



REPUBLIC OF KENYA



KENYA LAW
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**Kyule v Munyili (Civil Appeal 6 of 2020)
[2022] KEHC 15668 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 6 OF 2020
GMA DULU, J
NOVEMBER 23, 2022**

BETWEEN

STEPHEN MUTUKU KYULE APPELLANT

AND

JEREMIAH MBANDI MUNYILI RESPONDENT

(Being an Appeal from the judgment of Hon. M.K. Mutegi (SRM) in Tawa Senior Resident Magistrate's Court Civil Case No.12 of 2018, delivered on 29th January, 2020)

JUDGMENT

1. In a judgment delivered on January 29, 2020 in Tawa SRMCC No 12 of 2018, the learned magistrate found that the plaintiff (appellant herein) failed to prove negligence on the part of the driver of motor vehicle Reg No KBY 039A and as such failed to prove the case on balance of probabilities. The court thus dismissed the case in its entirety with costs to the defendant (respondent herein).
2. In addition to the above, the trial court also applied the same judgment to two other cases No 12 of 2018 and No 14 of 2018.
3. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal through counsel Tombe & Company, on the following grounds –
 1. That the learned trial magistrate erred in law and in fact in dismissing the suit when there was sufficient and overwhelming evidence on record to the contrary thereby arriving at an erroneous conclusion.
 2. That the learned trial magistrate erred in law and in fact in holding that the plaintiff had not proved his case yet the defendant admitted occurrence of the subject accident thereby arriving at an erroneous conclusion.



3. That the learned trial magistrate erred in law and in fact in applying the wrong principles of law thus arrived at an erroneous conclusion.
4. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Tombe & Company advocates for the appellant and the submissions filed by AM Mbindyo & Company for the respondents. I note that each counsel relied on several decided court cases.
5. This being a first appellate court, I am duty bound to examine the evidence on record afresh and come to my own independent conclusions – see *Selle v Associated Motor Boat Co Ltd* (1968) EA and the case cited by counsel for the appellant *Kamau v Mungai & another* [2006] I KLR 150 wherein the Court of Appeal stated that –

“being a first appeal it was the duty of the Court of Appeal to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witness and hence making due allowance for it”.
6. The burden was on the plaintiff to prove his allegations against the defendant. This is what is anchored in statute under section 107 of the *Evidence Act* (cap 80), that he who alleges must prove. The appellant herein was thus required to prove his allegation against the respondent on the balance of probabilities, as this is a civil case.
7. In proving his case, the appellant in the fatal accident test suit, called two witnesses. Pw1 was PC Paul Kiplagat a Police Officer from Mbooni Police Station who produced the police abstract and P3 form for Mike Mutie and Patrick Mutia. He was not the investigating officer and could not blame on anybody for the accident.
8. Pw2 was Stephen Mutuku Kyule the uncle of Frankline Muli Muindi who died in the accident which involved motor lorry KBY 039A. His testimony was that on arrival, he saw the deceased at the scene, attended post mortem examination and incurred funeral costs of Kshs 65,000/= . He said that the deceased was aged 31, not married and did casual work for Kshs 500/= per day, which he used for himself, and cared for his old sickly mother.
9. The defence on their part, called one witness Dw1 Jeremiah Mbandi Munyili the owner of the subject motor vehicle, who stated that on March 31, 2017 he sent his driver to Mbooni to collect timber. The driver was Paul Nzalani Munyao and the turn boy was Mutua.
10. It was his evidence that at about 11am, he was informed that the vehicle fell on its side and one person had died. He went to the scene and found that police had already taken the body. According to him, his lorry was comprehensively insured and CIC Insurance Company repaired the vehicle.
11. In my view, from the totality of the evidence on record, both for the appellant and the respondent, negligence was proved against the respondent.
12. In my view, if the plaintiff's (appellant's) evidence was considered together with the defence evidence, as the trial court was required to do, negligence would have been found to be proved against the respondent, as the deceased was involved in lawful work in the lorry of the defendant, and the lorry having been parked by the driver of the defendant toppled and killed him, a person who was engaged in manual work therein. There being no evidence that the deceased caused the accident, in my view the magistrate erred in not finding negligence on the part of the respondent.



13. However, in my view, the driver of the defendant (respondent) not driving the lorry at the time of the accident, he cannot be held 100% liable in negligence for the accident. I will thus find that the defendant was 60% liable in negligence while the deceased was 40% contributory negligent, as the deceased should have noted that the lorry was parked dangerously, and avoided loading the timber logs to avoid the accident.
14. I note that the trial magistrate did not assess damages payable, which was a mistake. The magistrate should have assessed quantum of damages, even if the case was not successful.
15. I note also that at the trial, the respondent's counsel asked for Kshs 10,000/= damages for pain and suffering, and Kshs 100,000/= damages for loss of life expectation. He also proposed Kshs 360,000/= for loss of dependency being Kshs 3,000 x 30 x 1/3.
16. On the other hand, the appellant's counsel proposed Kshs 10,000/= for pain and suffering, Kshs 200,000/= for loss of expectation of life and Kshs 2,000,000/= for loss of dependency being $1/3 \times 15,000 \times 34 \times 12$.
17. I am of the view that, with the evidence on record, a figure of Kshs 10,000/= for pain and suffering, and Kshs 100,000/= for loss of life expectancy are sufficient award.
18. With regard to loss of dependency, I am of the view that the best approach was to go by the minimum wage of Kshs 7,000/=. Thus it will be $1/3 \times 7,000 \times 34 \times 12 = 952,000/=$.
19. On special damages, in my view the amount of Kshs 500/= for the police documents, and a reasonable figure for funeral expenses of Kshs 50,000/= was proved based on the evidence on record.
20. I will thus set aside the judgment of the trial court, and instead enter judgment for the appellant against the respondent as follows –

Liability 60% against, the respondent, 40% against the appellant.

Pain and suffering Kshs 10,000/=

Loss of Life Expectancy Kshs 100,000/=

Loss of Dependency Kshs 952,000/=

Funeral expenses Kshs 50,000/=

Special Damages Kshs 500/=

Total Kshs 1,112,500/=

Less 40% (455,000)

Final total award Kshs 657,500/=
21. The respondent will also pay the costs of appeal and costs of the trial court proceedings. Interest will accrue till payment in full.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF NOVEMBER, 2022, VIRTUALLY AT MAKUENI.

GEORGE DULU

JUDGE

