



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**BB (Suing as the Legal Representative of the Estate of the Late NN - Deceased Minor) v Waweru
(Civil Appeal 67 of 2011) [2022] KEHC 14755 (KLR) (Civ) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14755 (KLR)

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

CIVIL

CIVIL APPEAL 67 OF 2011

CW MEOLI, J

OCTOBER 28, 2022

BETWEEN

**BB (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE
LATE NN - DECEASED MINOR) APPELLANT**

AND

JOHN KANJA WAWERU RESPONDENT

*(Being an appeal from the judgment of L. M Njora (Mrs.) (SRM).
delivered on 27th November 2009 in Kikuyu PMCC No. 50 of 2018)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 27th November 2009 in Kikuyu PMCC No. 50 of 2018. The suit was commenced by way of a plaint filed on 3rd April 2008 by BB the plaintiff in the lower court (hereafter the Appellant) against John Kanja Waweru, the defendant in the lower court (hereafter the Respondent). The claim was for damages under the Law Reform Act and the Fatal Accidents Act in respect of fatal injuries sustained by NN (hereafter the deceased minor) in a road traffic accident on 7th December 2005. The Respondent was sued in his capacity as the registered owner and driver of motor vehicle registration number KAK 873Q. It was averred that the Appellant was lawfully crossing the road at a designated zebra crossing point together with the deceased minor when the Respondent so negligently, carelessly and or recklessly drove the said motor vehicle that the vehicle knocked down the minor occasioning her fatal injuries as a consequence of which the minor's estate and the Appellant suffered loss and damage. Negligence was pleaded against the Respondent.
2. The Respondent filed a statement of defence denying the key averments in the plaint and liability. Alternatively, the Respondent pleaded contributory negligence against the Appellant and deceased minor. The suit proceeded to full hearing during which only the Appellant adduced evidence. In its



judgment, the trial court found in favour of the Respondent on grounds that the Appellant had not proved her case to the required standard. The Appellant's suit was accordingly dismissed with costs.

3. Aggrieved with the outcome, the Appellant preferred this appeal which is anchored on the following grounds: -

- “1. The learned trial magistrate erred in law and in fact in failing to objectively analyze the evidence before her and hence arrived at a bad decision.
2. The learned trial magistrate erred in law and in fact when she reached a final verdict before analyzing evidence as required by law and hence arrived at a bad decision.
3. The learned trial magistrate erred in law and in fact when she let her personal opinion about counsel appearing before her colour her judicial objectivity and hence arrived at a bad decision.
4. The learned trial magistrate erred in law and in fact in failing to appreciate that the facts placed before her were contested and thereby arrived at a wrong decision.
5. The learned trial magistrate erred in law and in fact when she failed to appreciate the gravity of the issues before her and thereby arrived at a wrong decision.
6. The learned trial magistrate misdirected herself by failing to award judgment to the Appellant and hence arrived at a wrong decision.” (Sic)

4. The appeal was canvassed by way of written submissions. Counsel for the Appellant condensed the grounds of appeal into three cogent issues for this court's determination. Addressing the court on the first issue it was contended that the court did not objectively analyze the Appellant's uncontroverted evidence to the effect that she and her husband had a child aged 6 years and that the accident occurred on a zebra crossing. Hence the trial court was not justified in rejecting it. Concerning the police abstract counsel took issue with the Court's questioning of its contents and also complained that the trial court failed to objectively exercise its discretion with respect to the typographical errors in the Appellant's pleadings. While calling to aid the decisions in *Grace Nzula Mutunga v Joyce Wanza Musila* [2017] eKLR counsel asserted that the Appellant's unchallenged evidence ought to be allowed to stand. In conclusion he argued that the court's dismissal of the Appellant's suit amounted to a gross miscarriage of justice and the said decision ought to be set aside and the Appellant compensated for the loss of her child at such a tender age.

5. The Respondent failed and or opted not to participate in the instant proceedings before this court.

6. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the Appellant. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle -Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.



An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

7. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. Upon review of the memorandum of appeal and submissions by the Appellant before this court, it is the court's view the appeal turns on one key issue, namely, whether the Appellant established her case on a balance of probabilities. Pertinent to the determination of issue are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

8. The Appellant by her plaint averred at paragraphs 4, 5, 6 and 7 that:

"

" 4. At all material times to this suit, the Defendant was the owner of motor vehicle registration number KAK 873Q Peugeot 504 Salon (hereinafter known as "the said motor vehicle") and the said motor vehicle was being driven by the Defendant.

5. On or about the 7th day of December 2005 at about 4.30pm or thereabouts the Plaintiff was lawfully crossing the road at a designated zebra pedestrian crossing point together with the minor NN at Zambezi along Kikuyu-Limuru Road when the Defendant so negligently, carelessly and or recklessly drove the said motor vehicle that the same knocked down the said NN a minor resulting in her death in consequence whereof the Plaintiff suffered loss damage for which she holds the Defendants liable.

