



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 92 OF 2010

**ISABELLA MORAA (Suing as the Legal Representative to the Estate of
MOHAMMEDJACOB GETUGI (Deceased).....APPELLANT**

VERSUS

THE KENYA POWER AND LIGHTING CO. LTD.....RESPONDENT

*(An appeal from the judgment and decree of Hon. MAXWEL GICHERU (Chief Magistrate) dated
and delivered on the 26th day of May 2010 in the Original Kisii CMCC No. 51 of 2009)*

JUDGMENT

1. ISABELLA MORAA, the appellant herein, is the mother of MOHAMED JACOB GETUGI (hereinafter “the deceased”) who died on 7th June, 2008. The appellant filed a suit before the subordinate court on behalf of the estate of the deceased under the Law Reform Act Cap 26 Laws of Kenya on her own behalf and on behalf of other named dependants under the Fatal Accident’s Act.

2. In the said suit, she alleged that on or about 6th June 2008, the deceased was lawfully engaged in his lawful employment with the respondent as a loader when while loading electricity poles onto the defendants motor vehicle at Rongo Town, one pole overwhelmed and knocked the deceased down whereupon he sustained serious injuries from which he succumbed on 7th June 2008.

3. The appellant attributed the accident and the eventual death of the deceased to the negligence and breach of statutory duty by the respondent. She listed the particulars of breach of statutory duty and negligence as follows:

- a. Failing to take any or any adequate precautions for the safety of the deceased while he was engaged upon the said work.**
- b. Exposing the deceased to risk of damage or injury of which they knew or ought to have known.**
- c. Allowing the deceased to undertake risky ventures without adequate man power**
- d. Failing to provide the plaintiff with the proper machinery or tackle and other equipment to undertake the task he was assigned.**

4. The appellant sought both general and special damages arising out of the accident together with costs and interest.

5. The respondent filed a defence on 18th June 2009 in which it denied not only being the employer of the deceased as alleged, but also denied that it was negligent or in breach of any statutory duty of care.

6. At the trial both the appellant and the respondent called witnesses in support of their respective cases and at the close of the trial, the trial court delivered a judgment on 8th April 2010 in which it dismissed the appellant's case with costs thereby giving rise to the instant appeal in which the appellant has listed the following grounds of appeal.

1. The Trial Magistrate erred both in law and fact in failing to hold that the Appellant had proved her case on a balance of probabilities.

2. The trial magistrate erred in both law and fact in failing to appreciate and hold that there was adequate evidence to show that the deceased worked for the Respondent and sustained the fatal injuries in the lawful course of his employment with the Respondent.

3. The trial magistrate erred in both law and fact in failing to appreciate that the Respondent's witnesses' evidence was contradictory and did not rebut the consistent and well corroborated evidence of the Appellant's witness.

4. The trial magistrate erred in law and fact in failing to hold the Respondent liable for the fatal injuries sustained by the deceased and thereby proceed to make an award in damages.

7. When the appeal came up for hearing on 7th November 2016, parties agreed to canvass their arguments by way of written submissions.

Appellant's submissions

8. Through her lawyers M/s Minda & Co. Advocates, the appellant submitted that she had proved her case against the respondent to the required standards by demonstrating that the deceased was fatally injured while in the actual employment of the respondent a fact which, she stated, was not rebutted by the respondent. The appellant stated that the documents relied upon by the respondent were not genuine as they did not bear the respondents official letter head, logo and were not signed. The appellant argued that the trial court had no basis for believing the respondents witnesses despite the fact that the said evidence was not substantiated.

9. The appellant further contended that the trial court's judgment contravened the provisions of order 21 of the Civil Procedure Rules.

Respondents submissions

10. M/s Wasuna & Co. Advocates for the respondents submitted that the appellant did not prove her case against the respondent to the required standards as there was no documentary proof of the deceased's employment with the respondent. The respondent discredited the evidence of PW1 who described himself as the chairman of loaders at the respondent's Nyangena office because he did not furnish the court with any proof that he was the respondent's employee.

11. It was the respondent's case that that it furnished the court with cogent and consistent evidence to prove that the deceased was not its employee.

12. The respondent further stated that the appellant did not discharge the burden of proof placed upon her. In this regard the respondent cited the case of **Grace Kanini Muthini vs Kenya Bus Service Ltd & Another [2000] eKR** and **Miller vs Minister of Pensions (1947)**.

13. This is a first appeal and therefore the court is under a duty to evaluate the evidence tendered before the trial court with a view to arriving at its own independent decision. See **Selle vs Associated Motor Boat Company Ltd & Another (1968) EA 123**.

