



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 73 OF 2019

JULITA AKINYI OUMA (Suing as a Legal

Representative of the Estate Joseph Ouma Ndege (Deceased).....APPELLANT

-VERSUS-

HILLPARK INVESTMENT COMPANY LIMITED.....1ST RESPONDENT

KISII CLASSIC.....2ND RESPONDENT

(An Appeal from the Judgement of Hon. R. Odenyo, Senior Principal Magistrate

at Migori in CMCC No. 1735 of 2016 dated and delivered on 11th June, 2019)

JUDGEMENT

This appeal has been triggered by the decision of Hon. R. Odenyo delivered in Migori CMCC No. 1735 of 2016 on 11/6/2019.

The suit in the lower court was filed by the appellant Julita Akinyi (the plaintiff) as the legal representative of Joseph Ouma Ndege (Deceased) against the respondents (Defendants) to recover damages resulting from a fatal accident which occurred on or about 20/4/2016 at around 8.00pm as a result of which Joseph Ouma Ndege (deceased) lost his life. It was the appellant's case that the deceased was a law-abiding pedestrian walking along the Awendo-Rongo road particularly at Kokuro area when motor vehicle registration number KCC 183Y bus was negligently and/or carelessly driven by the defendants and/or their authorized agent or servant that it lost control and violently hit the deceased causing him fatal injuries. The appellant also pleaded the doctrine of *res ipsa loquitor*.

The appellant filed a defence denying the occurrence of the accident and pleaded negligence on the part of the deceased and or that the doctrine of *res ipsa loquitor* was applicable.

After the hearing, the trial Magistrate found that the appellant failed to prove her case against the respondents on a balance of probability and dismissed the case with costs to the respondents.

Aggrieved by the decision, the appellant filed the instant appeal and preferred sixteen (16) grounds of appeal which can be summarized in the following eight (8) grounds as follows:-

- a) That the learned Magistrate erred in law and in facts in dismissing the appellant's case against the weight of evidence;**
- b) That the trial court erred in law and in facts in dismissing the appellant's case while relying on the wrong principles of law;**
- c) That the trial court erred in law by dismissing the appellant's case on technicalities;**
- d) That the trial court manifested clear bias against the appellant which was unfair and unjust;**
- e) That the trial court erred in law and in facts in bringing extrinsic evidence on record while dismissing the appellant's case;**
- f) That the trial court erred in dismissing the appellant's case without taking into account the submissions filed and the case law cited by the appellant;**

g) That the learned Magistrate erred in dismissing the appellant's case without giving reasons which was against the rules of natural justice;

h) That the trial court erred in law and fact in finding that the appellant's case has not been proved on a balance of probabilities.

The appellant prayed that this appeal be allowed and the judgement and/or decree herein dated 11/6/2019 be set aside and/or varied accordingly and the court did grant any other remedy that the court may deem fit, just and expedient in the circumstances.

Directions on the appeal were given on 25/11/2019. The court directed that the appeal be canvassed by way of submissions. Only the appellant filed submissions dated 7/6/2021 on 8/6/2021.

The appellant also faulted the trial Magistrate for the scanty judgement that does not meet the threshold as provided for under Order 21, Rules 4 & 5 of the Civil Procedure Rules.

The appellant submitted that the plaintiff who was also PW1, stated on oath what happened on the material day and that her case was supported by a police abstract issued by the Base Commander Awendo Police Station which contained full details concerning the accident; that it was discernible from the pleadings and the evidence on record that the deceased died as a result of the injuries sustained from the accident. This evidence was not challenged in any way hence there is no doubt that an accident occurred on the material day which resulted in the death of the deceased.

On the respondents' defence, the appellant submitted that the respondents' witness on cross - examination, admitted that an accident occurred and a police abstract was issued; that the evidence of DW1 was without basis as the said witness did not tender any evidence in support of the defences' case, hence the appellant's case remained unchallenged.

The appellant further submitted on four heads. The first was whether there was enough evidence in support of the appellant's case. It was submitted that the accident was reported at Awendo traffic sub-base and a police abstract was issued and the same was not disputed by the respondent; that the respondents' witness admitted that the victim was involved in an accident with the respondents' motor vehicle registration number KCC 183Y.

On whether the appellant was entitled to the orders, the appellant submitted that she adduced enough evidence before the court hence there was no reason by the trial Magistrate to decline the appellant's claim.