Particulars of the Defendant's Negligence



- a. Driving at a high speed that was excessive in the circumstance;
 - b. Failing to keep any or any proper look out or to have any sufficient regard for the pedestrians crossing the road;
 - c. Failing to see the minor in sufficient time to avoid colliding with the minor;
 - d. Failing to accord precedence to the minor who was crossing the road with the Plaintiff on the said pedestrian crossing;
 - e. Failing to stop before reaching the limits of the said pedestrian crossing on which the minor was when crossing the road;
 - f. Failing to give any or any adequate warning of his approach;
 - g. Failing to apply brakes sufficiently or in time or at all;
 - h. Failing to stop, slow down, to swerve or in any other way so to manage or control the said motor vehicle so as to avoid the said collusion;
 - i. Failing to adhere to the provisions of the Highway Code and the road *Traffic Act* (Cap 403)
6. The Plaintiff will rely on the maxim *Res Ipsa Loquitor*.
7. By reason of the death of the deceased minor her estate has suffered loss and damage.” (sic)
9. The Respondent filed a statement of defence denying the key averments in the plaint and liability. Alternatively, the Respondent pleaded contributory negligence against the Appellant and deceased-minor by stating at paragraphs 6 and 7 that;

“

- “6. In the alternative and without prejudice to paragraph 5 hereof, the defendant will aver that if any accident did occur, (which is not admitted) and if the deceased minor was knocked down and she sustained fatal injuries (which is also not admitted) then the said accident occurred solely or substantially as a result of gross negligence on the part of both the plaintiff and the deceased minor.

Particulars of Negligence of the Plaintiff

- a. Failing to take any or any proper care of the minor with whom she was and allowing her to cross the road in a dangerous manner without any due regard to her safety.
- b. Failing to keep any or any proper look-out or to see or observe or heed the presence of the defendant’s motor vehicle on the said road in sufficient time or at all to avoid the said accident.
- c. Failing to stop the deceased minor from getting onto the road haphazardly in a most dangerous manner without first waiting for motor vehicles on the road to pass.
- d. Permitting the accident to occur.

Particulars of Negligence of the Deceased MINOR



- a. Crossing or attempting to cross the said road in a most dangerous manner without any due regard for her own safety.
 - b. Suddenly without warning, jumping onto the road dangerously without regard to her own safety.
 - c. Getting onto the road haphazardly in a most dangerous manner without first waiting for motor vehicles on the road to pass.
 - d. Failing to keep any or proper look-out or to see or observe or heed the presence of the said motor vehicle registration number KAK 873Q in sufficient time or to at all to avoid the said accident.
 - e. Failing to take adequate precaution for her safety.
 - f. Causing or permitting the accident to occur.
7. The defendant denies the maxim Res Ipsa Loquitor is applicable as alleged in paragraph 6 of the plaint and the Plaintiff is put to strict proof thereof.” (sic)
10. By her grounds of appeal, the Appellant challenges the finding of the trial court as going against the weight of evidence by the Appellant. The trial court after restating the said evidence observed as follows:

“The onus in civil matter is for the Plaintiff to prove their case. The Plaintiff here had a good cause that was badly prosecuted.

.....It’s my opinion that counsel was careless in his pleadings when he merely stated “particulars pursuant to statute” which statute? Is the court to suppose and assume.....It was incumbent upon counsel for the Plaintiff to be particular also polish up on his pleadings. Even a formal proof must go through the same text as a fully contended hearing and rules of procedure and evidence must be followed. There must be no gaps left at all.

This court is not satisfied that there was a zebra crossing at all and even at the point that the Plaintiff say that there was, or even that PW1 and the deceased minor were crossing a zebra crossing point when the road traffic accident occurred.

We were shown proof of death vide burial permit and death certificate by prosecution in evidence. As I said earlier the Plaintiff had a cause of action but which was so badly presented that it’s not possible for this court to find in favour of the Plaintiff. Reasons wherefore, this court finds the Plaintiff has not proved her case to the required standards and as such her claim is dismissed forthwith with costs to the Defendant.” (sic).

11. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the [Evidence Act](#). The Court of Appeal in [Mumbi M’Nabea v David M.Wachira](#) [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on



the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“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 exists.” The above provision provides for the legal burden of proof.

