



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 167 of 2003

CERES ESTATE LIMITED 1ST APPELLANT

EDWARD KHAGONI IMBWAKA 2ND APPELLANT

VERSUS

AGNES WANJIKU 1ST RESPONDENT

MUTHONI NJOROGE (*Minor suing thro'* JOHN MAINA.. 2ND RESPONDENT

JOHN MAINA (*Legal Representative*)

RUTH NYAMBURA MAINA (Deceased) 3RD RESPONDENT

JUDGMENT

This appeal arises out of three suits which were filed before the Chief magistrate's Court in respect of a traffic road accident that occurred on the 15th August 1999 along Nakuru – Bahati road at Maili Kumi Shopping Centre involving the respondents and motor vehicle registration No KLN 901. The three suits being **CMCC No. 2003 of 2000** in respect of the estate of the late **Ruth Nyambura**, **CMCC No.2910 of 1999** in respect of **Muthoni Njoroge Maina** and **CMCC No. 2608 of 1999** in respect of **Agnes Wanjiku** were all consolidated under the holding file of **CMCC No. 2910 of 1999**.

According to the plaintiff, **Agnes Wanjiku** told the court that on the 15th day of August 1999, she was in the company of her late **Ruth Nyambura** and the minor **Muthoni Njoroge** at a shopping centre called Maili Kumi. They were standing at a bus stop waiting for a vehicle to travel towards Nakuru. Suddenly they heard gun shots and everybody scampered for their safety. The plaintiff with the sister and the child started running towards the Nakuru direction. A lorry KLN 901 which belonged to the 1st appellant and was controlled by the 2nd appellant, knocked them down killing **Ruth Nyambura** while **Muthoni Njoroge** sustained serious injuries and Agnes sustained some soft tissue injuries. The baby **Muthoni Njoroge** was admitted in the hospital for several weeks for the injuries sustained, while Agnes was treated and discharged.

John Maina [PW2] was the father of the late **Ruth Nyambura (deceased)** who succumbed to the injuries. He obtained the letters of administration in respect of his daughter's estate and also brought the suit on behalf of **Muthoni Njoroge** the minor child as the guardian.

This appeal is against the findings on liability the only issue which was contested. The appellants filed three grounds of appeal as follows: -

- 1. The learned trial magistrate erred both in law and in fact in finding that the appellants' lorry registration number KLN 901 was involved in the accident giving rise to the case when the evidence before him showed clearly that the vehicle was not involved in the alleged accident at all.**
- 2. The learned trial magistrate erred both in law and in fact by failing to consider or consider adequately the defence case and the submissions filed on behalf of the appellants.**
- 3. The learned trial magistrate erred both in law and in fact in assessing the damages by taking into account irrelevant factors, and left out of account relevant factors.**

In further exposition of the above grounds of appeal, Learned Counsel for the appellant *Mr Wamasa* invited this court to consider that, as a result of a panic caused by the gun shots, everybody at the shopping centre ran away including the 1st respondent who was the only eye witness in her case. It was the respondent's case that she was hit by a vehicle from behind. The appellants denied having been involved in the accident and there was no basis upon which the trial court based its findings that the accident was caused by the motor vehicle KLN 901.

Counsel further submitted that according to the evidence of the 1st respondent, the accident happened between 7.20 – 7.40 p.m. and as the result of the accident, the 1st respondent lost consciousness for about twenty minutes which clearly shows that it was not possible for her to identify the vehicle that caused the accident. Due to the commotion and the fact that there was darkness and more fundamentally no police abstract was produced to prove that motor vehicle KLN 901 was involved in an accident the trial court should have dismissed the plaintiff's case.

