



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 50 OF 2012

PATRICK GITARI MBERIA.....APPELLANT

VERSUS

LAZARUS MUMO KIMATHI.....RESPONDENT

JUDGMENT

This is an appeal from the judgment of Hon. P. Ngari delivered on 30th April, 2012 in Chuka PMCC No. 38 of 2010 on which the appellant in Memorandum of Appeal says he was aggrieved and dissatisfied with the judgment of the learned trial magistrate in dismissing the plaintiffs case on the grounds set out in the Memorandum of Appeal. The appellant prayed that the judgment be set aside and judgement be entered in favour of the plaintiff together with cost of the suit in the court below.

A brief summary of the plaintiffs case as narrated on the statement of Erick Muriuki Gitari, was that he and his younger brother 7 years old Kelvin Gitari among other children were walking from school along Kathwa road when a white motor vehicle drove by and some children including himself boarded the lorry as it went by That along the way same children shouted that someone had fallen. He called out for his brother but there was no response.

He alighted from the lorry to confirm and indeed his brother was lying on the ground motionless. That many people including his mother and police came to the scene.

Magdalene Karendi a witness for plaintiff said the driver of the white lorry stopped and asked her to tell some kids to stop hiking lift on the lorry. She said the lorry went ahead and when she reached a corner ahead she found a child lying on the ground and she called neighbours. Later she learnt that child had died.

The driver of the lorry in question testified for the defence and said he learnt from the defendant later after he had parked the lorry at Muringa ventures limited that he had caused an accident when he went to take defendants wife to the house. He said he never saw any children on the lorry.

P.C.Okoth Kennedy of Chuka Traffic Base investigated the accident and did not prefer any charges as he did not establish negligence on the part of the driver.

The trial magistrate found that it was established the deceased did not board the lorry in question and considering that it was getting dark at night the driver was not likely to have known that the deceased was running after the vehicle and being there was no eye witness, it is difficult to attribute any negligence or liability on the driver of the lorry or even the defendant. Hon. Peter Ngare SPM then dismissed the suit.

The respondent filed written submissions in opposition to the appeal whereas the appellants counsel Mr.

Mokua did not file any submissions.

The court had on 31st day of March 2016 directed that the appeal would be decided upon written submissions and parties were given a specific period of time to file but it was not until on 15th August, 2016 that respondent filed submissions. I have perused evidence on record of the plaintiff and defendant in Chuka SRMCC No.38 of 2010 and giving consideration that I did not have advantage of seeing or listening to the witnesses physically find no reason to interfere with the findings of the Honourable Magistrate for reasons the appellant failed to file submissions in support of that appeal and secondly for reasons that even the plaintiffs witnesses particularly PW3 did not fault the driver DW1 with causation of the accident. She did not see the deceased aboard lorry's trail guards and she said DW1 told her to tell the children on trail guard of his lorry to stop climbing on the lorry.

It was at dusk and it is not understandable either by plaintiff on defence how that deceased got into contact with the lorry to suffer the fatal injuries.

It is unfortunate that such young life was cut short but it is a opponent the driver did not do anything that can be said to have been negligent conduct to make this court, overturn the findings of the lower court. The appeal is therefore dismissed. However each party will bear their own cost.

Judgment signed, dated and delivered this 4th day of May, 2017

In the presence of

Penina - Court Assistant

Appellant – No appearance for Mokua Advocate for Appellant.

Respondent –Ms Njenga Advocate – No appearance

Court

Notice to issue.

HON. A.ONG'INJO

JUDGE