



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 82 OF 2013**

**BETTY CHELANGAT LANGAT**

(suing as legal representative and dependant to the estate of JOEL KIBET LANGAT).....**APPELLANT**

**VERSUS**

**ADAN MAHUD.....RESPONDENT**

**JUDGMENT**

1. This suit was consolidated with HCA No.83 of 2013 for purposes of hearing and disposal of the two appeals. The suits filed in the lower court by the two appellants arose from an accident which occurred on 15<sup>th</sup> April 2010 involving motor vehicle KAY 636S Mercedes Benz trailer which overturned near Butare in Kigali Rwanda resulting in fuel bursting to fire which burnt the deceased herein resulting in his death.

2. After hearing, the trial magistrate found that the plaintiff/appellant failed to prove the case on a balance of probabilities but went ahead to assess damages which would have been awarded if the appellants succeeded in the suit. The trial magistrate also declined to make a determination on the defendant's counterclaim on ground that it did not form part of the defence.

3. Being aggrieved by the above decision, the appellant filed appeal on the following grounds: -

*i. The learned trial magistrate erred in law and fact in dismissing the appellant's suit.*

*ii. The learned trial magistrate erred in law and fact in finding that the appellant had not proved liability on the part of the respondent thus dismissing the suit.*

*iii. The learned trial magistrate erred in law and fact in failing to find that the appellant's claim as against the respondent is bonafide.*

*iv. The learned trial magistrate erred in law and fact in disregarding the overwhelming evidence adduced by the appellant as well as the witnesses hence arriving at a wrong decision.*

*v. The learned trial magistrate erred in law and fact in deciding the suit in total disregard of the principles of law.*

*vi. The learned trial magistrate erred in law and fact in finding that the suit by the appellant against the respondent has not been proved on a balance of probability.*

*vii. The learned trial magistrate erred in law and fact in failing to consider the circumstances of the case and the submissions made by the appellant's counsel.*

4. Directions on hearing of the appeal were given on 15<sup>th</sup> July 2019. Counsel for the appellant was directed to serve the directions on the respondent. When the matter was mentioned on 29<sup>th</sup> October 2020, counsel for appellant indicated to the Court that he served the respondent's advocates with submissions and the mentioned notice and had filed affidavit of service to confirm service.

**APPELLANT'S SUBMISSIONS**

5. The appellant submits the learned trial magistrate erred in his judgment by dismissing the appellant's case and appealed on 7 grounds. He was the plaintiff in Nakuru CMCC No. 688 of 2011 against the respondent herein who was the defendant. He submits the claim of action

arose out of a road accident which occurred on 5<sup>th</sup> August 2010. He was working as a turn boy in motor vehicle registration number KAY 636S Mercedes Benz, he sustained tender blunt trauma to the chest and swollen and tender on the right shoulder and arm.

6. The appellant submits the trial magistrate overlooked the appellant's evidence adduced and that submitted through the submissions. Further did not give a convincing reason as to why he dismissed the appellant's case on ground of employment relationship. The Court erred in failing to establish liability on the respondent, he failed to challenge the appellant's evidence and opted to remain silence in his defence.

7. The appellant alleged and proved his case on a balance of probability, the respondent was the appellant's employer and had sued him for negligent.

8. The respondent failed to file written submissions and failed to attend Court on 29<sup>th</sup> October 2020 despite service. The Court did not therefore get the opportunity of knowing the respondent's arguments.

### **ANALYSIS AND DETERMINATION**

9. I have perused and considered the appellant's submissions alongside the grounds of submissions. My role as the first appellate is to re-evaluate evidence adduced before the trial court and arrive at an independent determination as was held in the case of **Selle & Another Vs Associated motor Boat Co. Ltd & Others (1968 ) EA 123** where the Court stated as follows:-

**“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

10. From evidence adduced before the trial court, the deceased herein was an employee of the defendant/respondent. He was the driver of the vehicle registration number KAU 636S was involved in the accident herein. The appellant in this case testified that the appellant in HCA 82 of 2013 was the deceased's turn boy.

11. On cross examination, the appellant confirmed that police report indicated that the driver was over speeding. She also confirmed that she signed an agreement with the defendant/respondent that the kshs 100,000 paid was final dues and compensation for the family and that she signed the agreement as the wife of the deceased and was witnessed by her pastor. She said he never produced the agreement in Court.

12. The appellant also stated in the lower court that she had not adduced evidence to show that the vehicle was defective. She confirmed that the deceased spent kshs 894,400 to bring the deceased's body from Rwanda. She however said the defendant did not tell of the expenses when he paid her kshs 100,000 and if he was claiming the expenses, he could not have paid kshs 100,000.

