



**Gicheru (Suing as the Legal Representative of the Estate of Cleophas Gicheru Muriuki) v
Waigwa (Civil Appeal 64 of 2021) [2024] KEHC 16762 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 64 OF 2021
NIO ADAGI, J
OCTOBER 2, 2024**

BETWEEN

**SAMUEL MUTIUKI GICHERU APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CLEOPHAS
GICHERU MURIUKI**

AND

JOSEPH MUCHOKI WAIGWA RESPONDENT

*(Being an appeal from the judgment of Hon. V.S. Kosgei
delivered on 14/9/2021 in Karatina PMCC No. 71 of 2017)*

JUDGMENT

Factual background

1. The Plaintiff (Appellant herein) obtained letters of administration ad litem issued on 31/1/2017 being the son of the deceased. He then by a Plaint dated 27/6/2017, instituted a suit against the Defendant (Respondent herein) claiming General Damages for pain, suffering and loss of dependency and expectation of life and special damages of Kshs.10,050/=.
2. The Appellant averred that on or about the 13/3/2015, the deceased was a lawful rider of motor cycle registration number KMDC 340H along Karatina-Sagana road when at Jambo area the Respondent's driver, agent, employee and or servant drove, controlled and or managed motor vehicle registration number KBL 853M so carelessly and or negligently that he permitted it to knock down the deceased where he sustained fatal injuries.
3. Upon serving the Respondent with the summons, copy of the Plaint as well as the annexures thereto in person on 22/1/2019, the Respondent accepted service but declined to sign on the copies. The Respondent never entered appearance and never filed a statement of defense to this date.



4. The matter proceeded therefore by way of formal proof. The Appellant adopted his statement and his filed documents as per the list of documents as evidence in the matter. He added that the deceased was his father. That the deceased died as a result of an accident on 13/3/2015. In his statement, the Appellant stated that on 13/3/2015, he was informed that his father had been knocked down by a motor vehicle as he was riding Motor Cycle Reg. No. KMDC 340H. He later learnt that the motor vehicle that knocked his father was Reg. No. KBL 853 M. That the deceased was taken to Karatina District Hospital where he was pronounced dead and his body taken to Karatina Hospital Mortuary and buried after a week.
5. That the deceased was survived by his children namely; Samuel Muriuki Gicheru, Pauline Wambui Cleophas, Victor Gitau Gicheru and Melvin Mundia Gicheru. That at the time of his death, the deceased was the sole bread winner for his family and used to solely take care of them as his children by providing basic necessities and payment of school fees. That he was a farmer and was of good health at the time of his death.
6. The Appellant then closed his case and filed submissions as directed by the court.
7. The trial court upon considered the evidence on record and perused through the submissions filed by the Appellants' Counsel. The court formed the opinion that the following issues were for determination:
 - a) Whether or not the Appellant proved his case on a balance of convenience against the Respondent
 - b) If so, what reliefs is the plaintiff entitled to.
8. On the first issue, the learned Magistrate stated that it was clear that the matter proceeded by way of formal proof. The Appellant his submissions urged the court to find the Respondent 100% liable for the accident for having failed to enter appearance and an interlocutory judgment having been obtained against him. The Appellant relied on the case of Felix Mathenge Vs Kenya Power & Lighting (2008) eKLR. This court perused through the authority and made the following finding:

“The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages. See Kavindu & Another Vs. Mbaya & Another [1976] KLR 164. We would agree, therefore, with Mr. Muturi that it was an error on the part of the Hon. Commissioner of Assize to dismiss the suit for want of proof of liability instead of merely assessing damages”
9. The trial court observed that, that case was in relation of assessment of loss of income and thus not related to accident claims. The assessment was for the calculation for loss of income which would be a liquidated claim considering that the Plaintiff in that case had lost tenants due to disconnection of power by the defendant and it was the duty of the court to assess the loss and nothing else.
10. Further the learned Magistrate stated that Formal Proof in its ordinary Dictionary meaning refer to being "methodological" according to rules (of evidence). According to Halsbury's Laws of England



Vol. 15, paragraph 260," proof" has been defined to be that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. That proof refers to evidence which satisfies the court as to the truth or falsity of a fact.

