



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO.237 A OF 2013

BETWEEN

MICHAEL MUCHOMBA AMISI.....APPELLANT

AND

SHADRACK DAVID MWILARIA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. E.W Wambugu, RM, in Meru CMCC No.109 of 2012 dated 28th March 2013).

JUDGMENT

The appellant herein, **Michael Muchomba Amisi**, was the plaintiff in the Meru C.M's Court Civil Case Number 109 of 2012 in which he sued the respondent seeking special and general damages following the death of **Martin Kirimi Mbaya**, his son in a road traffic accident which occurred on 20th September 2011 and which he blamed the driver of motor vehicle KBF 145 D. The deceased was a pedestrian along Meru - Mikinduri road.

The appellant blamed the respondent's driver, for the accident, alleging that the said motor vehicle was driven so negligently that it veered off the road and hit the deceased who died as a result.

The respondent entered appearance and filed defence. He denied ownership of motor vehicle registration No. KBF 149 D and the fact that there was an accident on 20th September 2011 along Meru -Mikinduri road.

The respondent testified that on the material day he was in Nairobi. While leaving for Nairobi he used public means and did not assign anybody to drive his motor vehicle registration number KBF 145 D.

The learned trial magistrate made a finding that the appellant did not prove that motor vehicle KBF 145 D was involved in the said accident.

The appellant was aggrieved by the judgment of the learned trial magistrate and filed this appeal. In his Memorandum of Appeal the appellant set out seven grounds of appeal that I have summarized as follows:-

1. The learned trial magistrate erred in law and fact by disregarding the police abstract on the issue of involvement of motor vehicle KBF 145 D in the accident.
2. The learned trial magistrate erred by laying undue regard to the fact that the driver of motor vehicle KBF 145 D was not charged.

3. The learned trial magistrate erred in law and in fact by disregarding watertight evidence.

The respondent prayed that the judgment and decision of the trial magistrate be upheld.

When the matter came for directions, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged .

This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

It is evident from the evidence on record that there was an accident involving the deceased and a motor vehicle. At the trial, the issue that was very central to the case was whether the motor vehicle that fatally knocked down the deceased was that of the respondent. The evidence of **DANIEL METETHIA KARUNTIMI** (PW2) was that the accident was at 8.30 p.m. Later in his evidence he said that the accident was at about 7.30 p.m. He said he was walking along Meru-Mikinduri road with the deceased and were headed to Kamukara. They were walking 4 meters off the road. The motor vehicle that hit the deceased had no headlights on. He said it was motor vehicle registration number KBF 145 D. He said before he left to call the parents of the deceased, he used his mobile phone's spotlight to check on the condition of the deceased.

Two issues emerge. One, it must have been dark whether the incident took place at 7.30 p.m or at 8.30 p.m, so by what light did he read the registration number of the offending motor vehicle? Two, at what juncture was he able to identify the offending vehicle? It is common knowledge that the first reaction when an accident happens in the manner described by PW2 is for one to scamper for safety. He simply had no time to read the registration number of the offending vehicle. Since he said the vehicle did not have its lights on, this complicated the matter even further. The trial magistrate relied on the case of **JOHN KIRIA & 6 OTHERS vs. CHARLES KAUNDA MUSYOKA & ANOTHER [2010] eKLR** where it was held:

Without evidence regarding how that information was procured, the contents of the police abstract report with regard to the persons involved in the accident, and ownership of the vehicles alleged to have been involved in the accident, is of little evidential value and cannot be relied upon. In this regard, this case is distinguishable from Samuel Mukunya Kamunge vs. John Mwangi Kamura, (supra) in which the officer who produced the police abstract report visited the scene and verified his information.

I find that the learned trial magistrate applied the law to the facts at her disposal and was entitled to arrive at the conclusion that it was not proved that motor vehicle KBF 145 D was involved in the accident. Without the evidence of involvement of the said motor vehicle, the appellant's case had no basis against the respondent.

The appellant has failed to demonstrate that his appeal has any merits. I therefore uphold the decision by the learned trial magistrate and consequently this appeal is dismissed with costs to the respondent.

DATED at MERU this 28th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE