Wambugu & another (Suing as the Legal Representatives and Administrators of the Estate of Wisdom Wambugu Wachira -Deceased) v Gitua & another (Civil Appeal E212 of 2022) [2024] KEHC 8937 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E212 OF 2022

AB MWAMUYE, J

JULY 11, 2024

BETWEEN

FRANCIS WAMBUGU ..... 1ST APPELLANT

JANE WACHIRA ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF WISDOM WAMBUGU WACHIRA -DECEASED

AND

SAMUEL MWATHI GITUA ..... 1ST RESPONDENT

LEWIS JONATHAN EDWARD ..... 2ND RESPONDENT

(Being an Appeal against the Judgment & Decree of the Hon L Nyabando (RM) delivered on 16th September, 2022 in Kikuyu SPM CS No. 244 of 2020)

JUDGMENT

Background

1. By a Plaint dated 9th September, 2020 the Appellants sued the 1st and 2nd Respondents under the provisions of the *Fatal Accidents Act* and the *Law Reform Act*. The Appellants sought general damages for pain and suffering, damages for loss of expectation of life, special damages in the amount of Kes.39,930.00, costs, and interest of the Suit.

    1. In the proceedings before the Trial Court, the Appellants pleaded that on or about 7th October, 2019, while the deceased was lawfully standing on the pedestrian lane along the Karura – Kanyungu Road in the Wangige Area of Kiambu County, a motor vehicle registration number KAS 574N being a Mitsubishi Pajero owned by the 2nd Respondent and driven at the time by the 1st Respondent struck him, thereby occasioning him fatal injuries. At the time of his death

the deceased was six years old, and the Appellants attributed his death to the negligence of the Respondents.

2. The Respondents' Statement of Defence dated 19th February, 2021 denied the claims of negligence and instead blamed the deceased of negligence that resulted in his death.

3. The Appellants, in their capacity as the Plaintiffs before the Trial Court, called two witnesses during the hearing held on 4th July, 2022. PW1, Francis Wachira Wambugu, testified that he was the biological father of the deceased minor. PW1 adopted his Witness Statement dated 9th September, 2020 as his evidence in chief; and he produced the Plaintiffs List of Documents dated 9th September, 2020 and the documents therein as exhibits, save for the Police Abstract which was Marked for Identification as item 5.

4. PW1 wholly blamed the Respondents, the Defendants before the Trial Court, for the death of his son. He testified that due to their failure to drive the vehicle with due care and attention, his son lost his life. PW1 urged the Trial Court to attribute 100% liability to the Respondents.

5. Under cross examination, PW1 conceded that he did not witness the accident. He testified that he was informed of the incident and its circumstances by his twelve-year-old daughter, who was in the company of the deceased at the time.

6. PW2, PC Somo Abdullahi, testified that he was in the witness box chiefly to produce the Police Abstract in the matter. He testified that the fatal accident was reported to King'eero Police Station and the scene was visited by an Inspector Karani and a Sergeant Mutegi; both of whom had since left the Service after being transferred. PW2 produced the Police Abstract and stated that as per the Occurrence Book Entry the 1st Respondent was driving the motor vehicle KAS 574N towards Wangige when he lost control of the motor vehicle and fatally struck the deceased, a pedestrian.

7. Under cross examination, PW2 conceded the following:

    a. He was not the investigating officer in the matter;

    b. He did not visit the scene;

    c. He did not have a copy of the Police File but he did have a copy of the OB,

    d. He did not have the sketch plan of the accident;

    e. He did not make the entry into the Occurrence Book;

    f. He did not have the investigation report;

    g. The Officer who made the entry into the Occurrence Book did not confirm the exact location and position of the accident; and

    h. The Police Abstract did not blame any person for the accident or recommended anyone for criminal prosecution.

2. Under re-examination, PW2 stated that as per the OB the driver of the motor vehicle lost control and hit the deceased. After the testimony of PW2, the Appellants closed their case.

3. The record of the Trial Court informs that the Respondents did not list any witnesses in their Defendants' List of Witnesses dated 19th February, 2021; with the sole entry in that document stating "to be advised in due course". The same phrase was used by the Respondents in the Defendants'

List of Documents also dated 19th February, 2021. Thus, it came as no surprise that when the Respondents' sought an adjournment and further date for Defence Hearing the Appellants objected to the same; on the grounds that they had not been served with any Witness Statements or Documents by the Respondents. Accordingly, the Respondents closed their case without calling any witnesses or producing any documents.

4. The Trial Court delivered its judgment on 16th September, 2022. The Trial Court found that notwithstanding the fact that the Respondents herein as the Defendants therein had not called any witnesses or produced any documents of their own, the Plaintiffs therein who are the Appellants herein had failed to prove their case. The Trial Court relied on the fact that neither PW1 nor PW2 were eye witnesses to the incident; terming their evidence as hearsay. Accordingly, the Trial Court dismissed the Suit, with no orders as to costs.

5. Aggrieved by the decision of the Trial Court, the Appellants filed a Memorandum of Appeal dated 20th September, 2022 appealing to the High Court against the findings of the Trial Court on liability and quantum of damages. The seven grounds stated in the Memorandum of Appeal revolved around two limbs, namely:

    i. That the Trial Court erred in law and in fact by failing to find the Respondents liable for the fatal accident in question; and

    ii. The Trial Court erred in law and in fact by failing to find that the Appellants were entitled to a quantum of damages.

Submissions by the Parties

6. Upon directions by the Court, the Parties filed written submissions on the Appeal. The Appellants' submissions dated 22nd May, 2023 cited the cases of Bottorff V South Construction Company, 184 Ind. 221, 110 N.E. 977 (1915) and Bashir Ahmed Butt V Uwais Ahmed Khan, [1982-88] 1 KAR 1; [1981] KLR 349 in support of their contention that the deceased minor could not have contributory negligence with respect to his own death. Instead, the Appellants prayed for a finding of liability at 100% as against the 1st Respondent and vicariously against the 2nd Respondent.

7. On the second limb, the Appellants argued that they are entitled to Quantum, logically flowing from their contention with regard to the first limb. In addition to the claim for Special Damages that had been specifically pleaded, itemized, and computed to a total of Kes. 39,930.00; the Appellants also cited various authorities in support of their claims for an award of damages for Pain and Suffering, Loss of Expectation of Life, and Loss of Dependency. The Appellants prayed for an award of a quantum of damages as follows:

    i. Special Damages - Kes. 39,930.00

    ii. Pain and Suffering - Kes. 100,000.00

    iii. Loss of Expectation of Life - Kes. 150,000.00

    iv. Loss of Dependency - Kes. 2,000,000/=

    Total: Kes. 2,289,930.00

8. The Respondents' Written Submissions dated 24th July, 2023 contended that the Trial Court's decision was correct in fact and proper in law. The Respondents cited the case of Bwire V Wayo & Sailoki, [2022] KEHC 7 (KLR) in support of their contention that the Trial Court properly found that the two witnesses for the Plaintiffs were not eye witnesses and thus their testimonies were hearsay. The

Respondents also relied on the decision in *Florence Mutheu Musembi & Geofrey Mutunga Kimiti V Francis Karenge, [Machakos HCCA No. 95 of 2019*] in support of their contention that a Police Abstract is merely evidence that an accident was reported to the Police, and unless it contains more information as to the investigations and their outcomes it cannot be evidence of negligence.

Analysis and Determination

9. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the Trial Court both on points of law and facts, and to thereafter reach its own findings and conclusions. The Court of Appeal for East Africa in Peters V Sunday Post Limited, [1958] A. pg. 424 stated that:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

10. It is clear that the determination of the present Appeal revolves around the question of whether the Appellants proved their case on the balance of probabilities. The provisions of Sections 107, 109 and 112 of the *Evidence Act*, on the burden of proof, were extensively 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."

11. It is not in dispute that neither PW1 nor PW2 witnessed the fatal accident. PW1's testimony was entirely reliant on and informed by the information he allegedly received from his daughter, who was in the company of the deceased minor when the accident occurred. She was not called to give evidence, and there can be no controversy in labelling the evidence of PW1 as hearsay.

12. PW2 was clear on the very limited information that he had about the incident. He was not the investigating officer, he did not visit the scene, nor did he record the Occurrence Book Entry. His chief evidentiary role appears to have been to produce the Police Abstract dated 7th October, 2019. I have perused the Police Abstract found at Page 39 of the Record of Appeal and I find that it is evidentiary bare for the reason that it does not contain any information that could be relied on to ascribe negligence to either the 1st or the 2nd Respondent.

13. The Appellant's case is essentially that the very nature of a motor vehicle hitting a pedestrian is in of itself a negligent act and that the failure by the Respondents to produce any evidence was sufficient for a finding of negligence on their part with respect to the fatal accident. However, this is not the law. In the case of Henderson V Henry E Jenkins and Sons, [1970] AC 232 at 301 it was held that:

> "In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendants, the issue will be

decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants."

14. I agree with the Trial Court that the Appellants did not prove their case on the balance of probabilities. The non-production of evidence and documents by the Respondents during the trial is of no consequence since at no point during the trial did the Appellants establish a prima facie case that would shift the burden of proof and require rebuttal from the Respondents.

15. It is also not possible for the Appellants to rely on the doctrine of res ipsa loquitor in the present case. In Embu Public Road Services Limited V Riimi, [1968] EA 22 the East African Court of Appeal stated:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident... Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence"."

16. For the doctrine of res ipsa loquitor to be successfully invoked, there must be evidence placed before the court from which negligence can be inferred. The mere occurrence of an accident does not necessarily mean that the driver and/or owner was negligent. No evidence of negligence on the part of either or both of the Respondents was produced by the Appellants.

17. Having discharged the duty of the first appellate court to re-evaluate the evidence on both points of law and of fact, I agree with the finding of the Trial Court that the Appellants failed to prove liability on the part of the Respondents.

18. Consequently, this Appeal fails and is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Mr. Chege Counsel for the Appellants

Ms. Oganga Counsel for the Respondents

Mr Guyo, Court Assistant