On whether there was evidence by the respondent to challenge the evidence adduced by the appellant, the appellant submitted that her evidence was not challenged by the respondent in so far as the respondent did not call the owner of the suit motor vehicle to rebut her evidence; that the trial Magistrate erred in relying on the evidence of DW1 and yet the said witness did not produce any documentary evidence in support of the defence; that the evidence adduced by the respondent was merely speculative.

On whether the appellant's case was proved on a balance of probability, the appellant asked this court to find in the affirmative and relied on the case of **Petrocity Enterprises(U)Ltd vs Roseline Sikudi (2017) eKLR** and **Susan Mwangangi & Another vs Patrick Mbithi Kavita (2019) eKLR**.

I have read and understood the appellant's memorandum of appeal and the submissions.

The issues for determination are

- i. Whether the identity of the suit motor vehicle was established with.**
- ii. Whether the appellant proved her case on a balance of probabilities.**
- iii. Whether the estate of the deceased is entitled to damages.**

This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court afresh and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in **Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123**.

It is settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were not based on evidence at all, or they were made on a misapprehension of it or on demonstrably wrong principles not supported by evidence or they were based on wrong principles of the law. This was the finding of the Court of Appeal in **Mbogua Kiruga v Mugecha Kiruga & another [1988] eKLR** where the Court of Appeal held:-

“An appeal court cannot properly substitute its own factual findings for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

On the first issue, I shall examine the witness statements before the trial court.

PW1 who is the appellant herein, testified:-

“On 20/4/2019 at about 8.00p.m. I received a call at around 8.00p.m. from a certain lady who told me that the deceased had been knocked by a vehicle.”

On cross examination she testified:-

“I did not witness the accident. The lady who called me to inform me of the accident is a greengrocer...she is not my witness. I was told of the registration number of the accident vehicle by others.”

The respondents called the Investigation Officer of the said accident who testified as **DWI - No. 63428 CPL Joseph Gati**. Concerning the identity of the suit motor vehicle he testified:-

“It was reported that on 21/4/2016, one Joseph Ouma had been knocked at Kokuro town. I was told by the person who made the report that he rushed to the scene and found the victim lying in a pool of blood. That he and others took the victim to Rapcom Hospital where he was declared dead. The victim was his cousin. When the report was being made, we were not given the motor vehicle number. I was only told that the victim was found lying on the side of road...on 29/5/2016 I visited the offices of the Hill Park (1st defendant) to confirm their bus which had been plying that route on the material day. In their main list, they had allocated bus KBU 759Y. They stated KCC 183Y was on the material day plying the Nyamira - Nairobi route...My findings are that the victim was involved in an accident, but the real vehicle involved is not known upto date.”

On cross examination, he testified:-

“The abstract was issued on the 8/7/2016. I issued the abstract talking about KCC 123Y as a matter of routine.”

Based on the above witness' testimony, that the trial Magistrate held as follows:-

“In my considered view, the Plaintiff has failed to establish that it was the said motor vehicle that knocked the deceased. The Plaintiff was not an eyewitness. She did not call any eyewitness. She testified that she was given the Registration number of the vehicle that caused the accident by “Other” but she did not bring the “Other” to tell the court what they saw. Thus the evidence of the Plaintiff as to the identity of the vehicle that knocked the deceased is plain hearsay.”

Counsel for the appellant submitted that the suit motor vehicle was at the accident scene and this was confirmed by the police abstract issued from the Awendo Police Station. It was his further submission that the respondents did not produce witnesses to testify otherwise, the appellant proved her case.

Section 107 of the Evidence Act Cap 80 states:-

“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.”

Section 109 further provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person.”

It is trite law states that he who alleges must prove. The appellant therefore being the party who wanted the court to believe that a set of fact did exist on how the accident occurred, had the burden of proving her case. It is her submission that the police abstract was sufficient prove that there indeed an accident involving the deceased and the suit motor vehicle registration number KCC 183Y. The appellant also wanted the court to believe that in as much as she was not at the accident scene, the police abstract which was not controverted and in fact admitted by DW1 is sufficient proof of her case.

The question that comes to my mind is, in the absence of any eyewitness does a police abstract suffice to prove the existence of facts? The importance of a police abstract has been the subject of numerous findings in the Court of Appeal. In **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another,(2010) eKLR**:

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”

Likewise, in *Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003* the Court of Appeal expressed itself as follows:

“The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent.”

