an Administrator of the Estate of the deceased (Exhibit P3); and a copy of a demand letter (Exhibit P4) which she sent to both Dr. Godswill Makombe (as an insured) and the Alliance Insurance Corporation Limited (as Defendant's Insurer). Through her

evidence in chief and the documents she exhibited, the Plaintiff blamed the defendant for the accident and urged the court to hold the defendant fully liable in negligence. The main issue calling for my determination is whether it was the negligent act of the defendant which caused the death of the deceased, for which the defendant owed the Plaintiff a duty of care. It is obvious from her evidence in chief that the Plaintiff did not witness the incident which led to the demise of her father. But to establish the negligent act of the defendant she relies mainly on the records of Traffic Case Number 648 of 2011 wherein the defendant had been arraigned and subsequently pleaded guilty of causing the death of the late Braulius Bigoko. The Plaintiff surmises that since the defendant pleaded guilty and was convicted and sentenced for causing death by dangerous driving arising from the accident subject of this suit, the defendant should also take full responsibility for negligence under this civil suit. After looking at the evidence in chief and documentary evidence that the Plaintiff exhibited, I am prepared to seek the guidance of section 43A of the Evidence Act, Cap. 6 which states: 43A. A final judgement of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgement or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates. Applying this provision on the evidence on record, I can deduce that so far, there is no evidence to suggest that the conviction of Dr. Godswill Makombe has been overturned by any superior court. Guided by section 43A of the Evidence Act, I hereby make a finding that exhibit P2 manifesting the records of the Traffic Case Number 648 of 2011 at Resident Magistrate's Court of Kinondoni conclusively prove that the defendant was convicted of the offence of negligent and careless driving which relates to the subject matter of this suit. It is also my finding that although the Plaintiff did not witness the accident that led to the death of her father, the conclusiveness of the Judgment in the Traffic Case Number 648 of 2011 at Resident Magistrate's Court of Kinondoni prima facie establishes that it was the negligent driving of the defendant Dr. Godswill Makombe which caused the death of the late Braulius Bigoko. Having come to the conclusion that the defendant was negligent, it is important to move on to the question of damages which should be payable. To answer this question I will inevitably rely on the only evidence on record, i.e. evidence of the Plaintiff herself and documentary evidence she exhibited. In both her plaint and her evidence in chief, the Plaintiff prays for a sum of Tshs 414,000,000/= to compensate her pain and suffering for losing her father and a breadwinner. I have also considered Plaintiff's Demand Note which was admitted as Exhibit P4. In this demand letter, the Plaintiff states how the family of the deceased expected their bread winner to live beyond his 52 years to at least attain the age of 75. Apart from his side activities which earned him income, the deceased was employed by Majembe Auction Mart and B.B Security Guards. These employment and income-earning activities earned the deceased a monthly total income of Tshs 1,500,000/=. The demand note also contends that the untimely death of Blarius Bigoko had occasioned loss of expectation of the children who were still pursuing education. It is also important to note that in her evidence in chief, the Plaintiff disclosed her age to be 33 years, an adult in that respect. In her Demand Note, the Plaintiff indicated that she was acting on her own behalf; and also on behalf of the deceased's widow and other seven children. I should quickly point out that the Plaintiff did not specify the names and age of these other dependants of the

deceased. She did not specify which two children were still in school. It is therefore not clear whether the seven other children of the deceased are adults with their own independent sources of income. The Plaintiff has through her Demand Note claimed that the deceased had a total monthly income of Tshs 1,500,000/=. It is fair to point out that the deceased did not surrender all this monthly income to his dependants, but retained at least Tshs. 1,000,000/= out of his monthly income for his own use. Retirement age in Tanzania is invariably at 60 years. This fact implies that had the hand of death not intervened, the deceased had 8 more years to work and continue to earn his monthly income. From the foregoing consideration, I think the global figure of Tshs 414,000,000/= suggested by the Plaintiff is on the very high side of the scale. A global figure of Tshs 75,000,000/= is in my opinion sufficient to recompense the Plaintiff and the deceased's family of their pain and suffering occasioned by the negligence of the defendant. In the upshot, I shall give judgment in favour of the Plaintiff as against the Defendant. Defendant shall pay the Plaintiff Tshs 75,000,000/= as general damages. I further award costs and interest on the general damages from the date of this ex parte judgment. DATED at DAR ES SALAAM this 14 day of December, 2012. I.H. ma JUDGE Ex parte Judgment is delivered in the presence of Mr. Massawe (Advocate for the Plaintiff) I.H. Juma % JUDGE)h 14/12/2012

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