



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 52 OF 2011

CORAM: D.S. MAJANJA J.

BETWEEN

ZIPPORAH MUMIRIA suing as the legal representative

of the estate of MUMIRIA RIMBERE (deceased).....APPELLANT

AND

PAUL MUTHURI..... 1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. W. Kiarie, CM dated 19th April 2011 at the Chief Magistrates Court at Meru in Civil Case No. 476 of 2008)

JUDGMENT

1. The appellant is aggrieved by the dismissal of her claim by the subordinate court where she had sued the respondents for causing the death of her husband, the deceased. According to the plaint, on 5th December 2007, the deceased was aboard a public service motor vehicle registration number KZP 349 when the 1st respondent, an administration police officer, discharged his firearm causing the 1st respondent to suffer fatal injuries. As a result, the deceased's personal representative and dependants claimed damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*.
2. The gravamen of the appellant's case as set out in the memorandum of appeal dated 28th April 2011 is that the trial magistrate erred in dismissing her claim yet there was sufficient evidence and that she had proved that the case on the balance of probabilities. Counsel for the appellant, contended that the trial magistrate erred in relying entirely on the inquest proceedings to exonerate the respondents from any liability yet the appellant proved her case.
3. Counsel for the respondent opposed the appeal and submitted that the trial magistrate took into account the totality of the evidence including the inquest proceedings reach the conclusion that the respondents were not liable. Counsel also submitted that from the totality of the evidence, the deceased was to blame for the incident that led to his death.
4. The principle that governs the exercise of this court's exercise of appellate jurisdiction is that it is the duty of the first appellate court to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co. [1968] EA 123*).
5. Although respondents denied, in their statement of defence, that the incident took place as alleged by the appellants, they also pleaded that the 1st respondent used force after the driver of the vehicle registration number KZB 349 was suspected to have committed an offence and was about to or had been hijacked by robbers refused to stop after being flagged legitimately by an officer to stop. In view of the fact that the inquest proceedings in *Meru Chief Magistrate's Court Inquest No. 21 of 2008* were admitted by consent. Since the incident was not disputed, I find and hold that the deceased died as a result of the gunshot wounds inflicted by the 1st defendant. The issue then in this case, is whether the appellant proved her case on the balance of probabilities.
6. At the trial, the appellant called four witnesses while the respondents did not call any witness. Two witnesses, Patrick, Kathurima Mugambi (PW 2) and Samuel Mukiria Cyprian (PW 3) testified as the circumstances of the incident as they were both passengers in motor vehicle KZP 349 on 5th December 2007. PW 2, who was the driver, recalled that a person emerged from the side of the road and stopped the

vehicle. He did not stop and as he proceeded, he heard gunshots a loud bang. He drove the vehicle off the road and parked it. He noted that the rear windscreen had been shattered and there were gunshot holes at the back and on the sides. He later learnt that the deceased had been shot after he had been arrested on suspicion of carrying robbers.

7. PW 2 recalled that the someone stopped the vehicle but the driver drove off, as the place was not a designated stage. As the vehicle was driving off, he heard gun shots and the deceased groaning. When the driver parked the vehicle, he realised that the deceased was injured. And appeared to have been shot from behind.

8. After reviewing the evidence including the evidence before the inquest the trial magistrate concluded that the testimony given at the inquest showed that the deceased was not shot at by the 1st respondent but was injured by a single bullet which was aimed at the tyre of the vehicle in a bid to stop the vehicle after the 1st respondent had tried to stop it and the driver had refused to stop and that therefore there was reasonable use of force in the circumstances of the case. The trial magistrate also held that the failure by the respondent to call witnesses was not fatal since the explanation by the 1st respondent and other witnesses formed part of the appellant's evidence which the court was entitled to consider.

9. In a case such as the present one, the singular issue in this appeal is whether the trial magistrate was correct in holding that the respondent had discharged the burden of showing that the use of force by the 1st respondent was reasonable and lawful in the circumstances. In a similar case, *Charles Munyeki Kimiti v Joel Mwenda and 3 Others NYR Civil Appeal No. 129 of 2004 [2010]eKLR*, the Court of Appeal observed the following in regard to inquest proceedings in a civil case;

The trial Judge admitted the proceedings and ruling of the Inquest as evidence in the trial and has not been faulted for doing so. Indeed, the learned counsel for the respondents relied on such evidence in this appeal. We will similarly rely on the evidence tendered at the Inquest and the ruling of the Inquest thereof. However, we appreciate that the evidence of the witnesses at the Inquest particularly the evidence of the first and second respondents was not subjected to cross-examination regarding the circumstances of the shooting. We also appreciate that the purpose of the Inquest was in essence to determine whether or not the police officers committed any criminal offence when they shot dead the appellant. (See section 387 (4) and (5) of the Criminal Procedure Code (Cap. 75) Laws of Kenya). We say so because there was overwhelming evidence, and, the police admitted, that, the deceased was shot dead by the police. Lastly, we appreciate that the Inquest was in the nature of criminal proceedings.

10. This case can be distinguished from the case as I have cited because the appellants did not rely on the Inquest proceedings to prove liability but the testimony of the two witnesses; PW 2 and PW 3 who were present at the scene and who were cross-examined. The purpose of the producing the proceedings of the Inquest is to confirm that the incident took place and not as evidence of the truth of the assertions therein. It is therefore clear that the appellant's evidence remained uncontested when weighed against that of witnesses who gave evidence at the Inquest and were not cross-examined in these proceedings.

11. The uncontested facts which PW 2 and PW 2 testified to were that the vehicle hailed by someone at an undesignated area but when it did not stop, there was a hail of bullets fired at the vehicle. These facts constitute a prima facie case of negligence against the respondents. They would thus be required to show that the force used was reasonable in the circumstances. They did not call any evidence to support their defence which was peculiarly within their knowledge. In the circumstances, the appellant proved her case on the balance of probabilities.

12. I therefore allow the appeal and set aside the judgment dismissing the appellant's case. As the trial magistrate assessed the quantum of damages, the trial court judgment is substituted with a judgment for the following amount assessed by the trial court;

Loss of Dependency (10 X 6500 X 2/3 X 12)	Kshs.520,000.00
Loss of expectation of Life	Kshs.100,000.00
Pain and Suffering	Kshs. 20,000.00
Special Damages	Kshs. 77,000.00
TOTAL	Kshs. 697,202.00

13. The damages shall accrue interest at court rates from the date of judgment before the trial court. The appellant shall have costs of this appeal assessed at **Kshs. 40,000/-** and costs of the subordinate court to be assessed and certified by that court.

SIGNED AT MERU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A.MABEYA

JUDGE

Mr Mutegi instructed by Kiautha Arithi & Company Advocates for the appellant.

Mr Kiongo instructed by the Office of the Attorney General for the respondents.