



REPUBLIC OF KENYA

IN THEN HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.20 OF 2015

TABITHA SONGA

(Suing as mother and on behalf of other dependants of the late

PAUL MULONDOLO SONGA).....APPELLANT/PLAINTIFF

VERSUS

BERNARD KIGANDA.....RESPONDENT

(Appeal from the judgment of Hon M.L. Nabibya, S.R.M., in Butali PMCC No.43 of 2013 dated 5th February 2015)

JUDGMENT

1. The appellant had sued the respondent in the lower court seeking for general special damages under the Fatal Accidents Act after her son, and who was riding a motor cycle, was fatally knocked down by the respondent's motor vehicle Reg. No. KAH 515F along Kakamega-Webuye road. The appellant attributed the death of the deceased to the negligence of the respondent. Upon hearing the case the trial magistrate dismissed the case on the grounds that the appellant/plaintiff had not proved that it was the respondent's negligent manner of driving that had caused the accident. The appellant was aggrieved by the decision of the trial magistrate and filed this appeal in which she raised the following grounds, that:

- 1. the trial magistrate erred in law and fact in finding that the appellant had not proved her case on a balance of probabilities.**
- 2. the honourable trial magistrate erred in law and fact in dismissing the applicant's case without regard to the evidence tendered before court.**
- 3. the trial magistrate erred in law and fact in failing to consider the plaintiff's submissions.**
- 4. the trial magistrate erred in law and in fact in failing to consider the fact that the respondent did not tender any evidence and therefore the appellant's evidence remained uncontroverted.**
- 5. the trial magistrate erred in law and in fact in failing to find that the appellant had proved her case and that she was entitled to an award of damages.**

2. The appeal was opposed by the respondent through the submissions of their advocate.

The Evidence:

3. The evidence for the appellant was that on the 15th February 2013, she was at home when she received a report that her son had been involved in a road traffic accident along Kakamega-Webuye road. That she went to the scene of the accident and found him having been taken to hospital. The accident motor vehicle was at the scene. That the deceased died on the way to hospital.

4. The appellant called one witness in the cases, CPI Cheruiyot PW2. The evidence of the witness was that he is not the one who investigated the case. That he took over the file one year later. That the police file indicated that the accident had occurred on 18th February 2013 but that policemen visited the scene on 25th February 2013 when the sketch plan was drawn. That the statements recorded in the case indicated that both the driver and the motorcycle rider were to blame for occasioning the accident.

5. The witness, PW2, in his evidence produced as exhibits the police abstract and some copies of documents from the police file. The

documents that were produced as copy of the police file were photocopies of the statements of three of the intended witnesses for the plaintiff, the statement of the defendant/respondent, the inspection reports of the accident motor vehicle and motor cycle, the OB extract No.5 of 25/2/13, the post mortem report, notice of intended prosecution issued to the defendant/respondent and the covering report and statement of the investigating officer, PC (W) Kajuju. None of those people who recorded statements testified in the case.

6. The respondent did not call any evidence in the case.

Findings by the magistrate:

7. The trial magistrate dismissed the case on the grounds that there was no evidence of any person who witnessed the accident. Consequently that no aspect of negligence was proved on the part of the driver of the motor vehicle.

Submissions by advocates for appellant:

8. The advocates for the appellant submitted that the driver of the motor vehicle knocked the deceased from behind. That the road was clear and there was no obstruction to the road. That this proved negligence on the part of the driver of the motor vehicle. Further that the police abstracts and the police file were produced in court which documents established negligence on the part of the respondent. That the defendant/respondent did not tender any evidence to counter the evidence of the appellant. That the appellant's evidence was thereby uncontroverted. That the appellant had thereby proved the case despite that she had not called an eye witness to the accident. The advocates urged the court to find that the respondent was 100% liable for the accident. The advocates relied on the following authorities:

- *Gladys Wanjiru Nyambura/suing as personal representative of the estate of Ernest Waweru Nyambura vs Globe Pharmacy & Another (2014) eKLR* where the petitioner did not call any eye witness to the case and the trial magistrate dismissed the case. That on appeal the High Court sitting at Nyeri held that the evidence of the police officer and documentary evidence produced in form of a police abstract and police file had established negligence on the part of the respondent.