14. The appellant testified that on 6th June 2008 the deceased who worked for the respondent as a casual labourer got injured in Rongo while loading poles onto a lorry. She produced the deceased treatment notes and death certificate as exhibits 1 and 2 respectively she added that the deceased was aged 25 years at the time of his death, had two children and earned Kshs. 300/= per day from his casual employment.

15. PW1 ZABLON NYABUTO testified that he worked for the respondent as a loader and that he knew the deceased as a colleague at work. He stated that the deceased got injured at work on 6th June 2008 as they were loading poles onto a truck.

16. On cross examination, he stated that he did not have any documentary proof of his employment with the respondent but that he was still an employee of the respondent as at the time of his testimony in court. He added that the deceased died one day after his injury but that he did not attend his funeral. He stated that he was the chairman of the loaders and had worked for the respondent for 2 years prior to the deceased's injury.

17. DW1 BENJAMIN ONSOMO the respondent's senior electrical technician based at Kisii denied that the deceased was one of the respondent's employees. DW2 VINCENT MUNUMCHA KATAMI produced the respondent's casual workers pay muster roll for the period relevant to the date of the alleged accident to show that the deceased's name was not entered in the said workers pay master roll. DW2 also denied that PW1 was one of the respondents' employees.

Analysis and determination

18. I have considered the entire record of appeal and the parties respective written submissions filed before this court. The issues for determination are as follows:

a. Whether the appellant proved her case against the respondent on a balance of probabilities.

b. Whether the trial court's judgment contravened the provisions of Order 21 of the Civil Procedure Rules.

19. On the first issue of proof, it is trite law that he who alleges must prove. See **Miller vs Minister of Pensions (supra)** in which it was held:

"The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

20. Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya stipulates as follows:

"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

21. In the instant case, the trial court found that the appellant's case was not proved to the required standards because firstly, there was no documentary proof of the deceased's alleged employment by the respondent and secondly, the cause of death was not established to be as a result of being hit on the chest by an electric pole.

22. It is my finding that in this case, the appellant needed to prove the fact of the deceased's employment by the respondent in view of the fact that the respondent had vehemently denied having employed the deceased and in this respect produced a muster roll to support its claim.

23. In the case of **Timsales Ltd vs Noel Aina Okello [2014] eKLR** it was held:

“I do not agree that the contents of the muster roll or accident register cannot be taken as conclusive proof of the fact of employment.....when therefore the name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the muster roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher.”

24. In the instant case, the appellant's sole witness, PW1, who also claimed to be an employee of the respondent for 2 years prior to the alleged accident and even as at the time of his testimony in court, did not furnish the court with any documentary proof of his said employment. PW1 went further to testify that he was the chairman of the loaders without furnishing the court with any proof of such chairmanship. As opposed to the deceased who was already dead, PW1 had ample time to put his act together and present credible evidence of his alleged employment with the respondent which opportunity he did not utilize but chose to come to court “empty handed” so to speak in the hope that he would convince the court on the credibility of his evidence. As was observed in the **Timsales** case (supra), the degree of proof by the appellant got higher the moment the respondent produced the Muster Roll to prove that the deceased was not their employee.

25. It is also instructive to note that PW1 did not also feature in the respondent's books as one of its employees. On cross examination PW1 had the following to say on his employment by the respondent:

“I have nothing to show that I work for KPLC. I worked with KPLC for 3 years. Nyangena is in Kisii. I am still an employee of KPLC. I asked for permission from my supervisor.”

26. The instant case was strongly opposed by the respondent who denied having employed the deceased or that it was responsible for his fatal injuries. In the circumstances the appellant was under a duty to prove the employment of the deceased and the cause of the accident. I therefore find it ironical that the appellant presented a witness to prove the claim that the deceased was employed by the respondent when he (PW1) was incapable of proving his own employment with the respondent. PW1 testified that their supervisor at the time of the deceased's alleged injury was one Mr. Kasanga who was at the time of his testimony on transfer to Western Kenya. No efforts were made by the appellant to have summons issued the said Mr. Kasanga to appear in court to shed light on the deceased's injuries. It would appear that the appellant acted under the impression that oral evidence on employment would suffice in this case. As I have already stated in this judgment the level of proof required in a case where employment is contested is much higher than in other cases where there is no contest on employment.

27. From the above foregoing, it is evident that the trial court had nothing to go by in terms of proof of the deceased's employment with the respondent apart from mere word of mouth of PW1. It is my finding that the evidence tendered by the appellant and her witness fell short of discharging the burden of proof placed on a claimant in a civil claim, more so, in the face of documentary proof from the respondent to show that the deceased was not one of their employees.

