



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL DIVISION**

**CIVIL APPEAL NUMBER 123 OF 2018**

**BETWEEN**

**KAMANDUU KAUMBA.....1<sup>ST</sup> APPELLANT**

**JANET MUIA (*Suing as legal representatives of the Estate of***

**PHILIP MUIA KAUMBA (DECEASED) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KINGSWAY MOTORS.....RESPONDENT**

***(Being an appeal from the Judgement of the Hon. Principal Magistrate C. A Otieno Omondi given on 27<sup>th</sup> September 2018 at Thika in Thika CMC Civil Suit No. 964 of 2016)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellants were the plaintiffs in Thika CMCC number 964 of 2016. They sued the respondent for recovery of both general and special damages in connection with the death of Philip Muia Kaumba who died as a result of a road traffic accident which occurred on 11<sup>th</sup> May 2014 along the Nairobi –Thika Road. The appellants contended in their plaint that the respondent or its authorized driver had been negligent while driving motor vehicle registration number KAE 200A such that the vehicle veered off the road and collided with the deceased as a result of which the deceased sustained fatal injuries. The appellants set out particulars of negligence at paragraph 3 of the plaint dated 6<sup>th</sup> September 2016.
2. The deceased was said to be 34 years old, was employed and earned Kshs. 30,000/- per month. The appellants averred that the death of the deceased deprived them of the means of support they had hitherto enjoyed and had suffered loss and damage.
3. The respondent entered appearance and also filed defence in which it vehemently denied the allegations of negligence. In the alternative, the respondent averred that the deceased was responsible for his own woes having failed to observe the traffic rules as he walked in the middle of the road and engaged in an animated conversation without minding other road users. The respondent urged the court to dismiss the appellants' suit.
4. The appellants filed a reply to the defence dated 27<sup>th</sup> February 2017.

**Judgment of the Learned Trial Court**

5. After hearing the appellants' case and without any oral evidence from the respondent, the learned trial magistrate dismissed the appellants' claim with costs to the respondent on grounds that the appellants had failed to prove their case against the respondent on a balance of probabilities.

**The Appeal**

6. Being aggrieved by the whole of the said judgment, the appellants filed this appeal which is premised on six grounds as set out in the Memorandum of Appeal dated 1<sup>st</sup> October 2018. The appellants aver, *inter alia*, that the learned trial magistrate erred in law when she failed to make a finding that the appellants had proved their case against the respondent on liability and further that the learned trial magistrate fell into grave error when she made findings that were based on speculation and not on the evidence on record. Finally, the appellants fault the learned trial magistrate for failing to apportion liability between the appellants and the respondent.

7. As this is a first appeal, this court is under a duty to comply with the rules of procedure which require it to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The only caution to the court is that in this appellate jurisdiction, it has no opportunity of seeing and hearing the witnesses who gave evidence during the trial and to make an allowance for it. See ***Selle & Another versus Associated Motor Boat Co. Limited [1968] EA 123.***

### **Submissions and Issues for Determination**

8. The parties filed their respective rival written submissions together with many authorities. The court has taken time to read through the same. Any relevant highlight will come out during analysis and determination.

9. The main issue for determination in this appeal is whether the findings of the Hon. trial Magistrate were well founded. In other words, was the learned trial magistrate correct in reaching the conclusion that the appellants did not prove their case against the appellant to the required standard namely that they failed to prove their case on a balance of probabilities? While the respondent thinks that the learned trial magistrate was right in doing so, the appellants think otherwise.

### **Analysis and Determination**

10. It is a well-known principle of law that the burden of proof in most civil trials is balance of probabilities, which means that the side with the stronger evidence, however slight the edge may be is the one that wins the case. In ***Black's Law Dictionary Tenth Edition at page 1373***, the phrase "***balance of probabilities***" is defined under the phrase "***preponderance of the evidence***" as

***"The greater weight of the evidence, not necessarily by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force, superior evidentiary weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue, rather than the other."***

11. Thus the burden of proof in civil cases is different from the burden of proof in criminal cases which must be beyond reasonable doubt.