- *PI suing as a next friend of C M (Deceased) v Zena Roses Ltd & Another* 2015 eKLR where the plaintiff was the only witness in the case and testified that he received information that the deceased had been involved in a road traffic accident and as a result died. The defence did not call any witness and the court held that the appellant had proved his case on a balance of probabilities and went ahead to assess damages.
- *Linus Nyanga Kiongo & 3 others vs Town Council of Kikuyu* (2012) eKLR where the defendant filed a defence but did not testify and the court held that the plaintiff's case stood unchallenged. Further that the claims made by the defendant in his defence and counterclaims were unsubstantiated.
- *Molo Mount Mineral Water Ltd vs Industrial & Development Bank Ltd*, Nakuru High Court Case No.113 of 2004 (2012) eKLR where it was held that under **section 107(1)** of the Evidence Act, whoever desires any court to give judgment as to any legal liability dependent on the existence of facts which he asserts, must prove the existence of those facts.
- *Hon. Daniel Toroitich Arap Moi vs Mwangi Muriithi & Another* (2014) eKLR where it was held that submissions could not take the place of evidence.

9. The advocates further relied on the provisions of **section 112** of Evidence Act which is to the effect that:

In civil proceedings, when any fact, is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

To buttress this position the advocates cited the case of *Janet Njoki Kigo (suing as the personal representative of the estate of the late Benson Irungu Wanjohi vs Daniel Karani Gichuki* (2016) eKLR where Aburili J relied on the Court of Appeal decision in the case of *Rahab Micere Murage (suing as a representative of the estate of Esther Wakiini Murage vs Attorney General & 2 others* (2015) eKLR where the Court of Appeal stated that the burden of proof lies on he who alleges but however that where the plaintiff was not present when the fatal accident occurred and the defendant who was the driver of the material motor vehicle involved in the accident is possessed of the evidence of how the accident occurred but deliberately fails to adduce evidence with the sole intention of frustrating the plaintiff's suit, **section 112** of the Evidence Act would be invoked by the court to deal with such a situation.

Submissions by advocates for respondent:

10. The advocates submitted that the appellant failed to adduce evidence to support the pleadings. That PW1 pleaded that the accident occurred on 18th February 2013 but testified in court that the accident occurred on 15th February 2013. That the policeman, PW2, in his evidence stated that the accident occurred on 25th February 2013.

11. The advocates further submitted that the respondent did establish by way of cross-examination on PW2 that the respondent was not to blame for the accident and hence discharged the burden placed on him. That in the premises, the respondent was under no legal obligation to adduce further evidence as this would be contrary to the provisions of the Evidence Act and would amount to the defence being put to the strict proof thereof of all the allegations pleaded in the plaint.

12. The advocates distinguished the authorities relied upon by the advocates for the appellants in the following manner:

- *Gladys Wanjiru Njaramba vs Globe Pharmacy and Another (supra)*.

That in that case there was documentary evidence by way of the police file produced that the 2nd respondent was to blame for the accident and was charged with the offence of causing death by dangerous driving. That in the present case the documentary evidence and the evidence by PW2 confirms that the respondent in the present appeal was not to blame for the accident.

- *Molo Mount Mineral Water Ltd vs Industrial Development Bank Limited (supra)*.

That the decision in the case supports the respondent's case in that the honourable Judge in conclusion stated that :

“It is suffice to say that the plaintiffs who do not plead their damages properly and who do not then prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to.”

That in the instant case, the plaintiff in the subordinate court failed to prove negligence on the part of the defence and hence the trial magistrate rightly dismissed the suit.

- *PI (Suing as a next of kin of CM deceased) vs Zena Rose Limited and Another (supra)*.

That in that appeal there was evidence on record that the 2nd respondent was charged with the offence of causing death by dangerous driving. That in the present case there is evidence on record by PW2 that the respondent was not to blame for the accident.

- *Janet Njoki Kigo (Suing as personal representative of the Estate of the late Benson Irungu Wanjohi) vs Daniel Karani Gichuki (supra)*.

That in that case the honourable Judge relied upon section 112 of the Evidence Act which comes into operation where the plaintiff is deprived of evidence as to what caused the accident and the defendant deliberately withholds evidence as to the cause of the accident.

That in the present case there was sufficient evidence on record, both oral and documentary produced by PW2 as to what transpired on the material date and by which evidence it is clear that the defendant made full disclosure in respect of the events on the material date and was found not to blame for the accident and hence section 112 is not applicable to the present case.

- *Daniel Toroitich Arap Moi, CGH vs Mwangi Stephen and Another (supra)*.

That in that appeal the respondent did not adduce any evidence in support of the claim for damages, costs and interest rate and hence the appellate court held that submissions cannot take the place of evidence.

That in the present appeal there is evidence on record by way of cross-examination supported with the submissions that the defendant was not liable for the accident.

