



Juma & 2 others (Suing as the Personal Representatives of the Estate of Edward Kibe Ngunjiri - Deceased) v David (Civil Appeal E134 of 2021) [2023] KEHC 26015 (KLR) (Civ) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26015 (KLR)

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

CIVIL

CIVIL APPEAL E134 OF 2021

DAS MAJANJA, J

NOVEMBER 30, 2023

BETWEEN

NGUNJIRI JUMA 1ST APPELLANT

STEPHEN MWANGI NGUNJIRI 2ND APPELLANT

PERIS NJOKI NGUNJIRI 3RD APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
EDWARD KIBE NGUNJIRI - DECEASED**

AND

NDERITU GICHUKI DAVID RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. M. Kivuti, PM dated 22nd February 2021 at the Nairobi Magistrates Court, Milimani in Civil Case No.7590 of 2017)

JUDGMENT

1. This is an appeal against the judgment of the Subordinate Court dismissing the Appellants' suit against Respondent seeking damages under the Law Reform Act (Chapter 26 of the Laws of Kenya) and the Fatal Accident Act (Chapter 32 of the Laws of Kenya) for the death of Edward Kibe Ngunjiri ("the Deceased") following a road traffic accident that took place on 29.08.2016. According to the Amended Plaintiff dated 02.06.2019, the Deceased was a pedestrian on the material day when he was knocked down by the motor vehicle registration number KCF 322E owned by the Respondent. The trial court held that the Appellants had failed to prove their case on the balance of probabilities.
2. In their Memorandum of Appeal dated 16.03.2021, the Appellants complain that the trial magistrate failed to apply the principles of the law of negligence and for concluding that the Appellants failed



- to prove their case to the required standard. That the trial magistrate failed to consider that the Respondent failed to call any witness and in particular, his driver, to rebut the Appellant's case and that the trial magistrate failed to invoke section 112 of the *Evidence Act* (Chapter 80 of the Laws of Kenya).
3. The Appellants called three witnesses to support their case. Alice Laxen (PW1), a police officer was called to produce the police abstract. She confirmed that the accident took place and that the Deceased was a pedestrian. Juma Ngunjiri (PW2) admitted that he did not know the circumstances of the accident while Stephen Mwangi Ngunjiri (PW3) stated that he was informed that the Deceased had died in a traffic accident. The Respondent (DW1) admitted that an accident took place involving his motor vehicle but he did not know the Deceased. Based on this evidence, the trial magistrate come to the conclusion that the Appellants had failed to prove their case on the balance of probabilities.
 4. Whether the Appellants proved their case or otherwise is a question of fact hence this court, as the first appellate court, has the duty to examine all the evidence presented before the Subordinate Court and come to an independent determination whether the trial court's judgment should be upheld always making an allowance for the fact that it neither saw nor heard the witnesses testify (*Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
 5. I am constrained to agree with the trial magistrate that the Appellant failed to prove their case on a balance of probabilities. In their Amended Complaint, the Appellants set out to prove that the Respondent's driver was driving at an excessive speed causing the motor vehicle to veer off the road and hit the Deceased. That the Respondent's driver failed to apply brakes or otherwise control the motor vehicle, failed to slow down or swerve so as to avoid hitting the Deceased. None of the Appellant's witnesses testified to these facts. They readily admitted that they did not witness the accident.
 6. The police officer did not witness the accident or even visit the scene of the accident. She produced the police abstract. As the name suggests, a police abstract is an extract of police records and contained the key facts of the accident reported to the police. It is prima facie evidence of the occurrence of the accident and the particulars of those involved as was held in *Peter Kanithi Kimunya v Aden Guyo Haro* [2014]eKLR that, "A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station." (see also *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v Francis Kareng'e* [2021] eKLR).
 7. This is not to say that a case must be dismissed because of the lack of an eye witness. The duty of the court is to consider all the evidence and make an inference from which liability may be established. In *Abbay Abubakar Haji v Marain Agencies Company & another* [1984] 4 KCA 53, the Court of Appeal observed that, "There can be no doubt that it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. The court cannot, as Denning LJ said, wash its hands of the case and shrink from arriving at a conclusion simply because the evidence is deficient in some respects." (see also *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita* [2019]eKLR and *EWO suing as the next friend of minor COW v Chairman Board of Governos Agoro Yombe Secondary School* [2018] eKLR).
 8. The Appellants had a duty to place before the court sufficient evidence from which the court would conclude that the Respondent's driver was negligent and which would enable Appellants discharge their evidential burden. The burden of proof is stipulated in section 107(1)(2) of the *Evidence Act* that provides that:



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Appellants failed to discharge this burden.

9. The Appellants argue that the trial court ought to have had recourse to section 112 of the Evidence Act which provides that:

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.

I would point out that the Respondent would only be called upon to answer the Appellants case once they had discharged their evidential burden. Second, application of section 112 above would only apply if the facts were within the Respondent's knowledge. In this case it was not established that the Respondent was aware of the circumstances of the accident. In the Amended Complaint, the Appellants stated he was the owner while the vehicle was being driven by his driver. The Respondent denied that he was at the accident or that he knew the Deceased. He did not have the facts within his knowledge hence section 112 of the Evidence Act did not apply.

10. From the totality of the evidence on record, the Appellants failed to prove that the accident occurred as a result of the Respondent's negligence.
11. The appeal is dismissed. The Appellants shall pay costs of the appeal assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023.

D. S. MAJANJA

JUDGE

Mr Amutallah instructed by Amutallah Robert and Company Advocates for the Appellants.

