



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 113 of 2008

NYANSIONGO TEA FACTORY LIMITED APPELLANT

AND

JAMES NYABUTI NYAMUYA (Suing as Personal

Representative of Bernard Osiemo Nyabuti) RESPONDENT

(Being an appeal from the judgment and decree of Hon. Mr. J. Were, SRM

dated 1st July 2008 in Keroka SRMCC No.145 of 2007)

JUDGMENT

1. The appellant herein was the defendant in Keroka SRMCC NO.145 of 2007 in which the respondent, as plaintiff, sued the appellant seeking both general and special damages for the death of Bernard Osiemo Nyabuti which occurred as a result of a road traffic accident which occurred on or about the 15th February 2007. It was alleged that the deceased was lawfully travelling in the appellant's M/V Registration Number KAT 316 N along the Gesima-Keroka road when the appellant's driver, servant and/or agent so negligently drove, managed and controlled the said motor vehicle along the said road that he caused or permitted the same to violently overturn. As a result of the said accident, the deceased suffered serious physical injuries from which he eventually died. The respondent held the appellant liable in negligence for the said accident, hence the suit that was filed in the lower court.
2. The appellant filed defence on 28th June 2007 and denied all the allegations of negligence attributed to it and/or its driver, servant and/or agent. The appellant also denied that it was the registered owner of the offending M/V; that the said M/V was involved in an accident on the alleged date or at all. In the alternative, the appellant averred that if any accident occurred at all, an allegation that was denied then the same was caused by or substantially contributed to by the Respondent. Particulars of negligence attributed to the Respondent are set out in paragraph 8(a) – (u) of the defence.
3. In the further alternative, the appellant averred that if the deceased suffered any injuries, then those injuries, whose existence was denied by the appellant, were self inflicted and further that the death of the deceased was from causes completely unrelated to the alleged accident. The appellant asked the court to dismiss the Respondent's suit with costs.
4. The Respondent did not, apparently, file any reply to the defence. I use the word apparently guardedly because I have not seen any such pleading on the file.

5. The trial court heard evidence from the Respondent who stated that the deceased Bernard Osiemo Nyabuti was his son. On the 15th February 2007, he got information that his son had been involved in a traffic accident. He produced receipts to show that he had spent over Kshs. 40,000/= on the deceased's funeral. He also testified that as a result of the death of the deceased, he lost the financial support he used to get from him. The deceased was said to be self-employed, and that the vehicle which caused the accident was a lorry used for ferrying tea leaves.

6. PW2 was Annah K. Nyaigoti. She said she was an eye witness to the accident and testified that on the material day, at about 6.30 a.m., she saw the subject motor vehicle being driven very fast along the Gesima-Kijauri road near Gesima Primary School. She was some 15 metres away from the road. When the vehicle hit a bump, it was thrown into the air and in the course of it, someone fell out of the lorry onto the road. The vehicle stopped some metres away from the bump. She rushed to the scene and saw the deceased lying dead on his stomach. The driver drove off after Annah screamed. She stated that the deceased who was her grandson, was one of three men who were travelling in the lorry. Later police went to the scene and took away the deceased's body.

7. The appellant called John Omonywa who testified as DW1. He stated that at about 6.00 a.m. on the material day, he was driving the subject motor vehicle from Mosobet to Nyansiongo. At Gesima he noticed that some of the bags carrying green leaf had fallen out so he stopped to check on the fate of the fallen bags. That was the time he noticed a dead person on the road. He denied carrying the deceased in the vehicle since he was not authorized to carry passengers save if they are employees of the appellant. DW1 also stated that it was still a bit dark by the time he got to the accident scene and that before he stopped, he saw something falling off the back of the lorry, only to stop and find that it was a person.

8. During cross examination, DW1 stated that perhaps the deceased was hanging on the back of the lorry. He also said that when he stopped and came out of the vehicle, he saw a certain lady who started screaming and alleging that he had killed the deceased. Later, he went to report the incident to the police. He also said that perhaps the deceased jumped from the road. He denied that the motor vehicle was involved in an accident.

9. After carefully considering all the evidence that was placed before the trial court and the submissions made by both counsel, the trial court entered judgment for the Respondent as follows:-

·	Loss of dependency	Kshs.560,000.00
·	Funeral Expenses	Kshs...10,000.00
·	Fees for Limited Grant	Kshs. 25,000.00
·	Loss of expectation of life	Kshs. 100,000.00
·	Pain and suffering	<u>Kshs.10,000.00</u>
	Total	<u>Kshs.705,000.00</u>

plus costs of the suit and interest at court rates.

10. The appellant was aggrieved by the entire judgment of the trial court, hence this appeal which was premised on the following 19 grounds:-

1. *The Learned Trial Magistrate erred in Law and in fact in holding that the Respondent had established his case against the Appellant on a balance of probabilities.*

2. *The Learned Trial Magistrate erred in Law in proceeding to determine the case on causes of*

action and issues/facts that were never pleaded or canvassed in the evidence or submissions.

3. *The Learned Trial Magistrate erred in proceeding to decide the case on a hypothesis not supported by the pleadings or evidence.*

4. *The Learned Trial Magistrate erred in ignoring the divergence of the evidence given by the Respondent and the pleadings and thus failed to hold that Respondent had not established negligence as pleaded against the Appellant to the standard required by law.*

5. *The Learned Trial Magistrate erred in law and in fact in failing to hold that the particulars of negligence alleged in the plaint were not established on evidence.*

6. *The Learned Trial Magistrate erred in Law and in fact in holding that the deceased was hit by the Appellant's lorry while presumably a pedestrian while the state of the pleadings and evidence showed that the Deceased was not a pedestrian.*

7. *The Learned Trial Magistrate failed to appreciate and analyze the evidence before him to arrive at a correct decision.*

8. *The Learned Trial Magistrate failed to consider the fact that the deceased was solely to blame for the accident, or was a major contributory thereof.*

9. *The Learned Trial Magistrate erred in fact and in law by ignoring and downplaying all evidence favourable to the appellant tending to negate the Appellants' liability.*

10. *The Learned Trial Magistrate misapprehended the principles applicable in awarding damages and thus arrived at the wrong quantum of damages.*

11. *The Learned Trial Magistrate failed to direct his mind to the glaring disparities between the Respondent's evidence and pleadings.*

12. *The damages awarded are inordinately high as to constitute a miscarriage of justice.*

13. *The Learned Trial Magistrate used and/or was guided by the wrong principles in reaching the awards of damages.(sic)*

14. *The Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent's income for the purpose of determining damages, was not established.*

15. *The learned trial magistrate proceeded to find that the deceased earned more than was submitted by the Respondent's advocates without any basis for so holding.*

16. *Learned Trial Magistrate erred in awarding special damages for funeral expenses that were never pleaded nor proved.*

17. *Learned Trial Magistrate awarded special damages for expenses for obtaining letters of administration in amounts larger than pleaded and/or proved.*

18. *The Learned Trial Magistrate ignored the Appellant's submissions in toto.*

19. *The Learned Trial Magistrate's judgment is contrary to Law and has occasioned a miscarriage of justice.*

11. *The appellant therefore prays that the appeal be allowed and the judgment of the learned trial magistrate on liability be set aside and/or varied. The award of damages be set aside and or varied and that the costs of this appeal and of those in the court below be paid to the appellant.*

12. On the 29th June 2010, parties herein took directions to the effect that the appeal be canvassed by way of written submissions. The submissions were to be filed and exchanged by 23rd July 2010. However, for reasons that are not clear on the record, the appeal never proceeded to hearing substantively until 11th February 2013 when the court was informed that the submissions had since been filed and that neither party wanted to highlight the submissions.