Duty of first appellate court:

13. This being a first appeal, the court is expected to re-evaluate the evidence tendered before the trial court and come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses – see *Jabane vs Olenja* 1986 KLR 664 and *Sumaria & Another vs Allied Industrial Ltd* (2007) 2 KLR.

Questions for Determination:

14. The questions for determination are whether:

- (1) **The appellant had proved her case against the respondent on a balance of probability.**
- (2) **The appellant was entitled to the claim for damages.**

Analysis and Determination:

15. The appellant did not witness the occurrence of the accident. She did not call any evidence of an eyewitness to the accident. It was therefore a misdirection for her advocates to submit that the deceased was hit by the motor vehicle from behind.

16. The police officer who testified in the case PW2 is not the one who investigated the case. He took over the file one year later. He was only relying on what was recorded in the police file. Though he stated in his evidence-in-chief that the driver and the motor cycle rider were both to blame for occasioning the accident, he stated in cross-examination that the driver was not to blame for occasioning the accident and that it is the motor cycle rider who was to blame. The witness could not clearly state whether the accident occurred on 18th February 2013 or 25th February 2013.

17. The trial court allowed statements of people who had not testified in the case to be admitted in the case. This was unprocedural. Witnesses are required to testify in court and be cross-examined by the adverse party. A court of law cannot take shortcuts to this. The evidence of the police officer, PW2, as to how the accident took place was therefore heresy evidence. The bottom-line was that the appellant did not adduce evidence as to how the accident occurred. The respondent on the other hand did not tender evidence as to how the accident occurred. The respondent cannot rely on the heresy evidence of the police officer PW2 to hold that he was not to blame for the accident. If the respondent wanted to exonerate himself from blame he should have testified as to how the accident had occurred and not to rely on the heresy evidence of the policeman.

18. In *Janet Njoki Kigo (suing as the personal representative of the estate of the late Benson Irungu Wanjohi) vs Daniel Karani Gchuki* (2016) eKLR, Aburili J was faced with a similar scenario as in this case. The plaintiff had not witnessed the accident and did not call evidence as to how the accident took place. The defendant similarly did not call evidence to show how the accident took place. The learned judge relied on the Court of Appeal decision in the case of *Rahab Micere Murage (suing as a representative of the estate of Esther Wakiini Murage vs Attorney General & 2 others* (2015) eKLR where the court was faced with a similar scenario and invoked the provisions of *section 112* of the *Evidence Act Cap 80* to find that the defendant was liable for the accident. In the case the Court of Appeal held that:

“As stated earlier, the respondents blamed each other for the accident. They tactfully avoided calling any evidence regarding the cause of the accident presumably relying on the provisions of Section 109 of the Evidence Act which provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

That an accident did occur is not in dispute; that the three cars involved in the accident were respectively owned by the three respondents; How the accident happened was a matter within the knowledge of the respective drivers of those three vehicles. Well driven motor vehicles do not just get involved in accidents. The driver of the 1st respondent’s vehicle died in the accident. The remaining ones, we suppose, were alive at the time of the appellant’s case was heard. The failure on their part to testify must have been a deliberate act on the part of the 2nd and 3rd respondents. The police appear not to have been in a hurry to conclude investigations as to the cause of the accident. The appellant went to them to get a police abstract report of the accident. They gave one but the accident was said to be still under investigations. The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the appellant’s suit. Section 112 of the Evidence Act Cap 80 of the Laws of Kenya, we think was meant to deal with situations as those in the present case. The section provides thus:

“In Civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The appellant alleged negligence against all the respondents as the cause of the accident in which her daughter died. She was not there at the scene and could not have known how the accident happened. As stated earlier vehicles driven on public roads in a proper manner do not without cause become involved in accidents. It must be for that reason that the appellant accused the respondents of negligence. Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent and through such negligence caused the accident in which the deceased died. It is not a presumption arising out of the doctrine of *res Ipsa Loquitur*, but from the evidential burden as imposed under Section 112 of the Evidence Act.

Having come to the foregoing conclusion, it is our judgment that Angawa J. erred in ruling that no negligence was proved. The burden was on the respondents to disprove on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law. It follows that each of the three respondents is liable to the appellant in damages in equal shares

19. In the present case, the facts were similar to those that were before the

Court of Appeal in the cited case. The respondent or his driver had knowledge of how the accident took place but deliberately failed to testify so as to frustrate the appellant’s case. I will also follow the above quoted Court of Appeal decision. I accordingly hold that *section 112* of the *Evidence Act* is applicable in the circumstances of the case before me. The respondent had knowledge of how the accident occurred. The burden of proof was on him to disapprove the contention by the appellant/plaintiff that he was to blame for occasioning the accident. He did not. The court finds that he caused the accident that resulted to the death of the deceased. The respondent is found 100% liable for the accident.

