



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 519 OF 2018

HAGOS BIRIKTI TEWOLDEBREHEN

DE LA TORRE RAMIREZ NELLY VICTORIA

(Suing as the administrators of the estate of

MENDOZA LOPEZ AQUELINA(Deceased).....APPELLANTS

-VERSUS-

EVANS IHURA..... 1ST RESPONDENT

EVANS IHURA NJOROGE.....2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon. Ms. E. Wanjala Senior Resident Magistrate dated 12th day of October 2018 in CMCC No. 259 of 2015)

JUDGEMENT

1) On 13th September 2013, **Mendoza Lopez Aquelina** (now the deceased) was involved in a road traffic accident along Tom Mboya Street and was fatally injured. **Hagos Birikti Teweldebrehen** and **De La Torre Ramirez Nelly Victoria**, the 1st and 2nd appellants respectively in their capacity as the legal representatives of the estate of the deceased's estate filed a compensatory suit before the Chief Magistrate's Court, Nairobi against **Evans Ihura** and **Evans Ihura Njoroge**, the 1st and 2nd respondents respectively.

2) The 2nd respondent was the driver of the motor vehicle registration no. KAT 098H which crashed the deceased against another motor vehicle and was driving it under the authority and or instructions of the 1st respondent.

3) The respondents filed a joint statement of defence to deny the appellants' claim. When the suit came up for hearing, the appellants summoned two witnesses to testify in support of their case while the respondents opted not to summon any witness to testify in support of their defence. Hon. E. Wanjala, learned Senior Resident Magistrate, heard the suit and had the same dismissed in her judgment delivered on 12th October 2018.

4) The appellants were aggrieved hence they preferred this appeal and put forward the following grounds:

a) This appeal be allowed.

b) The judgment and decree of the Hon. Ms. E. Wanjala Senior Resident Magistrate dated 12th day of October 2018 be set aside and the appellants' claim against the respondent be allowed.

c) Judgment on both liability and quantum of damages be varied and or set aside.

d) The defendants be held wholly liable for the accident.

e) *The appellants be awarded special damages of kshs.1,203,479/=.*

f) *The costs of this appeal and that of the trial court be provided for by the appellants.*

5) When the appeal came up for hearing this court directed the appeal to be disposed of by written submissions. At the time of writing this judgment the appellants were the only parties who had filed their submissions.

6) I have re-evaluated the case that was before the trial court. I have also considered the written submissions and the authorities cited by the appellants.

7) The learned Senior Resident Magistrate considered the appellants' evidence and came to the conclusion that the appellants' witnesses did not inform the court on what transpired on the suit accident date to enable the court make an informed decision as to whether the principle of *res ipsa loquitur* applied.

8) The trial magistrate further stated that **Sister Beatrice Kamau (PW2)** did not witness the accident and that there was no eye witness. On the basis of the above reasons the learned Senior Resident Magistrate held that the appellants had failed to discharge the burden of proof as envisaged under Section 107(1) and (2) of the Evidence Act.

9) The trial magistrate also stated in her judgment that the name of Sister Beatrice Kamau (PW2) was not on the letters of administration granting her *locus standi* to appear and act on behalf of the estate of the deceased.

10) She also stated that PW2 did not prove that she had authority to act on behalf of the administrators of the estate of Mendoza Lopez Aquilina, deceased. In the trial magistrate concluded that PW2 lacked *locus standi* to act on behalf of the deceased's estate and found that the evidence of PW2 was based on hearsay.

11) On appeal, the appellants have urged this court to find that the trial court's conclusions were erroneous. It was argued that the trial magistrate fell into error when she concluded that the appellants (plaintiffs) ought to have attended court themselves.

12) I have carefully re-evaluated the evidence tendered vis-à-vis the conclusions arrived at by the trial magistrate in her judgement.

The record shows that the appellants' advocate successfully applied to substitute the witness statements of the appellants that of sister Beatrice Kamau (PW2) because the appellants were out of the country.

13) PW2 testified and produced inter alia the appellants (Plaintiffs') **identity cards, Resolution of the committee of the Daughters of St. Anne, a Grant of letters of administration Intestate, witness statements and receipts proving special damages.**

14) In her witness statement and in Her oral testimony PW2 did not indicate that she was acting or substituting the plaintiffs(appellants). It is clear from her evidence that she came into the suit as a witness in support of the appellants' (plaintiffs) case.

