



REPUBLIC OF KENYA



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Ndung'u & another (Suing as the next friend of MWM - Deceased) v Karanja (Civil Appeal E012 of 2022) [2025] KEHC 1869 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E012 OF 2022
CW GITHUA, J
FEBRUARY 19, 2025**

BETWEEN

JANE NJAMBI NDUNG'U 1ST APPELLANT

MAINA NJUGUNA 2ND APPELLANT

SUING AS THE NEXT FRIEND OF MWM - DECEASED

AND

STEPHEN MUNGAI KARANJA RESPONDENT

(Being an appeal from the judgement of Hon. M Sudi (P.M) dated the 11th of January, 2022, in Kandara Civil Case No. 50 of 2019)

JUDGMENT

1. The genesis of this appeal is a road traffic accident which occurred on or about 30th November 2016 involving Milka Wambui Maina, now deceased and motor vehicle registration No. KCG 302Y (the subject vehicle) which was allegedly being driven or controlled by the respondent in his capacity as the authorized driver and or agent of Equity Bank which was the 2nd defendant in the Lower Court.
2. In the Plaintiff dated 18th March 2019, the appellants who were the representatives of the deceased's Estate alleged that as a result of the accident which was negligently caused by the respondent on 30th November 2016, the deceased sustained fatal injuries which led to her death about two years later. They sought both general and special damages under the Law Reform Act and the Fatal Accidents Act . . The particulars of the respondent's alleged negligence were pleaded in paragraph 8 of the Plaintiff.
3. In the statement of defence filed on the respondent's behalf by Ms J.K. Kibicho & Company Advocates, the respondent and his co-defendant denied all the allegations of negligence leveled against them in the Plaintiff and put the appellants to strict proof thereof. In the alternative and on a without



prejudice basis, they averred that if the accident actually occurred, it was solely caused or substantially contributed to by the negligence of the deceased.

4. After a full hearing, the learned trial magistrate rendered her judgement on 11th January 2022 and dismissed the appellants suit on grounds that they had failed to prove liability for the deceased's death against the respondent and his co-defendant to the standard required by the law. In dismissing the suit, the learned trial magistrate made a finding that the appellants had failed to establish proximate cause between the accident and the deceased's death.
5. The Appellants were aggrieved by the trial court's decision hence this appeal. It is however not clear why the appellants chose to proffer the appeal only against the respondent who was the 1st defendant in the primary suit leaving out his co-defendant, Equity Bank yet they had sued them together. However, as the omission of the 2nd defendant does not affect the validity of the appeal, I will let the matter rest there.
6. In their Memorandum of Appeal filed on 18th February 2022, the appellants advanced five grounds of appeal in which they complained that the learned trial magistrate erred in law and fact by: finding that they had not proved their case on a balance of probabilities; speculating that there could have been an intervening act between the deceased's last hospital visit and her date of death; making contradictory findings on the issue of liability; disregarding the Pathologist's evidence on the deceased's cause of death and their evidence in general.
7. The appeal was prosecuted by way of written submissions which each party duly filed and which I have carefully considered.

I am cognizant of the fact that this is a first appeal to this court and that as a first appellate court, my primary duty is to thoroughly re-evaluate, re-assess and analyse all the evidence presented before the trial court to arrive at my own independent conclusion whether or not to uphold the decision of the trial court. In so doing, I should bear in mind that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage: See: *Selle V Associated Motor Boat Company Ltd* [1968] EA; *Abok James Odera T/A A. J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocate* [2013] eKLR.

8. Guided by the above principle, I have carefully considered the grounds of appeal, the rival submissions filed by both parties and all the authorities cited. I have also read the evidence on record and the judgement of the learned trial magistrate. Having done so, I find that the key issue arising for my determination is whether the appellants appeal was merited.
9. To start with, the law as stipulated in Section 107 to 109 of the *Evidence Act* is that he who alleges must prove. Specifically, Section 107 of the *Evidence Act* provides as follows;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

10. In their plaint, the appellants alleged that as a result of the respondent's negligence in driving the subject vehicle which led to the accident on 30th November 2016, the deceased sustained injuries which resulted in her death two years later. As a result of the deceased's death, the appellants sought compensation in the form of general and special damages under the *Law Reform Act* and the *Fatal Accidents Act*.



