



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 160 OF 2010

**M'MBULA CHARLES MWALIMU.....APPELLANT**

**VERSUS**

**COAST BROADWAY COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. This is an unfortunate case in which M'Mbula Mwalimu died in an accident after being knocked down by a bus as he rode his bicycle. It is not only the death that was unfortunate. The negligence plateau set by the pleadings was also found to be too high to be scaled by the evidence adduced. That resulted in the dismissal of the Plaintiff's suit by the Hon. L.N. Mutende, Senior Principal Magistrate in SRMCC 947 of 2003. The basis of dismissal was lack of evidence to prove negligence, and hence liability.

2. The Appellant has filed five grounds of appeal. All grounds concern the question of liability, namely:

- that the learned Magistrate should have found that, on negligence the Appellant discharged the burden of proof;
- That the learned Magistrate wrongly held that reliance on the Police abstract without the investigation outcome was insufficient to place blame for the accident.
- That the learned Magistrate failed to attach any fault on the Defendant
- That the learned Magistrate failed to appreciate that the failure by the Defendant to call rebuttal evidence should have led to a holding that the Plaintiff was 100% liable
- That the learned Magistrate failed to critically analyse the evidence availed which proved the Plaintiff's case.

3. The real question for determination is whether liability, flowing from proof of negligence, was achieved by the evidence adduced, and if so, what damages are payable.

4. The role of this court is, under Section 78(2) of the Civil Procedure Act, to review the case on the same basis as if it were the trial court. However, the court is conscious that it did not have opportunity to hear the witnesses or observe their demeanour, and takes this into account.

5. The starting point is the pleadings, for parties are bound by their pleadings. The Plaintiff pleaded at

paragraph 4 of the Amended plaint, that the deceased was cycling on his rightful lane when the Defendant's bus, driven negligently and recklessly, knocked him from behind.

6. At paragraph 5, the plaint alleges that the accident was due to the sole negligence of the Defendant and or its authorised driver/agent. Particulars of negligence alleged included:

- Driving too fast, and driving without care and attention,
- Failing to stop, slow down or swerve to avoid knocking down the deceased who was in his rightful lane
- Failing to take regard or any proper regard to road users especially the deceased who was on the rightful lane
- Failing to hoot or in any way give adequate warning of his approach.
- Causing or allowing the deceased to suffer fatal injuries

The facts and particulars relied upon were to be proved by the Plaintiff, unless admitted or not rebutted.

7. The Defendant, in paragraph 4 of its Defence denied that the accident took place on the date, time and place alleged, or in the manner alleged in paragraphs 4 and 5 of the amended plaint, and put the Plaintiff to strict proof. Further, it denied all particulars of negligence in paragraph 5 of the Plaint and put the Plaintiff to strict proof. It also alleged contributory negligence but the particulars thereof are obviously unrelated to the present suit.

8. The Plaintiff's role was therefore to prove the allegations in the plaint by adducing relevant material evidence to discharge the burden. Did the Plaintiff discharge the burden? Or more correctly, in the circumstances here: did the Plaintiff's evidence tend to show that whatever the cause of the accident the Defendant was obliged to explain the death, given that the driver had control of the vehicle whilst the rider had control of the bicycle?

9. The only witness called to testify in the suit was the Plaintiff (PW1), the administrator of the deceased's estate. He said he was the deceased's brother, and stated where he lived. He exhibited the Letters of Administration (Exhb 1) proving he was the legal representative of the deceased. He did not say he was an eye witness, but he said the deceased died in a road accident on 16<sup>th</sup> October, 1999 that occurred at Nyali Bridge. That the deceased was riding a bicycle from Kongowea to Mombasa. He identified the vehicle registration number based on the Police Abstract (Exhb 2). He said he was issued with the Abstract from Nyali Police Station. Finally he said "**the Defendant is to blame for the accident.**"

That was the full extent of the evidence on negligence. It does not disclose that PW1 was an eye witness, indeed, he appears not to have been one.

10. I am unable to find in the aforesaid evidence anything that shows or elucidates or demonstrates the allegations made in the plaint, viz:

- that the deceased was cycling in the rightful lane
- that the accident was due to the Defendant's or its driver's negligence
- that the driver drove too fast, without care or attention, or failed to slow down or swerve
- that the driver had no regard for other road users, or failed to hoot or give warning of his approach.

