



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 15 OF 2020**

**MERCY WANJIRU NYAGA.....APPELLANT**

**VERSUS**

**JOSPHAT KIURA.....1<sup>ST</sup> RESPONDENT**

**MARTIN NJERU MUGO.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the judgment of the learned Principal Magistrate Hon. H. Nyakweba in Embu CMCC No. 124 of 2018 dated and delivered on 3<sup>rd</sup> March 2020).***

**JUDGMENT**

**A. Introduction**

1. The Appellant herein filed in this court a memorandum of appeal appealing against the judgment of the Learned trial magistrate Hon. H. Nyakweba (PM) in Embu CMCC 124 of 2018 delivered on 3/03/2020 dismissing her case. The grounds upon which the appeal is based were that: -

- 1) *That the learned trial magistrate erred in law and fact in dismissing the appellant's case in toto.*
- 2) *That the learned trial magistrate erred in law and fact in failing to consider the severity of the injuries sustained by the Appellant.*
- 3) *That the learned trial magistrate erred in law and fact in failing to award the Appellant the general damages for pain, suffering and loss of amenities against the law and weight of the evidence on record.*

2. The appellant thus prayed that the appeal be allowed with costs and the judgment of the trial court be set aside and a reasonable award be made for general damages for pain, suffering and loss of amenities.

3. The record of appeal was served upon the Respondents' counsel but they never appeared in court on the day of the hearing of the appeal. The appellant erected to canvass the appeal by way of written submissions and which submissions were filed.

**B. Submission by the Appellant**

4. The appellant submitted to the effect that she had proved liability as against the Respondent on a balance of probabilities and that she gave evidence as the eye witness and which evidence was never controverted as the Respondents herein or their advocates never attended court on the day of the hearing of the suit when she produced documents in support of her case. As such her evidence was not controverted. That she was able to prove the ownership of the accident motor vehicle by producing the police abstract and the copy of records indicating that the 2<sup>nd</sup> Respondent was the registered owner of the accident motor vehicle. Reliance was made on the case of **Securicor Kenya Ltd -vs- Kyumba Holdings Civil Appeal No. 73 of 2002** and **Joel Muga Opinja -vs- East African Sea Foods Ltd** to the effect that ownership of a motor vehicle can be proved by registration card or logbook or document from the registrar of motor vehicle showing who is the owner. Reliance was further made to the case of **Motex Knitwear Limited -vs- Gopitex Knitwear Mills Ltd Nairobi (Milimani) HCCC No. 834 of 2002** to the effect that failure by a defendant to call evidence means that the plaintiff's case is unchallenged and that the defendant's defence is unsubstantiated. The appellant further submitted that the appellant was entitled to award of general damages under the Law Reforms Act for pain and suffering and proposed a figure of Kshs. 100,000/= relying on the case of **David Kahuruka Gitau & another -vs- Nancy Ann Wathithi Gitau & another [2016] eKLR**. She submitted that the court could award Kshs. 200,000/= for loss of expectation of life and relied on **Kericho HCCA No. 48 of 2014- Vincent Kipkorir Tanui (suing as the administrator and/or personal representative of the Estate of Samwel Kiprotich Tanui (deceased) -vs- Mogogosiek Tea Factory Co. Ltd & another**. It was further submitted that the appellant was entitled to damages for loss of dependency under the Fatal Accidents Act and the court was invited to apply a multiplier of 8 years as the deceased was 66 years old and reliance made on **Joseph Muturia M'Libiyo -vs- Patrick Njoroge Gathogo (2002) eKLR**; a

multiplicand of Kshs. 12,926.55 being the minimum wage under the Regulation of Wages (General) (Amendment) Order and a dependency ratio of 2/3. Reliance was made on Nyamira Tea Farmers Sacco -vs- Wilfred Nyambati Karaita & another Kisii Civil Appeal No. 68 of 2005 [2011] Eklr and Jacob agiya Maruja & Another -vs- Simeoni Obayo (Civil) Appeal No. 107 of 2002 [2005] eKLR on prove of earnings. The Appellant thus proposed a figure of  $2/3 \times 12,926.55 \times 8 \times 12 = 827,299.2$  as the damages under that head.

5. The Respondents did not participate in the appeal.

### **C. Issues for determination**

6. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd [1968] EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348. These authorities echo section 78 of the Civil Procedure Act and by dint of the same, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

7. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634 and Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)).

8. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the appellant. This appeal therefore revolves around the following issues: -

i. *Whether the appellant proved her case to the required standards*

ii. *What damages ought to be awarded to the appellant if the court finds in affirmative the first issue.*

### **D. Determination of the issue**

#### **i. Whether the appellant was able to prove her case to the required standards.**

9. It is trite law that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities (See Miller v Minister of Pensions [1947] 2 All ER 372 and Section 107 of the Evidence Act). However, there is evidential burden which is captured by sections 109 and 112 of the Evidence Act. These two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that: -

*“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”*

10. Ibrahim J (as he then was) in Treadsetters Tyres Ltd -Vs- John Wekesa Wepukhulu [2010] eKLR and which authority I find persuasive held as thus: -

*“On question of proof, and burden thereof, it is stated in CHARLESWORTH & PERCYON NEGLIGENCE 9<sup>TH</sup> edition at P.387: -*

*“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.....”*

11. In East Produce (K) Limited -vs- Christopher Astiado Osiro In Civil Appeal No. 43 Of 2001 the Court of Appeal held that: -

*“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku -Vs- Kenya Cargo Hauling Services Ltd 1991 where it was 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.”*

(See Mount Elgon Hardware -vs- Millers C.A. No. 19 of 1996 and Mwaura Mwalo v Akamba Public Road Services Ltd HCC No 5 of 1989).

12. It follows that the initial burden of proof lay on the plaintiff, the Appellant in this appeal to prove negligence.

13. Negligence was defined in the case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done” (See Salmond and Heuston on the Law of Torts 9<sup>th</sup> Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See **Donoghue v. Stevenson [1932] A.C. 562.**)

14. The question therefore is whether the appellant in discharging the burden of proof placed on her did prove the elements of the tort of negligence (the tort upon which the suit was based)?

15. The plaintiff in the trial court filed her plaint whereby she pleaded the particulars of negligence on the part of the Respondents herein. She further filed her list of documents and her witness statements and which she subsequently adopted as her evidence in chief. The Defendants therein (the Respondents herein) filed their defence wherein they denied the averments in the plaint and raised a defence of contributory negligence. However, the Respondents herein did not attend court on the day of the hearing of both the plaintiff’s case and the defence case as such they did not call any evidence in support of their defence.

16. I appreciate the trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings and that the evidence adduced by the opposing party against them is uncontroverted and therefore unchallenged (See **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited (supra)**, **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001**, **Karuru Munyoro vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988**, **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007**).

17. As I have opined above, there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove negligence against the defendant where the claim is based on negligence. The plaintiff in my opinion must place sufficient material before court which is sufficient enough to discharge the burden placed on such a party. On the day of hearing of the suit before the trial court, the appellant adopted her witness statement and produced documents as her evidence. What this means is that the said statement became her evidence in chief. A perusal of the said statement however leaves me with more questions than answers. The same does not prove on the balance of probabilities the issue of negligence by the Respondents herein. In fact, looking at the particulars of negligence, the court is not in a position to tell how the accident occurred.

18. The Respondents had denied negligence and attributed fault to the deceased and particulars whereof were supplied at paragraph 7 of the Defence. Having failed to adduce evidence in proof of those particulars, it cannot be said that the Appellant sufficiently rebutted the Respondents’ contention that they were to blame for the occurrence. In this case, there was no material before the court for the court to require the Respondent to rebut the allegations. As Ibrahim J (as he then was) in **Treadsetters Tyres Ltd –Vs- John Wekesa Wepukhulu (supra)** held while finding the evidence on record not sufficient to prove negligence (more so breach of duty owed to the deceased) on a balance of probabilities and having made reference to **CHARLESWORTH & PERCY** at P. 392: -

*“The party seeking to recover compensation for damage must make out the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed.”*

19. I note that the Respondents filed a witness statement by one Peter Gisori Njoguri filed on 5/02/2019 and wherein the author claimed that he was the driver of the accident motor vehicle on the date of the accident and proceeded to state that he was driving the vehicle at average speed and it was drizzling and when he saw somebody staggering on the road at a close proximity, while holding beer.

20. In my opinion, a suit cannot be allowed as prayed just by the mere fact that it was not opposed. The plaintiff in a suit has a duty to tender sufficient evidence in support of his case. Otherwise, the court would end up allowing even frivolous claims just because the evidence was uncontroverted.

21. As such, considering the evidence which was tendered before the trial court, I am of the opinion that the conclusion reached by the Learned Trial Magistrate (dismissing the suit before it for want of evidence to establish negligence for liability to attach) was founded on sound evidence.

22. As such the appeal herein is hereby dismissed.

23. It is so ordered.

**DELIVERED, DATED and SIGNED at EMBU this 11<sup>th</sup> day of November, 2020.**

**L. NJUGUNA**

**JUDGE**

**In the presence of: -**

.....for the Appellant

.....for the Respondent