



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO.138 OF 2009

(Appeal from Principal Magistrate Hon. S. Shitubi in Bungoma Court in Civil Case No.97 of 2003)

JANE NYONGESA NGUTI (Suing as the

Administrator of the Estate of the late

HEZRON N. NGUTI.....APPELLANT

VS

WANJIRU EVANS MUTHONI.....RESPONDENT

JUDGMENT

This is an appeal against the judgment and decree of the Principal Magistrate at Bungoma in which the Appellant's suit against the Respondent was dismissed with costs on 14/10/2009. The Appellant's suit was for general and special damages under the Fatal Accidents Act (Cap.32) and the Law Reform Act (Cap.26). Her case was that on or about 9/1/98 her husband (the deceased) was traveling as a fare paying passenger in motor vehicle registration number KAB 624Y Peugeot 504 matatu along Kakamega-Webuye Road when it lost control and overturned owing to the negligent driving of the Respondent, his agent or driver leading to the fatal injury of the deceased. The suit was filed by the Appellant as the administrator of the estate of the deceased. The deceased was a teacher, aged 54, earning Ksh.15,133/= per month and in good health. The Appellant and her family had lost the support of the deceased, hence the suit.

The Respondent filed a defence denying the fact of accident, the allegation that he was the owner of the vehicle in question, the allegation of negligence, and so on.

The trial magistrate received the evidence of the Appellant only as the defence did not call witnesses. It dismissed the case with costs on the basis that no witness had been called regarding the fact of accident, or the manner in which the vehicle was being driven. It was also found that the Appellant had not proved that the Respondent was the owner of the vehicle that had allegedly caused the accident. These are the findings that the Appellant has challenged in this appeal.

I have considered the grounds in the Amended Memorandum of Appeal and the submissions filed by Kiarie & Company Advocates for the Respondent and Roselyne Aburili & Company Advocates for the Appellant. It is the duty of this court to subject the entire evidence to fresh and exhaustive evaluation to be able to reach its own conclusions on the matter. **(Peters v. Sunday Post Ltd [1958] EA 424).**

The evidence of the Appellant was that her husband left home to go to Kakamega on 9/1/98 and did not return. After two weeks she was contacted by Kitale Police following which she went and found her husband's body at Mukumu Hospital Mortuary. She identified it for post mortem and it was eventually released to her for burial. It was from the police that she learnt that the deceased had on 9/1/98 been fatally injured while passenger in motor vehicle registration number KAB 624 K Peugeot 504 Matatu traveling along Kakamega-Webuye Road at Bukhaywa. The police had reduced this information into the police abstract (Exhibit 4) which they gave to her. She did not witness the accident and did not call any witness who had witnessed the same. The police officer who prepared the abstract was not called to testify. There is no evidence that the officer attended the scene or investigated the accident.

Under section 107 of the Evidence Act (Cap.80), the Appellant desired the court to give her judgment. It was up to her to call evidence to show that indeed there was an accident involving the deceased; that the vehicle involved belonged to the Respondent; the vehicle was at the time being negligently driven and by the Respondent, her driver or agent; and therefore that the Respondent was liable to her in damages. I agree with the trial court that none of these was proved by the Appellant. She did not witness the accident, and neither did she call any witness who saw the accident happen. In short, there was no evidence called regarding how the accident happened, whether there was any piece of driving on the part of the driver that was negligent, or whether that driving was the cause of the accident. There was no evidence called to show who was the driver of the vehicle at the time—whether it was the Respondent or her agent or driver. As was stated by Justice Omolo (J.A) in **Kiema Muthuku v. Kenya Cargo Handling Services Limited [1991] 2 KAR 258:**

“There is, as yet no liability without fault and a Plaintiff must prove some negligence against the Defendant where the claim was based on negligence.”

None of the particulars of negligence set forth in the plaint was proved on balance, or at all.

Secondly, the Appellant was under a duty to prove that the vehicle which was involved in the accident belonged to the Respondent. It should be recalled that the Respondent had denied in her defence that she owned the vehicle and put the Appellant to strict proof. It became necessary for the Appellant to call evidence from the Registrar of Motor Vehicles showing that the Respondent was the registered owner of the vehicle at the time of the accident. A certificate of search was necessary. **(Thuranira Karauri v. Agnes Ncheche, Civil Appeal no.192 of 1996 at Nyeri.** This was not done and, once again, that aspect of the Appellant's case was not proved on balance.

Without proof of liability it is unnecessary to attempt to calculate the damages payable. The result is that the appeal is dismissed with costs.

Dated and delivered at Bungoma this 15th day of March, 2012.

A. O. MUCHELULE

JUDGE