Berobere (Suing as the Administrator of the Estate of Patrick Chabodo Uzele (Deceased)) v Kuehne Nagel Limited & another (Civil Appeal E083 of 2022) [2025] KEHC 6713 (KLR) (13 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E083 OF 2022

GL NZIOKA, J

MAY 13, 2025

BETWEEN

EMMANUEL GERSON BEROBERE ..... APPELLANT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF PATRICK CHABODO UZELE (DECEASED)

AND

KUEHNE NAGEL LIMITED ..... 1ST RESPONDENT

MWINYI ABDALLA MWANUNGO ..... 2ND RESPONDENT

(Being an appeal from the decision of Honourable J. Ndengeri Senior Resident Magistrate delivered on 3rd November 2022 vide Naivasha CMCC No. 707 of 2018)

JUDGMENT

1. By a plaint dated 2nd July 2018, the plaintiff (herein "the appellant") sued the defendants (herein "the respondents") seeking for Judgment against the respondents jointly and severally for: -
    a. Special damages of Kshs 75,000;
    b. General damages;
    c. Cost of the suit;
    d. Interest on above at court rates from the date of filing suit
2. The appellant's claim arose from a road traffic accident that occurred on 19th April 2016. It is the appellant's averment that, on the material date the deceased was driving motor vehicle No. CGO 444SAA/07 while the 2nd respondent was driving motor vehicle motor vehicle registration No. KBJ

147R along Mai Mahiu – Naivasha road at Kosovo area. That the 2nd respondent caused his vehicle to collide with the deceased's wherein the deceased suffered fatal injuries. The particulars of negligence attributed to the 2nd respondent are tabulated at paragraph 4 of the plaint.

3. The appellant pleaded that 1st respondent is sued under the doctrine of vicarious liability as the 2nd respondent was its authorized agent.

4. The appellant avers that, the deceased was aged 49 years and survived him as his brother and dependent. The particulars of special damages totaling Kshs 75,000 are tabulated at paragraph 6 of the plaint.

5. However, the respondents denied the claim vide a statement of defence dated 22nd September 2018 and instead blamed the deceased for driving his vehicle negligently causing the accident. The particulars of negligence attributed to the deceased are tabulated at paragraph 9 of the statement of defence.

6. The matter proceeded to full hearing and by judgment dated 3rd November 2022, the trial court dismissed the appellant's suit on the ground that, the appellant had not "staged the plaintiff" to testify.

7. In that regard the trial court stated as follows: -

> " That, he was not sworn to confirm if his averments were correct. Needless to say, the plaintiff did not produce any exhibits. Consequently, it was not possible for the court to assess anything what the court ascertained was that, indeed there was an accident, the deceased was fatally injured and that the accident was reported".

8. The court went on to state that: -

> " It is the considered view of this court that, the plaintiff deviated from the rules of procedure. By failing to stage the plaintiff, the plaintiff failed to prove his case on a balance of probabilities while the court appreciates that there is evidence of occurrence of the accident, liability and quantum cannot be assessed on the basis of the evidence on record"

9. It is against the afore decision, that the appellant is aggrieved and appeals based on the following grounds: -

   a. That the learned magistrate erred in law and fact in dismissing the appellant claim against the weight of evidence.

   b. That the learned trial magistrate erred in law and in fact when she failed to hold that the appellant had proved his case to the required standard.

   c. That the learned magistrate erred in law and fact in ignoring documents produced by consent of the parties as exhibits without calling the makers thereof

   d. That the learned magistrate erred in law and fact in ignoring the appellant statement produced by consent of the parties without calling the appellant.

   e. That the trial court erred in law and fact when she ignored the provisions of Order 11 rule 7 of the civil procedure rules which allows the admission of statements without calling the makers as witnesses.

   f. That the learned magistrate erred in law in ignoring the testimony of PW1 and the document produced by the witness.

   g. That the learned magistrate erred in law by failing to make a finding as to quantum of damages payable to the appellant had he succeeded on his case.

h. That the learned magistrate erred in law and fact in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.

10. The appeal was disposed of vide filing of submissions. In submissions dated 29th January 2024 the appellant argued that the trial court failed to consider the evidence of PW1 at page 41 line 28 to 31, and page 42 line 1-18 of the record of appeal, which was sufficient to prove liability against the respondents.

