



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 17 of 2001**

**STEPHEN M. KUBAI (legal representative of the estate of**

**JULIA KABIRITHU MURUGU (DECEASED) ..... APPELLANT**

**VERSUS**

**MIKELINA AMATU .....1<sup>ST</sup> RESPONDENT**

**BARNABAS MUTWIRI..... 2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. In his Memorandum of Appeal filed on 13.2.2001, the Appellant has put forth the grounds of Appeal;-

- i) The learned Magistrate erred in law and fact in finding that the Appellant had not proved negligence on the part of the 1<sup>st</sup> Respondent and wholly blaming the deceased on the causation of the accident.
- ii) The learned Magistrate erred in law and fact in totally disregarding the evidence adduced by the Plaintiff and his witnesses and the exhibits produced therein.
- iii) The learned Magistrate erred in law and fact in admitting defense evidence which was hearsay and not admissible.
- iv) The learned Magistrate erred in law and fact in failing to appreciate the fact that the Defence had admitted that the Deceased was a passenger in the 1<sup>st</sup> Defendant's M/Vehicle Reg. No. KAJ 108 A Mazda p/up
- v) The learned Magistrate erred in law and fact in failing to appreciate the fact that the plaintiff

required to prove his case on a balance of probabilities.

vi) The learned Magistrate erred in law and fact in failing to consider the quantification he would have awarded in the event that the Defendant's were found liable.

2. The genesis of the whole matter is that on 12.8.1997, Julia Kabirithu Murugu died. It was the Appellant's case that the said Julia was a fare paying passenger in Motor Vehicle registration number KAJ 108A and that the 2<sup>nd</sup> Respondent who was driving that Motor Vehicle on 12.8.1997 managed or controlled it so carelessly and negligently that "**he caused an accident whereby the deceased was fatally injured.**" The particulars of negligence are set out at paragraph 5 of the plaint and these are that the 2<sup>nd</sup> Respondent was negligent in;

(a) Driving the said M/V at an excessive speed under the circumstances.

(b) Driving on the wrong side of the road.

(c) Failing to brake, slow down and/or swerve or stop so as to avoid the accident.

(d) Failing to take due care and attention.

(e) Failing to regard the safety of the passengers and especially the deceased's.

(f) Failing to adhere to the traffic rules and regulations.

(g) In the alternative, the said m/v must have been defective and thus incapable of proper control and management.

3. In a bid to prove these allegations of negligence, the Appellant gave the following evidence;

That he was the employer of the deceased, Julia, who was also his niece as her mother was a sister to the Appellant's wife. He received a report of the death of Julia on 13.8.1997 and he later instituted suit after he obtained a grant of letters of administration to institute the suit. He had no evidence to present as regards the circumstances under which the accident occurred which is really the substance of this Appeal.

4. P.W.2 Joseph Murungi, father of the deceased, Julia, and this is important for reasons to emerge shortly, confirmed that at the time of the accident Julia was expectant with child (she was 8 months pregnant) and he denied that she was frustrated by rejection upon pregnancy and that she actually died after deliberately jumping out of the moving vehicle in a successful bid to commit suicide.

5. P.W. 3 John Mutua said that on 12.8.1997 he was at a place called Kauthangi at about 6.00 p.m. when a vehicle that was being driven at high speed approached and this is what is recorded as his evidence;

**“After going about 20 paces ahead of me I saw brakes being applied. I saw as if it wanted to stop because of the brake lights. The rear door opened. I do not know if anybody opened it. I saw a woman coming out of the vehicle but as she alighted the vehicle suddenly drove off. The vehicle slowed down as if it was going to stop and the door opened. At the back there were two people including the turn boy and the lady. I had known the lady and the turn boy. The turn boy was Kathurima. I did not know if the turnboy opened the rear door or not. The vehicle went for a short distance and then stopped. The driver picked the deceased and drove off...I witnessed the accident. The lady did not jump out of the vehicle. I saw her fall from the vehicle as the rear door opened.”**

In cross-examination, the witness in part stated as follows:

**“The lady did not jump out of the moving vehicle. The motor vehicle moved at 150 km and the light was fairly (*sic*). I knew she was 8 months pregnant.”**

5. The Respondents in answering the question, how did the accident occur, called the 2<sup>nd</sup> Respondent, Bernard Mutwiri. He stated that he was transporting maize on the material date and on the road from Mikinduri to Kagene he saw the deceased whom he gave a ride. On the way he heard someone banging the rear door and he stopped. When he checked he found that the deceased had fallen off and he turned back and took her to hospital where she died. Of interest is his evidence as follows:

**“I have never been charged with any traffic cause causing that death (*sic*). An inquest No. 14/98 was opened in Meru Court found that she jumped out of the vehicle.”**

6. D.W 2 Stephen Rwanja produced the S.R.M. inquest file No.14/98 (Maua) aforesaid and the finding of that court are consistent with the evidence of D.W.1.

6. With this evidence, the learned trial magistrate found that the deceased was the author of her own death and no negligence could properly be attributable to the 2<sup>nd</sup> Respondent as alleged by the Appellant. He relied on the inquest finding in file No.14/98. He proceeded to dismiss the suit as no liability on the part of the Respondents had been proved.

8. I have, on looking at the Memorandum of Appeal and upon hearing submissions by counsel, come to the conclusion that the only question to determine is whether the allegations of negligence as set out above had been proved satisfactorily, for the Respondents to be held liable for the eventual death of Julia Kabirithu Murugu. To do so I must go back to the evidence and conclusion reached in inquest No. 14/98. The court sitting in that matter was inquiring into the circumstances that led to the death of Julia. After hearing all witnesses present, the court ruled that the deceased died because she jumped out of the moving vehicle and was the creator of her own death. The Appellant in all the evidence presented to court said nothing of this matter and whereas there may well be questions as to how the inquest was conducted, the final decision is not challenged.

9. Even if the inquest was not properly conducted and the decision taken is found to be improper, I still see no evidence presented before the trial court that can sustain the allegations of negligence by the 2<sup>nd</sup> Respondent. The evidence of P.W.3 John Mutua by itself cannot be proof of negligence. He had no idea about the circumstances leading to the deceased ejecting from the Motor Vehicle. Whether she ejected herself or was forced out is a matter of speculation. He says that **“he saw brakes”** being applied. How could he do so when he was outside the motor vehicle? He also saw the rear door open. Who opened it and could it have been the deceased? He could not tell and again the answer to the question would be

speculative. He also said that he saw “**the lady**” and the turn-boy Kathurima, in the rear of the motor vehicle. He does not say at what point he saw them because his evidence is as if he saw them inside the motor vehicle when the deceased had already fallen off. It is also unclear what he meant when he said that the door opened and the lady fell off. Was she pushed or did she trip and fall?

10. All these questions do not assist the Appellant’s case whatsoever and it was his duty to prove the allegations of negligence and sadly the evidence of John Mutua does not meet that standard of probable proof. Speculation cannot be the basis for proof.

11. Since I have found like the trial magistrate that there was no evidence to prove liability, I have no more to say on this Appeal.

12. The appeal is hereby found to be lacking in merit and must and is hereby dismissed.

13. Costs thereof to the Respondents.

14 .Orders accordingly.

**DATED SIGNED, AND DELIVERED AT MERU THIS 4<sup>th</sup> DAY OF JULY 2006**

**I. LENAOLA,**

**JUDGE**

In the presence of:

Mrs Gitonga Advocate for the Appellant

Mr Mwangi Advocate for the Defendant

**I. LENAOLA,**

**JUDGE**