15) I agree with the submissions of the appellants that it is not mandatory for a plaintiff to attend court to testify in support of his or her case. What is important is that a plaintiff can use the evidence of any other competent witness to bolster his or her case.

16) In the case of **Julianne Ulrike Stamm vs= Tiwi Beach Hotel Ltd (1998) eKLR**: the Court of Appeal held inter alia as follows:

There is no reference in this rule to the plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1) a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel.

17) I also find that the learned Senior Resident Magistrate fell into error when she held that PW2 had no *locus standi* to act on behalf of the estate of Mendoza Lopez deceased. PW2 was a competent witness who attended court to testify on behalf of the appellants. She produced relevant documents showing that the appellants had been authorized by a resolution of the **committee of the Daughters of St. Anne** and by **letters of administration intestate** in respect of the estate of **Mendoza Lopez**, deceased.

18) The appellants also faulted the trial magistrate's finding that PW2's evidence was hearsay. It was pointed out that PW2 had presented the oral evidence narrated to her by the deceased as to the cause of the accident pursuant to the provisions of **Section 33 of the Evidence Act**, hence the same cannot be said to be hearsay.

19) I have perused the record and it is apparent that PW2 adopted the contents of her written witness statement in which she stated in part what the deceased told her as follows:

“When I went to the hospital, I found sister Mendoza Lopez (deceased) still alive and conscious. When I asked her how the accident happened, she told me she was going to Eastleigh and had crossed the road to pick a matatu in a line of matatus going to Eastleigh, when matatu registration number KAT 098H crushed her against the back of another matatu that was stationary waiting for passengers. The matatu that hit her had to move back for her to be picked up and taken to the hospital by a good Samaritan.”

20) It is clear from the evidence of PW2 that the witness narrated what transpired on the date of the accident. The evidence of PW2 cannot be said to be hearsay in view of the express provisions of Section 33 of the Evidence Act which provides as follows:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead..... are themselves admissible in the following cases-

Relating to cause of death

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

21) The statements made by the deceased to PW2 relates to the cause of death and in the absence of any contrary evidence, it is conclusive proof that the respondents (defendants) were to blame for the accident.

22) In the end, I am satisfied that the appellants had discharged the burden of proof under Section 107(1) and (2) of the Evidence Act.

23) On quantum, the appellants argued that the trial magistrate fell into error when she concluded that special damages were pleaded but not proved by production of receipts. I have carefully looked at the record and it is clear that P.C. John Mungao (PW1) produced the police abstract form and informed the court that he had been paid ksh.5,000/= to attend court to testify.

24) It is also apparent from the record that PW2 produced a total of 11 documents to wit; **identity cards, certificate of death, minutes, post mortem report, grant of letters of administration intestate, certificate of search**. Amongst the documents PW2 produced, are receipts proving hospital expenses totaling to ksh.1,198,779/=.

25) With respect, I agree with the appellants' submission that the learned Senior Resident Magistrate fell into error when she held that the plaintiffs had failed to establish special damages. It is clear that special damages were pleaded and proved.

26) The other aspect which the appellants challenged is the finding by the trial magistrate that the claim for loss of dependency was not pleaded nor proved. A close perusal of the plaint will reveal that the appellants had prayed for general damages under both the **Law Reform Act** and **the Fatal Accidents Act**. The minutes of the meeting of the **committee of the Daughters of St. Anne** which were produced by PW2 show that the appellants(plaintiffs) were appointed to act for them and on behalf of the deceased's estate.

27) It is clear from the evidence of PW2 that the deceased worked with the congregation in serving the people of the Lord and her death left a huge gap in the organization. Since the deceased earnings were not specified, I will make a global award of kshs.1,500,000/=.

28) In the end, this appeal is found to be meritorious. It is allowed.

Consequently, the order dismissing the suit is set aside and is substituted with an order finding the respondents (defendants) wholly liable for the accident.

29) The appellants are awarded as follows:

a) Special damages ksh.1,203,479/=

b) General damages

i. Pain & suffering ksh. 150,000/=

ii. Loss of expectation

of life ksh. 100,000/=

iii. Loss of dependency ksh.1,500,000/=

ksh.1,750,000/=

Total Ksh.2,953,479/=

The special damages to attract interest at court rates from the date of filing suit until the date of full payment while general damages to attract interest at court rates from the date of this judgment until the date of full payment.

(iv) Costs of the suit and this appeal are awarded to the appellants.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 10th day of July, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent