



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 12 OF 2018

(CORAM: R. E. ABURILI - J.)

ZOS & CAO (Suing as the Legal Representatives in the Estate of

SAO (Deceased).....APPELLANTS

VERSUS

AMOLLO STEPHEN.....RESPONDENT

(Being an appeal against judgment delivered on 4th May 2018 at the Senior Resident Magistrate in Bondo PMCC No. 48 of 2017, before Hon. E.N. Wasike, SRM).

JUDGMENT

1. The Appeal herein arises from the judgment and decree of Hon. E.N. Wasike, SRM vide Bondo PMCC No. 48 of 2017, dated 4th May 2018.
2. The appellants herein are ZOS and CAO, suing as Legal Representatives in the Estate of SAO (deceased). The Respondent is Amollo Stephen.
3. The appellants were Plaintiffs in the Lower Court whereas the Respondent was the Defendant.
4. The Plaintiff's claim against the Defendant was as per the Complaint dated 30th May 2017.
5. According to the Plaintiffs, on or about the 19th day of August 2015, the deceased SAO was lawfully walking off the *Bondo-Misori Road*, on the right side of the road while facing Misori direction when at Bar Kowino Area, the Defendant's motor vehicle registration No. KAT 685F Toyota Station Wagon which was approaching from Bondo direction towards Misori was carelessly, negligently and or recklessly driven, managed and or controlled by the Defendant and or his driver that it lost control and suddenly swerved or veered to the right of the road and knocked the deceased causing him fatal injuries, and that as a consequence the Plaintiffs suffered loss and damage for which they claimed for damages under the Fatal Accidents Act and the Law Reform Act. The deceased was at the time of his aged 13 years old and was survived by his brothers V O aged 18 years, and H O O aged 14 years and his putative parents the Plaintiffs in the suit.(the deceased was an orphan).
6. The Complaint narrated particulars of negligence on the part of the defendants. These are: -
 - (a) *Swerving / veering off the road thus knocking the deceased.*
 - (b) *Loosing control of Motor Vehicle KAT 685F.*
 - (c) *Driving too fast in the circumstances.*
 - (d) *Driving Motor Vehicle Reg. No. KAT 685F without brakes or with defective brakes.*
 - (e) *Driving a defective / unroadworthy motor vehicle.*
 - (f) *Failing to keep proper lookout for the deceased and other road users.*

(g) Failing to notice the deceased in good time or at all.

(h) Driving the said motor vehicle KAT 685F without any attention, or care at all.

(i) Failing to exercise sufficient care, skill or prudence or at all in driving Motor vehicle KAT 685F.

(j) Failing to stop, slow down, apply brakes, swerve or in any other way act so as to manage and or control motor vehicle registration no. KAT 685F so as to avoid the accident.

(k) Driving under the influence of alcohol.

(l) Falling asleep while driving.

7. The trial court record shows that the defendant was 'served' with summons to enter appearance on 1/9/2017, as per the 'affidavit of service' filed by Nadebu P. Caleb on 14/9/2017. However, the said "Affidavit of Service" was never commissioned hence it was not sworn before any Commissioner for Oaths or a Magistrate as required by the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya**. This is so because an Affidavit can only be an affidavit if it is signed by the deponent in the presence of a person commissioning the affidavit. This was not the case with the 'affidavit of service' of Nadebu P. Caleb which was only signed by the author but not commissioned."

8. The above notwithstanding, the court record further shows that on 11/10/2017 the Plaintiff's counsel filed a request for judgment on account of the defendant's failure to either enter an appearance or file defence in time or at all. The request for judgment is dated 27/9/2017.

9. The trial court record further shows that on 19/10/2017, the request for judgment dated 27/9/2017 was endorsed and formal proof hearing was set for 23/11/2017.

10. In his oral testimony before the trial court, PW1 ZOS testified that CA, the 2nd Plaintiff was his wife and that she was unwell. He stated that the deceased SAO was his nephew and that his parents died. PW1 produced a Death Certificate S/No. 0450531 as PExhibit No. 1 showing that the deceased died on 19/8/2015 in a road traffic accident. That he was knocked and died instantly. He stated that he did not witness the accident. That the matter was reported to the police station and the accident motor vehicle was towed to the station. PW1 also produced postmortem report dated 20/8/2015, Police Abstract from Bondo Police Station, Chief's letter, grant of Letters Administration *Ad Litem*, Search from Registrar of Motor Vehicles showing the defendant as the owner of the accident motor vehicle **KAT 685F** and receipts showing legal fees of Kshs, 21,000/= paid to the Advocate to obtain limited grant.

11. PW1 also produced a report Book from [Particulars Withheld] Primary School showing that the deceased was in Class 7 and aged 13 years old at the time of his demise. He also testified that the deceased was a bright student and the witness also produced a demand letter dated 16/12/2016 issued by his advocates to the defendant as Exhibit No. 9.

12. The plaintiff prayed for compensation and expenses incurred in the suit. The Plaintiff's suit was then closed and the submissions were filed urging the court to allow the suit for general and special damages.

13. In his judgment delivered on 4/5/2018, the trial magistrate Hon. E.N. Wasike SRM dismissed the Plaintiff's suit on the basis that liability had not been established in that the negligent acts of another person that contributed to the occurrence of either an uneventuality or accident were not proved.

14. He stated that the Plaintiff simply testified that the deceased died as a result of a road traffic accident and that he did not witness the accident. That he failed to call an eye witness who witnessed the accident and so it threw the suit into speculation.

15. That there was no evidence that convicted the Defendant to the accident and therefore he found that the Plaintiff had failed to prove liability on the defendant hence the defendant was found not liable. The trial magistrate, however held that had he found in favour of the Plaintiffs, he would have awarded the damages as follows: -

Pain and suffering Kshs. 20,000/=

Loss of expectation of life Kshs. 120,000/=

Lost years Kshs. 800,000/=

Special Damages Kshs. 21,000/=

Total Kshs. 961,000/=

16. Dissatisfied with the above judgment and decree of the trial court, the Plaintiffs filed this appeal vide a Memorandum of Appeal dated 23/5/2018 asserting that: -

(1) The learned Trial Magistrate erred in law and fact in writing a judgment which is against the provisions of law and procedure.

(2) The learned Trial Magistrate erred in law and fact by failing to appreciate that there was interlocutory judgment entered against the Respondent and as such the appellants were not required to prove liability.

(3) The learned Trial Magistrate erred in law and in fact in dismissing the appellant's case based on wrong assumption that an eye witness did not testify on liability.

17. The Appellants urged this court to set aside the trial court's judgment on the issue of liability, enter judgment for the appellants on liability at 100% against the Respondent, uphold the trial court's finding on quantum and grant costs of the trial case and this appeal to the appellants.

18. This appeal was canvassed orally with Mr. Okoth, Advocate submitting on behalf of the appellants whereas Mr. Langat Advocate held brief for Mr. Kibicho Advocate for the Respondent.

19. In his submissions, Mr. Okoth argued all the grounds together and maintained that since the judgment in default of appearance and defence had been entered against the defendant, and as the case was merely for formal proof, the trial court should not have dismissed the suit since under **Order 10 Rules 2, 4 and 6 of the Civil Procedure Rules 2010** are express that where judgment is entered, the court is limited to setting down the suit for assessment of damages.

20. Reliance was placed on **HCC No. 158 of 2008** by **Mabeya J** in **Adan Hussein Ali Rahima Dahir vs Geoffrey Ndiku Mutisya and A.H. Hameed Traders** where the learned Judge held at *paragraph 4* that:

"The Plaintiff need not prove liability in instances where interlocutory judgment is entered since such judgment is considered final on the issue of liability. All the plaintiff is required to do therefore is to prove damages. See Felix Mathenge vs Kenya Power & Lighting Co. Ltd (2008) eKLR...."

21. The Appellant's Counsel further relied on **HCC 1264/2000 Roy Transmotors vs Silkin Limited & Another [2004] eKLR** where the High Court (Angawa J) held that judgment on liability in interlocutory judgment is final and no proof is needed. Counsel urged the court to allow the appeal with costs.

22. In the opposing the appeal, Mr. Langat Counsel for the Respondent submitted that **Section 107 of the Evidence Act** requires the appellant to prove its case to the required standard and that even at formal proof, the appellant should have proved liability on the part of the Respondent and further, that since the Plaintiff / Appellant testified that he did not witness the accident, there was no causal link between the accident and the fatal injuries occasioned to the deceased.

23. He also submitted that the judgment by the trial court confirms with **Order 21 Rule 4 of the Civil Procedure Rules** and urged the court to dismiss the appeal with costs to the Respondent.

DETERMINATION:

24. Having considered this appeal in line with Section 78 of the Civil Procedure Act as a first appellate court and as stipulated in the case of **Sielle & Another vs Assdociated MotorBoat Company Ltd and Others [1968] EA 123**, in my humble view, the main issues for determination in this appeal are whether the trial magistrate erred in law and fact in dismissing the appellants suit on account that no liability against the Respondent was established by the testimony of PW1 who was not an eye witness, despite interlocutory judgment in default having been entered.

25. Under **Sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya**, the person who alleges is under a duty to prove all allegations as contained in his claim against the Defendant, on a balance of probabilities, as was held in **Kirugi & Another Vs Kabiya & 3 Others [1987] KLR 347**, the Court of Appeal held as follows: -

"The burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof." {Emphasis added}.

26. It was therefore incumbent upon the appellants to prove the occurrence of the material pleaded accident.

27. In this case, the appellant testified and stated that the deceased was involved in an accident and that he died on the spot. The postmortem form produced as exhibit shows what injuries the deceased sustained that resulted in his death.

28. The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred.

29. The police abstract produced as PEx. 3 dated 21/8/2018 only provides particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereof.

30. The accident was reported at Bondo Police Station and the status of the matter was that it was P.U.I – pending under investigations.

31. That being the case, it was incumbent upon the appellant, at the time of hearing, to either call an eye witness who saw the accident take

place to prove any of the listed particulars of negligence attributed to the Respondent, or to call the police from Bondo Police Station, who investigated the accident to shed light on the results of the investigation; and as to who was to blame for the subject accident wherein the deceased lost his life.

32. Albeit, there was no defence filed by the Defendant / Respondent to deny the particulars of negligence pleaded by the appellants, the burden of proof lay and remained with the appellants to prove negligence on the part of the defendant / respondent and therefore his liability to pay damages to the estate of the deceased SAO who was a pedestrian at the time of the accident.

33. Reverting back to the question of interlocutory judgment entered against the Defendant/Respondent in default of appearance and defence, I observe that the 'affidavit' of service filed by the appellant's counsel was not commissioned hence the 'deponent' process server Mr. Nadebu cannot be examined on the truthfulness or otherwise of the purported service of summons to enter appearance and plaint upon the defendant.

34. In my humble view, the trial court had no power to enter judgment in favour of the Defendant/Respondent in the absence of a commissioned affidavit of service proving service of a plaint and summons to enter appearance.

35. The trial court ought to have been more vigilant before endorsing the request for judgment which I hereby find and hold, was erroneous, and therefore all the *ex parte* proceedings that followed that endorsement of the request for judgment were erroneous and a nullity, whether or not the appellant proved negligence on the part of the Defendant/Respondent.

36. It is not in doubt that it was the duty of the appellant to prove liability of the Defendant/Respondent, and not to merely testify that there an accident which took place at a particular place and time involving the Defendant/Respondent's motor vehicle and the deceased child.

37. In my humble view, there can be no fair hearing in a matter where the proceedings were a nullity ab initio for want of service of summons to enter appearance and a plaint requiring appearance and defence and where the purported process server did not swear an affidavit proving such service.

38. **Article 48 of the Constitution of Kenya** contemplates access to justice for all. In addition, **Article 159 of the Constitution** places on courts and tribunals the burden of ensuring that justice is done to all.

39. In this case, it is the view of the court that had the Defendant/Respondent been served with a plaint and summons requiring his appearance, he would have shed light on what transpired on the material date of the accident, and not merely stay out of the proceedings and let the plaintiff who was not an eye witness say nothing about what transpired.

40. The Estate of the deceased did suffer an injustice as a result of failure to involve the defendant in the proceedings as there was no one called to state what transpired.

41. The two authorities cited by the appellants' counsel are only persuasive and not binding on this court.

42. I have cited the Court of Appeal decision which is clear that even if the case proceeds by way of formal proof, the plaintiff is under a legal duty to prove negligence and liability of the defendant as particularized in the plaint. Liability is not like special damages. In the latter case, judgment would be final where there is no defence as opposed to the former and hence the requirement for formal proof to prove negligence or liability of the defendant and the general damages suffered as a result of the alleged acts of negligence.

43. Having found that the proceedings leading to the impugned judgment were irregular and improper, I am left with no alternative but to invoke the provisions of **Section 78 of the Civil Procedure Act** and **order** that the entire suit namely; **Bondo PMCC No. 48 of 2017** shall be reheard afresh before any other Magistrate other than Hon. E.N. Wasike, SRM.

44. As there was mistrial of the suit, I **order** that each party shall bear their own costs of the trial court and of this appeal.

45. The judgment of the trial court entered as interlocutory judgment and final judgment subject of this appeal are hereby set aside and vacated and in their place, this court reinstates the Plaintiff/Appellant's suit for rehearing. The Defendant/Respondent is hereby granted 15 days of this judgment to file and serve his defence upon the Plaintiffs' Counsel.

46. Parties to appear before Bondo PM's Court on 3/4/2019 for further directions on the hearing of the suit.

Dated, Signed and Delivered in Open Court at Siaya this 4th Day of March 2019.

R.E. ABURILI

JUDGE