



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 643 OF 2016

NYOIKE JOEL1ST APPELLANT

THOMAS K. GAKONYO.....2ND APPELLANT

VERSUS

BENARD MUTHEKE MUNYOKI.....1ST RESPONDENT

MARY MUTHEKE MUNYOKI.....2ND RESPONDENT

(Suing as the personal representatives of the late **GEORGE MUNYOKI MUTHEKE**).

(Being an appeal from the Judgment Delivered Nairobi CMCC No. 5485 of 2014 by Orege, Senior Resident Magistrate on 8th April, 2016)

JUDGMENT

1. This appeal emanates from the judgment of **Orege SRM** delivered on 23rd September, 2016 in Nairobi CMCC No. 5485 of 2014. The suit was filed by **Bernard Mutheke Munyoki** and **Mary Mutheke Munyoki** (the 1st and 2nd Respondents respectively) in their capacity as legal representatives of the estate of their son **George Munyoki Mutheke** who died in a road accident which occurred on 14th January, 2014 along Juja Road, Nairobi. In their plaint filed in the lower court, the Respondents had averred that the deceased was lawfully boarding the vehicle registration No. **KAM 186V**, owned by **Nyoike Joel** (1st Appellant) and at the time driven by his driver **Thomas T. Gakonyo** (2nd Appellant) when the latter so negligently drove the vehicle that the deceased fell off and was crushed by the said vehicle, sustaining fatal injuries.

2. The Appellants had by their statement of defence denied the occurrence of the accident and negligence and pleaded in the alternative, that the deceased substantially contributed to the accident through his own negligence, including the attempt to board a moving vehicle. The matter proceeded to full hearing at which the parties called one witness each. In his judgment, the learned trial magistrate found the Appellants wholly liable for the accident and awarded damages as follows:

Loss of dependency - Kshs. 1,936,588.50

Loss of expectation of life - Kshs. 70,000/-

Special damages -Kshs.25,000/-

Total- Kshs. 2,051,588.50

3. Aggrieved by this outcome, the Appellants preferred the present appeal. Grounds 1 to 3 primarily challenge the finding on liability while grounds 4 to 6 challenge quantum.

4. The appeal was canvassed by way of written submissions, which this court has considered together with the entire record of appeal and lower court file.

5. In my considered view, this appeal turns on the question of liability. The Appellants submitted in this regard that the Respondents did not adduce evidence to prove negligence on the part of the Appellant driver. Citing several decisions of the High Court and the Court of Appeal as well as the provisions of Section 107 to 109 of the Evidence Act, the Appellants argued that the Respondents failed to discharge the burden to prove their case on a balance of probabilities. They urged the court to allow the appeal and dismiss the lower court suit for want of proof of negligence, or in the alternative to apportion blame on a ratio of 50:50.

6. For their part, the Respondents defended the judgment of the Lower Court. The Respondents asserted that the Appellants failed to “disprove” the Respondents’ claim as the driver of the accident vehicle did not testify, while the evidence of the police officer who testified for the defence did not suffice. Relying on several authorities including **Embu Public Road Services Ltd v Riimi [1968] EA 22 Nandwa v. Kenya Kazi Ltd [1988] KLR 888** they asserted that negligence could therefore be inferred against the Appellants.

7. The duty of the first appellate court is to re-evaluate the evidence in the Lower Court and draw its own conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. See **Selle & Another V. Associated Motor Boat Co. Ltd & Others [1968] EA 123; Peters V. Sunday Post Ltd [1958] EA 424**. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on a misapprehension of the evidence or 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 V. Duncan Mwangi Wambugu [1982 -1988] I KAR 278)**

8. I find it pertinent at the outset to lay out the provisions of Sections 107 and 108 of the Evidence Act respectively, which are to the following effect:

“107. Burden of proof

(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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

9. It is true that the Respondents had pleaded and particularized negligence against the Appellants in their plaint. However, the onus lay with the Respondents to establish the said negligence through evidence. While there can be no dispute that an accident occurred on the material date involving the Appellants’ vehicle and the deceased, that mere occurrence, without more, cannot be proof of negligence on either side. 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] 2KAR 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.”*

10. More recently in **Antony Francis Wareham t/a A.F. Wareham and 2 Others v Kenya Post Office Savings Bank [2004] e KLR** the Court of Appeal stated that :

"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 the 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 nonexistence 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. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings."

11. In this instant matter, the only witness for the Respondents was the 1st Respondent. He did not witness the accident. His evidence as to the manner in which the accident occurred was essentially hearsay. Ditto for the evidence of **PC Mogaka (DW1)**, the police officer who gave evidence for the defence. He merely gave indirect evidence on the accident and produced a copy of the police abstract which differed with that tendered by the Respondents in that the former copy blamed the deceased for the accident. Indeed, based on the testimony of the 1st Respondent and even **DW1**, there was no admissible and credible evidence as to how the accident occurred. Thus, it is surprising that trial magistrate while correctly rejecting the hearsay evidence of **DW1** appeared to accept the 1st Respondent’s evidence on the occurrence of the accident and therefore stating in his judgment that:

“The defendant had to rebut the assertion of negligence on his part by showing either that there was no negligence on their part(or) that the accident was due to circumstances beyond his control. The plaintiff attributed the death to negligence on the part of the defendant agent and/or driver which the defendant had not rebutted. From the foregoing I find that the defendant was wholly to blame for the accident”.

12. This finding is not based on evidence by the Respondents or at all. Not only was there no evidence of the negligence of the driver of the accident vehicle leading to the accident, but also no facts were established from which any inference of negligence could be made against the Appellants and therefore call for a rebuttal. See **Nandwa V. Kenya Kazi Ltd [1988] KLR 488**.

13. 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 Respondents herein failed to tender any credible evidence from which a finding or inference of negligence could be based. The finding of the lower Court that the Appellants were wholly liable for negligence is without evidential foundation and cannot stand. In the circumstances, this court must interfere with that finding by setting it aside.

15. The appeal on liability is therefore allowed and the judgment and decree of the Lower Court are hereby set aside. Consequently, this court substitutes therefor an order dismissing the Respondents' suit in the lower Court. Parties will bear own costs on this appeal and in the lower Court.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF JUNE 2021.

C. MEOLI

JUDGE

In the Presence Of:

Mr. Nyanjwa h/b for Miss Nkatha for the Respondents

N/A for the Appellants

Corol- Court Assistant