



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. 56 OF 2015
(FORMERLY KISII HCCA NO. 104 OF 2010)

BETWEEN

JULIUS OKELLO OYOO suing as the Administrator of the estate of

DAVID ODHIAMBO OKELO (DECEASED) APPELLANT

AND

HAMBROSE OCHIENG 1ST RESPONDENT

JOSEPH M. ONGANYO 2ND RESPONDENT

(Appeal from the Judgment and Decree of Hon. S. Shitubi, SPM delivered on the 27th April 2010 in Senior Principal Magistrates Court at Migori Civil Case No. 61 OF 2009)

JUDGMENT

1. This is an appeal against the dismissal of the appellant's suit in the subordinate court. The appellant lodged the suit against the respondents on behalf of the deceased's dependants and as administrator of his estate. The deceased, his son, perished in a road traffic accident which occurred on 8th January, 2009 along Muhuru – Migori Road involving a motorcycle he was riding and the respondents' motor vehicle.
2. The trial court held that the appellant had not discharged the burden of proof in that the evidence regarding the accident was based on mere hearsay and that the ownership of the vehicle was not proved by production of a search certificate issued by the Registrar of Motor Vehicles in light of the Court of Appeal decision in ***Thurania Karauri v Agnes Ncheche* NRB CA Civil Appeal No. 192 of 1996 [1997]eKLR.**
3. In summary the appellant appeals on the ground that the trial court erred in holding that he had failed to prove ownership of the vehicle, that the learned trial magistrate failed to take into account the fact that he had proved his case on the balance of probabilities and that the respondents did not offer or challenge his evidence.
4. As this is the first appeal, I am required to evaluate the evidence afresh and come to an independent conclusion having regard to the fact that I neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.* [1968] EA 123).**

5. Only the appellant testified and the material part of his testimony was as follows:

David Odhiambo Okello was my son. He died last year 8.1.2009. On that morning I was informed that he had been hit by the motor vehicle and died. I was told it was motor vehicle No. KAR 358S Mitsubishi Canter. He was healthy. He used to do driving for a living.

5. I find that the plaintiff's testimony was insufficient to found liability and I agree with the learned magistrate his case was founded on hearsay evidence. Other than confirming the death of the deceased, no evidence was led to establish how the deceased could have died to raise sufficient evidence for the respondents to rebut. The appellant did not even produce a police abstract to confirm that there was a collision between the deceased's motorcycle and the respondents' motor vehicle and that the incident was reported to the police.
6. Even if the learned magistrate is faulted on relying on ***Thuranira's case (Supra)***, there is no other evidence upon which the court could find that the respondent owned the vehicle apart from what the appellant testified he was told by some unknown person. I therefore uphold the finding by the learned magistrate that, "*the plaintiff did not discharge the burden of proof or put forth a prima facie case.*"
7. As there was no appeal or cross appeal on the issue of quantum, I shall not comment on the same. The appeal is therefore dismissed.
8. As the respondents' advocate did not attend court for the hearing of the appeal despite being served, there shall be no order as to costs.

DATED and DELIVERED at MIGORI this 19th day of June 2015.

D.S. MAJANJA

JUDGE

Mr Odingo instructed by Odingo and Company Advocates for the appellant.

Moronge and Company Advocates for the respondents.