



Ntue & another (Suing as the Legal Representative of the Estate of Sebastian Gitonga Nkanata - Deceased) v Arimi & another (Civil Appeal E158 of 2021) [2024] KEHC 6577 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E158 OF 2021**

LW GITARI, J

MAY 24, 2024

BETWEEN

JOYSLEEN NTUE 1ST APPELLANT

FESTUS KIMATHI NKANATA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SEBASTIAN
GITONGA NKANATA - DECEASED**

AND

JOSEPH KINOTI ARIMI 1ST RESPONDENT

NDOGA GILBERT 2ND RESPONDENT

JUDGMENT

1. The appellant in this appeal moved the trial court vide a plaint dated 7th July 2014 and a further amended plaint dated 17th December 2014 seeking orders of general damages under both the [Law Reform Act](#) the [Fatal Accidents Act](#), Special damages of Kshs 335,320/=, cost of the suit, interest at court rate on (a) (b) (c) above and any other or better relief that the Court deems fit to grant.
2. The Appellant pleaded that at all material times to the suit the respondents were the beneficial registered owner of motor vehicle registration No. KBW 322R Toyota matatu. That on or about 3rd January 2014 at around 3.00 p.m. the deceased was a fare paying passenger on board motor vehicle registration No. KBW 322R Toyota matatu plying along Nkubu-Nairobi when the respondent or his driver, agent, servant, employee so negligently, carelessly and negligently controlled the motor vehicle causing the accident as a result of which the deceased sustained fatal injuries which lead to his death.
3. The Appellant enumerated the particulars of negligence of the driver, agent, employee/servant as driving at a speed that was excessive in the circumstances, failing to take any or other measures to



prevent the motor vehicle from rolling, driving a defective motor vehicle, failing to exercise or maintain any sufficient or adequate control of the said motor vehicle and driving carelessly in total disregard to traffic rules and highway code regulations.

4. The Appellant avers that by the reasons of the aforesaid the deceased sustained fatal injuries that led to his early and premature death. That at the time of his death, the deceased was 49 years and of very good health and strength and was earning Kshs.120,000/= at Joset Auctioneers. That as a result of his untimely death, his estate has suffered great loss and damage as the family greatly depended on him for upkeep.
5. The Appellant particularized the deceased dependents as Josyleen Ntue the widow, Dominic Mwiti the son, Jeremy Mwirigi and Nelson Guantai who are the sons to the deceased and they were minors and Purity Nkatha Muriuki a daughter to the deceased who is also a minor.
6. The Appellant further particularized special damages which entailed a police abstract at Kshs. 200/=, Funeral expenses Kshs,305,120/= and Advocates fees for the grant of limited letters of administration ad litem vide Meru HC. Succ No. of Kshs 30,000.The total was Kshs.335,320/=
7. The respondent filed a defence dated 5th September 2014 wherein he denied the Appellant's claim. The respondent denied that at all material times he was the registered owner of motor vehicle registration number KBW 322 R a Tota Matatu and the Appellant was put to strict proof.
8. The respondent pleaded that he denied the occurrence referred to in the plaint more particularly that on or about the 3rd January 2014 the Appellant was a lawful passenger in motor vehicle registration number KBW 322R driven along Nkubu-Nairobi road and further denied the particulars of negligence as particularized by the Appellant.
9. The respondent particularized the deceased negligence as failing to take any or any adequate precaution for his own safety, failing to heed the instructions on safety precautions when travelling and failing to heed the traffic rules and regulations when travelling.
10. The respondent further pleaded that in the alternative and without prejudice to the foregoing, the occurrence as the appellant may prove occurred without any negligence on their part and the same was due to an inevitable accident.
11. The Appellant filed a reply to the defence dated 12th June 2015 supporting their claim.
12. Upon considering the matter, the trial court found that the appellant failed to discharge the burden of proof on preponderance of evidence against the respondents and the Appellants suit was dismissed with no orders to cost.
13. The appellant was aggrieved by that judgment and filed this appeal on the following grounds:-
 1. The the Learned Magistrate erred in law and fact in dismissing the Appellants claim as being unproved in its entirety.
 2. That the learned trial magistrate erred in both law and fact in misdirecting himself by disregarding the Appellants evidence and witness testimony in trial.
 3. That the Learned trial Magistrate erred in Law and fact in failing to consider the Appellants Submission on record.
 4. The learned trial Magistrate erred in Law and in fact in holding that the Appellant had not established and/or proved the ownership of motor vehicle registration number KBW 322R which motor vehicle was owned and operated for the benefit of the 1st respondent.



5. The learned trial Magistrate erred in Law and fact in disregarding the Appellants sufficient evidence regarding ownership of motor vehicle KBW 322R and in the Courts finding that the Defendants/Respondents was the beneficial owner of motor vehicle registration no. KBW 322R on the date of the accident and thereafter inexplicably coming to the finding ownership of the motor vehicle registration no. KBW 322 R was not proved as at the time of the accident.
 6. The Learned trial Magistrate erred in Law and in fact by failing to find liability on the part of the Respondent's deceased driver when the Appellant had tendered sufficient evidence to prove the same and in absence of evidence to a contrary position being tendered by the defence in support of their allegation that the accident was due to an inevitable accident.
 7. The learned trial Magistrate erred in Law and in fact in dismissing the Appellant's claim which claim had not been rebutted by the Respondent and in particular the inference of negligence on the driver of motor vehicle registration No. KBW 322R which was in a self-involved accident, thus raising the burden of proof above the required standard of on a balance of probabilities.
 8. The learned trial Magistrate erred in law and in fact in arriving at the erroneous conclusion that the Appellant herein had not produced evidence to support a claim for special damages when in fact the same had been specifically pleaded and receipts in support of special damages produced at trial.
 9. The learned Magistrate's judgement/decree is against the weight of evidence on record at the trial thereof.
14. The appellant prays that the appeal be allowed with costs, the judgement delivered on 21st October, 2021 by the Honourable T.M Mwangi (Senior Principal Magistrate) be set aside and the court make a finding on liability and assess damages afresh, costs of the proceedings be in the lower court be awarded to the Appellant and costs of this appeal be borne by the respondent.
 15. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 29th May 2023 through the firm of Kiautha Arithi & Co. Advocates while the respondent did not file their submission.

Appellant's Submissions.

16. The Appellant submitted on a brief background of the appeal and further identified two issues for determination. The first issue was whether the Appellant was entitled to an award of damages and the second issue was whether the Appellant was able to prove that the motor vehicle belonged to the respondent.
17. The Appellant submitted on the first issue and pointed out that the Learned Magistrate erred in Law and fact in arriving at an erroneous decision that the Appellant herein had not produced evidence to support claim for special damages when in fact the same had been specially pleaded and receipts in support of special damages were produced at the trial. The Appellant relied on the cases of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd (2013) eKLR, Jivanji case (Supra), Kampala City Council vs Nakaye (1972) EA 446, Ouma v Nairobi City Council (1976) KLR 297.
18. It is the Appellant's submission that she was able to show that indeed she had a claim for special damages as there were receipts in support of his claim and thus it will be prejudicial for her and against the interest of justice if the same is denied.
19. The Appellant submitted on the second issue that indeed she was able to demonstrate that motor vehicle registration number KBW 322R belonged or rather was registered to the 1st respondent by



- producing a police abstract which showed that the 1st respondent was insured in respect to the said motor vehicle, thus the 1st respondent was the beneficial owner of the said motor vehicle. The Appellant relied in the case of Bernard Muia Kilovoo v Kenya Fresh Produce Exporters (2020)eKLR, Miller vs Minister of Pensions (1947) 2ALL ER 372, Ignatius Makau Mutisya vs Reuben Musyoki (2015)eKLR.
20. The Appellant further relied on section 107,108 and 109 of the Evidence Act which provides on the burden of proof.
 21. It is the Appellant's submission that a party is bound by his pleadings and what the appellant pleaded is that the respondent is the registered owner of the motor -vehicle and therefore the appellant was therefore supposed to adduce evidence in support of that allegation to prove that indeed the respondent is the registered owner. The Appellant relied in the cases of Ignatius Makau Mutisya vs Reuben Musyoki Muia, Securicor Kenya Limited vs Kyumba holdings Civil Appeal No.73 of 2002, Joel Muga Opinja vs East African Sea food Limited(2013)eKLR., Thurairara Karauri vs Anes Mocheche(1997)eKLR.
 22. The Appellant submitted that from the foregoing she was able to establish that the 1st respondent indeed was the registered owner of the motor vehicle and that the learned trial magistrate erred in law and fact by failing to consider the evidence that the Appellant produced in court as at that time.
 23. It is the Appellant's submission that the judgement delivered on 21st of October 2021 be set aside and in place, the court to find that the Appellant had proved his case against the respondent on liability of 100% and proceed to assess the damages awarded to the estate of the deceased.

Analysis and Determination

24. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of Selle & another Vs Associated Motor Boat co. Ltd (1968) EA 123.
25. There are only three issues I find for determination :
 - i. Whether the Appellant proved her claim.
 - ii. Whether the Appellant proved ownership of motor vehicle registration number KBW 322R.
 - iii. Whether the trial court erred in failing to find liability on the part of the respondent's deceased driver when the Appellant had tendered sufficient evidence.

Whether the Appellant proved her claim.

26. The Appellant pleaded that at all material times to the suit the respondents were the beneficial registered owner of motor vehicle registration No. KBW 322R Toyota matatu. That on or about 3rd January 2014 at around 3.00 p.m. the deceased was a fare paying passenger on board motor vehicle registration No. KBW 322R Toyota matatu plying along Nkubu-Nairobi when the respondent or his driver, agent, servant, employee so negligently, carelessly and negligently controlled the motor vehicle causing the accident as a result of which the deceased sustained fatal injuries which lead to his death.
27. Turning to the substantive issues herein, it is trite law that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities (See Miller v Minister of Pensions [1947] 2 All ER 372 and Section 107 of the Evidence



Act). However, there is evidential burden which is captured by sections 109 and 112 of the Evidence Act. These two provisions were dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that: -

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

28. In *East Produce (K) Limited v Christopher Astiado Osiro* In Civil Appeal No. 43 Of 2001 the Court of Appeal held that: -

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

29. It follows that the initial burden of proof lay on the plaintiff, the appellant in this appeal to prove negligence.

30. Negligence was defined in the case of *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done” (See *Salmond and Heuston on the Law of Torts* 9th Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See *Donoghue v. Stevenson* [1932] A.C. 562.)

31. Similarly, the Traffic Act Cap 403 the Laws of Kenya imposes a duty of care on drivers, to take necessary precautions to avoid accidents. In the event they breach the Traffic Act and Highway Code they are liable for penal sanctions in cases of careless or reckless driving or causing death by dangerous driving. The Law on these issues is very clear, and the breach by a driver of any motor vehicle on the Kenyan roads.

32. In reference to the above, the question therefore is whether the appellant in discharging the burden of proof placed on him did prove the elements of the tort of negligence (the tort upon which the suit was based)?

33. The plaintiff/appellant in the trial court filed his plaint whereby he pleaded the particulars of negligence on the part of the Respondents herein. The Appellant enumerated the particulars of negligence of the driver, agent, employee/servant as driving at a speed that was excessive in the circumstances, failing to take any or other measures to prevent the motor vehicle from rolling, driving a defective motor vehicle, failing to exercise or maintain any sufficient or adequate control of the said motor vehicle and driving carelessly in total disregard to traffic rules and highway code regulations.



