



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 23 OF 2018

THWAMA BUILDING SERVICES LIMITED.....APPELLANT

VERSUS

PETER WAMBU MBUVI.....1ST RESPONDENT

WINFRED NZISA MUTUA.....2ND RESPONDENT

(suing as a legal and personal representatives

of the estate of Sebastian Mutua Mwambu (deceased)

(Being an Appeal from the Judgment and Decree in Thika CMCC No. 930 of 2013

by Hon. C.A.Otieno Omondi (PM) on 29th January, 2018)

JUDGMENT

1. **PETER WAMBU MBUVI and WINFRED NZISA MUTUA (hereinafter referred to as respondents)** sued **THWAMA BUILDING SERVICES LIMITED (hereinafter referred to as appellant)** in the lower court claiming damages for fatal injuries suffered by **Sebastian Mutua Mwambu**, their son and husband respectively, on 03.10.11 when he fell from the 4th floor of a building from where he was working for the Appellant allegedly due to the negligence of the Appellant.

2. The Appellant in its statement of Defence denied the claim and blamed the deceased for the accident in which he was fatally injured.

3. In a judgment delivered on **29th January, 2018**, the trial court found the Appellant liable at 100% and awarded damages in the sum of Kshs.1,655,000/-.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 14.02.18 filed the Memorandum of Appeal dated 13.02.18 which sets out 5 grounds of appeal that may be summarized into the following 3 grounds that:-

- 1) The Learned trial Magistrate erred in law and in fact in finding that the Respondents had proved the case on a balance of probability**
- 2) The Learned trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant**
- 3) The Learned trial Magistrate erred in law and in fact in failing to properly evaluate Appellant's submissions**

SUBMISSIONS BY THE PARTIES

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities. I note that

the appeal revolves around the question of liability.

Appellant's submissions

6. Appellant submitted that the 2nd Respondent gave hearsay evidence having not been at the scene of the accident and thus failed to discharge the burden to prove that Appellant was negligent. Appellant placed reliance on Miller v. Minister of Pensions [1947] 2 ALL ER where Lord Denning stated that “burden or standard of proof in civil cases must carry a reasonable degree of probability but not as high as is required in criminal cases”.

7. Appellant also relied on William Kabogo Gitau v George Thuo & 2 others [2010] eKLR where the court held that “in ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place” and Mary Wambui Kabugu V Kenya Bus Service Limited [1997] eKLR emphasized the age long principle of law is that he who alleges must prove whose duty rests on a party that alleges negligence.

8. Reliance was also placed on Halsbury's Laws Of England, 4th Edition at paragraph 662 at page 476 which states as follows with respect to the what is required to be proved in an action such as the Respondents:

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established.”

Respondent's submissions

9. It was submitted for the Respondents that Appellant did tender to evidence to prove that the deceased was working in a safe environment and had been supplied with protective clothing. It was also argued that there was no evidence that deceased jumped to his death as was pleaded by the Appellant.

10. It is not disputed that the deceased was working for the Appellant and was injured on 03.10.11 when he fell from the 4th floor of a building from where he was working for the Appellant. The 2nd Respondent discharged the burden to prove that the deceased died as a result of that accident. As such, *prima facie*, the Respondents had a case against the Appellant.

11. The Appellant did not tender any evidence of whatsoever nature to rebut the Respondents' case and as was held in Embu Public Roads Services Ltd. -Vs- Riimi (1968) EALR, 22 as cited by Koome J, in Regina Wangechi -Vs- Eldoret Express Co. Ltd. (2008) eKLR, the Court of Appeal stated that: -

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident”,

12. The Appellant not having tendered any evidence, it followed that the Respondents' case remained un-rebutted. Appellant having failed to prove that deceased jumped to his death, the presumption drawn thereof is that the Appellant did not maintain a safe working environment and was therefore negligent.

13. Having summarized the brief evidence, this court can only but agree with the trial court that the Respondents had proved on a balance of probability that the accident that resulted in the death of the deceased was solely caused by the negligence of the Appellant.

DISPOSITION

14. In view of the finding I have made, the appeal is found to be unmeritorious and it is dismissed with costs to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 25TH DAY OF OCTOBER, 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

For the Appellant -N/A

For the Respondents - N/A