



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 223 OF 2016

**JACKSON KIMANI NGUGI (Suing as the legal representative of the estate of
JOSEPHAT MBURU GITAU-Deceased).....APPELLANT**

-VERSUS-

JACKTON AYIEKO ARUKO alias

ORUKO JACKTON.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

*(Being an appeal against the judgment and decree delivered by M. Chesang (Mrs.) (Senior Resident Magistrate) on 10th June, 2015 in
Milimani CMCC NO. 1901 OF 2012)*

JUDGMENT

1. Jackson Kimani Ngugi, the appellant herein, filed a suit against the 1st and 2nd respondents in his capacity as the legal representative of the estate of Josephat Mburu Gitau (“*the deceased*”) in which he sought for both general damages under the Law Reform Act and the Fatal Accidents Act, and special damages in the amount of Kshs.70,320/ plus costs of the suit and interest thereon.
2. The appellant pleaded in his plaint that sometime on or about the 31st of October, 2010 the deceased was lawfully walking along Thika Road near Clayworks when motor vehicle registration number KBJ 681D (“*the subject motor vehicle*”) being jointly owned by the 1st and 2nd respondents, veered off the road and knocked down the deceased, leading to fatal injuries.
3. The appellant attributed the accident to negligence on the part of the 1st respondent who was the driver, by setting out the particulars in his plaint.
4. Further to the foregoing, the appellant relied on the *res ipsa loquitur doctrine*.
5. It was also pleaded in the plaint that prior to his death, the deceased was a vigorous man who left behind the following dependants:

a) Jackson Kimani Ngugi	Brother	Adult
b) Pauline Njeri	Sister	Adult
6. Upon entering appearance, the respondents filed their statement of defence jointly to deny the allegations set out in the plaint.
7. At the hearing of the suit, the appellant testified as the sole plaintiff witness whereas the respondents closed their case without calling any witnesses.
8. The parties thereafter filed written submissions.
9. Eventually, the trial court dismissed the suit with costs in its judgment delivered on 10th June, 2015.
10. The aforementioned judgment is now the subject of the appeal before this court. To challenge the judgment, the appellant has put forward the following grounds of appeal vide his memorandum of appeal dated 27th April, 2016:

(i) THAT the learned trial magistrate erred in law and in fact by holding that the appellant had failed to prove his case on the frontier of negligence on a balance of probabilities contrary to both oral and documentary evidence that the appellant had tendered in court.

(ii) THAT the learned trial magistrate erred in law and in fact by wrongly holding that from the evidence adduced in court, it was not easy to establish who had caused the accident yet the police abstract and the evidence adduced in court clearly indicated and/or pointed out that the 1st respondent was the one who caused the accident.

(iii) THAT the learned trial magistrate erred in law and in fact by failing to take into consideration the evidence of the 1st respondent who admitted in his evidence at the inquest proceedings in Case No. 17 of 2012 that he is the one who knocked down the deceased with his vehicle, being motor vehicle registration number KBJ 681D and failed to report the accident to the police.

(iv) THAT the learned trial magistrate erred in law and in fact by failing to take cognizance of the evidence that was given during the inquest hearing that clearly showed that the deceased met his death as a result of the accident that took place on 31st October, 2010 involving motor vehicle registration number KBJ 681D driven by the 1st respondent.

(v) THAT the learned trial magistrate erred in law and in fact in dismissing the suit for lack of sufficient evidence yet the appellant's evidence was uncontroverted since the respondents did not tender any evidence neither did they avail themselves for cross examination.

(vi) THAT the learned trial magistrate erred in law and in fact by failing to quantify damages that would have been awarded to the appellant in the event that the appellant's claim succeeded, which decision was therefore against judicial precedence and therefore bad in law.

(vii) THAT the learned trial magistrate erred in law and in fact by dismissing the appellant's suit at the lower court despite the overwhelming evidence that had been presented before the court to show that the respondents were wholly liable for the accident.

(viii) THAT the learned trial magistrate wrongly exercised her discretion by dismissing the appellant's suit at the lower court for damages and disregarded the appellant's submissions and thus arrived at a wrong decision.

11. This court directed the parties to file written submissions on the appeal. The record shows that the respondents neither appeared in the appeal nor filed written submissions.

