



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 46 OF 2011**

**JOSEPH MUGWERU NJENGA & DAVID NJOROGE NJENGA**

**(Suing as the legal representatives of the estate of the late)**

**ESTHER WANJIRU NJENGA.....APPELLANTS**

**VERSUS**

**JOSEPH KAMAU NG'ANG'A.....RESPONDENT**

***(Being an appeal from the judgment and decree of C.G. MBOGO, Chief Magistrate delivered on 2<sup>nd</sup> March, 2011 in Eldoret Cmcc No. 451 of 2013).***

**JUDGMENT**

**1. JOSEPH MUGWERU NJENGA and DAVID NJOROGE NJENGA** hereinafter referred to as the Appellants are aggrieved by the judgment entered in favour of the Respondent **JOSEPH KAMAU NG'ANG'A** (hereinafter referred to as the Respondent) wherein the trial magistrate dismissed the plaintiff's suit.

**2.** The appellant having been dissatisfied with the said judgment preferred an appeal before this court on grounds that:-

- a). The trial Magistrate erred in law and fact in dismissing the entire suit based on an error in the grant of letters of administration.
- b). The trial Magistrate erred in law and in fact in dismissing the plaintiff's suit when the plaintiff had proved their case on a balance of probabilities.
- c). The learned trial Magistrate erred in law and in fact in holding that the plaintiff died on **21<sup>st</sup> April 2006 at Langas** against the overwhelming evidence on record that she died on **21<sup>st</sup> June 2006 along Eldoret-Nakuru road**.
- d). The learned trial Magistrate erred in law and in fact in finding the defendant not liable for the accident inspite of the evidence on record.
- e).The learned trial Magistrate erred in law and in fact in failing to consider the defendant's submissions on liability.
- f). The trial Magistrate erred in law and in fact in failing to consider the plaintiff's evidence on record and submissions.
- g).The magistrate misdirected himself in awarding damages which were manifestly low.

**3.** The Appellants had filed a suit against the respondent seeking damages as a result of fatal injuries sustained by **ESTHER WANJIRU NJENGA** in a road traffic accident which occurred on 21<sup>st</sup> June 2006, involving motor vehicle registration KAT 303S owned by the respondent wherein she was a passenger and died on the spot. The accident was blamed on the respondent's negligence.

**4. ALLAN NYORO NGUGI (PW2)** told the trial court that he was a passenger in the said vehicle when at around **BURNT FOREST** area, the matatu driver applied emergency brakes, and because the vehicle was speeding, it overturned. He however had nothing to prove that he was a passenger in the said vehicle. He heard good Samaritans who arrived at the scene saying that someone had been crushed under the vehicle, although he did not know the person

**5.** The first appellant told the trial court that the deceased who was his mother aged 70 years died on the spot near Burnt Forest area, and he

reported the same to **TARAKWA** police station where he was issued with a police abstract. Thereafter the deceased was buried on 4/07/06 and he presented the death certificate. He also produced letters of administration he had obtained in relation to the deceased's estate.

6. The deceased was said to be a 70 year old farmer who earned Kshs 15,000/- from her farming activities

7. The respondent denied liability stating that the accident was solely caused or substantially contributed to by the deceased. However, the respondent did not tender any evidence at the hearing.

8. The trial magistrate in his judgment noted that whereas the grant of letters produced showed that the deceased died on **21<sup>st</sup> April 2006 at Langas**, the pleadings and PW1's evidence was that she died on **21<sup>st</sup> June 2006 at BURNT FOREST** and there was no attempt to reconcile this apparent anomaly, although the trial magistrate acknowledged that the death certificate showed the death as 21<sup>st</sup> June 2006. This when coupled with the lack of any tangible evidence as to whether the deceased was indeed a passenger inside the said vehicle rendered their claim unsustainable and the same was dismissed.

9. The trial magistrate however went further to find that in the event that his finding on date of death was erroneous, then the deceased who was 70 years with no known source of income was dependent on the two appellants who were her sons, and given that the life expectancy for women in Kenya was 50 years, then appellants would have been awarded a global sum of **Kshs 70,000** and special damages of **Kshs. 21,816**

10. These findings were challenged on grounds that the trial magistrate determined the issue of liability only based on the letters of administration produced despite the Appellant producing other documentation which upon perusal would have informed him on the decision of liability.

11. Secondly, that this claim was brought both under the **Law Reform Act and the Fatal Accidents Act** but the trial magistrate totally failed to consider the Appellant's submission on quantum under the Law Reform Act and the Fatal Accident Act.

12. The Respondent on the other hand did not respond or file any written submissions to rebut what the Appellants had submitted on.

### **Analysis**

13. As a first appellate court, the duty, as espoused under section 78 of the Civil Procedure Act of course is to approach the whole of the evidence on record from a fresh perspective.

14. The court is enjoined to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at an independent conclusion, bearing in mind the fact that unlike the trial court, it had no advantage to see and hear witnesses as they testified. This principle of law was well settled in the case of

Selle – Vs – Associated Motor Boat Co. Ltd (1968) EA 123 where **Sir Clement De Lestang** stated that:

*“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)).” See also Peter Vs Sunday Post (1958) 428.*

15. This court is equally alive to and shall be guided by the decision in the case of Mbogo – Vs – Shah & Another (1968) EA 93, where the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

*“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”*

16. Surely the proof of death and when it occurred was supported by the death certificate, and the anomaly in the letters of administration was never pointed out to the 1<sup>st</sup> appellant on cross examination so as to get an explanation on it. I hold the view that the trial magistrate failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion as regards the date of death.

17. As to whether the deceased was a passenger inside the said vehicle, she was listed in the police abstract as the passenger with a fatality. Being a passenger, then no evidence was presented to demonstrate how she could have contributed to the accident, and the respondent ought to have been found 100% liable. I am in total agreement with the decision by Odunga J, in **Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012] e KLR** on the consequences of a party failing to call evidence wherein he referred to remarks in other decisions to the effect that:

“.....in the case of **Motex Knitwear Mills Limited Milimani HCC 834/2002** Honourable Lessit J citing **Autar Singh Bahra & Another Vs Raju Govindji HCC 548** of 1998 stated:

*“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail... Where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.....”*

13. Indeed pleadings, answers in cross examination and or submissions do not amount to evidence or defence and it does follow that however well-choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence. The respondent was 100% liable

18. As regards to assessment of damages, to properly assess damages under the **Fatal Accidents Act**, it is necessary to determine the deceased’s income, the dependency ratio of his dependants and the multiplier to be used. It is not clear why the trial court decided to suggest a global award when the claim was under very specific heads. This Court should be guided by the manner of assessment of damages for loss of dependency as aptly explained by Ringera J. (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988** as follows:

**The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”**

19. **Under the Law Reform Act:**

- **Pain and suffering-** the deceased died on the spot, and the conventional figure of Kshs 10,000/- is reasonable and I so award
- **Loss of life expectation-**the trend of courts has been to award the sum of Kshs. 100,000/\_ under this head (see **MEREZA ADHIAMBO vs AGNES SUSAN WAIRIMU and OTHERS HCCC No. 330 of 2000.**

**Fatal Accidents Act**

- **Loss of dependency: Section 4 (1) of the Fatal Accident Act** recognizes that an action brought under this provision shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. However in this instance as the trial magistrate noted, the deceased was past retirement age, with no known source of income, nor was any tangible evidence presented to demonstrate that she was realizing the sum attributed to her farming activities. Further from the 1<sup>st</sup> appellant she in no way assisted them in running their homes. It appellant’s own admission he and the 2<sup>nd</sup> appellants were assisting the deceased whenever she required, and would therefore be misplaced to make an award under this head, and I so decline.

The appeal succeeds only to the extent narrated above and the respondent shall bear the costs of this appeal

**Delivered and dated this 19<sup>th</sup> day of October 2018 at Eldoret**

**H. A. OMONDI**

**JUDGE**