The 2nd appellant was called at the police station nine days after the accident and he denied that his vehicle was involved in an accident. He also relied on the evidence of *David Warui Mwangi (DW 3)* who is the owner of the premises that were robbed on the material time. This witness told the court that there were many vehicles that were parked at the shopping centre and when the shooting ensued, some of the vehicles took off. He said that he saw the lorry KLN 901 when the shooting started and the truck was driven towards the Jomo Kenyatta direction. He said also said he ran towards the direction of Bahati and he did not find anybody injured or dead on the road. The truck was ahead of him about 50 metres. He ran up to his home which is about 200 metres and on his way back to the shopping centre to check on the condition of his wife who was a victim of the robbery that is when he heard somebody groaning and a child crying that they had been hit by a vehicle.

It is on the basis of the above evidence that the trial court found that lorry registration number KLN 901 was the cause of the accident and proceeded to assess damages in favour of the plaintiffs.

On the part of the respondents, learned Counsel for the respondents urged this court not to interfere with the decision of the lower court on the grounds that the appellants in their defences merely denied liability. There was no specific pleading that motor vehicle registration number KLN 901 was not involved in the accident. He argued that this was a material fact which ought to have been pleaded under **Order 6 Rule 4 (1) b of the Civil Procedure Rules**.

On the issue of evidence before the trial court, this court exercising its appellate jurisdiction can only evaluate the evidence while bearing in mind that the trial court had the advantage of seeing the witnesses testify and thus add the advantage of assessing their demeanor.

Counsel drew the attention of this court to the judgment where the court examined the demeanor of the 1st respondent and remarked as follows: -

"I looked at Agnes in court and she stuck the court as a truthful witness. She was consistent. She had

seen the lorry at the stage earlier. This was confirmed by **Edward** (driver) and **David (DW 2)**. She also told the court that the lorry stopped ahead to await its other passengers who had been at the market centre.”

He also relied on the case of **Kirua Vs Kiruga and Another [1988] KLR page 348** where the Court of Appeal held

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

This being the first appeal, this court is mandated to re-evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowances for that. I wish to evaluate the findings of facts based on the evidence that was before the trial court and on the basis of the pleadings in order to establish whether the findings are based on sound principles of both facts and law.

According to the 1st respondent, the accident occurred at about 7.20 p.m. when it was dark. The accident occurred also in circumstances that can be said to have been difficult in that there was commotion as a result of gun shots. The appellant and other victims of the accident were hit from behind and the 1st appellant who was the only eye witness said that she became unconscious for a period of about twenty minutes. The evidence of **DW 2** was to the effect that there were many motor vehicles at the shopping centre and he saw the subject motor vehicle about 50 metres away from the shopping centre when he was running away from the commotion. He passed the motor vehicle and went to his home which is about 200 metres and then returned that is when he found the victims of the accident.

The issue to be determined is whether there was sufficient evidence or whether the plaintiff or in other words whether the plaintiffs were able to prove their case to the required standard. It is trite law that the plaintiff must prove their case on balance of probability. The plaintiff must show the cause of the accident and connect it to the negligence on the part of the defendant.

Another curious matter that is apparent in these records is that there was no evidence by way of a police abstract form to show that motor vehicle registration KLN 901 was involved in this accident. Although the trial court had a better advantage of assessing the demeanor of witnesses, I find the circumstances under which this accident occurred were difficult for the 1st respondent sole evidence to be relied upon to arrive on the issue of liability. This is a matter that would have required elaborate investigations due to the circumstances prevailing.

As such the evidence by the 1st respondent and reliance of the same was plainly wrong as it was supposed to be weighted against the defence and the circumstances surrounding the accident. I find there was no evidence to prove on a balance of probability that the appellants were liable for the accident.

On the issue of the matters of denial having not have been pleaded it is clear that in **CMCC No 2003 of 2000** the appellants denied that the motor vehicle KLN 110 was involved in an accident and since all the suits were consolidated and heard as one am satisfied that the provisions of **Order 6 rule 4 [1] [b]** were complied with.

In the upshot, I allow the appeal with costs to the appellants. The judgment and decree of the lower court is set aside and the respondents’ case is dismissed with costs.

Judgment dated and delivered on 15th February 2007.

MARTHA KOOME

JUDGE