13. The appellant's evidence in this case was adopted in CMCC No.618 of 2011 giving rise to HCA No.82 of 2011.

14. The respondent availed one witness DW1 **Adaan Mohammed**. He confirmed that he was doing business using motor vehicle registration number KAU 636S. He confirmed that the deceased was his driver and **Samwel Kipngetch Koros** the appellant in HCA No.82 of 2013 was his turn boy. He testified that the driver was responsible for the vehicle which was valued at kshs 7 million. He said the vehicle did not require a turn boy and he came to know **Samwel Kipngetch Koros** after the accident. He said he had not employed him and that he learnt he was the deceased's nephew. He said the vehicle was not supposed to carry passengers and there was warning at the door and the driver was not allowed to drive from 6pm to 6 a.m.; that the accident occurred at 9pm

15. The respondent testified that the vehicle had no defect and the cause of the accident is indicated acted as over speeding as shown by report produced by accident report which he produced. He added that as per the report **Samwel Kipngetch Koros** was not among the victims. The respondent testified that he spent kshs 894,400 following the accident which included bringing the deceased's body to Kenya, expenses for coffin and transport. He said he lost the lorry and fuel. He produced in Court logbook of the vehicle.

16. The respondent testified that the family of the deceased admitted that the deceased was on the wrong but requested financial help to complete building a house, continue with farming and bring up the children; and they recorded an agreement which he produced as exhibit 4; he said he paid the widow kshs 100,000 and produced receipts showing expenses. He stated that he filed a counterclaim for the vehicle and fuel. He restated that **Samwel Koros** was not his employee and he met him for the first time during the funeral of the driver.

17. The respondent further stated that if the vehicle was defective, he could not have been allowed to carry super fuel and that he agreed to pay the family in good faith. In re-examination he said he paid hospital expenses for **Samwel Koros** and said he appeared to him as family of the driver.

18. The defendant availed a witness DW2 **Bashir Abdul** who testified that he had hired the vehicle from the defendant to transport fuel from Nakuru Pipeline to Rwanda. He said he is the one who paid for the fuel. He said he was exporting the fuel to a client called ACC who refused to pay. He said they discussed with defendant and family of the deceased after the funeral and recorded an agreement to pay as the family kshs 100,000 as they were poor though he was driving at night against the law.

19. From the foregoing, the vehicle was in good condition, police report indicate it was being driven at high speed and lost control while descending at the scene of the accident and at night 9 p.m. This was confirmed by the widow of the deceased who confirmed the contents of the police report.

20. No evidence was adduced to controvert evidence availed to Court by the defendant in form of report from the police. On a balance of probabilities, the plaintiff failed to prove negligence on part of the defendant. In my view the trial magistrate did not err in arriving at the decision that the plaintiff failed to adduce evidence to controvert evidence of negligence on part of the driver.

21. In respect to appellant in HCA No.82 of 2013, record show that he not did produce any document to show that he was employed by the defendant. He also stated that after travelling for 4 days the engine brakes developed problems at Kaseje in Rwanda and they waited for a mechanic from Nakuru for 3 days. He said after repair they proceeded on the journey for 20 kilometres when the trailer started wobbling. He said the brake problem recurred.

22. I note from the report that **Samwel Koros** is indicated as turn boy. The report by police did not show any pre-accident defects. It is true he is not listed as victim but he is listed as turn boy in the report. He is listed under witness and in bracket after his name is turn boy. From the appellant's evidence, it is true he never produced any documents to prove employment. On perusal of the appellant's testimony, there is high probability that he was truly a conductor in the lorry though terms of employment have not been made clear. The defendant in his testimony said he engaged the deceased driver whenever there was work and even for the driver no document of employment was produced, it is unlikely that the appellant in HCA 82 of 2015 would travel in the vehicle all the way to Rwanda unless he was engaged to accompany the deceased driver as a conductor.

23. The appellant's allegation that the vehicle had break problem has not been sufficiently proved as the report after the accident revealed that the vehicle was normal. The defendant blames the deceased driver for over speeding and if that was the case, the deceased being his driver as he confirmed, he would be vicariously liable for the acts of his employee. From the foregoing I find that the appellant in HCA No.82 of 2013 never contributed to the accident and he should be paid damages assessed by the trial court.

24. From the foregoing, I see no merit in this appeal.

25. **FINAL ORDERS**

1. Appeal in HCA No. 83 of 2013 is hereby dismissed.
2. Appeal in HCA No.82 of 2013 is allowed.
3. Appellant in HCA No.82 of 2013 to be paid damages assessed by the lower court.
4. Each party to bear own costs of appeal in both files .

**Judgment dated, signed and delivered via zoom at Nakuru This 17<sup>th</sup> day of December, 2020**

.....  
**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Mr. Chepkwony counsel for the Appellants

No appearance for Respondent