



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 163 OF 2018**

**MOHAMMED KONG'ANI LUTTA**

**(suing for and on behalf of the estate of**

**MUSA KONG'ANI also known as**

**MOSES KONG'ANI LUTTA, deceased).....APPELLANT**

**VERSUS**

**SHIV HAULIERS LIMITED.....RESPONDENT**

**(Being an appeal from the judgment of Hon. CC Kipkorir, Senior Resident Magistrate in**

**Mumias SPMCCC No. 87 of 2012, of 5<sup>th</sup> December 2018)**

**JUDGMENT**

1. The appeal herein arises from the judgment and decree of the Senior Principal Magistrate's Court at Mumias in Civil Suit No. 87 of 2012, delivered on 5<sup>th</sup> December 2018. The suit was dismissed because the appellant never attended court to prove his case, and the court had no basis upon which to assess liability on and make an award in compensation.
2. The appellant being dissatisfied with the judgment lodged the instant appeal, vide a memorandum of appeal filed herein on 14<sup>th</sup> December 2018, dated 13<sup>th</sup> December 2018, setting forth the following grounds: that the trial court erred in rejecting an adjournment to allow the substitution of the appellant, and that the trial court was wrong to conclude that the estate of the deceased was not able to prove negligence with regard to his death. The appellant would like the judgment of the trial court set aside, and he be allowed to substitute the appellant so as to establish his case against the respondent.
3. The factual background is that deceased person, the subject of these proceedings, Musa Kong'ani Lutta alias Moses Kong'ani Lutta, a pedestrian, pushing his pedal cycle along the Mumias-Busia road, was knocked down by motor vehicle registration mark and number KAT 105U/ZC 2709, allegedly belonging to the respondent. The appellant then filed suit at the lower court, claiming compensation by way of general damages for the fatal injuries, pain and suffering undergone by the deceased. The matter initially proceeded *ex parte*, in default of defence, and 3 witnesses testified; but before judgment was delivered, the proceedings were set aside, and the respondent allowed to defend. It filed a defence, denying everything, and, in the alternative, attributing liability on the deceased. In the subsequent proceedings, 2 witnesses testified, PW1, an eyewitness, and PW2, a police officer. PW1 explained how the accident happened, while PW2 testified on the investigations done in respect of the accident. The appellant did not testify. In the end, the court, found that, in view of the fact that the appellant did not testify, the case was not proved, and proceeded to dismiss the suit.
4. Directions on the disposal of the appeal were given on 2<sup>nd</sup> March 2020, to the effect that the appeal be canvassed by way of written submissions. There has been compliance. Both sides filed their respective written submissions, which I have read through and noted the arguments made. There are only two grounds of appeal, on the the denial of adjournment to allow substitution, and the finding that negligence had not been proved.
5. On adjournment, the record reflects that the matter first came up for hearing on 25<sup>th</sup> September 2018. On that day the appellant was absent, but 3 witnesses were available. PW1 testified and the matter was put off to 31<sup>st</sup> October 2018. On 31<sup>st</sup> October 2018, the appellant was not present, but PW2 testified. The matter was put off to 14<sup>th</sup> November 2018, and was marked as a last adjournment, with a reminder that the court had given notice to the parties that the matter ought to be concluded by December 2018. On 14<sup>th</sup> November 2018, the appellant was not present, and there was no other witness. An adjournment was sought on the basis that the appellant was based in Uganda, and his advocate had been unable to get him or his family. The advocate asked for time to substitute the appellant as plaintiff. The adjournment was

declined, and both sides closed their cases. Judgment followed on 5<sup>th</sup> December 2018, on the basis that the appellant, as plaintiff, did not testify, and that the only relevant witness was PW2, the police officer who confirmed how the accident happened, and the fact of the death of the deceased. It was found that none of the particulars of negligence alleged in the plaint were proved, and it was not shown how the respondent was negligent.

6. Was the appellant entitled to adjournment? The matter came up for hearing on 3 occasions. Ideally, the appellant ought to have been the opening witness. This was his case, for he was the plaintiff. That the matter came up on 3 occasions when he was not in attendance, in my view, was telling, he was not ready for the case. Suits are mounted by the parties, and parties must demonstrate seriousness in their quest to prosecute the suits. Non-attendance by a plaintiff on 3 straight occasions is unacceptable, and it cannot be said that the court exercised its discretion arbitrarily or wrongly. 3 occasions to attend court and testify was enough time to the appellant.

7. The advocate who appeared for the appellant sought adjournment, so that he could substitute the appellant with someone else. There is nothing on record which explains why the appellant was not able to attend court. I understand this appeal to be by the appellant, who was the plaintiff at the trial court. I do not understand how he can argue that an adjournment was denied, which would have allowed his substitution, yet he has not explained why he was unable to attend court on the 3 occasions. An attempt to explain his absence was given on 14<sup>th</sup> November 2018, when adjournment was denied, that he lived in Uganda, and that no one could reach him. Certainly, the court did no wrong in denying adjournment, in a case where the appellant filed suit and simply disappeared, leaving his advocates without any form of contact. Suits are not filed so that they remained parked at the registry. They are for hearing, and the persons who file them must make efforts to have them prosecuted, failure to which the suits are struck out or dismissed. The dismissal of the suit herein was a logical conclusion to the failure by the appellant to prosecute his suit.

8. It is submitted that the appellant was working in Uganda, and was unable to get time off work to come to Kenya to testify. Those are statements made from the bar, for when the matter came up for hearing on 25<sup>th</sup> September 2018, 31<sup>st</sup> October 2018 and 14<sup>th</sup> November 2018, those explanations were not given. It was only on 14<sup>th</sup> November 2018 that it was said that he was living in Uganda, there was no reason given why he could not come to court. On the issue of substitution, the record is clear that the appellant had a last adjournment. Prudence required that between 31<sup>st</sup> October 2018 and 14<sup>th</sup> November 2018, once it became clear that the appellant would not make it to court, an application for his substitution ought to have been filed, to demonstrate seriousness, and to save time. None was filed, and the appellant was content to wait till the last day to raise the issue. Overall, I do not find any merit in the first ground of appeal. The trial court had properly exercised discretion to deny the adjournment.

9. On whether the evidence placed on record from the PW1 and PW2 was not adequate to prove negligence, I note that the two witnesses gave testimonies that were not congruent. PW1, the eyewitness, saw a tractor registration mark and number KAT 195 hit the deceased. The police records, presented by PW2, talked of a lorry registration mark and number KAT 105U/ZC2709. So, was it a tractor or a lorry? If we go by PW2 and his documents, then the challenge will be that PW2 was not at the scene, he did not witness the accident, and he did not investigate the matter, but merely presented documents prepared by another. The story of the eyewitness is not in tandem with that of the investigator. So, what was the trial court to make of this? To whom was negligence to be attributed? The owner/driver of the tractor or the lorry? Were both owned by the respondent, and driven by the same person? From what is before me, I do not see any basis upon which I can conclude that negligence could be attributed to the respondent. Of course, the facts given by PW1 reflectingly, it is my finding that the appeal herein has no merit, and it is hereby dismissed. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS .....6<sup>th</sup> .....DAY OF  
.....AUGUST.....2021**

**W. MUSYOKA**

**JUDGE**