11. That PW1 told the court that, the 2nd respondent, who was the driver of the vehicle KBJ 147R was charged with the offence of causing death by dangerous driving. That, PW1 produced the police abstract as exhibit 1 which has information of the charges and outcome. That vide traffic case No. 13 of 2016 the 2nd respondent was found guilty and fined Kshs 35,000 which was proof that he was responsible for deceased's death. That, the afore evidence was not controverted.

12. Further, that the parties recorded a consent to have the witness statements and documents attached thereto be produced without calling the maker, and the consent terms confirmed by the respondent. That the trial court indicated that as follows: -

> " court shall adopt the consent in part" The documents shall be produced without calling the makers".

13. The appellant termed the court's finding that there was no evidence as erroneous and invited the court to consider the decisions in the cases of; Kenneth Nyaga Mwige –vs Austine Kiguta & 2 others (2015) eKLR and Ali Ahmed Naji –vs- Lutheran World Federation Court of Appeal No 18 of 2003.

14. Finally, the appellant argued that, the finding of the court that the appellant had no locus was erroneous, for it is not mandatory that a plaintiff testifies. The appellant relied on the cases of Nathaniel Kipkorir Tum- vs- The Inspector of State Corporation (2015) eKLR, Naivasha HCC No. 46 of 2019 Mainshkumar Kentilal Patel –vs- Ayub Karuri Kamau & another, and Nairobi HC Civil case No. 2522 of 1996- Philip Kipchirchir Murgor & 2 others –vs- Josiah Nyawara Ogina & 2 others (2020) eKLR.

15. However, in response submission dated 23rd June 2024 the respondents submitted that PW1 merely adduced evidence but did not lead eye witness evidence and that he merely relied on the content of the police abstract as evidence. The case of Chemwolo & another –vs Kubende (1986) KLR 492. was relied on.

16. Further reliance was placed on the case of ZOS & CAO (Suing as the legal representative of the Estate of SAO (Deceased) –vs Amollo Stephen (2019) eKLR, to argue that in the absence of an eye witness, the appellant did not prove his case.

17. The respondents further relied on the case(s) of Muthoni Munene –vs Kenneth Muchange & Kenya Bus Services Limited on HCCC No. 858 of 1998 and Grace Kanini Muthini –vs Kenya Bus Service Ltd & another HCCC No. 4708 of 1989.

18. The respondents further submitted that the trial court declined to adopt the consent by the parties and set the case for hearing on 18th August 2022 on which date the appellant closed its case without producing the documents.

19. The respondents maintained that, the documents were not produced at all on 7th July 2022, when the consent was adopted and that, there is need to interrogate the record of that date. That the court could not rely on documents not produced. Reference was made to the cases of; Kenneth Nyaga Mwige –vs Austina Kiguta & 2 others (2015) eKLR and Laban Omuhaka –vs- Truphose Okutoyi (2019) eKLR.

20. Finally, the respondents submitted that, the appellant failed to prove dependency. However, on a without prejudice basis a sum of Kshs 10,000 is sufficient for pain and suffering and Kshs 70,000 for loss of expectation of life.

21. Having considered the materials placed before the court in relation to the appeal herein, I find that only one issue that arise for determination is whether the trial court arrived at a proper and correct finding when it held that the appellant did not establish locus standi and/or failed to offer any evidence or produce any documents to prove his claim.

22. It suffices to note at the outset that this appeal is not on the merit of the matter, as the trial court did not make any finding thereon. I say so, because the respondents have submitted and offered a proposal on quantum.

23. Be that as it were, I note the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

24. The Court of Appeal thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

25. In regard to the aforesaid, my considered opinion, the answer to the issue raised herein lies in the proceeding of the trial court. The record of the trial court reveals that on 1st October 2019, the appellant's witness (PW1) No. 62680 PC Martin Mwenda, stationed at Naivasha Police Station testified as plaintiff's witness.

26. He stated that a report of the subject accident herein was received at the police station on 19th April 2016. That accident involved motor vehicle registration No(s) KBJ 147R Trailer ZC 8552 Scania driven by the 2nd respondent and motor registration No. CGO 445A Trailer 07CGO449 AA driven by the deceased.