Quantum:

20. It is incumbent upon a court where the court dismisses a claim for general damages, to assess the amount of general damages that it would have awarded the claimant had he/she been successful in the case – see *Mordekai Mwangi Nandwa vs Bhogals Garage Ltd CA No.124 of 1993* (1993) KLR 4448. The trial magistrate therefore erred in failing to do so in this case.

21. The appellant pleaded in the plaint that the deceased had died at the age of 30 years. That he was carrying on a boda boda business from which he earned Kshs.10,000/- per month. She further pleaded that the deceased had dependants of a mother and 2 children. In the lower court her advocates had asked the court to adopt a multiplier of 30 years, a dependency ratio of two thirds and a multiplicand of 10,000/-. The advocates for the respondent do not seem to have made any submissions. In this appeal they submitted that there is no evidence on

record with regard to the damages to enable the court arrive at a finding on quantum. Further that the appellant is praying for the damages by way of submissions yet submissions cannot take the place of evidence as was stated by the Court of Appeal in **Hon Daniel Toroitich Arap Moi, CGH vs Mwangi Stephen & Another**, Nairobi Civil Appeal No240 of 2011 (2014) eKLR. That general damages cannot thereby be awarded.

22. There is no dispute that the deceased died after being knocked down by the respondent's vehicle. The photocopy of the death certificate filed with the plaint indicated that the deceased died at the age of 30 years. The certificate indicated the occupation of the deceased to have been farming. The pleadings indicated that he was a boda boda rider. In face of this contradiction the court cannot know the kind of work that the deceased was doing to earn a living. The deceased's occupation was thereby not proved.

23. The appellant pleaded that the deceased left behind two children. In her evidence in court she did not make mention of any children. No evidence was tendered to prove the existence of such children. There was thereby no evidence that the deceased had children who were dependent on him.

24. The appellant testified in court that she was the mother to the deceased. This evidence was not controverted by the defence. The appellant therefore did prove that she was the mother to the deceased. The appellant pleaded that she was aged 59 years. In the African set up, it is expected that children will take care of their elderly parents – see Kneller, JA in **Hassan v Nathan Mwangi Kamau Transporters & 5 others** (1986) KLR, 457 where it was noted that:

“The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it.

This fact remains true to date.

In the premises I hold that the appellant was a dependant to the deceased.

25. In the absence of evidence as to what the deceased was doing to earn a living, the court ought to be guided by the government's minimum wage guidelines to decide on what the deceased was earning. According to the Regulations of Wages (General) (Amendment) order, 2017, the wage of a general labourer in rural arrears is Kshs.6900/- per month. I will adopt that as the multiplicand.

26. In the case of **Gladys Wanjiru Njaramba vs Globe Pharmacy & Another** (supra) where the deceased died unmarried at the age of 25, **Wakiaga J** adopted a dependency ratio of one-third and a multiplier of 25 years.

In deciding dependency the age of the dependant has also to be put into consideration. In **Rev. Father Leonard O. Ekisa & Another v Major Birgen** (2005) eKLR (cited in **Janet Njoki Kigo vs Daniel Karani Gichuki**) (supra), Ringeria J. (as he then was) held, *inter alia* that:

“In determining the right multiplier, the right approach is to consider the age of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum (Hannah Wangaturi Moche & Another vs Nelson Muya** HCC 4533 of 1993)”**

In this case the appellant was aged 59 years at the time of filing suit. She did not however show that she was entirely dependent on the deceased. The court will adopt a multiplier of 11 years and a dependency ratio of one-third. The tabulation for loss of dependency is therefore

$$6,900 \times 12 \times 11 \times \frac{1}{3} = 303,600.$$

27. The appellant in addition claimed special damages for money spent towards obtaining a police abstract and a death certificate. It is trite law that special damages must be strictly proved. No receipts were produced to prove money expended towards the procurement of the two items. The claim for special damages is thereby dismissed.

28. In the foregoing, I find that the appellant had on a balance of probabilities proved his claim on general damages under the Fatal Accidents Act against the respondent. I will thereby allow the appeal, set aside the judgment of the lower court and replace it with an award of Kshs.303,600/-, with interest at court rates. The appellant to have the costs of the suit both in this appeal and in the lower court.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 16th day of April, 2018.

J NJAGI

JUDGE

In the presence of:

Miss Wambani H/B Kitwa for appellant

Nyikuli H/B Mishi for respondent

Court assistant George

Appellant absent

Respondent absent