



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 116 OF 2019

TABITHA MORAA RATEMO

(Suing as a legal representative and administrator of the estate of

TIMOTHY RATEMO NYAMBOGA (Deceased).....APPELLANT

VERSUS

DAVID MBUGU.....DEFENDANT

[Being an appeal from the Chief Magistrate's Court at Kisumu Hon. A. Odawo SRM

dated and delivered on 18th September 2019 in Kisumu CMCCC No. 249/2009]

JUDGMENT

The Appellant was the Plaintiff before the trial court. She had sued the Respondents, in her capacity as the legal representative and Administrator of the estate of her late husband, **TIMOTHY RATEMO NYAMBOGA**.

1. It was her case that Timothy was lawfully driving a Toyota Saloon vehicle Registration No. **KAK 425P**, on the material day.
2. It was the Appellant's further case that the Defendant's driver, drove the Mitsubishi Fuso Registration No. **KBB 457A** so negligently, that that vehicle hit the vehicle which Timothy was driving. As a consequence of the accident, Timothy sustained serious injuries, which led to his death.
3. After a full trial, the learned trial magistrate dismissed the suit. It is the said dismissal of the suit that prompted the appeal herein.
4. Whilst dismissing the suit the trial court noted that the Appellant was the only person who testified in support of the claim.
5. The learned magistrate noted that the Appellant expressly stated that she did not know how the accident occurred. Therefore, the trial court concluded that the Plaintiff had failed to prove her case against the Respondents herein.
6. Being the first appellate court I have a duty to re-evaluate all the evidence on record, and to draw therefrom my own conclusion.
7. **PW1, TABITHA MORAA RATEMO**, is the widow to Timothy. She testified that Timothy was working as a driver, of the vehicle Registration No. **KAK 425P**. That vehicle belonged to Robert.
8. On the material day **PW1** received a phone-call through which she learnt that Timothy had been involved in an accident. She rushed to the scene, where she found her husband dead.
9. During cross-examination **PW1** said;

"I do not know how the accident occurred. The police did not tell me who to blame for the accident."

10. After **PW1** testified, her advocate informed the trial court that he needed to call more witnesses. The case was then adjourned at the behest of the Plaintiff.

11. Thereafter, the Plaintiff was amended so as to add a Third Party, **ROBERT EDMOND ORANGO**. The said Third Party was described as

“the beneficial owner of Motor Vehicle KAK 425P, which was involved in the accident.”

12. On 17th July 2019 all the 3 parties consented to the production of the following documents, as exhibits in the case;

(i) Death Certificate;

(ii) Bundle of receipts;

(iii) Letter of employment;

(iv) Police abstract;

(v) Grant of Letters of Administration;

(vi) Copy of KRA records;

(vii) Copies of two Birth Certificates.

13. The Plaintiff then closed her case.

14. The Defendant called one witness, **HARRISON NJUGUNA THUKU**, who testified as **DW1**.

15. He said that on the material date he was driving the Mitsubishi Fuso Registration No. **KBB 457A**.

16. **DW1** testified that the vehicle which Timothy was driving was involved in a multiple accident, in which it first hit one vehicle and then lost control, whereupon it proceeded to hit the vehicle which **DW1** was driving.

17. After **DW1** testified, the Defendant closed his case.

18. The Third Party then gave his evidence. He said that on the material date, he had tasked Timothy to drive his vehicle, **KAK 425P**. On that date, the vehicle was being used for purposes of attending a graduation.

19. During cross-examination the Third Party said that when he visited the Ahero Police Station after the accident, he noted that the Police Abstract indicated that the matter was still pending under investigations.

20. He said;

“It is not clear which vehicle was at fault. I doubt road traffic accident could occur as stated by

DW1. If the vehicle would have been hit on the side, it would have continued to the side and not gone to the incoming vehicle. That is all.”

21. The Third Party concluded his testimony by reiterating that he was not at the scene of the accident.

22. In her submissions, the Appellant stated that the evidence on record prove that the Defendant and the Third Party were to be blamed for the accident.

23. The Appellant asked the Court to apportion liability 50:50 between the Defendant and the Third Party.

24. From the evidence on record it is clear that the Third Party was not driving any of the two vehicles which were involved in the accident. He was the owner of the vehicle which was being driven by the deceased, Timothy.

25. The Appellant has not demonstrated to the Court how any liability would attach to the third party, when the said party has not been shown to have either done something or failed to do something that caused the accident.

26. Being the owner of a vehicle which was involved in an accident could render the third party vicariously liable for the actions or omissions of his driver. Therefore, the third party herein could, arguably, be vicariously liable for the acts of either commission or of omission, by the deceased.

27. When a claim is brought by a person who was a passenger in a vehicle which was involved in an accident, the passenger would not ordinarily be liable for any contributory negligence. In such a scenario it is possible that the drivers of the vehicles involved in the accident would share liability for the accident.

28. In the case before me, the deceased was the driver of one of the vehicles which were involved in the accident. It is therefore possible that either he or the driver of the lorry, or both the deceased and the lorry driver could have been liable for the accident. The Court can only apportion liability based on evidence.

29. Apportionment of liability is not an abstract exercise.

30. The burden of proof rested upon the Plaintiff. She ought to have adduced evidence to prove that the Defendant or the third party, or both of them were liable for the accident.

31. However, the Plaintiff stated that she did not know how the accident occurred. In effect, the Plaintiff did not prove the link between the accident and any particular actions or omissions of the Defendant or of the third party.

32. It is well settled that injuries or even death could result from circumstances involving a person or people; but it is not always that such injuries or death can be attributable to the negligence of someone. Therefore, when a claim is founded upon negligence, the claimant must prove the said negligence so as to enable the Court to hold the Defendant liable.

33. I note that even though the police abstract was produced in evidence, the Appellant has conceded that;

“... on the abstract, under the ‘results on investigations’, the results were still pending”

34. Therefore, the said police abstract did not advance the Plaintiff’s case.

35. In ZOS & CAO (Suing as the Legal Representatives in the Estate of SAO (Deceased) Vs Amollo Stephen [2019]eKLR the Court held as follows;

“The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident, but proof of the fact that following an accident, the occurrence thereof was reported to the police, who took cognizance of that accident. It is therefore the police, having received information or a report of the occurrence of an accident, who would investigate and establish circumstances under which such an accident occurred.”

36. I find that the Appellant failed to prove any of the particulars of negligence which she had asserted against the Respondents. Accordingly, the learned trial magistrate was right to have dismissed the suit.

37. In the result, the appeal lacks merit and is therefore dismissed. The costs of the appeal shall be paid by the Appellant, to the Respondents.

DATED, SIGNED and DELIVERED at KISUMU

This 28th day of October 2021

FRED A. OCHIENG

JUDGE