



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 54 OF 2020**

**PATRICK MAINA MUNUHE**

**ALICE WACHEKE MUNUHE** (suing as the legal representatives of the estate of)

**PAUL KAIRU MUNUHE (DECEASED)**.....**APPELLANTS**

VERSUS

**RIFT VALLEY COMPUTER SHUTTLE**.....**1<sup>ST</sup> RESPONDENT**

**ZAHEEN TRUCK AND TRAILER PARTS**.....**2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Senior resident magistrate*

*in Nakuru CMCC No. 816 of 2016 delivered on 21<sup>st</sup> February 2020*

*by Honourable E.Kelly, Resident Magistrate )*

**JUDGMENT**

1. This appeal arise from a claim filed by **Patrick Maina Munuhe** and **Alice Wacheke Munuhe** as the legal representatives of the deceased **Paul Kairu Munuhe** on behalf of the estate and on behalf of the dependants against the defendants following a fatal road accident on 28<sup>th</sup> July 2013 along the Nakuru –Eldoret Highway in which the **Paul Kairu Munuhe** and another died.

2. The claim against the 2<sup>nd</sup> defendant was withdrawn. From the court record, there was no defence filed in by the 2<sup>nd</sup> defendant and neither was interlocutory judgment entered. Judgment was delivered on 21<sup>st</sup> February 2020. The trial court found that the plaintiffs had not proved on a balance of probability that the defendant’s driver was negligent for the accident making the defendant liable for injuries sustained by the deceased. The suit was dismissed with costs.

3. The appellant being aggrieved by the trial court’s decision then filed memorandum of appeal dated 27<sup>th</sup> February 2020 setting out the following grounds: -

*a. That the learned trial magistrate in dismissing the appellants’ case erred in law and in fact in failing to take into account that the accident was not disputed, so, too the date and place it occurred and that the deceased suffered fatal injuries thus failing to find that the accidents do not just happen and thereby failed to apply and thus misapprehended the plea of Res Ipsa Loquitor.*

*b. That the learned trial magistrate erred in law and in fact in finding that negligence was not proved contrary to the evidence of admission of accident which admissions by the 1<sup>st</sup> respondent was itself negligence on the part of either of the drivers of the motor vehicles involved.*

*c. That the learned trial magistrate erred in law and in fact in not finding liability against the 1<sup>st</sup> respondent despite there being evidence on record on negligence against the 1<sup>st</sup> respondent driver.*

*d. That the learned trial magistrate erred in law and in fact and misdirected herself in rejection entirely the evidence of PW3 despite the police officer’s evidence that was not controverted that: -*

i. The accident was reported at Salgaa Police Station.

ii. The accident was on 28<sup>th</sup> July 2013 along Eldoret- Nakuru Highway involving 3 motor vehicles all heading in the same direction.

iii. The driver of KBB 726X/ ZC 361S disappeared and the owner was charged and fined Kshs 7,000/= and that driver was blamed for the accident.

e. That the learned trial magistrate erred in law and in fact in not considering the pleading evidence and submissions filed on behalf of the appellants and if she did (which is denied) she reached wrong conclusions on the evidence and made wrong findings on the law cited.

f. That the learned trial magistrate erred in law and in fact in not assessing damages payable.

g. The decision was arrived at on consideration, to the extent that this was done, of wrong principles of law and/or contrary to the principles of law.

h. That the decision was against the weight of evidence.

4. The appellants filed the Record of Appeal dated 24<sup>th</sup> May 2020. On 26<sup>th</sup> July 2021 directions were taken to have the appeal dispensed with through written submissions.

### **APPELLANT'S SUBMISSIONS**

5. The appellant submitted that the occurrence accident was not disputed neither was the date and place disputed and the respondent having admitted the occurrence of the accident had a duty to give the evidence to exonerate itself from causing the accident and quoted Section 112 of the Evidence Act, Cap 80 of the laws of Kenya which provide as follows:-

**“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...”**

6. The appellant further submitted that they pleaded the doctrine of *Res Ipsa Loquitur* which the trial court failed to consider and that the appellants proved their case on a balance of probability and the accident was admitted whereas the 1<sup>st</sup> defendant failed to tender evidence and the evidence of PW3 was not controverted; further from the record, it is evident the 1<sup>st</sup> defendant driver escaped from the scene.

