



Mwangi & another v Maina (suing as the administrator of the Estate of the Late Dennis Irungu Maina) (Civil Appeal 160 of 2019) [2023] KEHC 21871 (KLR) (Civ) (15 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 160 OF 2019

AN ONGERI, J

AUGUST 15, 2023

BETWEEN

PAUL KANYI MWANGI 1ST APPELLANT

MOSES NGANGA 2ND APPELLANT

AND

**TABITHA WANGARI MAINA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE DENNIS IRUNGU MAINA) RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. E. WANJALA
(SRM) in Milimani CMC no. 1109 of 2016 delivered on 27/2/2019)*

JUDGMENT

1. The respondent filed Milimani CMCC no. 1109 of 2016 on behalf of the estate of Dennis Irungu Maina (deceased) seeking damages under the *Law Reform Act* and the *Fatal Accidents Act* for fatal injuries sustained by the deceased on 26/5/2014 along Jogoo Road while travelling as a passenger in motor vehicle registration no. KBW 538X belonging to the 1st appellant while being driven by the 2nd appellant
2. The appellants filed a defence denying the plaintiff's case. During the hearing of the case the appellant did not call any witnesses.
3. The respondent's evidence in summary was that the deceased was 21 years old at the time of his demise.
4. The respondent who is the mother of the deceased said the deceased had finished high school and was waiting to join college when the accident occurred. The plaintiff said she had sent the deceased to Naivas supermarket and later she received a call from mama Lucy Hospital and when she went to the hospital she found the deceased who died 15 minutes later.



5. There was no eye witness to the accident. The trial court found the appellants 100% liable and assessed general damages as follows;
- Loss of expectation of life 140,000
- Loss of dependency 769,866
- Special damages 42,700
- Total 952,566
6. The appellants have appealed against the judgment and decree on the following grounds;
- i. That the learned trial magistrate was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - ii. The learned trial magistrate erred in law and fact in finding the appellants 100% liable for the accident jointly and severally liable.
 - iii. The learned trial magistrate erred in law and fact by relying solely on the evidence of the plaintiff who did not witness the accident and could not establish negligence of either the deceased of the defendants.
 - iv. The learned trial magistrate erred in awarding costs of the suit and interest to the plaintiff.
7. The parties filed written submissions as follows;
- The appellant submitted that the respondent's witness PW 1, Tabitha Wangari Maina did not witness the accident and the trial court had no basis for apportioning liability at 100% in favour of the respondent against the appellant.
8. Further, the appellant submitted that the respondent did not prove her case to the required standard since there was no witness who testified on how the accident occurred. The appellant relied on Section 107 and 108 of the Evidence Act which state that he who alleges a fact is duty bound to prove it.
9. The appellant also relied on the cases of Mary Wambui Kabugu vs Kenya Bus Services Ltd Civil Appeal No. 195 of 1995 which was cited in the case of Florence Mutheru Musembi & Geoffrey Mutunga Kimiti vs Francis Karengi (2021) eKLR.
10. The appellant urged the court to apportion liability at 50:50% in view of the fact that there was no iota of evidence that the appellant was negligent.
11. The appellant also relied on the case of Lakhamshi vs AG (1971) E 2 118, 120 quoted in the case of Calistus Juma Makhanu vs Mumias Sugar Co. Ltd & Anotebr (2021) eKLR where it was observed as follows;
- “It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame....”
12. The respondent on her part submitted that the facts presented by the respondent were not disputed by the appellant who did not call any witnesses.
13. Further, that the trial court relied on the police abstract in which it was stated that the deceased was passenger in the subject motor vehicle.



14. The respondent also submitted that the appellants failed to adduce evidence that they were not to blame for the accident but they have made denials hoping to be exonerated from liability.
15. The respondent relied on the case of *Keats Njuguna Muchiri vs Mash Express Ltd* (2008) eKLR where it was stated as follows;

“This court can only but agree with the plaintiff that where there is not attempt at rebutting the application of the principle of res-ipsa-loquiter then once pleaded the same applies”
16. The respondent submitted that the 1st appellant witnessed the accident but failed to testify and the court can only draw the inference that the facts were against the appellants.
17. The respondent also relied on the cases of *Ngilu vs Republic* (1985) KLR 412 where it was opined that where a party fails to produce certain evidence a presumption arises that the evidence, if produced would be unfavourable to that party.
18. The respondent also relied on Sections 109 which was relied on by the appellant and 112 of the *Evidence Act* which states as follows;

“112 In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
19. The respondent also relied on the following authorities to buttress the doctrine of *res-ipsa-loquitor*. The case of *Joseph Kabinda Maina vs Evans Kamau Mwaura & 2 others* (2014) eKLR where the reasoning was guided by the decision in *Esther Nduta Mwangi & Another vs Hussein Dairy Transporters Limited – Machakos HCCC No. 66 of 2007*.
20. The respondent also relied on the case of *Susan Kanini Mwangangi & Another vs Patrick Mbiti Kavita* (2017) eKLR where Justice Odunga said that the doctrine of res ipsa loquitor may be successfully invoked where there was no eye witness to the accident but there is credible evidence on which negligence may be inferred.
21. This being a first appeal, the duty of the first appellate court is re-evaluate the evidence adduced before the trial court.
22. The issues for determination in this appeal are as follows;
 - i. Whether the trial court was right in finding the appellants 100% liable for the accident.
 - ii. Whether the award of damages was erroneous.
23. On the issue as to whether the trial court was right in finding the appellants 100% liable for the accident, I find that although the plaintiff was not at the scene of the accident, the trial court did not have a base for apportioning liability.
24. The appellants did not testify to throw some light on how the accident occurred. There is a presumption that the evidence, if produced would be unfavorable to the Appellants.
25. I find that the doctrine of res ipsa loquitor is applicable in this case.



26. I agree with the case of *Susan Kanini Mwangangi & Another vs Patrick Mbithi Kavita* (*supra*) relied on by the Respondents where Justice Odunga said as follows;

“In this case, it is true there was no eye witness to the accident. However, it is not necessary fatal as long as there is credible evidence on which negligence can be inferred. Such inference may be made where the plaintiff was a passenger in the vehicle that got involved in an accident in which event *res ipsa loquitur* may be successfully invoked.....”

27. I find that the Trial Court was right in finding that the Appellant was 100% liable in negligence.

28. On the issue as to whether the award of damages was erroneous, I find that the Appellant did not contest the award of damages.

29. I find that this appeal lacks in merit and I accordingly dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the 2nd Respondent

