



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 84 OF 2019

SALESIO NTELA ARUNYARU (suing as the legal representative of the

Estate of David Mutuma (deceased).....APPELLANT

VERSUS

JULIUS WACHIRA MATHENGE.....1ST RESPONDENT

PATRICK KAARIA.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. P. M. Wechuli (SRM) made on 14/12/2018)

J U D G M E N T

1. The appellant was the plaintiff in the lower Court. He had sued the Respondents as owner and driver of motor vehicle registration number KBJ 506E (“the subject vehicle”), respectively. He sought general damages for pain, suffering and loss of amenities, general damages under the Law Reform Act and the Fatal Accidents Act and special damages of Kshs 43,250/=.

2. The appellant had alleged that on or about 30th December 2009, **David Mutuma** (deceased) was lawfully a pillion passenger on a bicycle along Meru - Maua Road when at Muthara, the 2nd respondent negligently and carelessly controlled the subject vehicle whereby he caused the same to veer off the road and violently hit the deceased occasioning him fatal injuries.

3. The defendants denied the plaintiff’s allegations *in toto*. They also denied that the deceased’s death was as a result of the injuries he sustained from the accident of 30/12/2009.

4. After trial, the trial court found that the death of the deceased had no bearing whatsoever with the accident. In the premises, the trial Court dismissed the appellant’s suit in its entirety.

5. It is against the said decision that the appellant appealed to this Court raising five (5) grounds of appeal as follows: -

(a) That the learned trial Magistrate erred in law and in fact in dismissing the Appellants claim as being unproven in its entirety.

(b) That the learned Magistrate erred in both law and fact in misdirecting himself by disregarding the Appellant’s evidence and witness testimony in trial.

(c) That the learned trial Magistrate erred in law and fact in failing to consider the Appellant’s submissions on record.

(d) That the learned trial Magistrate erred in law and in fact in failing to consider conventional awards in similar cases.

(e) That the learned trial magistrate erred in law and in fact by failing to evaluate and/or appreciate the nature of the gravity of injuries sustained by the appellant which indeed led to his untimely demise.

6. As the first appellate Court, this court is duty bound to re-evaluate the evidence afresh and come to its own independent findings and conclusions. See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**.

7. The case before the trial Court was that on 30/12/2009 the deceased left home to go to Muthara to see his K.C.P.E results. The appellant

later received a report that the deceased had been involved in a road accident at Muthara market. That the deceased sustained injuries to which he never recovered until 9/04/2011 when he died.

8. The parties adopted **John Kamenchu's** evidence in a sister file i.e. **Tigania Cmcc No, 151 of 2012**. It is worthy to note that this file or its proceedings was not included in the record of appeal. Further, it was nowhere in the original record for this case. The Court was therefore not able to discern what the said witness stated. This is a fatal error on the part of the appellant.

9. **Pw3 Dr. Guantai Nicholas** of Meru teaching and referral Hospital, produced a medical report prepared by Dr. Macharia dated 7/9/2010. It showed that the deceased was attended to after a road traffic accident and had multiple laceration of scalp and face with bleeding in the ears and nose. He also had multiple cuts on the right wrist and a fracture of the left femur, The CT scan showed no intracranial injury. He was nursed and discharged from hospital on 29/3/2010.

10. It was his testimony that except for scars, the fractures had healed. That the deceased had healed before his death. That the deceased died as a result of a stomach infection which led to dehydrogenation. In his view, the death had no bearing whatsoever with the accident. It was a stomach bug as per the death certificate that caused the deceased's death.

11. By consent the parties adopted the statement of DW1 in **Tigania Cmcc No, 151 of 2012**. Again, his statement in that case was not included in the Record before this Court. It was also not in the original record of the lower Court that was forwarded to this Court. All that this Court noted is what the trial Court commented about it in the judgment and the submissions of the parties. Obviously, this Court is not bound by what either the parties or the Court noted about the said statement. It was upon the appellant to include it in his Record if he wished the Court to rely on it. This he did not do.

12. The Court has considered the respective parties' written submissions. The main issue for consideration is whether the trial Court erred in dismissing the appellant's claim before it.

13. **Ground nos. 1, 2, 3 and 5** relates to liability. From the evidence on record, the trial Court found that there was no dispute that the deceased was involved in an accident with motor vehicle KBJ 506W driven by the 2nd defendant. There was no cross-appeal on this finding. In this regard, the issue whether there was an accident between the deceased and the 2nd defendant was determined with finality.

14. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of an issue. That is the purport of **section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)** which provides:-

“(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”.

15. From his plaint, the appellant alleged that as a result of the accident caused by the 2nd respondent, the deceased sustained injuries from which he died. It is in respect of the said death that the appellant sought compensation under both the **Law Reform Act and the Fatal Accidents Acts**.

16. In this case, the appellant testified that the deceased was involved in a road accident as a result of which he sustained fractures on the leg, head and pains on the ribs. He stayed in hospital for three months and succumbed to those injuries three years after the date of the accident.

17. The evidence of **Pw3 Dr. Guantai** was that as at the time the deceased was being examined by Dr. Kariuki on 2/9/2010, he had healed from the fractures and only scars were left. That the deceased's death had no bearing whatsoever with the accident. That the deceased died out of a stomach bug.

18. The Court has looked at the Death Certificate No. 023566 dated 9/5/2012. The cause of death is indicated as being '*Cardiopulmonary arrest due to gastroenteritis*'. This simply meant that the deceased died out of a stomach infection that led to uncontrolled diarrhoea. There was no evidence to connect the stomach infection with the injuries that were sustained at the accident of 30/9/2010.

19. In **Statpack Industries v James Mbithi Munyao [2005] eKLR**, the Court cited with approval the case of **Wilsher vs Essex Area Health Authority (1988) 2 W. L. R. 557** where the House of Lords held that, where a plaintiff's injury could have been caused by six possible factors of which the defendant's negligence was only one, the onus was on the plaintiff to establish "causation", and that, in that case he had failed to establish that the defendant's negligence was the cause of the accident.

20. In **Elijah Ole Kool vs George Ikonya Thuo [2001] eKLR**, the Court held:-

“There can be no liability unless the damage is the “proximate” result of the negligence. It, therefore, remains upon the Appellant to prove both that the Respondent was negligent and that his negligence caused or materially contributed to the damage..... In other words, the defendant's negligent act or omission is the cause of the Plaintiff's injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the Plaintiff's injury: The inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence.”

21. In this case the stomach bug was another cause which came into play after the accident and which caused the deceased's death. It had nothing to do with the injuries the deceased had sustained from the subject accident three years prior.

22. To the extent that the appellant's claim before the trial Court was a claim under both the **Law Reform and Fatal Accidents Acts** allegedly

on the basis of the accident complained of, the trial Court cannot be faulted.

23. As regards special damages, none were proved. In this regard, the trial Court was right in its conclusion that none were payable.

24. On quantum, had the appellant succeeded, a global sum of Kshs. 500,000/- would have been adequate.

25. For the foregoing reasons, I find the appeal to be without merit and the same is hereby dismissed with costs.

Signed at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 23rd day of January, 2020.

A. ONG'INJO

JUDGE