13. This appeal is before me as first appeal. This means that as the first appellate court, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. It is however important to remember that this court does not have the privilege of seeing and hearing the witnesses who testified before the trial court. This being the case, this court would not be in a hurry to overturn the judgment of the trial court unless it is clear that either there was no evidence to support the trial court's findings or that the conclusions reached by the trial court were based on wrong principles. See **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123.**

14. I have now carefully evaluated the evidence afresh. I have also considered the law and have also carefully considered and weighed the judgment of the subordinate court. Since the appeal is on both matters of fact and law, the issues that arise for determination are twofold:-

- a) *Whether the Respondent proved his case against the appellant on a balance of probabilities and*
- b) *Whether this court should interfere with the award of damages made to the Respondent.*

15. After carefully considering all the above, I find and hold that

there was no evidence before the trial court establishing that the Respondent proved his case against the appellant on a balance of probabilities. First and as submitted on behalf of the appellant, there was no evidence before court to show that the deceased was lawfully travelling in the appellant's motor vehicle. The plaintiff did not witness the accident. The evidence by Annah does not support the claim that the deceased was lawfully travelling in the subject motor vehicle before he fell off the vehicle as alleged by Annah. Annah's evidence on the issue as to whether the deceased was or was not in the motor vehicle was this:-

“The deceased was hit by a vehicle along Gesima Kijauri road at Gesima Primary School. I was present at the time of the accident. I was about 15 metres away. The accident was at 6.30 a.m. The vehicle was over speeding at Gesima it hit a bump, and jumped up. Someone fell from the vehicle. I went to the spot and found that the vehicle had stopped some metres away. I saw it was the deceased who had fallen from the vehicle.”

During cross-examination, Annah stated the following:-

“--- I had not seen the motor vehicle earlier. I cannot remember what day it was. I did not see any other person there. I was outside my house when I saw the vehicle at about 20 metres away. --- The vehicle had 3 people in the cabin and all of them were men. I first saw deceased on the ground. I did not see deceased on the vehicle.”

16. And in his judgment, the trial court made the following findings:-

“It is however in the evidence of the defence that he saw something fall from the side mirror and on checking he saw it was a human being.

That seems to tally with the evidence of PW2 that she saw the deceased fall after the motor vehicle hit a bump as it was coming at a high speed. I do find the assertion by the defendant's witness that his motor vehicle did not cause the accident a bit untrue. The defendant testified that he had not carried the deceased. If he saw the deceased fall from the side mirror that if points towards a collision with the deceased with the side of his lorry. The defence witness stated that it was dark and he did not see the deceased at all prior to the accident. If the deceased had been at the back of the lorry, then it is most probable that he would have fallen behind and on his stomach points to a person who had been hit possibly from behind and fallen on

the stomach.

In all probability I do thus find the defendant motor vehicle hit the deceased and caused his death. The defence have not stated that the deceased was walking on the road. The time of day having been morning and the defendant having said it was a bit dark, he had responsibility to use his headlights to ensure a clear view of the road. It is apparent he did not do so. In this regard, I would find the defendant fully liable for the accident (100%).”

17. From all the above, it is clear that the evidence adduced by the Respondent did not support the pleadings. The only eye witness said she did not see the deceased on the appellant’s motor vehicle. It is trite law that a party is bound by its pleadings. Secondly, no evidence was laid before the court to show that the deceased was lawfully travelling on the Respondent’s motor vehicle, let alone the fact that no evidence was adduced to show that the deceased was a passenger in the motor vehicle. Thirdly, the conclusions reached by the trial court to the effect that the appellant was 100% liable in negligence were based on a hypothesis that was neither pleaded nor canvassed in evidence. As rightly submitted on behalf of the appellant, there was no evidence that the deceased was walking along the road and even if there had been such evidence, the respondent did not plead in the plaint that the deceased was walking along the road before he was hit by the appellant’s car. Nor was there evidence to suggest how and with what part of the vehicle the deceased was hit. Annah, who stated that the deceased was her grandson, told the court that she did not see the deceased before she saw his body lying dead on the road.