11. In this case, both appellants testified that the deceased was in good health prior to 30th November 2016 when the accident occurred.

Both witnesses admitted that they did not witness occurrence of the accident in question. They learnt about it later and went to see the deceased at Thika Level 5 Hospital where she had been rushed for treatment. They both testified that as a result of the accident, the deceased sustained injuries on her legs and was treated at both Thika Level 5 Hospital and the Thika Nursing Home.

12. A perusal of the patient referral/consultation form from Thika Level 5 Hospital and the Discharge Summary from Thika Nursing Home exhibited in support of the appellant's case clearly shows that the deceased was treated in these hospitals for open bilateral tibia and fibula fractures (fractures on both legs). These aligns very well with the testimonies of PW1 and PW2 to the effect that, after the accident, the deceased was unable to walk.
13. From the lower court record, it is apparent that the deceased was also treated in other hospitals namely, Murang'a District Hospital and Kiria-ini Mission Hospital. At Kiria-ini Mission Hospital, the discharge summary shows that on admission on 11th July 2017, the deceased was diagnosed with a mal-union of the left distal femur fracture and right tibia fibula fracture. The out-patient card at Murang'a District Hospital shows that the deceased was treated on 28th December 2017 for multiple fractures on her tibia shaft and distal femur.
14. PW3, Dr. Kamotho Watunga, the Consultant Pathologist who conducted an autopsy on the deceased's body testified that after his examination of the body, he found that the deceased had fractures on her legs but her abdomen bowels were also dilated and had pus. He noted that the deceased had suffered from intestinal obstruction (gangrene) and oedema (brain swelling). He concluded that the cause of death was gangrene and intracellular pressure. He further testified that trauma caused the gangrene and that the trauma could have been immediate or long term.
15. In cross examination, PW3 stated that in addition to his other findings, he also found that the deceased had an infection in her abdomen and that her fractures had healed.
16. The appellant's last witness who testified as PW4 was P.C. Rogers Mwiti. Other than producing a police abstract as P. Exhibit 3 proving occurrence of the accident which was admitted by the respondent in his evidence, PW4 did not give any other evidence that was useful to the appellant's case. He was not the investigating officer and he did not also witness the accident. His evidence in my view amounted to hearsay.
17. It must be remembered that the appellant's claim against the respondent and his co-defendant was based on the tort of negligence and therefore, in order to discharge their burden of proof, they were legally obligated to adduce credible and sufficient evidence to prove to the required standard of proof, which is on a balance of probabilities, that the deceased was not only involved in the accident in question but that the accident was caused by the respondent's negligence and that the injuries sustained by the deceased in the accident directly caused her death about two years later.
18. After my own independent analysis of the evidence on record, I find that the appellants failed to adduce evidence to establish as a fact that the accident in which the deceased sustained injuries on 30th November 2016 was caused by the respondent's negligence. As stated earlier, none of the appellant's witnessed the accident and they did not therefore know how the accident occurred or who between the respondent and the deceased was to blame for its occurrence given the averments in the respondent's statement in defence and his evidence before the trial court in which he blamed the deceased for occurrence of the accident. They did not call as a witness any person who witnessed the accident to tell the court how the accident occurred and whether it was caused by the respondent's negligence. The



police abstract produced by PW4 was not helpful in this regard since it did not apportion blame on the respondent for causing the accident.

