



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 75 OF 2018**

**VIOLET KAMWENYA ODIARA & JIMMY MUSANGA**

**(suing as the administratrix of the estate of the late**

**TIMOTHY ODIARA NDEGE) ..... APPELLANT**

**VERSUS**

**KIPRONO CHEMWONO..... RESPONDENT**

***(Being an Appeal from the Judgment of the Resident Magistrate Honourable N. Mosei in Eldoret Civil Case No. 754 of 2013, dated 19<sup>th</sup> June, 2018)***

**JUDGMENT**

This appeal arises from the decision of the trial court in CMCC No. 754 of 2013 where the trial court dismissed the suit in favour of the respondent herein. The appeal is based on various grounds, including: -

- a) The trial magistrate erred in finding that the blame could be apportioned on the respondent without the evidence of a witness
- b) The magistrate erred in disregarding *Section 107* of the *Evidence Act*.
- c) The magistrate erred in disregarding the provisions of the *Law Reform Act* and the *Fatal Accidents Act*.

The cause of action was a road accident where the plaintiff claimed the defendant negligently drove his motor vehicle and caused the death of the deceased by violently hitting a motorcycle that was being driven by the deceased.

**APPELLANT'S CASE**

The appellant submitted that he proved his case on a balance of probability. She produced medical documents indicating the cause of death of the deceased. PW2, a police officer confirmed the accident occurred on 21<sup>st</sup> August 2012 at 7.30 along the Eldoret-Nakuru road and involved the motor vehicle Registration No. KAG 461H and the motorcycle Reg. No. KMCT 570N where the rider lost his life. He also testified that the accident occurred on the overtaking lane and that the motorcyclist had indicated to turn right but the driver hit him.

DW1 confirmed that he was heading to Nakuru and the motor cyclist emerged from a petrol station, he tried to apply brakes but the motor cyclist was too near. This was proof that the defendant caused the accident.

The appellant relied on the doctrine of *res ipsa loquitur* to make the case that the defendant was liable. He cited the case of ***Nandwa v Kenya Kazi Limited (1988) eKLR*** on the doctrine. There is no doubt that the defendant is to blame after a keen look at the facts. The appellant cited the case of ***Margaret Waithera Maina v Michael K Kimaru (2017) eKLR***.

The appellant submitted that the respondent confirmed the accident occurred and in a similar matter, Eldoret CMCC No. 318 of 2013 where the plaintiff was a passenger on the deceased's motorcycle, the respondent was found 100% liable.

The appellant had realized an eye witness had been left out and made an application to call the said witness to testify but the same was dismissed. The appellant submitted that the same was in breach of natural justice. He cited the case of ***Patriotic Guards v James Kipchirchir Sambu (2018) EKLR***. The trial court erred by dismissing the suit for the fact that an eye witness was not called and not taking into consideration the facts that the applicant brought it to the courts' attention during the hearing, application and the final submissions.

The evidence tendered was reliable enough to prove the accident occurred and the defendant was liable.

The entire process was full of mistakes of counsel and as such the mistakes of counsel should not be visited upon the client. There was no appeal on the ruling dismissing the application to call an eye witness and the failure to call an eye witness was counsel's mistake. She relied on the case of *Johnson B Ndung'u B. Njoroge v George Waweru Muchai (2014) eKLR* on the same. She submitted that the trial court's decision amounted to a punishment of the appellant for a mistake brought upon by counsel.

The appellant submitted that the court ought to exercise its discretionary powers as per the rules set down in *Wanje v Saikwa (1984) 275*. The appellant further prayed that the court invokes *rules 22,23 and 24 of order 42 of the Civil Procedure Rules and Section 78 of the Appellate Rules* and either determine the case finally, take additional evidence or require evidence be taken or order for a new trial.

## **RESPONDENT'S CASE**

The respondent submitted that the appellant failed to prove their case to the required standards. *Section 107 of the Evidence Act* gives provisions of the burden of proof which was on the appellant herein.

PW2 did not have the police file and was not the investigating officer. He did not visit the scene either. The failure to call an eyewitness was so fatal to the case as only an eyewitness could give a clear picture on the accident. The appellant's case was full of speculations; no police file or sketch plans were produced. He relied on the case of *Postal Corporation of Kenya & Anor v Dickens Munayi (2014) eKLR*. The evidence adduced did not provide any causation link to the respondent herein thus he is not liable.

The appellants submitted that the respondent should be found liable on the grounds that he was found liable in Eldoret CMCC No. 318 of 2013. The respondents submitted that this cannot take place of evidence and relied on the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Anor (2014) eKLR*. They ought to have adduced evidence in court to prove their case. Failure to produce crucial evidence is fatal to their case.

The trial court was right in dismissing the case as the appellant ought to have called the eye witness to testify on the circumstances leading to the accident. Having found that the appellant did not prove its case the appellants could not be compensated under the Law Reform Act nor the Fatal Accidents Act.

The trial court was right in awarding costs to the respondents as *Section 27 of the Civil Procedure Act* provides that costs follow the event.

The appeal should be dismissed with costs.

## **ISSUES FOR DETERMINATION**

- a) Whether the appellant proved their case on a balance of probabilities.
- b) Whether the trial court erred in dismissing the appellant's claim.

## **WHETHER THE APPELLANT PROVED THEIR CASE ON A BALANCE OF PROBABILITIES**

The appellant submitted that PW2 who was a police officer confirmed that the accident occurred and involved the defendant's motor vehicle and the deceased's motorcycle. He however was not the investigating officer and did not have sketch plans for the accident. He therefore lacked the basis to point out that the respondent was to blame for the accident. He never witnessed the accident or visit the scene.

The appellant failed to bring an eyewitness who could testify on the accident and the circumstances surrounding the same. The appellant submitted that their application to bring in an eye witness was dismissed; they should have appealed against the same if they felt that they were prejudiced by the dismissal. The appellant has challenged that ruling in his submissions, whereas she should have appealed against it at the point it was dismissed. However, given that they did not, that submission is of no consequence to the current case. Neither is the submission that a suit arising from the same incident resulted in the respondent being found 100% liable; the court in that case determined the suit based on its analysis of the evidence presented before it and this court is not privy to the same.

## **WHETHER THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT'S CLAIM**

The trial court did not err in dismissing the appellant's claim as she failed to prove her case on a balance of probabilities. The policeman who testified was not the investigating officer and he did not produce any sketches of the scene. He did not visit the scene either. Further, the appellant failed to produce a witness to testify on how the accident occurred.

The appellant failed to prove her case on a balance of probabilities. The trial court was right in so finding and dismissing her claim with costs to the Respondent. The appeal therefore fails, with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 26<sup>th</sup> day of September, 2019**

In the presence of:

Ms Munyaga for the appellant

Ms Wesonga for the respondent

Ms Sarah – Court assistant

**Ms Munyaga:-** I pray for 30 days stay of execution.

**Court:-** Application is granted.

**SIGNED**

**S.M GITHINJI**

**JUDGE**

**26/09/2019**