11. That as we all well know, under Sections 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya, the person who alleges is under a duty to prove all allegations as contained in the claim against the Defendant(s) on a balance of probabilities. If that party adduces sufficient evidence to raise a presumption that what was claimed was true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. She referred to the Court of Appeal case in *Kirugi & Another Vs Kabiya & 3 Others* [1987] eKLR 347, which held as follows

“ The burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

12. A position that was supported by R.E Aburili (J.) in the case of *ZOS & C A O (Suing As The Legal Representatives In the Estate of S A O (deceased) vs Amollo Stephen* (201 9) eKLR 42 in Siaya on the 4th of March 2019 as follows:

“ that even if the case proceeds by way of formal proof, the plaintiff is under a legal duty to prove negligence and liability of the defendant as particularized in the plaint. Liability is not like special damage. In the latter case, judgment would be final where there is no defence as opposed to the former and hence the requirement for formal proof to prove negligence or liability of the defendant and the general damages suffered as a result of the alleged acts of negligence”.

13. Further, in the case of *Rosaline Mary Kabumbu Vs National Bank of Kenya.Ltd* (2014) eKLR, Justice J.B Havelock on 12.2.2013, while comparing whether or not formal proof was the same as full hearing. The court indicated that a formal proof was a form of hearing where "...all rules of evidence and procedure are observed and a party to a suit has to adduce evidence sufficient to sustain the suit".

14. The trial court guided by the case laws above, found that it was upon the Plaintiff to prove liability on a balance of probability and the current Plaintiff (Appellant) was no different. The Appellant in his list of documents attached a Police Abstract. The same is dated 3/4/2015 and it indicates that the traffic investigations were pending. The Appellant was not at the scene of the accident and therefore he could not testify as to the circumstances of the accident. The best the Appellant could do is avail the Police Officer who investigated the matter as to the circumstances of the same to testify. The court albeit reluctantly, held that the Appellant did not prove the allegations he stated in the Plaint as to how the Respondent was negligent. The matter was not proved on a balance of probabilities as required by law.

15. The trial court then determined the second issue on quantum of damages and stated that, if the Appellant proved his case, the court would have granted the following reliefs:

- a) Pain and Suffering Kshs.50,000
- b) Loss of Expectation of life Kshs.100,000
- c) Loss of Dependency: $6,736.30 \times 12 \times 1/3 = 404,17815$
- d) Special damages Kshs.10,050 -not proved
- e) Costs and interests from the date of judgement.



16. The upshot thereof was that the trial court found that the Appellant did not prove his case on a balance of probability and thus the Plaint dated 27/6/2017 was dismissed with no orders as to costs.
17. The Appellant being aggrieved by the said decision has lodged this appeal against the judgement through the Memorandum of appeal dated 5/10/2021 raising the following grounds of the appeal :-
 1. That the learned trial Magistrate erred in law and in fact in holding that the Appellant had failed to prove his case on a balance of probabilities.’
 2. That the learned trial Magistrate erred in law and in fact in disregarding the authorities cited by the Appellant.
 3. That the learned trial Magistrate erred in law and in fact in failing to hold that once interlocutory judgment was entered, the Appellant was not required to prove liability.
 4. That the learned trial Magistrate erred in law and in fact in dismissing the Appellants claim
18. The Appellant prays for orders that:-
 - a. The appeal be allowed
 - b. The order dismissing the Appellant’s suit be set aside
 - c. Judgment on liability ne entered at 100% in favour of the Appellant as against the Respondent and the court do proceed to assess general damages.