Presumably, when the Plaintiff's counsel drew up the plaint, on interview and instructions, and having

amended it twice, he was certain to avail evidence to illuminate and demonstrate at least some of the allegations in the plaint.

11. I have carefully perused the exhibits. I find that only the Police abstract connects the deceased's death to the accident with the subject vehicle. It, however, shows that investigations were incomplete and that no one had been charged. In respect of the question:

**"2... if the case is still under investigation is there any likelihood of either party being prosecuted?"  
The answer was 'No.'"**

Three persons, namely Francis Mkalla, Corporal Mwanga and Corporal Mulio were indicated as witnesses and their addresses given. None were called. Perhaps this is because the abstract was obtained on 2<sup>nd</sup> February, 2001, almost sixteen months after the accident, and the witness had moved on.

12. Neither the lower court, nor this court, is entitled to find negligence or liability unless there is material evidence in proof. Nor can the court rely on the presumption that the death was caused by the carelessness of the Defendant merely on account of the fact that the Police abstract indicates that the accident resulted in a fatal injury. The cause must have been the negligence of the Defendant or its driver or, as pleaded by the Defence, by the negligence of the deceased cyclist. Or the fault could have been attributed to both parties.

13. As correctly argued by the Respondent, the Plaintiff did not plead or rely on the maxim *Res Ipsa loquitur*, which is the applicable maxim where all the facts are not known. Nor do I find that the maxim would in any event be applicable in circumstances such as these: where both driver and cyclist had respective control of their movements; and the probability of the negligence of each is either equal or otherwise apportionable. The scenario would have been different if the deceased had been in the bus when the fatality occurred.

14. I have read the authorities referred to by both counsel. The case of **Grace Kanini Muthini vs Kenya Bus Service Ltd and Another** HCC 4708 of 1989 is on all four with this case. Although the Appellant distinguishes it on the ground that there the Defendant filed a defence unlike in the present case, this is inaccurate. I have seen the supplementary Record of Appeal filed by the Respondent on 12<sup>th</sup> January, 2012 by consent of the parties. That record contains the Respondent's Defence on 27<sup>th</sup> February, 2004.

15. I agree entirely with the reasoning of Ringera, J (as he then was) in **Grace Kanini's** case, although it is not binding upon this court. I quote relevant parts *in extenso* here:

***"On liability, the Plaintiff did not adduce any evidence beyond stating that the accident was reported to Police. She produced in evidence a Police Abstract of the accident. This document indicated that on 15<sup>th</sup> August, 1988 at 2.20p.m. an accident occurred on 1<sup>st</sup> Avenue, Eastleigh and General Waruinge junction involving motor vehicle KVZ 919 owned by the first defendant and driven by the second defendant and one Muthini Ndunda, the deceased. The said Muthini Ndunda is described therein as a pedestrian and the injuries are said to have been fatal. This document does not improve the case of the plaintiff. All that is recorded therein is the fact of an accident involving the deceased and the 1<sup>st</sup> defendant's motor vehicle which was being driven by the 2<sup>nd</sup> defendant....."***

***What is disputed is whether he sustained the fatal injuries as a result of his own negligence or as a result of the negligence of the driver, or partly as a result of his negligence and partly as a result of the driver's negligence. The Plaintiff's evidence does not shed any light on this disputed fact. And the defendant preferred not to offer any evidence. If the defendant had the burden of proof, I would have unhesitatingly presumed some adverse fact against him. But he did not bear the burden of proof. It was on the plaintiff and she had to prove her case on a balance of probabilities. On the undisputed facts, it is entirely probable that the accident was caused by the negligence of the second defendant. It is equally probable that it was caused by the negligence of the second defendant. And it***

*is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probably if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the Plaintiff's suit on the ground that fault has not been established against the defendants....."*

15. In the present case, I find that negligence was not proved as a result of which there can be no liability attributable to the Respondent. Consequently, the prayer in paragraphs 6 (b) of the Memorandum of Appeal requesting the court to assess damages does not arise.

16. In the result, the appeal is hereby dismissed. In light of the fact that the Plaintiff was acting for the estate of the deceased who earned only 200/= per day, and was not to blame for failure to adduce sufficient evidence to prove liability. I will make no order as to costs.

**Dated, signed and delivered this 27<sup>th</sup> day of September, 2012**

**R.M. MWONGO**  
**JUDGE**

**Read in open court**

**Coram:**

1. Judge: Hon. R.M. Mwango
2. Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

- a).....
- b).....
- c).....
- d).....