



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.12 OF 2017

MARGARET WAMBUI THIDIGWA.....APPELLANT

VERSUS

ELIUD SIDIGU OTIATO (Suing As The Legal Representative Of The

Estate Of The Late LUCY AGENGO SIDIGU.....RESPONDENT

(An Appeal From The Judgement Of Hon.Mr.Mararo (Pm) Dated 11th January 2017 In Nakuru CMCC No, 1106 Of 2011)

JUDGEMENT

1. The late **Lucy Agengo Sidigu** was alleged to have been travelling in a *tuktuk* registration number KBE 528P on 23rd July 2011 along Nakuru- Nairobi road near Pipeline hotel junction when the same was involved in an accident with motor vehicle registration number KBE 528P owned by the appellant. As a result of the said accident she sustained fatal injuries.
2. The respondent filed suit claiming damages both general and special under the Law Reform Act as well as the Fatal Accident Act. In the plaint before the trial court the respondent laid blame on the appellant and or her driver. He said that the same was being driven negligently without due regard to other road users and as a result her two young children have lost their mother who was aged 27 years and full of life.
3. The appellant did file a defence in which she denied the occurrence of the accident and if it did then the driver of the *tuktuk* was to blame.
4. The matter proceeded to full trial where the respondent called three witnesses and the appellant one who was the driver of the said lorry. The trial court in its judgement found the appellant 100% blameworthy and awarded the respondent general and special damages of about Kshs, 1.5 million together with costs and interest.
5. The appellant being dissatisfied with the said judgement has appealed on both headings namely, negligence and damages which she deemed excessive in the circumstances. Before looking at the same it shall be necessary to summaries the evidence as presented during trial.
6. **PW1 ELIUD SINDIGU OTIATO** testified that the deceased was her daughter in law and at the time of her death which he did not witness she was aged 27 years old and had two minor children. She generally produced the exhibits and narrated how he carried out the funeral arrangements as well as the fact that the deceased who use to sale clothes would give him kshs.3000 to 5000 per month.
7. **PW2 JOHN MBUGUA MAINA** testified that he was the driver of the *tuktuk* that was involved in the accident. He said that those whom she was carrying were the deceased, one Mwangi and her brother. He laid blame of the accident on the driver of the lorry. He said that he had even testified in the traffic case where the said driver had been charged although he could not remember the case.
8. **PW3 CPI JACKSON KOOME** from Nakuru police station testified on behalf of the police officers who went to the scene. He went ahead to produce the Occurrence Book(OB) of that day which concluded that the appellant's driver was to blame for the accident.
9. **DW1 PETER CHUHI** testified that he was the driver of the lorry on the material day which was involved in the said accident which he could not avoid. He however denied that he was negligent. He was charged at the traffic court but was acquitted.
10. Those are the brief summary of the facts as presented as well as the documentary evidence. The court has perused the submissions by the appellant which essentially lays blame on the trial court for failing to appreciate that the case was not proved to the required standard. There were no submissions from the respondent as at the time of this judgement.

11. The main ground which this court finds necessary to start with is whether the deceased herein was actually involved in the accident. In other words, was she in the said tuktuk vehicle? Pw1, her father in law, stated that he was informed about the accident by someone and he proceeded to prepare for the interment and thereafter the filing of the suit.

12. PW 2 testified in his evidence in chief that;

“I knew one passenger called Mwangi with her brother and Lucy Sindiyu....after discharge i was told Lucy passed. The other two were in bad condition. A second one passed on 3 days later.”

13. When cross examined he said that

“I had three passengers. I haven’t seen the OB yet. I don’t know how many people were recorded. My statement however said 3 persons. My passenger was Monica Achieng, her sister and Lucy.”

14. When Pw3 the police officer who produced the OB was cross examined he said;

“I have original OB. I was not there at the preparation of entry. OB talks of Mike Obana aged 34 years died on arrival at PGH. Faima Odhiambo and Faric Ochieng. It does not mention Lucy Agendo Sidigu.”

15. On re-examination he said that the names of the victims sometimes at the scene are not conclusive.

16. The court has perused extensively exhibit 13 which is the occurrence book (O B). The name of the deceased is not among those found to have been involved in the accident. The police abstract exhibit 9 indicates the deceased to have been involved in the accident. This was issued on 30th August 2011. The police abstract was obviously issued after the incident and way after the OB had been filled.

17. As a matter of fact, the police abstract is an abridged version of the OB. In this case the name of the deceased does not feature in the OB which is essentially the official document from the traffic police department showing the incidence, the vehicles and parties involved and the step by step action taken by the police.

18. Who then left the name of the deceased out of the records if indeed she was involved in the accident and was travelling in the said tuktuk? It is not disputed that the accident occurred but how come the deceased name is missing?

19. PW2 seemed to have contradicted himself in his evidence in chief for he mentions one Mwangi, her brother and Lucy while at cross examination he mentioned Monica Achieng, her sister and Lucy. Nowhere does he mention the people whose names are appearing in the OB.

20. In the absence of the deceased name in the OB can one conclude that she died as a result of this specific accident? I do not think so. The police abstract should and must always reflect the occurrence book and nothing else especially on the parties involved. The sanctity of the OB is seen even from the way it is filled, namely, that there should never be any spacing and if there are any alterations then they must be countersigned.

21. It was, in my view, incumbent upon the respondent to find that if indeed the deceased was involved in the accident then her names should have been officially entered. The allegations by pw3 that sometimes the names of victims in accident cases may not be correctly captured is not a genuine answer. Even if that is the case once it is known that wrong names have been entered corrections can always be done provided there are sufficient evidence. In this case there was no such attempt and one wonders where the police obtained the names inserted to the abstract.

22. Even for arguments sake the name of the deceased does not feature in the said OB which renders the above argument by pw3 spurious. It is trite law that he who alleges must prove.

23. **Section 107 of the Evidence Act** is relevant here. It states that;

(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.

24. In this case the respondent failed to discharge that onus. It could be true that the deceased was involved in the accident but not this one. The court has seen all the exhibits including the post mortem report which truly mentions the victim to be the one in this matter. The police documents do not support the same. The witnesses especially pw2 who was the star witness does not help the matters either.

25. In the premises, this court for this single ground alone finds that the trial court reached an erroneous conclusion. Had the court interrogated the matter enough it would have found that based on the evidence on record the late Lucy Agengo Sidigu was not involved in the accident in question. She may have died as a result of some road traffic accident but not the one at hand.

26. This court would not have nevertheless departed from the conclusion by the trial court on the twin issues of negligence and quantum. It was admitted by DW1 that he was on the wrong and the evidence by pw2 on how the accident occurred was clear.

27. On quantum I do not find anything reason to find fault on the assessment by the trial court on the damages awarded. The deceased was 27 years old and full of life. The two children left behind were young and obviously in need of care. It was not disputed that she was a widow. The award was not excessive in the circumstances.

28. In conclusion therefore this court allows the appeal on the ground that there was insufficient evidence that the deceased met her death on 23th July 2011 along Nakuru -Nairobi road as claimed by the respondent.

29. Each party shall meet its own costs both in this appeal and at the lower court.

Dated signed and delivered electronically at Nakuru this 4 day of March 2021.

H.K. CHEMITEI.

JUDGE.