34. During the hearing the Appellant called three witnesses who testified in her favour. The Appellant testified as PW1. She stated that on 3rd January, 2014 her late husband came from Meru and he boarded a vehicle at Nkubu and he called her that he was heading to Nairobi but he never arrived.
35. PW1 testified that he got a call from Chogoria mortuary attendant who inquired whether she knew Sebastian Gitonga. PW1 further testified that she went to Chogoria where her in laws and brothers went to the mortuary and identified her late husband and thereafter they planned the funeral. That she went to the police to be given a police abstract marked PEXH 1.
36. PW1 stated that the vehicle involved in the accident was KBH 322R and she had seen it at the police station and she conducted a search. PW1 further stated that her husband was 49 years and was in good health and strong. It was her evidence that the deceased was working with Jocet Auctioneers and was earning Kshs.120,000 per month per the letter dated 13th March 2014.
37. PW1 further testified that she had four children with the deceased. That her husband fully supported them paid rent, food, fees and everything needed on that homestead and he also supported his mother.
38. PW1 stated that she incurred burial expenses of Kshs.305,320/= and general damages of Kshs.143,500.
39. PW3 testified as John Mwenda Elijah Ngai and he was working with Jocet Auctioneers and the proprietor of the same. PW3 stated that he knew Sebastian Gitonga and Joysleen Ntue.
40. PW3 stated that the deceased was his employee for over 5 years as the main marketer earning a commission on monthly an average of Kshs.100,000-120,000 per month. PW3 produced a letter from Jocet marked exh.3.
41. PW3 was cross examined wherein he reiterated that he was the proprietor of Jocet and he had 4 employees. That the deceased died on 3rd January 2014. PW3 testified that he did not have documents but he had his official badge for Auctioneers.
42. PW3 testified that in February 2015 he lost all his documents in an illegal raid in his offices.
43. PW4 testified as PI Susan Muchemi from Chuka Police Station. She testified that she was familiar with the abstract dated 3rd January 2014. That it was called on behalf of Sebastian who was involved in a road traffic accident involving Motor Vehicle of registration KBW322R a Toyota Hiace Matatu.
44. PW4 stated that a road traffic accident occurred along Meru-Chuka road on 3rd January 2014 and the abstract indicated that the driver of the said motor vehicle died on the spot. PW4 further stated that part 9 of the police abstract indicated further that Sebastian was a passenger in the said Motor Vehicle and the motor vehicle was insured.
45. PW4 testified that she was not the investigation officer in the matter. She produced police abstract marked PEX1.
46. PW4 was cross examined by learned counsel Odhiambo wherein she reiterated that he was the investigation officer. She further testified that the two investigation officers visited the scene but she did not know what their findings were. That further she did not know if the inquest of 2014 over the matter was conducted and consequently she did not know if anyone was to blame for that accident.
47. PW4 was re examined and she testified that Pex1 indicated that the Motor vehicle was involved in a self-involving accident and no other motor vehicle was involved.
48. From the evidence adduced I am inclined to agree with the trial court that the Appellant did not prove her case for reasons that only three witnesses testified who did not witness the accident and further the



evidence of the investigation officer was of no probative value since he was not the investigation officer at the scene and he did not know who to blame for the accident.

Whether the Appellant proved ownership of motor vehicle registration number KBW 322R.

49. The Appellant submitted in her submissions that the motor vehicle KBW 322 R belonged and was registered to the 1st respondent by producing a police abstract which showed that the 1st respondent was insured in respect to the said motor vehicle.

50. In the trial court judgement, the learned magistrate held:

PW1 produced a police abstract (PEX1) which showed the 1st defendant was the insured in respect of the Motor vehicle KBW. In that sense I find the 1st defendant was the beneficial owner of the motor vehicle KBW.”

51. I opine that I agree with the trial court observation.

Whether the trial court erred in failing to find liability on the part of the respondent’s deceased driver when the Appellant had tendered sufficient evidence.

52. Assessment of damages is an exercise of discretion and the court can interfere with assessment of damages herein if the conditions set out in *Hidaya Ilanga v Mangema Manyoka* [1961] EA 705 are established.

53. There is no liability without fault in our legal system and appellant must prove negligence against the respondent where the claim is based on negligence. The appellant in my opinion must place sufficient material before court to discharge the burden placed on him.

54. The Court of Appeal in *Timsales Limited v Stanley Njihia Macharia* [2016] eKLR discussing the principles of ‘causation’ cited with approval the decision by Musinga J (as he then was) in *South Nyanza Sugar Co. Ltd v Wilson Ongumo Nyakwemba* [2008] eKLR quoting *Statpack Industries Limited vs. James Mbithi Munyao* HCCA No. 152 of 2003 (UR) where it was held that:

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence.”

55. PW4 was cross examined by learned counsel Odhiambo wherein she reiterated that she was the investigation officer. She further testified that the two investigation officers visited the scene but she did not know what their findings were. That further she did not know if the inquest of 2014 over the matter was conducted and consequently she did not know if anyone was to blame for that accident.

56. The Appellant did not adduce any water tight evidence in regards to the negligence of the driver. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned trial magistrates were well founded and I find no basis to interfere with it.

57. In the result, I find no merit in the appellant’s appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF DAY OF MAY 2024



**L. W. GITARI,
JUDGE**