28. The appellant claimed that the documents produced by the respondent to show its employees as at the time of the accident were not genuine for lack of a signature or logo. I have perused the said documents (Muster Roll) which were marked as D exhibit 1 and 2 and I note that they contain the respondent's logo

and were signed. The appellant did not prove that the Muster roll was manipulated, false or doctored by the respondent. There was no evidential proof of *mala fides* (bad faith) on the part of the respondent. Anyara Emukule J. had the following to say on the contents of a Muster Roll in the case of **Timsales Ltd (supra)**.

“The validity of these documents cannot be washed away merely because the extracts thereof are not signed and more so because the witnesses who made the material day’s entries themselves testified.”

29. From the above foregoing, I find that the trial court was justified in holding that the appellant did not prove that the deceased was employed by the respondent.

30. This court’s finding on the issue of whether or not the appellant proved that the deceased was an employee of the respondent would have been sufficient to determine this appeal, however, I am still minded to determine the other issues raised in the appeal.

31. On negligence, it is now trite law that a person making an allegation of negligence must prove a causal link between someone’s negligence and his injury (see **Statpack Industires vs James Mbithi Munyao, Nairobi HCCA No. 152 of 2003**). In this regard, the appellant was under a duty to adduce evidence from which, on a balance of probability, a connection between the injury and negligence may be drawn. In the instant case, PW2, the sole eye witness to the alleged accident testified as follows:

“We worked until 3.30 p.m. There was an accident. A pole fell on the deceased as we were loading a pole. We were 15 of us. We were using our bare hands. The only available machine was at Kisumu. The deceased died on the following day.”

32. From the above extract of the appellant’s witness’ testimony, the cause of the accident and the person to blame for it is not clearly brought out. The court was not told how and why the pole fell on the deceased in the first place. Similarly, the witness did not tell the court who was responsible for the fall so as to enable the court to determine if the respondent was negligent in the circumstances or not. It is therefore my finding that the appellant did not prove that the respondent was in any way to blame for the injuries that the deceased suffered. The alleged breach of statutory duty and negligence on the part of the respondent was not established. The doctrine of *res ipsa loquitor* was not pleaded and there was no evidence on record from which the court could make an inference of the same. In the case of **Nyamache Tea Factory Co. Ltd vs Convas Ontomwa Buge [2010] eKLR**, Musinga J (as he then was) stated:

“Occurrence of an accident per se does not connote negligence on the part of an employer, causation must be proved.”

33. The instant case is indeed a very sad one in which the life of a very young man was lost. However, as was observed by Musinga J (as he then was) in **Musinga J (as he then was) in Timsales Ltd vs Stephen Gacie Nakuru CA No. 74 of 2000**;

“A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so. An exception may be in a case where the circumstances under which the accident occurred are such that the doctrine of re ipsa loquitor can be drawn on.”

34. On the cause of death, the certificate produced by the appellant showed that the deceased died as a result of “cardio pulmonary arrest.” The question which then arises is whether the two documents provided sufficient proof, of the cause of death. I am afraid that the answer to the above question is to the negative because the death certificate does not show if the cardio-pulmonary arrest was related to the alleged chest injury or not. Wikipedia defines cardiac arrest, which is synonymous with cardio pulmonary arrest as **“a sudden stop in the effective blood flow due to failure of the heart to contract effectively or at all.”** According to Wikipedia, the causes of cardiac arrest are listed as **“coronary heart**

disease, major blood loss, lack of oxygen very low potassium, heart failures and intense physical exercise."

35. From the above foregoing definition and causes of cardiac arrest, I note that there are many causes of cardio pulmonary arrest and therefore it was incumbent upon the appellant to prove to that there was a nexus between the alleged chest injury and the subsequent death. A post mortem examination of the body of the deceased could have shed some light on the actual cause of death, however, the appellant did not furnish the court with such a report and therefore the cause of death was not established. The above scenario leaves this court with no material on which to anchor a finding that the alleged accident is what resulted into the death of the deceased.

36. On the validity of the subordinate court's judgment the appellant contended that the said judgment contravened the provision, of **Order 21 of the Civil Procedure Rules. Order 21 Rule 4 of the Civil Procedure Rules** Provides as follows:

"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

37. I have perused the lower court's judgment and I note that it contains all the essential elements/ingredients of a good judgment as the trial magistrate outlined all the facts of the case, the points for determination and provided the reasons for his decision.

38. Having found that the appellant did not prove negligence/breach of duty, the cause of death, or that the deceased was employed by the respondent and further, having found that the trial courts judgment met the mandatory requirements of Order 21 of the Civil Procedure Rules, it is my finding that the appeal lacks merit and it is hereby dismissed with costs to the respondent.

Dated, signed and delivered in open court this 15th day of February, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Momanyi for the Appellant

Isiji for Wasuna for the Respondent

Omwoyo court clerk