19. The learned trial magistrate did not apparently address her mind to the issue of whether or not the appellants had proved negligence on the part of the respondent. She instead concentrated on a determination of whether the appellants had demonstrated that the injuries sustained in the accident were the proximate cause of the deceased's death which was the second issue she should have considered after satisfying herself that the appellants had proved that the accident in which the deceased sustained injuries was caused by the respondent's negligence.
20. That said, given that the trial court's judgement was based on the learned trial magistrate's determination of the latter issue, I will proceed to examine the evidence on record to establish whether or not the trial court's findings were correct. A good starting point would be the definition of proximate cause otherwise referred to as direct cause.
21. The word "Proximate" is defined in the Concise English Dictionary as 12th Edition at page 1156 as: "closest in space, time or relationship; nearly accurate, approximate"

Proximate cause is defined in the Blacks Law Dictionary 7th Edition as;

"A cause that is legally sufficient to result in liability. A cause that directly produces an event without which the event would not have occurred"

The question that now begs on answer is whether the trial court erred in finding that the appellants failed to prove that the injuries the deceased sustained in the accident were the direct cause of her death.

22. . As demonstrated earlier, the appellant's testimonies and the medical records presented in support of their case clearly proved that as a result of the accident, the deceased sustained multiple fractures on her right tibia and left femur for which she received treatment in various hospitals.
23. Although the port-mortem report is not legible, its author PW3 testified that the cause of the deceased's death was gangrene which was intestinal obstruction as well as intracellular pressure.

The Pathologist in his evidence under cross examination confirmed that at the time of the deceased's death, the fractures had healed. He did not claim that there was any nexus between the fractures he noted on the deceased's body and the intestinal obstruction and brain swelling that caused her death. I must admit that I found it difficult to understand how fractures on the legs would have caused intestinal obstruction in the deceased's abdomen. In my view, the only plausible explanation I find from the evidence on record regarding the possible cause of the said intestinal obstruction was PW3's finding that the deceased had an infection in her stomach.

24. I say so because although PW3 indicated that trauma which was either immediate or long term had caused the gangrene, he did not go further to explain the type of trauma he had in mind and whether it was trauma to the deceased's abdomen or legs which appear to have borne the impact of the accident.
25. Further, I have looked at the deceased's death certificate S/No.0615811 issued on 31st July 2018 which shows that her cause of death was "Septic shock due to gangrenous Bowel due to intestinal obstruction due to hypertension."
26. In the absence of evidence establishing direct linkage or connection between the fractures the deceased sustained in the accident and the intestinal obstruction and intercellular pressure which caused her death, I am unable to fault the learned trial magistrate's finding that the appellants had failed to establish on a balance of probabilities that the injuries sustained in the accident were the proximate



cause of the deceased's death. The chain of causation appears to have been broken by other factors which included an infection in her abdomen.

27. Regarding the appellant's complaint that the learned trial magistrate contradicted herself by finding on one hand that the appellants had not proved their case against the respondent and his co-defendant and on the other hand proceeded to apportion liability in the ratio 35:65 in favour of the appellants and proceeded to assess damages, the record of the trial court's judgement shows clearly that the alleged contradiction did not exist. The learned trial magistrate explicitly stated that had she found in favour of the appellants on the issue of liability, she would have apportioned liability as indicated above. The judgement is clear that the learned trial magistrate dismissed the appellant's claim for want of proof on liability.
28. On the assessment of damages, it is now a well established principle that a court of first instance has an obligation to assess damages even in cases in which liability had not been proved. This is because decisions by courts of first instance are subject to appeals and it would make the work of the appellate court easier if it knew the view taken by the trial court on quantum.
- See: Frida Agwanda & Ezekiel Onduru Okech V Titus Kagichu Mbugua [2015] eKLR; Lei Masaku V Kalpama Builders Ltd [2014] eKLR.
29. Flowing from the foregoing, It is my finding that the learned trial magistrate was right in her finding that the appellants had failed to prove to the required legal standard their claim against the respondent. In the premises, I am satisfied that this appeal lacks merit and it is hereby dismissed.
30. Costs follow the event and are at the discretion of the Court. In this case, the order that best commends itself to me on costs is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 19TH DAY OF FEBRUARY 2025.

HON. C. W. GITHUA

JUDGE

In the Presence of:

Ms. Wairimu for the appellants

Ms. Rigaga for the Respondent

Ms. Susan Waiganjo, Court Assistant

