



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 562 OF 2007**

**JENNIFER TABITHA WAMBURA KIRINGU**

**ANNA MUMBI GATHECA (Suing as the personal  
representatives of the estate of**

**JOHNSON MURIMI MUMBI (Deceased).....APPELLANTS**

**-VERSUS-**

**STEPHEN KAMAU WAMUTWE t/a**

**STEMAK TOURS.....RESPONDENT**

***(Being an appeal from the judgment delivered by Honorable E. N. Maina***

***(Ms.) (Ag. Senior Principal Magistrate) on 7<sup>th</sup> June, 2007 in CMCC NO. 9158 OF 2003)***

**JUDGEMENT**

1. The appellants who filed a suit vide the plaint dated 3<sup>rd</sup> September, 2003 before the Chief Magistrate's Court on behalf of the estate of the deceased-Johnson Murimi Mumbi, deceased.
2. The same was filed against the respondent and another party (*the third party*), in which they sought damages under the Law Reform Act and the Fatal Accidents Act together with costs and interest thereon for the fatal injuries sustained by the deceased person as a result of an accident that occurred in the course of his employment as a driver with the respondent.
3. It was pleaded in the plaint that on or about the 3<sup>rd</sup> of August, 2002 while driving motor vehicle registration number KAB 091P owned by the third party, the deceased was involved in an accident along Nakuru-Nairobi highway.
4. The appellants further pleaded that the injuries and death of the deceased were caused by the negligence of the respondent and the third party, who overworked the deceased and failed to ensure the subject motor vehicle was serviced and fit for road use.
5. The plaint also stated that at the time of his death, the deceased was the sole breadwinner, earning a monthly salary of Kshs.10,000/= and whose dependants were his wife (the 1<sup>st</sup> appellant) and a 4-year old son.
6. When the matter came up for hearing before the trial court, the suit against the third party was withdrawn by consent.
7. At the hearing, two (2) witnesses gave evidence in support of the appellants' case while the respondent testified as the sole defence witness.
8. At the close thereof, the parties put in written submissions and the trial court ultimately dismissed the appellant's case with costs to the respondent.
9. Being aggrieved by the aforesaid decision, the appellants preferred this appeal and put forward the following grounds:

- i. THAT the learned trial magistrate erred in law and in fact in holding that the deceased was responsible for his own death.*
- ii. THAT the learned trial magistrate erred in law and in fact by failing to attribute negligence on the part of the respondent.*
- iii. THAT the learned trial magistrate erred in law by disregarding the evidence of the eye witness.*
- iv. THAT the learned trial magistrate erred in holding that the appellants had not proved their case on a balance of probabilities.*
- v. THAT the learned trial magistrate erred in law by relying on hearsay evidence from the respondent.*
- vi. THAT the learned trial magistrate considered irrelevant facts and evidence.*

10. In resistance thereto, the respondent filed grounds of opposition on 3<sup>rd</sup> October, 2007 supporting the trial court's decision.

11. The appeal was disposed of by written submissions, though it would appear this court only has the submissions of the appellant.

12. That notwithstanding, I have carefully considered the submissions on appeal alongside the cited authorities. I have also considered the record and supplementary records of appeal and re-evaluated the evidence presented before the trial court.

13. In my view the main issue which commends itself from determination on appeal is whether or not the learned trial magistrate's decision to dismiss suit was proper. A close perusal of all the grounds of appeal will reveal that they all relate to the question of liability.

On this limb, the appellant submits that since overtaking in itself is not evidence of negligence, it was wrong for the learned trial magistrate to conclude that the deceased was negligent on this basis.

I refer to the oral evidence presented to by the appellants' witnesses as referenced in the proceedings forming part of the record of appeal.

14. It is oral evidence PW 1 the 1<sup>st</sup> appellant herein testified that the deceased left their home early morning on the material date and she later learnt of the accident and deceased's death from PW 2.

15. PW 1 also stated that the deceased worked as a driver for the respondent, adding that he was the sole breadwinner of the home.

16. PW1 further stated that the deceased never drunk and was certainly not drunk on the material day, neither was he a matatu driver.

17. Boniface Kihara Wamuri, PW 2 on his part gave evidence that he similarly worked for the respondent as an electrician and that on the material day, he had accompanied the deceased in the subject motor vehicle headed for Nakuru and that the deceased was the driver and adding that he gave two (2) other persons a lift on the way.

18. PW 2 further stated that they were overtaking another vehicle when they noticed an oncoming vehicle and in an attempt to avoid a collision, they veered off the road and the subject motor vehicle rolled. That in the process, he and the other two (2) passengers sustained injuries while the deceased died on impact.

19. It was also PW 2's testimony that prior to the accident, the deceased did not make any mention of the condition of the subject motor vehicle.

20. The respondent in his oral evidence confirmed that both the deceased and PW 2 were his employees and that they were on assignment on the material date to tow a vehicle which had broken down in Nakuru.

21. He as well stated that he had no prior knowledge that the deceased and PW 2 had been accompanied by two (2) passengers, adding that an inquest was initially to be conducted but the same was abandoned following a court order.

22. The respondent further stated that he had serviced the subject motor vehicle the day before the accident and all was well with it as far as he was aware; that this was confirmed by the certificate of examination and test of the said vehicle issued following its inspection.

23. In her judgment, the trial magistrate indicated that based on the account offered by PW 2, the accident occurred after the deceased's act of overtaking and that PW 2 testified that at the time, the deceased was driving at 90kph.

24. In the end, the trial magistrate came to the conclusion that the deceased was to blame for the accident, since there was evidence showing that he was not driving carefully.

25. The trial magistrate also came to the conclusion that the appellants had not proved their case against the respondent on a balance of probabilities.

26. Having summed up the evidence tendered before the trial it is now the duty of this court to re-evaluate the case to determine whether the finding of the court was proper. The evidence of PW 2 was an eye witness to the happenings of the material day.

27. PW 2 clearly indicated that the accident occurred while the deceased was overtaking other motor vehicles. PW2 further stated that upon noticing an oncoming vehicle, the deceased swerved and veered off the road and in the process, the subject vehicle rolled.

28. It is also noted that PW 2 in his evidence made no mention of any apparent defects on the vehicle prior to the accident. The motor vehicle inspection report produced by the respondent indicated that there were no pre-accident defects.

29. After re-evaluating the evidence tendered before the trial court, it is clear to me that the evidence suggest that the deceased was solely to blame for the accident. He chose to overtake without ensuring the road was clear enough. There is really nothing to show that the accident was caused by the respondent's negligence.

30. I am satisfied that the learned trial magistrate took into account the facts and evidence placed before her and came to the correct conclusion that the appellants had failed to prove their case on a balance of probabilities.

31. In conclusion it is clear that the trial magistrate made reference to the inquest finding, but she did not solely rely on it in making her finding. In fact, the reading of her judgment reveals that she carefully considered the documentary and oral evidence before her and only referred to the inquest for emphasis or confirmation purposes.

32. In the end, the appeal is found to be without merit the same hereby dismissed with costs to the respondent.

**Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> day of May, 2019.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....**for the Appellants**

.....**for the Respondent**