However, Section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:

“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 provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

12. Further,

13. The duty of proving the averments contained in the plaint lay squarely on the Appellant. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

14. The mere occurrence, of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in *Eastern Produce (K) Ltd v Christopher Atiado Osiro* [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2 KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

“There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”



15. As earlier observed, the Respondent did not participate in the trial but applying the dicta in Karugi (*supra*) the onus was still on Appellant to satisfy the court by adducing credible and believable evidence which can stand, in the absence of rebuttal by the Respondent. The Appellant testified as PW1. She was the only eye witness to the accident. It was her evidence that she was holding the hand of the minor while crossing the road at a zebra crossing when the accident motor vehicle hit both her and the minor whereupon arrival at the hospital the minor was pronounced dead. She adduced the copy of records in respect of the accident motor vehicle as P.Exh.1 and Letters of Administration Ad Litem as P.Exh.2.
16. Moses Wanjala Papai testified as PW2. His evidence was to the effect that PW1 was his wife whereas the deceased-minor was their child. That as at when the accident occurred he was out of Nairobi and was thus informed of the same. Upon his return he proceeded to report the accident at the police station and thereafter moved the deceased-minor's body from the mortuary and organized her interment. He proceeded to adduce documents being the death certificate and receipt, receipt for the purchase of the coffin, receipts in respect of transportation, police abstract and burial permit which were marked by the trial court as P.Exh.3, P.Exh.4, P.Exh.5, P.Exh.6 and P.Exh.7, respectively.
17. In its judgment the trial court took issue with the said evidence particularly concerning whether the Appellant established that she was a parent to the deceased-minor, the location on the road where the accident occurred, and the description of the actual occurrence of the accident. On the first issue other than for Appellant's oral evidence there was nothing placed before the trial court to lend credence to the assertion of the alleged parentage, or her relationship to PW2 and the trial court was justified to identify the gap in the evidence.
18. Other than PW1's oral evidence, the other evidence comprised the copy of Limited grant of Letters of administration Ad Litem (P.Exh.2) tendered to support the Appellant's locus standi to institute the suit for her benefit and that of the estate of the deceased-minor. The issue of the relationship between the Appellant and the deceased minor was relevant to the matter at hand and to the general credibility of the two witnesses. Although the trial court did not explicitly pronounce itself on the pleadings touching on the alleged relationship, it is evident in the plaint that PW1 was said to be aged 20 years at the time of filing suit in 2008. The accident allegedly occurred in 2005, which means that she was aged 17 years at the time, while the alleged daughter was six years old at death, which would mean that PW1 got the deceased child at the age of 11years! The Appellant did not consider it useful to tender a birth certificate, baptism card, or a letter from the local administration in the relevant jurisdiction or the child's school to demonstrate her alleged parental standing in respect of the alleged deceased minor. This is an important issue so far as claims under the Fatal Accidents Act and Law Reform Act are concerned.
19. Regarding the accident itself, this court upon reviewing the evidence of PW1 is equally dissatisfied. The fact that a matter proceeds ex parte is not licence for a claimant to adduce scanty and vague statements concerning an accident he allegedly witnessed. The Appellant did not describe the location of the alleged zebra pedestrian crossing on the road, the position on the road where she and her alleged child were during the time of the accident, the side of the road from and to which they were crossing, the precise place on the crossing where she and the alleged deceased were when the vehicle approached, the direction from which the vehicle emerged or was heading, how it was driven in order to proceed to knock down the deceased, or even identify in her evidence the vehicle's registration number, instead tendering a copy of records.
20. If indeed the accident occurred at Zambezi along the Kikuyu /Limuru road, the said road is a dual carriage way, making it even more important to give full details. Despite pleading at paragraph 5 of the plaint no less than nine particulars, including excessive speed in respect of the vehicle driver's alleged



negligence, it appears that by her evidence PW1 was content to state only that she and the minor were on the pedestrian zebra crossing when the accident occurred.

21. Moreover, it was not explained how the deceased minor whose hand PW1 was allegedly holding at the time of the accident, was knocked down and fatally injured while PW1 was caught or hit by a side-mirror of the vehicle and apparently not injured. The Police Abstract (P. Exh.6) which is only evidence of the occurrence of an accident does not include the Appellant as one of those injured in the accident. Looking at the brief and bare account of the accident given by the Appellant at the trial, one is tempted to doubt that she indeed witnessed the alleged accident. Moreover, I am afraid the doctrine of *res ipsa loquitur* is of no avail to a claimant who fails to adduce sufficient and credible basic facts concerning the circumstances of an accident to justify the invocation of the doctrine in her favour.
22. As the court stated in Karugi's case (*supra*), even where a trial has proceeded ex parte, the trial court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant, evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim. The Appellant's case raises more questions than answers and the trial court, albeit employing unnecessarily strong language, cannot be faulted for disbelieving the evidence before it and dismissing the case. There is no merit in this appeal, and it is similarly dismissed it.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28TH DAY OF OCTOBER, 2022.

C. MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kiarie Njuguna

For the Defendant: N/A

C/A: Carol