Warsame J. (as he then was) in *Jotham Mugalo vs. Telkom (K) Ltd (2005) eKLR* held as follows:

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

From the above cases, the importance of a police abstract has been put on a high pedestal. The point of departure is if the contents of the police abstract are being challenged, then the challenging party has to adduce further evidence to prove that the contents of the police abstract are untrue. In the case of *Jonathan Mugalo (supra)* the learned Judge held that

“...Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act.”

I am at pains to understand why DWI being the investigation officer and the one who issued the police abstract, testified that it is indeed true that the suit motor vehicle KCC 183Y was indicated as the one which caused the accident but the police abstract issued was as *“a matter of routine.”* Notably, it was his testimony that on 29/5/2016, he visited the offices of the 1st defendant to confirm their buses. He found that in their main list, it was allegedly indicated that they had allocated bus no. KBU 759Y and not the suit motor vehicle to ply the route where the accident had occurred.

The police abstract was issued almost two months later on 8/7/2016 after DW1's said visit. If at all DW1 was convinced that the suit motor vehicle did not ply the said route, he could not have issued *“as a matter of routine”* a police abstract indicating that motor vehicle registration number KCC 183Y was the one involved in the accident. It behoved the investigating officer to act diligently and ethically in investigating this case.

Admittedly, the appellant is to share a fair blame on how she presented her case before the trial court. In the witness statement of PW1 dated 30/12/2016, she made mention of one Gordon Ochieng Odera who called her to inform her of the accident. However, in her oral testimony she contradicted herself that she was called by a certain woman who sells grocery. DWI made mention of Gordon Ochieng Odera as a witness and is also indicated in the police abstract. Other witnesses are Paul Otieno and Jared Odhiambo. I believe, these were crucial witnesses who would have shed light on what transpired on the material day on behalf of the appellant. For some reason Counsel did not deem it necessary to call the said witnesses which was a disservice to the appellant. As matters stand, no eye witness was called to explain how the accident occurred or exactly where it occurred.

From the evidence on record, I am convinced that motor vehicle registration number KCC 183Y did cause the accident on the 20/4/2016 causing the death of one Joseph Ndege Ouma.

The next question then is who is to blame for the said accident. This being a civil case, the standard of proof is one of on a balance of probabilities. The learned Judge in the case of *D.T. Dobie & Co. Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR* cited with approval the case of *Miller vs Minister of Pensions (1947) 2 ALL ER 372*, where Denning J had this to say:-

“The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case where a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

With profound respect to the learned Magistrate, he treated this as a criminal case in which the appellant was expected to prove beyond reasonable doubt that the suit motor vehicle caused the accident. The trial Magistrate ought to have taken judicial notice of the fact that the evidence produced by the appellant was not rebutted. The contents of the police abstract which indicated the motor vehicle involved in the accident with the deceased who was removed from the scene to the hospital where he was pronounced dead. I think that DW1 did a shoddy job in that he did not even bother to establish exactly where the accident occurred. Similarly, the Appellant did not prove that any of the

alleged negligent acts or omission were against the respondent, caused or materially contributed to the accident. What is not in doubt is that a collision occurred between the deceased and the respondent's vehicle. Without evidence as to what exactly happened, the court can only come to the conclusion that either one of the parties was to blame or both of them. People just do not get run over; either the deceased was in the path of the vehicle, or the vehicle left its path and went where the deceased was. The appellant had pleaded the doctrine of *Res ipsa loquitur* which is an exception to the rule that the plaintiff must prove his case. In the circumstances the court can only apportion liability. *Spry V. P. in Lakhamshi vs. A. G. (1971) E. A., 118 120* rendered himself as follows:-

“It is not 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. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

In the case of *Wambui Nderitu vs. Joseph Kiprono Ropkoi & Another (2004) eKLR*, the Court of Appeal in Migori said:-

“There is no doubt that an accident occurred between the two vehicles on the Nyeri – Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50.”

In *Embu Public Road Service Ltd vs. Riimi 1968 EA 22*, the court said

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the presence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident.... where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show “that there was a probable cause of the accident which does not connote negligence” or “that the explanation for the accident was consistent only with an absence of negligence.”

Guided by the above decision, I am persuaded to find that both parties were to blame and hereby apportion liability at the rate of 50/50.

On special damages, the appellant pleaded a total of Kshs. 305,900/=. It is trite law that special damages must be specifically pleaded and proven. The receipts on record sum up to **Kshs. 290,900/=** and the appellant is awarded the same.

On pain and suffering, from the pleadings and the witness testimonies the deceased died on the same day. In *Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) Odunga J held:-*

“...a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.”