12. On his part, the appellant submitted that the evidence produced before the trial court showed that not only was the subject motor vehicle registered in the joint names of the respondents, but the evidence on record also shows that the 1st respondent was the driver in control of the subject motor vehicle on the material date.

13. According to the appellant, the deceased died four (4) days after the accident and that in spite of the inconsistencies on the date of death, the appellant was of the view that the trial court ought to have considered the weighty evidence which showed that the deceased was involved in the accident in question and died as a result thereof.

14. It was also the appellant's contention that the respondents did not controvert his evidence.

15. On quantum, the appellant brought forth the argument that the trial court ought to have awarded the sum of Kshs.1,291,085/ for loss of dependency by applying a minimum wage of Kshs.9,780.95 per month for a casual worker such as the deceased and a multiplier of 11 years since the deceased died at 49 years of age to be tabulated as follows:

$$9,780.95 \times 11 \times 12 = \text{Kshs.1,291,085.40/}$$

16. Further to the foregoing, the appellant urged that the trial court should have awarded the sums of Kshs.100,000/ as damages for pain and suffering, and loss of dependency respectively, plus funeral expenses to the extent of Kshs.70,320/.

17. The total award proposed by the appellant in taking the above into account is Kshs.1,561,405.40/.

18. I have considered the appellant's written submissions on appeal. Moreover, I have considered the evidence which the trial court had the opportunity to look at.

19. It is clear that the appeal lies against the findings on liability and quantum. It is thus appropriate for me to address the appeal under the two (2) heads.

20. In his evidence as PW1, the appellant adopted his signed witness statement dated 13th April, 2012 and the documents constituted in his list and bundle filed before the trial court. The appellant gave evidence that the deceased died on 4th November, 2010.

21. The appellant admitted that he did not witness the actual accident, further stating that the deceased was at the time of his death a casual labourer earning a salary of Kshs.700/.

22. It was also the appellant's testimony that an inquest was carried out to establish the cause of the accident, the results of which were

inconclusive.

23. On her part, the learned trial magistrate reasoned that there were inconsistencies in terms of the date on which the deceased passed away, adding that the court which determined the inquest arrived at the conclusion that it was not clear who was to blame for the accident.
24. The learned trial magistrate also pointed out that the appellant's evidence was hearsay for the reason that he did not actually witness the accident taking place.
25. On that basis, it was the learned trial magistrate's finding that the appellant failed to discharge the burden of proof for the claim of negligence, consequently dismissing the suit.
26. Upon my re-examination of the evidence tendered before the trial court, I observed that the same confirms the occurrence of the accident on the date earlier referenced.
27. It is not controverted that the accident involved the deceased and the subject motor vehicle. There is equally no dispute that the deceased suffered fatal injuries as a result.
28. On the subject of ownership of the subject motor vehicle, the appellant produced a copy of records indicating both respondents as the joint registered owners of the said vehicle as at 9th November, 2010.
29. The above evidence was not at all disputed by the respondents by way of evidence. In the premises, the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of **Section 8** of the **Traffic Act, Cap. 403** Laws of Kenya which provides that the person whose name appears on the registration document in respect to a motor vehicle will be considered the owner of the same.
30. On the subject of the police abstract which I have similarly re-examined, the same confirms that the 1st respondent was the owner of the subject motor vehicle.
31. It is noteworthy that none of the respondents made an attempt at challenging the contents of the police abstract, which in the absence of contrary evidence, is deemed to be conclusive proof of ownership. Such was the reasoning adopted in **Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR** in the following manner:
- “...I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A... and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.”***
32. It therefore follows that the appellant did prove on a balance of probabilities that the respondents are the registered owners of the subject motor vehicle.
33. It is apparent from her impugned judgment that the learned trial magistrate did not address her mind on the above subject.
34. This brings me to the question of negligence which will in essence answer the question of liability. On the one hand, I am alive to the fact that the appellant being the sole witness before the trial court was not present at the scene of the accident when it took place.
35. I also looked at the inquest subsequently undertaken in Inquest No. 17 of 2012; various witnesses testified, including the investigating officer and the 1st respondent.
36. In the end, the court ruled that it was unable to determine who was to blame for the accident.
37. It is well settled that inquest proceedings, where undertaken, are usually a precursor to criminal proceedings if criminal culpability is established. It is also well settled that the standard of proof in criminal cases is much higher than that in civil cases.
38. From the foregoing, I am of the view that whereas the Chief Magistrate's Court in the inquest proceedings was unable to conclusively determine the issue of liability, it is noteworthy that this does not automatically mean that the appellant did not prove his case to the required standard before the civil court.
39. In that regard, I respectfully disagree with the learned trial magistrate's reasoning that the appellant was left with a slightly higher standard of proof; if anything, all he needed to do was to prove his case on a balance of probabilities.
40. This therefore brings me to the crux of the matter which has to do with the claim for negligence. I have already pointed out that the appellant's case was uncontroverted by the respondents.
41. Further to this, upon my study of the pleadings, I noted that the doctrine of *res ipsa loquitur* was pleaded in the plaint.
42. The doctrine was discussed in the authority of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to the East African Court of Appeal's decision in **Embu Public Road Services Ltd. v Riimi [1968] EA 22** where the following was held:

“The doctrine of res ipsa loquitur 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.”

43. From my understanding of the above rendition, a mere reliance on the doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

44. In the present instance, the learned trial magistrate ought to have appreciated the principles associated with the doctrine coupled with the lack of evidence to refute the appellant’s case; had she done so, I am convinced that she would have arrived at the conclusion that the appellant proved his case on a balance of probabilities.

45. I observed that the learned trial magistrate took the approach that the evidence adduced by the appellant bore contradictory dates in respect to the death of the deceased.

46. To my mind and upon revisiting the evidence, I opine that the learned trial magistrate chose to place too much focus on the above subject which constituted a technicality and in so doing, overlooked the principles encompassing the above doctrine.

47. I therefore agree with the appellant’s sentiments raised in his grounds of appeal and I find that going by the evidence on record, the learned trial magistrate arrived at an erroneous finding on liability which ought to be disturbed.

48. On quantum, it is apparent that the appellant sought for an award of general damages under the heads of loss of expectation of life, pain and suffering, loss of dependency, and special damages. I will therefore address the damages under the respective heads, keeping in mind that the learned trial magistrate did not make any assessment on damages in her judgment.

a) General damages

(i) Loss of expectation of life

49. Under this head, the appellant proposed the sum of Kshs.100,000/ before the trial court, citing the cases of **Irene W. Kagundu & another v W. K. Tilley (Muthaiga) Ltd & another [2008] eKLR** and **Jane Wairimu Maina v Peter Githinji Kahindi & another [2006] eKLR** in which the respective courts awarded similar amounts in damages.

50. On their part, the respondents did not offer any suggestions.

51. Courts have been known to award conventional sums of Kshs.100,000/ under this head. In that regard, I find that a similar award of Kshs.100,000/ will suffice.

(ii) Pain and suffering

52. The appellant urged the sum of Kshs.100,000/ and relied on **Jane Wairimu Maina v Peter Githinji Kahindi & another [2006] eKLR** where a similar award was made in the instance of a person who died 15 days after the accident in question.

53. No counter offer was made by the respondents.

54. As I have already pointed out, the date of death of the deceased varied amongst the relevant documents tendered before the trial court. Both the death certificate and the burial permit tendered before the trial court indicated the date as being 4th of December, 2010 while the postmortem report prepared by Kenyatta National Hospital indicated 4th November, 2010 as the date of death. In addition, there was no evidence to show that the deceased was either admitted in hospital or that he received any medical treatment.

55. In my view therefore, it remains unclear when exactly the deceased died. In the circumstances, I find that an award of Kshs.100,000/ would be on the higher side. I will instead award a reasonable sum of Kshs.10,000/ with reliance on the recent case of **Elite Earthmovers Ltd v Kiilu Masenge & 2 others [2019] eKLR** in which this court made a similar award under unclear circumstances on time of death.

(iii) Loss of dependency

56. The appellant sought for the amount already mentioned hereinabove under this head.

57. The provisions of **Section 4(1)** of the **Fatal Accidents Act** restrict the definition of a dependant to the parents, children and spouse of the deceased. It was the appellant’s evidence that the deceased was unmarried and without children at the time of his death. In the premises and for purposes of the abovementioned Act, the deceased’s siblings are not regarded as dependants for damages of this nature to apply.