Analysis and Determination

19. This being the first appellate court, its role is settled; to subject the whole evidence to a fresh and exhaustive scrutiny and make its own conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witness first hand. (See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).
20. I have carefully considered the record of appeal, the evidence presented, the Appellant counsel’s submissions and authorities cited in this appeal.
21. The main issue that requires this court’s determination is whether the appeal ought to be allowed and the order dismissing the Appellant’s suit be set aside.
22. What I have gathered from the trial court’s judgment is that the suit proceeded for hearing as a formal proof after interlocutory judgment was obtained against the Respondent. The Appellant in his list of documents attached a Police Abstract. The same indicated that the traffic investigations were pending. The Appellant was not at the scene of the accident and therefore he could not testify as to the circumstances of the accident. The best the Appellant could do is avail the Police Officer who investigated the matter as to the circumstances of the same to testify. The trial court held that the Appellant did not prove the allegations he stated in the Plaint as to how the Respondent was negligent. The matter was not proved on a balance of probabilities as required by law.
23. I have also considered the Appellant’s submissions and the contention that once interlocutory judgement had been entered against the Respondent, the trial Magistrate ought to have found the Respondent 100% liable.
24. The Court must emphasize one undeniable fact; that in as much as the Appellant’s obligation at formal proof hearing was to adduce evidence for assessment of general damages, this did not lessen her (Appellant’s) burden to demonstrate not only how the damages would be arrived at but also



the relationship of the Respondent with the alleged liability. More so, bearing in mind the cardinal principle that he who alleges must prove in cases where negligence is alleged. This was aptly set out by the Court of Appeal in the case of East Produce (K)Limited v Christopher Astiado Osiro, Civil Appeal No.43 of 2001 which held that:

“It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd (1991)..... in which the Court 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.”

25. It follows that from the testimony and the statement of the Appellant that nothing close to how the accident occurred was asserted. Further, it was never evidenced who was driving the subject motor vehicle; either the Respondent or driver, agent, employee and or his servant or as pleaded in the Plaint. As earlier observed by this Court there can never be liability without fault. It begs therefore, how the Plaintiff's sued the Respondent yet she could not demonstrate how he was linked to the vehicle said to have caused the accident or how he participated in the accident.

26. It is gain said that the burden also lay with the Appellant to demonstrate the acts of negligence on the part of the Respondent. Clearly, from the statement it was only stated that the vehicle was being driven along a particular road. Nothing about the negligent manner in which the vehicle was being driven was alluded to. The law is well settled at Section 107 of the Evidence Act that the burden of proof lies;

“(1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must proof that those facts exist.

(2) When a person is bound to proof to the existence of any fact it is said that the burden lies on that person.”

27. It is further clear from Section 108 of the Evidence Act that: -

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by either side.”

28. Therefore, I need not to belabour to emphasize that the Appellant failed to discharged her burden in demonstrating how the Respondent was linked to the causation of the accident, notwithstanding that the suit was uncontested and an interlocutory judgment entered against the Respondent.

29. No doubt that an interlocutory judgement was entered against the Respondent. But on introspecting the general meaning of the word “Interlocutory” it merely means “on the interim”. What this implies is that the Court had prima facie entered an interim judgment against the Respondent for his failure to enter appearance and file a defence. But then, at the formal proof hearing it was incumbent upon the Appellant to demonstrate how the accident occurred, who caused the accident and to what extent liability for the accident could be apportioned to the Respondent. To this extent the Appellant totally failed.

30. In fact, a look at both the oral evidence in Court and the Appellant's statement are a clear testimony of the casual manner in which the Appellant's case was conducted. A glimpse of it attests that the Appellant more so her Counsel assumed that merely because an interlocutory judgment had been



entered, there was no need to demonstrate how the Respondent was liable. Hence, the casual manner in which the evidence was recorded and adduced. Far from this because the law is spelt out in clear black and white that the Appellant still bore the onus of discharging her burden of proof of her liability against the Respondent. In this regard therefore, I find no fault in the learned trial magistrate's finding that the Court "cannot proceed to hold liable a party whose capacity and involvement in the alleged accident is not proved".

31. In sum, I come to the unfortunate conclusion that notwithstanding once again, that this Appeal was uncontested the Appellant failed to establish the link of the Respondent to the causation of the accident. Accordingly, I find the Appeal without merit and the same is dismissed with no orders of costs.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF OCTOBER 2024.

NOEL I. ADAGI

JUDGE

