



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 376 OF 2012

**JOYCE NJERI & JEREMIAH NJUE PHARIS. Suing as on behalf of the Estate of
PARTICK MURIITHI NJUE (Deceased's).....APPELLANTS**

VERSUS

CHOVU ZAGANYA..... 1ST RESPONDENT

SAMUEL MWANGI THUBI.....2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate T.W.C Wamae
(Mrs.) delivered on 12th day of July, 2012 in the Nairobi Chief Magistrates Civil Case No. 1877 of
2008)*

J U D G M E N T

Joyce Njeri Njege the 1st Appellant was the wife of Patrick Njue the deceased. The deceased was involved in a fatal road accident on 19th July, 2007, when he was knocked down by motor vehicle Reg. No. KAY 609K owned by the 1st Respondent and driven by the 2nd Respondent as his driver and/or servant. The Defendant/Respondent denied the claim and after force trial the trial magistrate found the Respondents not liable and dismissed the suit with costs. Aggrieved by the judgment, the Appellant preferred this appeal on the following grounds: -

- 1. That the learned magistrate erred in law and in fact in failing to find that the cause of death of the deceased was the negligence of the owner/driver of motor vehicle KAX 609X.***
- 2. That the learned magistrate erred in law and in fact in ignoring the Plaintiff's evidence that was not challenged and/or uncontroverted and chose to rely on hearsay, untested and unproved witness statements.***
- 3. That the learned magistrate erred in law and in fact in dismissing the Plaintiff's suit when the same had been proved on a balance of probability.***
- 4. That the learned magistrate erred in law and in fact in delivering a judgment that is manifestly unjust hence a travesty of justice.***

Briefly the evidence before the trial magistrate was that PW 1 Joyce Njeri received a report that her husband had been involved in a road traffic accident at 11 a.m. The deceased was a matatu conductor in motor vehicle registration number KAX 099X matatu and that she was informed that he was walking along the road when he was knocked down. She reported the matter to Kitengela Police Station. PW 2

Cpl Stella Karimi a Traffic Police Officer attached to Kitengela Police Station testified that motor vehicle KAX 609K was being driven from Nairobi towards Kitengela. There were touts waiting for matatus so that they could take passengers in the motor vehicle. Touts were scrambling to board the matatu when the deceased was pushed and was knocked by left side mirror of the matatu. He fell down and he was pronounced dead on arrival at Kenyatta National Hospital The deceased was taken to hospital by the same motor vehicle KAX 609K.

On being cross-examined by counsel for defendant this witness stated he blamed deceased for the accident. The deceased ran after the motor vehicle and was pushed and suffered fatal injuries. The deceased was to blame for attempting to board a moving motor vehicle.

The Defendant did not tender any evidence. The learned trial magistrate in her judgment stated: -

***“It is not disputed that there was a collision between the deceased and motor vehicle KAX 609X on the 4th July, 2007 and not 19th June, 2007 as pleaded in the plaint. It is also not disputed that the deceased suffered fatal injuries and died on the same date as has been evidenced by the certificate of death.*”**

***PW 1 was not at the scene at the scene of the accident and did not know how it occurred. Pw 2 the investigating officer testified that deceased was injured after he was pushed by other touts with whom he was scrambling to board the accident motor vehicle while it was on motion. It was also her evidence that she blamed deceased for the misfortune that befell him.*”**

From the foregoing, PW 1 failed to prove the allegation that had defendant drove negligently she failed to test of discharge her burden of proving what is alleged in terms of Section 108 and 109 of the Evidence Act. I have considered the holding in Yusuf Abdalla Vs Mombasa Liners Ltd (2004) eKLR and I find that negligence on part of defendants has not been proved and Plaintiff case must hence fail.”

It is from the above finding and judgment dismissing the suit that the Appellants have appealed. Their main ground of appeal is that the evidence showed that the deceased was knocked down by motor vehicle KAX 609X. That evidence was adduced to show that the driver was negligent and that the Plaintiffs evidence was not challenged as Respondent did not call evidence to controvert it, and therefore, the dismissal of the Appellant’s suit was manifestly unjust and a triversity of justice.

The Defendant/Respondent did not tender any evidence during the trial. The Plaintiff evidence was however not challenged. Even without the evidence of the Appellant, Respondent has to prove that the death occurred due to the negligence of the Defendant/Respondent. PW1 Joyce Njeri Njege was not at the scene. She only received the report of the death at 11.30 a.m. She confirmed that the deceased was a conductor in motor vehicle KAX 099P. PW 2 CPL Stella Karimi visited the scene of accident but her investigations showed: -

“the deceased and others were struggling to board the accident motor vehicle when deceased was pushed towards motor vehicle and was hit by its left side mirror as a result of which he fell and suffered fatal injuries. The investigation diary confirms that the deceased was pushed by a fellow tout and was in the process knocked down by the accident motor vehicle.”

There is no doubt that an accident occurred involving the deceased who sustained injuries from which he died while undergoing treatment. How did the accident occur? There was no eye witness who testified as to how the accident occurred. PW 1 was not at the scene. PW 2 the Police Officer visited the scene long after the deceased had been taken to hospital. The officer did not avail any evidence as to how the accident occurred apart from information she got from touts who were never called as witnesses. It is a cardinal tenet of evidence that he who alleges proves. I am satisfied in this appeal as the trial magistrate below that no evidence of negligence was tendered on the part of the Defendant. Without such evidence, the Plaintiff/Appellant failed to prove their claim and the same was properly dismissed. I find no merit in this appeal which is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 18th day of September, 2017.

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S N RIECHI

JUDGE