



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO.106 OF 2009

(Being Appeal from the judgment and decree of the Resident Magistrate at Kerugoya in Civil Case No.264 of 2008)

NDIMA TEA FACTORY	APPELLANT
	~VRS~	
LYDIA NYAWIRA MURIUKI		
(suing as the personal Representative of		
the Estate of JOHN WAMAI – DCD)		RESPONDENT

JUDGMENT

On 18/12/2006 along Kiangai/Thunguri road, the deceased John Wamai Muriuki was fatally injured by a motor vehicle while he was pedestrian. The certificate of death (exhibit 2) revealed that he died from head injury. The Respondent is his widow who obtained a limited grant and filed this suit before the Resident magistrate at Kerugoya seeking general and special damages from the Appellant whom she alleged owned the vehicle that had caused the accident. The suit was brought under the Fatal Accidents Act, Cap.32 and the Law Reform Act, Cap.26. It was pleaded that the accident had been caused by the negligent driving of a lorry registration number KAT 657 C belonging to the Appellant. The Appellant denied both the accident and the allegation that its driver was negligent. There was an alternative plea that if the accident did occur, it was caused solely by or substantially contributed to by the negligence of the deceased.

The matter was heard by the trial court which found that the accident was solely caused by the negligent driving of the driver of the Appellant. Judgment was entered in the sum of Ksh.330,000/= in general damages and Ksh.150/= in special damages, plus costs and interest. The Appellant was not satisfied with the decision and filed this appeal to challenge the findings on liability and quantum. Counsel for the parties agreed to file written submissions which this court has considered along with the evidence that was adduced before the trial court.

It is the duty of the first appellate court to evaluate the evidence that was adduced before the trial court to be able to reach its own conclusion, while bearing in mind that the trial court had the advantage of hearing and seeing the witnesses as they testified before it. **(Peters V. Sunday Post Ltd [1953] EA 424).**

The Respondent did not witness the accident. The witnesses she called to support her case in relation to the accident were corporal Jones Kimatu (PW1) of Kerugoya Police Station and Peter Murage Wachira (PW3). PW1 did not witness the accident and neither was he the officer who investigated the accident. The accident was investigated by P.C. Narture who was inexplicably not called to testify. PW1 merely produced the police file. The police file showed that four witnesses had recorded statements. They

included Gladys Wanjiru Munene who was at the scene and saw the deceased lying at the side of the road. She allegedly also saw this lorry and a car at the scene. She did not testify before the trial court. It is material that the police file did not have a sketch plan of the scene to tell whether the accident was inside or outside the road. Such a sketch would also indicate whether any skid marks were made by the vehicle that caused the accident. Skid marks are usually evidence of speed. It is further notable that the police who interrogated the witnesses and the driver of the lorry did not blame anyone for the accident but recommended that an inquest be conducted.

PW3 testified that he was going home between 7 and 8 p.m when this lorry emerged from behind him and went to knock the deceased who was on the left side of the road. There was another vehicle from the opposite direction and the two vehicles by-passed each other. After the lorry knocked the deceased, it did not stop. Its number was KAT 657 C . People were at the scene and took the deceased to Kerugoya Hospital. The police did not appear to have investigated the role of this second vehicle in relation to the accident. When PW3 was cross-examined, he stated that the deceased was run over by the rear tyres of the lorry.

The Appellant called Samuel Kinyua Gathumbo (DW1) who testified that he was the driver of the lorry and that he had worked for KTDA as a driver for 31 years. He was on this day accompanied by a clerk Winfred Wanju Mugo (DW2) and the conductor. They were carrying tea leaves from buying centres and taking to the factory. Their evidence was that they were using this road this day. At about 8.30 p.m. they were going to Thunguri when they found police officers who stopped them alleging that they had knocked down someone. At the scene was the deceased lying on the ground and surrounded by people. The witnesses said that they had used this road but had not been involved in any accident or knocked down the deceased. They argued that they would not have returned to the scene had they knocked the deceased. They said the road was busy at the time. The police inspected the lorry but did not find any stains or indication that it had been involved in an accident, they stated.

The court believed PW3 and disbelieved DW1 and DW2. It is material that PW3 who had allegedly witnessed the accident did not volunteer to either go and report to police or to record a statement. It is material that he said that he knew the deceased person before the accident. He said he was walking on the road between 7 p.m and 8.p.m. There was no indication by him regarding what light he used to see the accident. He was not led to say that he used the light from the lorry or the other vehicles that were using the road. He did not testify about how he was able to read the registration number of the lorry.

I have anxiously considered all the evidence as recorded by the trial court. It is clear to me that the testimony of PW3, when tested against that of PW1, DW1 and DW2, was not sufficient to establish that the deceased had been knocked down by the lorry. The failure to call the investigating officer and Gladys Wanjiru Munene did not make the respondent's case any better. The trial court fell into error when it found that the Respondent had established the fact of the accident against the Appellant. The fact of accident had to be proved as was the allegation that the accident was out of negligence.

The result is that the appeal is allowed with costs. The judgment and decree of the lower court are set aside and in their place there will be judgment dismissing with costs the Respondent's suit.

Dated and signed at Bungoma on this 19th day of October, 2011.

A. O. MUCHELULE
JUDGE

Signed and delivered at Embu on this 15th day of November 2011.

JUDGE