12. So, what must this court consider in determining whether or not the appellants proved their case against the respondent to the required standard? It is the allegations in their plaint that this court must consider and whether those allegations were supported by cogent evidence. At paragraph 3 of the plaint, the appellants averred that the respondent or its authorized driver drove the subject motor vehicle in a negligent manner by: -

- i. allowing motor vehicle KAE 200A to collide into the deceased;**
- ii. failing to have regard to other road users and in particular the deceased;**
- iii. driving without due care and attention.**
- iv. failing to stop, slow down, brake, swerve or manage the said motor vehicle [so as] to avoided the accident.**
- v. driving at excessive speed in the circumstances**
- vi. failing to adhere to the rules of the highway code.**
- vii. driving on the wrong side of the road.**

13. The appellants also said they would rely on the doctrine of *Res ipsa loquitor* to establish negligence.

14. It is important to go back to the burden of proof as defined above, and in the circumstances, the court would not expect the appellant to be at 100% proof in order to meet the burden of proof. What amounts to proof on a balance of probability is what Kimaru J stated in ***William Kabogo Gitau versus George Thuo and 2 others [2010] I KLR 526:-***

***"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is [more] probable than not, that the allegations he made occurred."***

15. In the present case, the appellants called two witnesses, no. 62585 PC Sangi Wafula, as PW1 and Sangi Mumo, PW2. PW1 stated that on 11<sup>th</sup> May 2014 at about 7.00pm a report was made to the police regarding a serious traffic accident involving motor vehicle KAE 200A, a Daewoo Saloon and a pedestrian Philip Muia, aged 33 years. PW1 also stated that the pedestrian later died, but he could not say whether the driver of the motor vehicle, one Timothy Makumbi Ndungu was ever charged with a traffic related offence. PW1 produced the police

abstract dated 13<sup>th</sup> March 2015, almost a year after the accident. Finally, PW1 stated that the investigating officer in the matter was PC Kaberia.

16. PW2 stated the deceased was her husband. She produced copy of death certificate – Pexhibit 4, search records as Pexhibit 5, receipts for funeral expenses Pexhibit 6(a)-(d). She also produced certificates – Pexhibits 7(a) and (b) for the two children. In her cross-examination, PW2 confirmed that she did not witness the accident.

17. The respondent did not call any witnesses, but contended in its submissions that the appellants’ evidence fell far short of proving any of the allegations of negligence set out in paragraph 3 of the plaint.

18. From the evidence on record, I do not see any iota of it going towards proving that the driver of the subject motor vehicle drove at excessive speed in the circumstances, or that he allowed the motor vehicle to collide with the deceased or that he failed to adhere to the rules of the Highway Code or even that he drove on the wrong side of the road. As was held in ***Kiema Mutuku versus Kenya Cargo Handling Services (1991) 2 KAR 258.***

***“There can be no liability without fault and a plaintiff must prove some negligence. Taking into account all the evidence on record, it is apparent that the plaintiff herein has failed to discharge the burden of proof by establishing the link between the defendant’s actions and the cause of action.”***

This is exactly what happened in the instant case. The appellants totally failed to establish the link between the respondent’s actions and the cause of action.

19. It was also held in ***Stat Pack Industries versus James Mbithi Munyao [2005] eKLR*** that

***“.....not every injury is necessarily as a result of someone’s negligence. That an injury per se is not sufficient to hold someone liable for the same.”***

The above being the case, it would be presumptuous for this court to conclude that because the deceased died then the respondent must be assumed to have been careless while driving and/or managing the subject motor vehicle.

**Conclusion**

20. From the foregoing, I find and hold that the appellant’s appeal lacks merit and must fail. This court finds no reason to apportion liability since liability was not proved in the first place. Accordingly, the appeal be and is hereby dismissed but with no order as to costs.

21. It is so ordered.

Judgement written and signed at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

Judgment delivered, dated and countersigned in open court at Kiambu on this.....11<sup>th</sup> .....day of .....June,..... 2020

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**CHRISTINE W. MEOLI**

**JUDGE**