18. All in all, I find no evidence on record to suggest that the appellant’s motor vehicle hit the deceased from whatever angle that fateful morning. Even the suggestion by Annah that the deceased fell from the vehicle is not supported and/or corroborated by any other evidence on record. She in fact contradicts her own testimony that the deceased fell from the motor vehicle when she says the following in answer to one of the questions on cross examination:-

“I did not see the deceased on the vehicle.”

19. In this regard, the case cited by counsel for the appellant, namely **CMC Motor Group Ltd. –vs- Starves Ronsalis & another – Nairobi Civil Appeal No.231 of 2000** is relevant and I entirely agree with the Court of Appeal findings therein.

20. I am also persuaded that the evidence upon which the trial court reached its decision on liability had no basis in the pleadings; the evidence was contradictory. There was no proof of negligence on the part of the appellant. Further, the Respondent’s failure to file a reply to defence meant that the particulars of negligence attributed to the deceased were admitted. The trial court did not, unfortunately, consider this aspect of the pleadings. Because of this, the Respondent did not prove on a balance of preponderance that the deceased died as a result of the negligence of the appellant’s driver, servant and/or agent. In this regard therefore, I entirely agree with the appellant’s counsel’s submissions that the respondent failed to prove that the deceased was lawfully travelling on the appellant’s motor vehicle and that the deceased died as a result of the negligence of the appellant’s driver, servant and/or agent. I am persuaded by what the court said in the case of **Associated Electrical Industries Ltd –vs- William Ratemo – Nairobi HCCA No.421 of 1998** cited by counsel for the appellant and also what the courts said in **Edward Kipsangok –vs- David Kirwa Sato – Eldoret HCCA No.41 of 2001** as well as **Galaxy Paint Company Ltd. –vs- Falcon Guards Ltd – Court of Appeal at Nairobi, Civil Appeal No.219 of 1998**. I entirely agree with the view that unless the pleadings are amended, parties must be confined to their pleadings. In the instant case, the evidence tendered by the respondent did not support the pleadings. Further the allegation that the deceased was lawfully travelling on the appellant’s motor vehicle was not proved. DW1 stated in his testimony that he did not carry any passenger who was not authorized to be carried on the vehicle. Both PW1 and PW2 told the court that the deceased was not an employee of the Respondent and Annah added that she did not see the deceased on the appellant’s motor vehicle nor did she see him before she saw him lying dead on the road.

21. Having reached the above conclusions, I do not find it necessary to consider the other grounds of appeal in detail. Suffice it to say that the evidence did not support the pleadings and that the trial court

imported its own evidence into the case and thereby reached the wrong conclusions.

22. A word only on the quantum of damages. I do agree with counsel for the appellant that in the absence of documents, a finding that the deceased earned Kshs.10,000/= a month from his tailoring business was on the high side. A sum of Kshs.5000/= would have been more reasonable. In effect therefore there was no evidence to prove the pleadings that the deceased earned Kshs.10,000/= from his tailoring business.

23. With regard to special damages, it is clear that the Respondent did not prove these having only marked for identification and not actually produced the receipts making up the specials awarded. It is trite law that special damages must not only be specifically pleaded but must also be specially proved. I also find that though the Respondent asked for Kshs.20,000/= being costs incurred in obtaining the grant of representation, the trial court awarded Kshs.25000/= without any explanation.

24. In the circumstances, I would make an award of damages as follows:-

Pain and suffering	Kshs. 10,000.00
Loss of expectation of life	Kshs.100,000.00
Loss of dependency ... Kshs.5000x12x20x¹/₃	Kshs.400,000.00
Special damages	<u>Kshs.20,000.00</u>
Total	<u>Kshs.530,000.00</u>

25. In conclusion, and for the reasons given above on the issue of liability, I allow the appellant's appeal, set aside the judgment and in lieu thereof I make an order dismissing the Respondent's case in the lower court with costs to the appellant.

26. As to costs, for this appeal, each party shall bear its own costs.

27. It is so ordered.

Dated and delivered at Kisii this 18th day of April, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Karanja for Appellant

Mr. Z. Ogwen (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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