27. That the 2nd respondent was to blame for overtaking another vehicle and driving on the right side of the road, leading to the collision and instant death of the deceased. Further that the 2nd respondent was charged with the offence of causing death by dangerous driving and fined Kshs. 35,000 and in default serve nine (9) months' imprisonment. The witness produced the police abstract as an exhibit (Pexh1). The witness was cross-examined vide one question and confirmed the traffic case was heard and judgment rendered.

28. The record indicates that after hearing PW1 the case was scheduled for further hearing on 7th July 2022. The record of the trial court shows that Mr. B. G. Wainaina for the plaintiff addressed the court as follows: -

> " That the witness statement of the plaintiff and documents attached be produced as exhibits without calling the maker thereof. That will mark the close of the plaintiff's case"

In response, Mr. Karanja for the defendants stated as follows: -

> " I confirm the terms of the consent"

The court then stated as follows: -

> " The court shall adopt the consent in part the documents shall be produced without calling the maker" The plaintiff must be sworn to adopt his statement. Parties shall take a date for hearing. Hearing on 18th August 2022"

29. On 18th August 2022 the parties addressed the court as follows

> " Mr. Wainaina for the plaintiff - "I wish to close the plaintiff's case at this stage"
>
> Mr. Karanja - We are not calling any witness and equally close the defence case"
>
> Mr. Wainaina- We can take 14 days to file submissions.
>
> Court- Mention on 27th September 2022.- Submissions"

30. In the judgment delivered by the trial court it is clear that, the evidence of PW1 was not considered and neither did the court consider whether the police abstract produced was adequate or not adequate to prove the appellant's case.

31. In my considered opinion, the omissions to consider, evaluate and make a decision on the evidence of PW1 and/or the police abstract he produced which formed part of the court record was erroneous and prejudicial to the appellant.

32. Furthermore, the trial court did not make reference to the consent the parties agreed on to the effect that, the appellant's statement and documents be adopted by consent without calling the makers.

33. It suffices to note that, despite the court also indicating that, the consent was to be adopted partially, the court did not evaluate the veracity, adequacy or otherwise of the partial consent, and particular whether it was adequate proof the appellant's case or not. Again in my considered opinion, that too is erroneous and prejudicial to the appellant's case.

34. Furthermore, it is not clear, why the court indicated that it was adopting the consent partially when that was not the intention of the parties.

35. It is the considered opinion of this court that, if the parties adopt documents including the witness statement without calling the maker, unless the court has good reason to require the maker to be availed and which reason should be recorded, the maker's presence is dispensed with.

36. In the same vein, although the respondents submitted that, the consent was not adopted at all that is not factually correct based on the proceedings of the trial court on 7th July 2022.

37. In addition, it does appear on 18th August 2022 when the matter was due for further hearing, the appellant for unknown reasons having taken the date for hearing closed his case without addressing the need to testify as ordered. The respondents too did not raise the issue of the appellant not taking the stand and neither did the court question why the appellant had not complied with its order that the appellant was to formally produce documents.

38. Consequently, it does appear that all the parties were acquiesced in the circumstances of 18th August 2022 as much as it was the appellant's case.

39. Finally, the parties tendered their submissions on appeal, it is not clear as to whether the respondents ever raised the issue of the appellant's locus standi and or failure to testify.

40. Unfortunately, the respondents' submissions are not included in the record of appeal, yet on 6th February 2024, the parties appeared before the Hon. Deputy Registrar W. Rading and confirmed the record of appeal was complete.

41. Pursuant to the aforesaid, I find and hold that the trial court erred in holding that, the appellant had failed to adduce any evidence to enable the court consider matter on merit.

42. Consequently, I allow the appeal and order that, the trial court's order dismissing the suit be and is hereby set aside. The matter be placed before the Hon. Chief Magistrate on or before 21st May 2025 for further orders as to whether it can be assigned to the same trial court and/or a different court for further consideration

43. Further taking into account that, the appeal arose out of the finding of the court, I order each party bear its own costs.

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF MAY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of

Mr. B.G Wainaina for the appellant

Mr. Karanja for respondent

Hannah –court assistant