In this case, the deceased died around midnight, four (4) hours after the estimated time the accident occurred. In *Civil Appeal No. 113 of 2012 Makano Makonye Monyanche v Hellen Nyangena (2014) eKLR* the Learned Judge R.N. Sitati held that the award for loss of expectation to life is Kshs. 100,000/= under the Law Reform Act and the same is deductible from the global award. The court stated as follows:-

“I find no reason to interfere with the award on loss of expectation of life under Law Reform Act as the same is always awarded at Kshs. 100,000/= across the board and the same was eventually deducted to avoid double award to same beneficiaries.”

I am convinced by this finding, and I award a sum of Kshs. 100,000/= for loss of expectation of life since the deceased died after some time.

On loss of expectation of life, the appellant stated that the deceased was her son but he was not married and had no children. In her testimony, she mentioned that she was dependent on him. The dependency contemplated under the Fatal Accidents Act is defined under Section 4(1) as follows:-

“Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused[and shall... be brought by and in the name of the execution or administrator of the person deceased”.

On loss of dependency, the appellant stated that the deceased was her son but he was not married and had no children. In her testimony, she mentioned that she was dependent on him. The dependency contemplated under the Fatal Accidents Act is defined under Section 4 (1) as follows:-

“Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall.....be brought by and in the name of the execution or administrator of the person deceased]”

That being the case, the appellant is a dependant as contemplated under the Act. In the pleadings and the testimony, the appellant stated that the deceased was a mason. There are no bank statements, payslip or any other documents to prove the income of the deceased. There is also no mention whether the deceased was employed, self-employed or not working at all at the time of his death. In the absence of documentary proof on the profession and income of the deceased, the court reverts to the **Regulation of Wages (General) Amendment Order, 2017**.

In *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal [2011] eKLR* it was held that:-

“...Without any tangible evidence as to the existence of the open air hair saloon and how much it used to make monthly, I do not think that the trial magistrate had any basis for settling for the conventional figure of Kshs. 9,000/=. In the absence of proof of income, the trial magistrate ought to have reverted to the Regulation of wages (General Amendment Order 2005)...”

A mason is one who is skilled in cutting, dressing and laying stone in buildings. Under the said order, a mason is classified as a ‘stone cutter’ whose monthly wage was **Kshs. 7,697.95/=** per month. The Court of Appeal in *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellen Wanjiru Rukanga (2020) eKLR* adopted the minimum wage as a multiplicand. I will therefore adopt **Kshs. 7,697.95/=** being the minimum wage.

The deceased died at the age of 20 years. The choice of a multiplier is a matter of discretion which discretion has to be exercised judiciously. In *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another (2021) eKLR*, the deceased, a boda boda rider died at the age of 23 years and the court adopted a multiplier of 27 years. In *Ruth Wangechi Gichuhi -vs- Nairobi City County (2013) eKLR*, the court applied a multiplier of 30 years for the deceased aged 22 years at time of death. *Ireru Moses v Peter Mutugi Muthike (suing as the legal administrator of Estate of the Late Mary Njeri Muthike (Deceased) (2019) e KLR* the deceased was a student aged 23 years who was unemployed. The appellate court upheld the adopted a multiplier of 20 years. Taking into account the vagaries and uncertainties of life, a multiplier of 30 years is reasonable.

On dependency, the only dependant of the deceased was his mother. The application ratio in this case would be 1/3. Under the head of loss as dependency, the court finds as follows: -

Kshs. 7,697.95×30×12×1/3=1,003,962.

The upshot therefore is that the appeal succeeds. The Judgement and Decree of the trial Magistrate entered on 11/6/2019 is hereby set aside.

I enter judgement for the appellant as follows:-

Liability 50:50 in favour of the appellant.

Pain and suffering	100,000/=
Loss of dependency	1,003,962/=
Special damages	290,900/=
Sub Total	1,393,962/=

Loss of expectation of life (less)	(100,000/=)
Total	1,293,962/=
Less liability (50%)	(646,981/=)
Grand Total	646,981/=

Costs of the lower suit and half of the costs in appeal are awarded to the appellant. General damages will accrue interest at court rates from the date of judgment in the lower court while special damages will accrue interest at the same rate from the date of filing the plaint.

It is so ordered.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF MARCH, 2022.

R. WENDOH

JUDGE

Judgement delivered in the presence of

Mr. Odero holding brief for Nyagesoa for the Appellant.

No appearance for the Respondent.

Nyauke Court Assistant.