



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 207 OF 2013**

**JOHN MWANGI NJOROGE.....APPELLANT**

**VERSUS**

**CHARLES WAMAE NJOROGE.....RESPONDENT**

*(Being an appeal from the Judgment/Decree and orders of Honourable Mungai Chief Magistrate in Nakuru CMCC No 629 of 2004 delivered on the 16<sup>th</sup> October 2013)*

**JUDGMENT**

1. By a plaint dated the 24<sup>th</sup> February 2004 the plaintiff, being the legal representative of the estate of the late Joseph Kimunge Njuguna vide a grant of Letters of Administration *Ad Litem* issued in **RMCC Succession Cause No. 66 of 2003** (Eldama Ravine) on the 13<sup>th</sup> November 2003, sought for damages under the Fatal Accidents Act (Cap 32) and Law Reform Act (Cap 26) Laws of Kenya following the death of the deceased in a traffic accident on the 19<sup>th</sup> December 2002 involving a lorry Reg. No. KZL 710 the property of the Respondent Charles Wamae Njoroge.

2. Upon trial, the court returned a dismissal judgment of the suit, on the main ground that the appellant failed to prove the case on a balance of probabilities, the standard of proof in a civil suit.

This appeal is against the said dismissal, on grounds that the trial court failed to consider and disregarded the appellant's testimony and exhibits thus reached an erroneous conclusion.

3. As the first appellate court, I have been urged to re-evaluate and re-examine the evidence and make own findings, and set aside the judgment of the trial court and find in favour of the appellant citing the case **Selle –vs- Associated Motor Boat Co. (1968) EA 123** that

*“..this court is not bound necessarily to follow the Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

4. I have carefully re-considered and re-evaluated the evidence.

**The issues that arise for determination in my view are three fold:**

***(1) Sufficiency of evidence to prove the claim on a balance of probabilities.***

***(2) Quantum of damages***

***(3) Costs***

5. Upon the death of the deceased and investigations by the traffic police from Naivasha within whose jurisdiction the accident occurred, an inquest was recommended as no clear findings could be reached as to the causation of the deceased's death. This was done under **Molo Court Inquest No. 34 of 2006**, alongside the primary suit, subject of this appeal.

6. On the 6<sup>th</sup> March 2008, the court citing lack of clarity as to who could have been to blame for the deceased's death closed the inquest with no further recommendations.

**7. Analysis of Evidence, Submissions and Findings.**

The Appellant John Mwangi Njoroge was not a witness to the accident. He therefore did not testify. He called two witnesses, PW2, and PW3.

8. There is no dispute that the deceased was run over by the Respondent's Lorry Reg. No. KZL 710 about 9.00 pm in a quarry where it had gone to ferry stones for a customer.

**PW1**, a cousin to the deceased was firm in his evidence that the deceased was drunk and troublesome demanding money, and was requested to go away which he did.

It was afterwards when the lorry was going uphill, being driven by PW4 that he thought he had a tyreburst and upon stopping to check, saw a person's body with the head crushed by the rear tyres of the lorry. His evidence was that he did not see how or from where the deceased came so as to be run over.

9. All the witnesses agreed that the deceased was drunk and had gone away from the quarry and none saw or knew how the deceased was run over by the lorry.

**PW1** was cousin to the deceased and owner of the quarry. He was at the quarry. He too could not state with clarity as to how the deceased was run over.

10. **PW2** the investigating officer only found the body of the deceased behind the accident lorry. It was his evidence that all the people at the scene who were interrogated stated that they did not know where the deceased came from as to be run over. He produced a sketch plan of the accident scene, and an inspection report of the accident lorry showing that it had no pre-accident defects Ext 4.

This not in tandem with the appellant's submissions that the lorry was defective, and had a mechanical defect.

11. The appellant did not testify before the trial court. Nowhere in the entire evidence it is testified as to him having been an eye witness to the accident, and if he was, it is not stated why he did not tender his evidence that would have been very crucial to help the court come to a just finding.

Even if stones were put behind the tyres of the lorry the place having been steep, in itself does not constitute a defect. Evidence of defects must be tendered and proved. A mere statement of a fact without any tangible proof is of no probative value – **Section 107-109 Evidence Act Cap 80, Laws of Kenya**.

12.. **DW1** Charles Njoroge was the driver of the accident lorry. His testimony was that the lorry had no fuel and had to get fuel to start it. *Per se*, lack of fuel in a vehicle cannot be a defect. In the instant case, once it was fuelled, the lorry engine was started and it moved at a high gear. The place was steep and the loaders moved behind the lorry as testified by the driver DW1. He produced the proceedings of the inquest – DExt 1- and was found to have been blameless and file closed.

13. It is trite that there can be no liability without blame as ably rendered in the case **Kiema Mutuku –vs- Kenya Cargo Haulers Services Ltd (1991) 2 KAR 258**, that

*“there is yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”*

14. It is also trite that parties are bound by their own pleadings and a party cannot be allowed to adduce any evidence that does not support its pleadings.

Likewise, a court cannot be called upon to adjudicate on issues that are not pleaded as by doing so would be causing injustice to the opposite party who would have been prejudiced by not having been given an opportunity to respond to the unpleaded issues – **Civil Appeal No. 219 of 2013 – IEBC and Another –vs- Stephen Mutinda Mule & 3 Others, (2014) e KLR**.

15. I have the plaintiff's plaint in the primary suit.

The appellant, then the plaintiff stated that the deceased was lawfully pushing the accident lorry when the driver negligently controlled it as a result it crushed and subsequently caused the death of the deceased (paragraph 5).

None of the witnesses who testified stated testified in support of the above pleading.

All were in agreement that they did not know how the deceased happened to be crushed by the lorry, having not been working with the others (stone loaders).

No evidence at all was tendered that the lorry was being pushed, crushed or rolled as alluded in the cited pleading – **Plaint Paragraph 5**.

16. I have considered the appellants authorities. With respect, I find the authorities cited to be irrelevant in the circumstances of this appeal.

The case of **Matunda Fruits Bus Services Ltd –v- Moses Wangila & Another(2018) e KLR** is distinguishable, as the court found that both the driver and the deceased contributed to the collision and thus apportioned liability equally. In this appeal there are no two accounts

on how the accident occurred.

17. In **Embu Public Road Services Ltd -vs- Riimi (1968) EA 22, the Court of Appeal** rendered

*“where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability, has to show that **there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence** – (emphasis mine).*

Towards that end, I am satisfied that the driver of the lorry was not to blame, and therefore no negligence could be attributed to him.

See also **Mwanzani Mwakitu –vs- Chandana Industries Co. Ltd (2015) e KLR.**

18. Accordingly I return a finding that the trial magistrate evidently considered all the evidence adduced before the court as well considered the exhibits tendered and reached at the well reasoned findings, that the appellant, then the plaintiff, failed to prove his case to the required standard of proof, on a balance of probabilities.

19. The appeal is dismissed with costs.

**Delivered, Signed and Dated at Nakuru this 31<sup>st</sup> Day of October 2019.**

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**J.N. MULWA**

**JUDGE**