



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 17 OF 2008

LILIAN WANJIKU WANJOHI (suing as the legal representative and administrator of the estate of the late **DAVIS WANJOHI GACHINI**)
.....**APPELLANT**

VERSUS

- 1. TORNADO CARRIERS LTD.....1ST RESPONDENT**
- 2. DANIEL MIGWI.....2ND RESPONDENT**

(Being an Appeal from The Judgment and subsequent Decree of the Honourable Chief Magistrate, Gilbert C. Mutembei delivered on 9th January 2008 in the Nakuru CMCC No. 81 and 82 of 2004, LILIAN WANJIRU WANJOHI (suing as the legal representative and Administrator of the estate of the Late DAVID WANJOHI GACHIHI -VS- TORNADO CARRIERS LTD and DANIEL MIGWI)

JUDGMENT

1. The appellant brought the lower court case to court as the legal representative and administrator of the estate of the late **David Wanjohi Gachini** who was her husband, and who died in a **Traffic Road Accident** on the 1st December 2002 while travelling in **Motor Vehicle Registration NO. KAE 182T** a Mitsubishi Trailer that collided with another. She held Letters of Administration *Ad Litem* issued in **Nakuru HCC Succession Cause No. 66 of 2003**. She brought the suit on the behalf of the deceased Estate under the **Fatal Accidents Act** and the **Law Reform Act**.

2. The First defendant was alleged to have been the owner of the accident motor vehicle registration **Number KAE 182T** while the 2nd Defendant was the driver thereof.

In her statement of claim in **CMCC No. 81 of 2004**(and consolidated with **CMCC No.82 of 2004** in the trial court,) she stated that the late **David Wanjohi** was a timber merchant and had hired the accident vehicle to transport timber from Kuresoi in Nairobi when the accident happened, that the said timber was seized by the defendants and have failed to return it, and as a result, the estate suffered loss.

She claimed monetary compensation, the value of the timber, general damages for trespass to goods and costs.

In **CMCC No. 82 of 2004**, the plaintiff blamed the defendants for negligence that she alleged caused the deceased fatal injuries. She pleaded that the second defendant drove the vehicle with authority, and as agent of the first defendant, the owner of the vehicle.

The suit was brought for the benefit of the Estate under the **Fatal Accidents Act**, and the persons for whose benefit it was brought were itemised, the six children and herself as the widow. It was her statement that the deceased was a farmer and a businessman earning a sum of Kshs.80,000/= per month with which he used to support his family. She claimed damages under both the **Fatal Accident Act** and the **Law Reform Act**. Before the hearing, both suits were consolidated.

3. The defendants in both suits filed a joint defence and denied all allegations. In particular, they denied that the first Defendant was the owner of the accident vehicle **Registration Number KAE 182T** and that the second Defendant was the first defendant's agent not authorised driver. All particulars of negligence were also denied and the plaintiff put to strict proof.

The plaintiff testified and called one witness, PC Christopher Mwangi, a police officer then based at Molo police station.

The police officer stated that he was not the investigating officer and that he did not visit the scene of accident, and that the driver of the vehicle complained that the vehicle brakes failed. He produced the police abstract. He told the court that the police abstract did not show how the accident occurred and had no basis to suggest that the brakes of the motor vehicle failed.

4. The widow of the deceased and plaintiff told the court that she did not know how the accident occurred. She produced no birth certificates for the named children. She did not produce any evidence to show where the deceased was working or the type of work he was doing nor his earnings. She told the court that she had no proof that the deceased had hired the lorry nor the cost of the timber alleged he had bought and was transporting when the accident occurred.

The defendants called no evidence but filed written submissions. The plaintiff also filed written submissions.

5. I have perused the Record of Appeal. I find no record of the defendants written submissions before the trial court.

In his judgment, the Honourable trial Magistrate dismissed the plaintiffs case with costs on the grounds that the plaintiff did prove liability against the defendants. On the issue of ownership of the accident vehicle, the trial court found that since the plaintiff produced a police abstract that stated the first defendant as the owner, and as the defendants did not controvert that fact, he concluded that the first defendant was the owner, and the second defendant was the driver and employee or agent.

As to the causation of the death of the deceased, the trial court held that it was incumbent upon the plaintiff to adduce factual evidence to prove that the death was caused by negligence of the 2nd defendant. The court further made a finding that since no proof was tendered on the hire of the vehicle, nor the value of the timber, the plaintiffs claim could not succeed. Likewise, the trial court found that the deceased's earnings were not proved. He proceeded to dismiss the claim in its totality.

6. Being dissatisfied with the dismissal of the suit, this Appeal was filed and is based on three main grounds:

(a) That the trial court erred in law and fact in dismissing the suit on the basis of absence of an official certificate of ownership of the accident motor vehicle(ground 1 and 2).