7. The appellant further submitted that a police abstract is a public document and when adduced as evidence and not disputed, the contents ought to be taken as true. The appellants cited the case of **Brian Muchiri Waihenya vs Jubilee Hauliers Ltd & 2 others (2017) eKLR** where the court observed as follows: -

**“...it is trite that a police abstract is a public document and its contents, when produced and admitted without objection, ought to be taken as the truth. Plaintiff and Pw5 who was in the vehicle KAU 325B stated that it was the trailer that was being driven in a zig-zag manner and that it veered from its lane onto the lane on the far left and collided with the other vehicle on the driver's side. This evidence was not challenged or controverted. Admittedly whenever a collision of two vehicles occurs, one or both must be at fault. See Baker Vs Market Marlborough Industrial Co-operative Society Ltd (1953) IWL 1497 Lord Denning (as he then was) observed.. everyday proof of collusion is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. Justice Vishram (as he then was) in the case amalgamated Sawmills Ltd vs Stephen Murutinguru HCCC 75 of 2005 stated: “that the burden of proof of any facts or allegation is on the plaintiff and a causal link between someone's negligence and his injury, and that the evidence adduced must on a balance of probability connect the two.”**

8. The appellants urged this court to set aside the order of dismissal and in place find that the appellants proved their case on a balance of probabilities and enter judgment in their favour and find the 1<sup>st</sup> respondent fully to blame for the accident.

9. The appellants also urge this court to determine the issue of damages as the trial court failed to award damages and quoted Order 42 Rule 32 of the Civil Procedure Rules 2010 as follows: -

**“the court to which the appeal is preferred shall have the power to pass any decree and make any order which ought to have been passed or made to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any respondents although such respondents may not have filled any appeal or cross-appeal”**

10. On the issue of quantum, the appellants reiterated the trial court submissions on pages 63 – 67 of the record of appeal and urged this court to grant special damages of Kshs. 35,000 as funeral expenses, postmortem fees, costs of the grant, affidavits and legal fees. On the issue of pain and suffering counsel submitted that 100,000 would be adequate compensation. For loss of expectations of life Kshs 300,000 is adequate compensation as the deceased died when he was 35 years old. Loss of dependency was submitted at the time of the deceased death he was earning Kshs. 29,000 life expectancy at 65 years and a multiplier of 20 used. Thus compensation of Kshs 2,320,000 is adequate compensation.

## 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS

11. The 1<sup>st</sup> respondent submitted that from the testimony of the appellants' witnesses, it is evident that there was no eye witness and their testimony was based on hearsay and failure to call an eye witness was fatal as there was no evidence as to how the accident happened and as such liability cannot be apportioned to the 1<sup>st</sup> respondent.

12. The 1<sup>st</sup> respondent further submitted that there was no sketch map produced as evidence to ascertain the point of impact at the time of the accident neither was there vehicle assessment report produced and cited the case of **Ishmael Nyasimi & Anor Vs David Onchagu Orioki suing as personal representative of Antony Nyabando Onchango (deceased) 2018 eKLR** where the court stated as follows: -

**“...there was no evidence on how the accident could have occurred and in the absence of such evidence, the court found and held that the respondent failed to prove negligence against the appellants on the balance of probabilities, in the circumstances, therefore indicated it would dismiss the suit for want of proof.”**

13. The respondent urged this court to be guided by the above decision and find that the appellants have not proved their case of negligence as against the 1<sup>st</sup> respondent as no eye witness nor the investigating officer was called to adduce evidence and further, the police abstract dated 9<sup>th</sup> April 2015 adduced as evidence indicates the matter is still pending under investigations neither that the evidence of PW3 stating the 1<sup>st</sup> respondent was to blame for the accident was not proved; that the appellant's evidence was based on hearsay and is not therefore admissible.

14. On the issue of the doctrine of *Res Ipsa Loquitur* the respondent submitted that the trial magistrate in her judgment at page 101 of the record of the appeal as follows: -

**“from the above evidence it's not in dispute that the accident did occur on the said date and place and that the deceased suffered fatal injuries. The pertinent question is as to if negligence is proved against the defendant noting that if all the Plaintiff's witness testified based on hearsays as none of them witnessed the accident.”**

15. Further counsel contends the doctrine of *Res Ipsa Loquitur* does not apply as there was no appellant who was present as an eye witness to shed light on how the accident happened and as such no evidence was adduced to attribute liability on the 1<sup>st</sup> respondent.

16. Lastly, the respondent submitted that assessment of damages for a dismissed suit amounts to a waste of judicial time and is an exercise in futility and cited the case of **M'Mbula Charles Mwalimu vs Coast Broadway Company Limited (2012) eKLR** where the court held: -

**“in the present case, I find that negligence was not proved as a result of which there can be no liability attributable to the Respondent. consequently, the prayer in paragraphs 6 (b) of the memorandum of appeal requesting the court to assess damages does not arise. In the result, the appeal is hereby dismissed.”**

17. The respondent urged this court to dismiss the appeal.

## ANALYSIS AND DETERMINATION

18. This being the first appellate court, I am obligated to reevaluate and reanalyze evidence adduced before the trial court and arrive at an independent determination, this position was held in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

**“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

19. In view of the position above, I have perused and considered proceedings before the trial court, pleadings and submissions filed and consider the following as issues for determination: -

a. *Whether the appellant discharged the burden of proving negligence on part of the defendant on a balance of probabilities.*

b. *Whether this court should interfere with the court decision of quantum*

### i. Whether the appellants proved negligence of part of the defendant/1<sup>st</sup> respondent case on a balance of probabilities.

20. It is not disputed that an accident occurred on 28<sup>th</sup> July 2013 at around 7.30 pm on Nakuru-Eldoret road at Molo River Bridge involving motor vehicles registration numbers KBS 242H, KBB726X ZC 361S Nissan Trailer and KBU 512K Trailer. The vehicle blamed for the accident was Motor Vehicle No. KBB 726X ZC 361S Nissan Trailer. It is not also disputed that **Paul Kairu Munuhe** who was a passenger in the motor vehicle KBS 242H lost his life.

21. PW1 and PW2 never witnessed the accident but relied on police abstract produced by PW3 the police officer blamed the 1<sup>st</sup> respondent

for the accident. PW3 testified that he was not the investigating officer and he did not therefore visit the scene and could not pinpoint the point of the impact or who was to blame for the accident. He however produced a police abstract dated 9<sup>th</sup> April 2015 in support of the appellants' evidence.

22. The police abstract confirm that the accident was reported at Salga Police Station on 9<sup>th</sup> April 2015 and confirm deceased Paul Kairu Munuhe was a passenger in the motor vehicle KBS 242H and was injured at the scene of the accident. The abstract was admitted in court without any objection from the 1<sup>st</sup> respondent or his counsel. The vehicle blamed for the accident was motor vehicle No. KBB 726X ZC 361S Nissan Trailer.

23. The respondent's argument is that production of police abstract is not sufficient evidence to prove the accident. There is no doubt that the police abstract is an official document that gives salient facts on the occurrence of an accident. The abstract adduces sufficient proof of the facts of the accident as ascertained by the police officers who visited the scene.

24. Postmortem report dated 29<sup>th</sup> July 2013 indicate the deceased **Paul Kairu Munuhe** died as a result of injury sustained from road traffic accident on 28<sup>th</sup> July 2013 and that he died on the spot. This evidence was not controverted. The fact that the deceased died on the spot show that the impact was massive and the driver must have been driving at a high speed.

25. In my view, in the absence of any other evidence to the contrary, the police abstract being an official government record/document is sufficient enough to prove on a balance of probability there was a road traffic accident involving motor vehicles registration numbers KBS 242H, KBB726X ZC 361S Nissan Trailer and KBU 512K Trailer along the Nakuru- Eldoret Highway as pleaded by the appellants.

26. The deceased herein having been a passenger in motor vehicle registration No. KBS 242H he could not have contributed to the accident. If the owner or driver of motor vehicle reg. no. KBB 726X ZC 361S Nissan Trailer had reason to blame the owner or driver of motor vehicle KBS 242H evidence should have been adduced to that effect. In absence of any evidence to controvert appellants/plaintiffs evidence, I find the 1<sup>st</sup> defendant 100% liable for the accident and the death of **Paul Kairu Munuhe**.

**(ii)Assessment of damages**

27. I have considered the lower court record and submissions filed. There is no dispute that the deceased died on the spot and find award of kshs 100,000 under pain and suffering sufficient.

28. On special damages of Kshs. 35,000 were proved and do ward the said amount .

29. On loss of expectation of life, I note that the deceased died at the age of 35 years and find an award of kshs 300,000 adequate compensation.

30. On Loss of dependency. The deceased was 35 years old at time of death. PW1 testified that the deceased was a mechanic employed by Signature Tours and Travel earning kshs 29,000 at the time of his death but he did not avail to court any document to prove his earnings. I will therefore apply minimum wage at the time the deceased died year 2013 being the **Regulations of Wages (General) Amendment Order, 2013**, the minimum wages are Ksh. 12,654.90 with a multiply of 20 years with dependency ratio of 1/3 Thus  $1/3 \times 20 \times 12 \times 12,654.90=1,012,392$

31. Damages are summarized as hereunder: -

- i. pain and suffering a sum of Kshs 100,000
- ii. loss of expectation of life sum of Kshs 300,000
- iii. special damages a sum of Kshs 35,000
- iv. For loss of dependency sum of Kshs. 1,012,392,

GRAND TOTAL.....Kshs.1,447,392

**32. FINAL ORDERS**

- 1) Appeal is allowed.
- 2) The 1<sup>st</sup> respondent to shoulder 100% liability.
- 3) Damages assessed at Kshs.1,447,392.
- 4) Costs of both trial court and appeal to the appellants/plaintiffs.

**JUDGMENT** dated, signed and delivered virtually at **Nakuru** This **30<sup>th</sup>** day of **March**, 2022

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Francis Lepikas - Court Assistant

Mr. Mutonyi for appellant

No appearance for respondent