



REPUBLIC OF KENYA



KENYA LAW
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**Muigui v Attorney General & 2 others (Civil Appeal 19 of 2018)
[2023] KEHC 229 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 19 OF 2018
HK CHEMITEI, J
JANUARY 26, 2023**

BETWEEN

JOSEPH KINYUA MUIGUI APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

DUNCAN KARIUKI KIMANI 2ND RESPONDENT

BEN KIRUI 3RD RESPONDENT

*(Being an Appeal from the Judgement of Hon F. Munyi (SRM)
dated 31st January 2018 in Nakuru CMCC No. 533 of 2014)*

JUDGMENT

1. The appellant's son, the late Dadson Gichuru Munuru was involved in a fatal shooting on August 16, 2003 in which the 2nd and 3rd respondents were involved and were later charged with the offence of manslaughter where they were convicted and sentence to serve probation period of three years each.
2. The appellant thereafter filed suit against the respondents seeking general and special damages as a consequence of the said incident. The matter proceeded at the lower court where the appellant singularly offered his evidence and did not call any witness. The respondents neither gave their evidence and the court proceeded to dismiss the case for the reason that it was not proved on a balance of probabilities.
3. The appellant was dissatisfied with the same and has filed the appeal herein anchored on 9 grounds. The gravamen of the same are that the trial court erred when it concluded that the appellant had not proved its case for the fact that it did not call any eye witness and by failure to endorse a consent between the parties.



4. When the matter came up for directions the court directed that the matter be disposed by way of written submissions which they complied.
5. The appellant basically hinged his submissions on the fact that the trial court failed to admit the documents as per the consent entered by the parties. He went on to cite section 35(b) of the *Evidence Act* and the decision of Ringera J (as he then was) in *David Ndungu Macharia v Samuel K Muturi & another* Nairobi HCCC No 125 of 1989.
6. The appellant argued that the substratum of his case was the criminal proceedings at the lower court which had found the respondents culpable for the murder of the deceased. The same ought to have been admitted as a matter of course and procedure by the said court.
7. The respondents on the other hand opposed the application stating that the appellant did not call any eye witness neither did he produce the criminal proceedings. The respondent further denied that there was any consent to produce the same or at all.
8. The respondent stated that it was not enough to file the documents in court but they ought to have been produced and be subjected to the usual cross examination. The respondents prayed for the appeal to be dismissed with costs.

Analysis and Determination

9. The court has perused the proceedings, the judgement of the trial court and the submissions herein. The main issue is whether the appellant prove his case on a balance of probabilities as expected in all civil cases.
10. There is no doubt that the deceased died as a result of the incident involving the respondents. The evidence on record is that of the appellant alone. After his testimony he closed the case and did not call any other witness.
11. It is clear that he was not an eye witness to the incident. He did not call any witness either. In the absence of any eye witness the court had to rely on his testimony which respectfully was not sufficient.
12. More importantly are the criminal proceedings namely Criminal Case No 1542 of 2005 which convicted the 2nd and 3rd respondents. They were not produced and the appellant in his ground of appeal states that the trial court failed to record a consent between the parties admitting the same.
13. This court has perused the record and it is apparently clear that the appellant testified and closed his case on October 10, 2017. The respondents as well closed their case on the same day and both requested for a date to file written submissions which the court granted. Eventually on January 31, 2018 the court delivered its judgement dismissing the appellants suit.
14. What followed thereafter was the filing of an application for review dated February 20, 2018 seeking the court to review its judgement on the grounds that it had not considered the documentary evidence and to therefor determine the issue of liability.
15. The record does show that the application was to be disposed by way of written submissions and as per the same record the matter was stood over generally on July 3, 2018. The said application was never prosecuted.
16. Even then, was there any consent to admit the documentary evidence.? This court has perused both the record as well as the original court proceedings and does not find any such consent. Neither did the parties record any consent on those lines. The sum total therefore is that the trial court had nothing to record and the allegations that it failed to do so are spurious.



17. Was the appellant aware of the documentary evidence, that is the criminal proceedings mentioned above.? The answer is yes. He was involved in testifying at the criminal trial and there was no suggestion that he was not in the picture.
18. In my view therefore, the court was right in dismissing the suit solely on the grounds that it was not proved on a balance of probabilities. Obviously in the absence of an eye witness it would have been prudent at least to rely on the criminal proceedings. Again, the appellant squandered his chance when he failed to prosecute his application for review. Probably the trial court which was seized of the matter may have granted his wish.
19. For the above reasons, this court does not find any reason to fault the trial court. The appeal is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 26TH DAY OF JANUARY 2023.

H. K. CHEMITEI.

JUDGE