(b) The trial Magistrate erred in his finding that the plaintiff did not prove liability when the Respondents did not offer any evidence to contradict the appellants evidence which was sufficient to hold the respondents liable (grounds 3, 5).

(c) The Appellant further faulted the trial Magistrate in failing to award the plaintiff damages on the basis that no damages had been proved.

7. This is the first appellate court. I mandated to re-evaluate the evidence tendered in the trial court and come up with its own independent findings conclusions. See **Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (EA) 123**.

This court has carefully considered the evidence before the court. As stated earlier, the defendants called no evidence, and to that extent the appellants' evidence stood controverted.

In his submissions before me, Mr. Karanja-Mbugua for the appellant urged that ownership of the accident motor vehicle was not disputed hence this should not have been an issue. He admitted that there was no eye witness to the accident and the doctrine of *Res Ipsa loquitur* that had been pleaded was not displaced by the Respondents. He urged that the police officer produced the police abstract and stated that the vehicle's brakes failed, and since this was not challenged, the trial court should have found negligence had been proved. According to the Appellant, production of the police abstract and the death certificate that showed cause of death as a road traffic accident was sufficient and no further requirement to prove the cause of death was required.

8. On the claim under **Fatal Accidents Act**, it was submitted that even in the absence of proof of earnings, the court ought to have used the Government Basic Wages guidelines for the period.

He urged that the trial court's judgment be set aside and this court finds in favour of the appellant.

9. The Respondents, in opposing the appeal submitted that there was no sufficient evidence that the trial court could have relied on to find negligence on the part of the defendants as none was tendered and as negligence was not proved, then no damages could have been ordered against the defendants.

10. I have considered the trial court's judgment *vis-a-viz* the grounds of appeal as stated by the appellant. It seems that the appellant did not analyse the Magistrate's Judgment sufficiently because grounds Numbers 1 and 2 are baseless. The trial court made a finding that the first and second appellants were the owner, driver and employee respectively of the accident vehicle, and even assessed possible awards of damages had he found the defendant liable in negligence. The only issue that remains for determination by this court is on liability, whether the Appellant proved her case on the required standards.

11. There is no dispute on the following facts:

- (1) That the plaintiff and her witness, a police officer from Molo police stations stated:
- (1) That they did not know how the accident occurred,
- (2) That the value of the alleged timber was known or proved.
- (3) That no proof of hire of the accident vehicle was tendered,
- (4) That earnings of the deceased were not known or proved.

Section 107, 108 and 109 of the Evidence Act, Chapter 80, lays the burden of proof of any particular fact on the person who asserts and who wishes the court to believe in its existence.

In the case **David Kajogi M'Mugaa -vs- Francis Muthomi (2012) KLR C.A 118 of 2010**, the Respondent did not tender any evidence in the trial court, and the investigating officer in traffic accident did not testify. The court proceeded to hold that statements in an investigation report are not binding to a court unless they are corroborated by evidence and that such statements are not sufficient and conclusive, and that court can either accept or reject them. It is therefore not sound submission by the appellant that the trial court failed to accept the police officers averment that the vehicle brakes failed, an assertion that was not supported by any evidence at all. It was the duty of the plaintiff to discharge her burden by tendering sufficient evidence notwithstanding that the defendants failed to testify.

12. The claim in this case was based on negligence. There can be no liability without fault against the defendant. In **Muthuku -vs- Kenya Cargo Services Ltd (1991) KLR** the court observed that:

“---- in my view it was for he appellant to prove upon a balance of probability one of the forms of negligence as was alleged in the plaint.Out law has not yet reached the state of liability without fault-----

The appellant failed to prove any sort of negligence against the appellants and in my respectful view his claim was rightly dismissed---”

In the present case, no attempt whatsoever was made to prove any one form of negligence as stated. The police officer was of no assistance at all, and having testified that he did not know how the accident occurred, that sealed the appellants case there having been no eye witness. It was incumbent upon the Appellant to link the death of the deceased to the Respondents negligence. The appellant has to prove the claim on a balance of probability whether or not the Respondents tendered evidence or not.

In **C.A. No.152 of 2003 – Statpack Industries -vs- James Mbithi Munyao**, the court observed that the plaintiff must adduce evidence which, on a balance of probability, a connection between the two may be drawn. An injury *per se* is not sufficient to hold someone liable for the same.

Likewise, the appellant had to prove a casual link between the Respondents negligence and the deceased's death. This was not done.

13. In view of the foregoing I find the appellant's grounds of appeal, in their totality without merit.

The appeal is therefore dismissed with costs.

Dated, signed and delivered in open court this 28th day of January 2016.

JANET MULWA

JUDGE