



Otaba & another v Juma (Suing as the Legal Representative of the Estate of Bonface Ouma Kweyu - Deceased) (Civil Appeal 13 of 2020) [2023] KEHC 20875 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL 13 OF 2020
WM MUSYOKA, J
JULY 28, 2023**

BETWEEN

VINCENT OTABA 1ST APPELLANT

JAMES OPIYO NYONGESA 2ND APPELLANT

AND

ZEBIO JUMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BONFACE OUMA KWEYU - DECEASED) RESPONDENT

(An appeal arising from the judgment of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, delivered on 3rd July 2020, in Busia SRMCCC No. 400 of 2006)

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellants, for compensation, on account of damages arising from a road traffic accident, where she prayed for damages, special damages, and costs. The respondent was the administratrix of the estate of the deceased, who was lawfully walking along the Bumula-Mumias road, when he was knocked down by motor-vehicle Kxx 6xxM, causing his death. The appellants filed a defence, in which they denied liability.
2. A trial was conducted, in which the respondent called 4 witnesses. The appellants called 2 witnesses. A judgment was delivered on July 3, 2020. Liability was assessed at 100%. A total of Kshs 984,000.00, being Kshs 10,000.00 for pain and suffering, Kshs 75,000.00 for loss of expectation of life, Kshs 864,000.00 for loss of dependency, and Kshs 35,700.00 special damages, was awarded.
3. The appellants were aggrieved, hence the instant appeal. In the memorandum of appeal, dated August 11, 2020, they aver that the trial court introduced a party to the proceedings and relied on statements of fact relating to that stranger; the finding on liability was not linked to the evidence; the court was wrong on assessment of damages and ascertainment of the beneficiaries; and the court failed to acknowledge that the burden of proof was on the respondent.



4. Directions were given on April 17, 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions. The appellants submit around the issues of the stranger introduced into the proceedings and liability. They have not submitted on assessment of damages. The respondent submitted on the appeal being filed out of time without leave of court, no decree was extracted and filed, on the alleged strange party, liability, assessment of damages, and burden of proof. I shall confine determination of this appeal on the grounds and points argued by the appellant. I shall take it that grounds and issues not submitted on have been abandoned.
5. On liability, the respondent was not at the scene, and she could not authoritatively speak about what transpired. PW2 was with the deceased. She explained that the accident happened at a petrol station, where they had stopped for the driver to fuel the accident vehicle. There was no petrol. The driver then turned the vehicle before the passengers embarked, and in the process knocked down the deceased, who was somewhere behind the vehicle. He fell on his back, and the tyre went on top of him, “stepped on” him. The driver did not take him to hospital, instead he took off. They went home, and the deceased died there, that night at midnight. PW3 was a traffic police officer, he only produced the police abstract. He was not a useful witness on the issue of liability. PW4 conducted post-mortem on the body of the deceased. The appellants presented a witness, DW3, who adopted his statement. He said he was at the scene as an overseer. DW1 and DW2 were the owners of the motor vehicle, who were not at the scene.
6. So how did the trial court deal with this evidence. The trial court relied entirely on the testimony of PW2, who was a passenger in the vehicle, and concluded that the driver of the appellants vehicle was wholly to blame, driving off before the deceased had fully disembarked, and in the process ran him over. Was the court on the wrong? I am not clear as to where the trial court got the material that the driver drove off before the deceased had fully disembarked, and he fell of the moving vehicle, because I have not seen that from the record. What PW2 told the court was that all the passengers had disembarked, when the driver turned the vehicle, and in the process knocked down and ran over the deceased who was somewhere behind the vehicle. The issue of falling off the vehicle did not arise.
7. Be that as it may. My assessment of the evidence is that of all the persons who testified, only PW2 was at the scene. She testified as an eyewitness. The appellants did not offer the driver of their vehicle as a witness. They presented DW3, Francis Olugoya Wanyama, who adopted his statement. In his witness statement, he alleged that he was at the scene, and that the deceased fell down, on his own, for he was drunk, and he was carried by some people and was put in the vehicle. So, of these 2 versions, which is believable? The testimony of PW2 was consistent on what transpired. DW3 did not witness the deceased fall, he only heard shouts, and his statement is based on what he heard other people say had happened. More importantly, the driver of the vehicle was sued as one of the defendants. He did not testify, to shed light on what exactly happened, for fingers were being pointed at him as the author of the accident. Given that the only clear and consistent testimony on record of what transpired was by PW2, that would be adequate, to establish on a balance of probability, that the accident happened in the manner narrated by her. The testimony of PW4, the medical officer who did the post-mortem on the body of the deceased, identified injuries on the head, inclusive of bleeding inside and outside the brain, which was consistent with the testimony by PW2, that the tyre of the vehicle touched the head of the deceased, after the vehicle knocked him down. Without any useful evidence from the appellants, the conclusion by the trial court, that liability be attributed to the appellants at 100%, is defensible.
8. On the trial court introducing the estate of the late Samuel Mwaura Ngugi into the matter, it is true that the opening paragraph of the judgment appears to be misplaced, for it does refer to the estate of Samuel Mwaura Ngugi. However, other than that opening paragraph, the rest of the body of the judgment is strictly on the matters which were the subject of the suit in Busia SRMCCC No 400 of 2006. The reference to the estate of Samuel Mwaura Ngugi had no impact on the final outcome of the



proceedings, for no award was made to that estate. In any case, the appellants have not demonstrated how that misleading paragraph negatively impacted on the final outcome of the suit.

9. For avoidance of doubt, that misplaced opening paragraph reads as follows:

' The Plaintiff have filed this suit as the Legal Representatives of the Estate of the late SAMUEL MWAURA NGUGI following a fatal a road accident on April 6, 2013.'

10. The said paragraph could only have found its way into the judgment by error, when one juxtaposes it against the paragraph that follows it, and which recites or narrates the pleadings in the suit that was the subject of the judgment, where the trial court says:

' By an Amended Plaint filed on October 3, 2007, the Plaintiff averred that on January 16, 2005, the deceased was lawfully walking along Bumala-Mumias Road having alighted from motor vehicle registration number Kxx 6xxM Toyota Hiace Matatu...'

11. As indicated above, the appellants did not submit on the other grounds, and I have, therefore, no basis for addressing my mind to them. I have treated them as abandoned.

12. In view of everything said above, it is my finding and holding that there is no merit in the appeal herein, and the same is hereby dismissed with costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 28TH DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Tonge, instructed by the Ngeresa & Okallo Associates, Advocates for the appellants.

Mr. Shihemi, instructed by Maloba & Company, Advocates for the respondent.

