



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 60 OF 2015

MUTHIO MUSYOKA (Suing as Personal Representative of the Estate of

DANIEL MUTINDA MUSYOKA (DECEASED).....APPELLANT

VERSUS

MAGNATE VENTURES.....RESPONDENT

(Being an Appeal from the Judgment in **Mwingi Resident Magistrate's Court Civil Suit No. 48 of 2008** by **Hon. Gichimu W. J. R M** on **21/04/09**)

J U D G M E N T

1. **Muthi Musyoka** (Suing as Personal Representative of the Estate of **Daniel Mutinda Musyoka**, the Appellant sued the Respondent claiming General and Special damages, costs and interest. The claim arose out of a road traffic accident in which **Daniel Mutinda Musyoka** (Deceased) was involved. It was pleaded that on the **24th February, 2006**, he was riding a bicycle off the road along **Mwingi-Garissa Road** when he was hit by motor-vehicle Registration No. **KAS 596T** that was owned by the Respondent and at the time was driven negligently by his driver/agent/servant.

2. The Respondent denied that the Appellant had capacity to sue on behalf of the Estate of the Deceased. It denied ownership of the motor-vehicle and the occurrence of the accident. It denied the negligence attributed to its driver and averred in the alternative that if the Deceased got injured while cycling he was wholly and/or substantially to blame for contributing to the occurrence of the subject accident.

3. The learned trial Magistrate considered evidence adduced and was of the view that there was no dispute that an accident occurred as pleaded but was not able to attribute the negligence to the Respondent's driver. Therefore he did not find the Respondent liable for the accident and dismissed the claim. On quantum he found that had the claim been proved he would have awarded **Kshs. 240,000/=** in damages.

4. Being aggrieved by the Judgment of the Court, the Appellant appealed on grounds that: The decision was reached against the weight of the evidence; as there was an eye-witness to the accident, reaching a finding that the Respondent was not to blame for the accident was a misdirection as the trial Magistrate failed to appreciate a balance of probabilities. He prayed for setting aside the Judgment and order of the Lower Court and to enter Judgment in favour of the Appellant in the sum of **Kshs. 340,000/=** in General Damages as assessed by the trial Magistrate.

5. Directions were given for the Appeal to be canvassed by way of written submissions but only the Respondent filed submissions.

6. It was urged by the Respondent that from the testimony of the witnesses, it was clear that the Appellant was to blame for the accident. That the 1st Appellant's witness' testimony was hearsay and his imagination. That the police officer who testified on behalf of the Appellant took over the file from the Investigation Officer where the recommendation was that a public inquest be conducted. He did not find the driver to blame. That the witness who purportedly saw how the accident happened was not observant enough as he was fetching sand at the river therefore could not tell what actually happened.

7. Further, it was argued that the trial Court was right in finding that the Appellant failed to prove the point of impact which would have led to the issue of liability being decided in favour of the Deceased. That no sketch map was tendered to anchor that crucial detail hence the Court was right in finding that the Deceased caused his own accident as the driver did not drive off the road into the path of the Deceased which means that he was not exercising caution. He blamed the Deceased to have not exercised caution while riding the bicycle as confirmed by evidence adduced by the witnesses of the Respondent.

8. This being a first Appellate Court, my duty is to reconsider what transpired in the Lower Court. Due to the nature of the matter I must also consider what transpired on Appeal.

9. This is a case that was transferred from **Machakos High Court** to this Court for determination. The Appeal was admitted to hearing on the **22nd September, 2009**. On the **29th April, 2010** when the file was placed before **Waweru, J.** he observed that the Record of Appeal did not contain the certified copy of the Decree appealed against, the Appellant was directed to file a Supplementary Record of Appeal pending further directions being given. The order of the Court was not complied with. On the **7th June, 2017** the Deputy Registrar sent a Notice of Dismissal to the parties pursuant to the provisions of **Order 42 Rule 35(2)** of the **Civil Procedure Rules** which provides thus:

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

When the matter came up the Appellant had retained **J. K. Mwalimu & Company Advocates** who filed a Notice of Change of Advocates. It was intimated that the Appellant was willing to proceed with the Appeal and a date was fixed for directions when there was no appearance. On the **10th July, 2018** both parties appeared before the Deputy Registrar who gave a mention date for directions. On that particular date there was no appearance for the Appellant. The Respondents were present therefore directions were taken and only the Respondent complied. Consequently, as it stands the Appellant failed to prosecute his Appeal.

10. It was the argument of the Appellant through his Memorandum of Appeal that the learned trial Magistrate misdirected himself in reaching the decision to dismiss his case. The obligation was upon him to prove the allegations on a balance of probabilities. Having failed to canvass the Appeal as directed by the Court, although his allegations were arguable, they could not be sustained.

11. In the circumstances, the Appeal filed herein is dismissed with costs to the Respondents.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 15th day of January, 2019.

L. N. MUTENDE

JUDGE