



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 377A OF 2010

PHARIS MUNDIA WARUI.....APPELLANT

- V E R S U S -

IRENE WAMBUI MWANGI.....1ST RESPONDENT

PATRICK GATHI MWANGI.....2ND RESPONDENT

**(Suing on their own behalf and on behalf of the
estate of Mwangi Gathi Karuena, deceased)**

(An appeal from the ruling and orders of Hon. S. N. Riechi (CM)

in

Milimani CMCC No. 3638 of 2005 delivered on 18th day of August 2010.)

JUDGEMENT

1) Irene Wambui Mwangi and Patrick Gathii Mwangi, the 1st and 2nd respondents respectively, in their capacities as the legal representatives of the estate of Mwangi Gathi Karuena, deceased, filed a compensatory suit before the Chief Magistrate's Court, Nairobi against one Lota Automobiles Ltd and Pharis Mundia Warui, the appellant herein for the fatal injuries the deceased suffered when he was allegedly hit by motor vehicle registration no. KAQ 066A along Thika road opposite Safari Park Hotel while the deceased was lawfully walking as a pedestrian. Lota Automobiles and the appellant filed a defence to deny the respondents' claim. The suit was heard by Hon. Riechi, learned Chief Magistrate, who in the end entered judgment in favour of the respondents and awarded damages in sum of ksh.422,400/=.

2) Pharis Mundia Warui, the appellant herein, felt aggrieved by the decision hence she preferred this appeal. On appeal the appellant put forward the following grounds:

1. THAT the learned trial magistrate erred in law and in fact in reaching a finding on liability against the second defendant contrary to the evidence adduced.

2. THAT the learned trial magistrate erred in law and in fact in making a finding on vicarious liability when the same was not supported by evidence nor applicable under the circumstances.

3. THAT the learned trial magistrate erred in law and in fact in making a finding based on evidence adduced through submissions and not presented before the court.

4. THAT the learned trial magistrate erred in law and in fact in making a finding on liability as against the second defendant yet the same had not been established nor was any evidence in support thereof led at the trial.

5. THAT the learned trial magistrate erred in law and in fact in reaching a conclusion that the second defendant did not call any evidence to refute the plaintiffs allegations on the alleged sale of the motor vehicle by the first defendant to the second defendant yet the said evidence was not produced by the plaintiffs in their testimony but annexed to the plaintiffs advocates submissions.

6. THAT the learned trial magistrate erred in law and in fact in relying on documents not produced at trial to be subjected to cross examination nor verified not tendered as exhibits contrary to the Civil Procedure and Evidence Act on production of documents and which formed the basis of the courts decision.

7. THAT the learned trial magistrate failed to consider the second defendants' submissions or at all on the second defendant's case.

3) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of 7 grounds of appeal, those grounds revolve around the question touching on liability and quantum.

4) It is the submission of the appellant that the learned trial Chief Magistrate erred when he found the appellant liable for the accident yet there was no credible evidence presented to link the appellant with the accident. The appellant argued that the respondents failed to summon eye witnesses or the police officer who investigated the accident to establish the tort of negligence as against the appellant. The 2nd respondent argued that PW2 produced the police abstract form which indicated that motor vehicle registration no. KAQ 066A knocked down the deceased killing him instantly. The respondent further submitted that the contents of the police abstract form were not challenged in cross-examination nor controverted by independent evidence. The 2nd respondent further argued that the respondent's evidence on the occurrence of the accident that caused the death of the deceased was unchallenged and uncontroverted. The 2nd respondent further argued that there is no evidence to suggest that the deceased was knocked down by another motor vehicle other than the appellant's motor vehicle.

5) Having considered the submissions of both sides on liability, it is now clear in my mind that the respondents tendered their own evidence. The duo were not eye witnesses. They failed to summon witnesses who witnessed the accident. The evidence in form of a police abstract form merely confirmed that the accident occurred. The form further shows that the accident was still under investigation. In other words, there was no conclusive evidence indicating who was to blame for the accident. What is not in dispute is who is to blame for the accident. In order to establish liability, the evidence of an eye witness or the evidence of the traffic police officers who investigated the accident. None of those witnesses were summoned to testify. With respect, I agree with the appellant that the respondents failed to tender credible evidence to prove that the appellant was liable for the accident. I am convinced that the learned trial Chief Magistrate erred when he made an order finding the appellant liable for the accident yet there was no credible evidence establishing liability.

6) In the end, I find the appeal against the order on liability to be meritorious. Consequently, the order finding the appellant liable is set aside and is substituted with an order dismissing the suit. In the circumstances of this appeal, I am of the view that a fair order on costs which I hereby issue that each party bear its own costs of the appeal.

Dated, Signed and Delivered in open court this 11th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents