



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 192 OF 2008**

**MBILO NZEKI MUNYASA &**

**PETER MULINGE MBILO (Both suing as the Administrators of the Estate of DANIEL MWANZIA MBILO) .....APPELLANTS**

**V E R S U S**

**MALDE TRANSPORTERS LTD .....1<sup>ST</sup> RESPONDENT**

**ADARSH DEVELOPERS LTD ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE MUIRURI ..... 3<sup>RD</sup> RESPONDENT**

***(Being an appeal from the judgment and Decree of Hon. Mrs. J. M. Gandani dated 30<sup>th</sup> day of October 2008 in SRMCC No. 152 of 2006 at Voi)***

**JUDGMENT**

**The lower court case**

1. On 10<sup>th</sup> April 2006 the Deceased was driving a tanker, motor vehicle Registration Number KTQ 570. That vehicle was involved in a head on collision with motor vehicle registration number KAV 913K, a canter, along Mombasa/Nairobi highway. The drivers of the tanker and canter died following that accident. The Plaintiffs', on behalf of the Estate of Mbilo (Deceased), driver of the tanker, claim before the lower court was against three Defendants. It is pleaded that the Deceased was an employee of the first Defendant. It was averred in the plaint that the first Defendant was the owner of the tanker. It was further averred that the second Defendant was the actual owner or was in possession of the canter. Further, that the third Defendant was the registered owner of that canter.
2. The Plaintiffs' pleaded breach of contract of employment as against the first Defendant by alleging that the first Defendant failed to provide a safe and road worthy vehicle to be used by the Deceased; failed to take adequate precaution to ensure the Deceased was safe in the driving of tanker; and that it exposed the Deceased to the risk of injury which it knew or ought to have known.
3. In respect of the second and third Defendants the Plaintiffs alleged that they, their driver, or agent were negligent in the manner in which the canter was driven; failed to observe the high way code;

drove the vehicle in excessive speed; failed to have regard for the safety of the Deceased; and failed to stop, slow down, or in any way to manage or control the canter.

4. The plaintiff's claim was under Fatal Accident Act. The claim was brought on behalf of seven persons, dependents, who included the Deceased's father and six siblings.
5. After receiving the parties' evidence the Court dismissed the Plaintiffs' case with costs. It is that dismissal that provoked the present appeal. The Plaintiffs have presented five grounds of appeal for consideration. This is the first appellate Court. As such I am aware of the role that I should play in the evaluating the lower courts evidence. This court's role as the first appellate Court has often been referred to in many previous cases, and was also set out in the case **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** wherein the Court of Appeal held inter alia that: -

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”**

6. The first witness for the Plaintiffs was the base Commander of Voi, Traffic Division. He visited the scene of the accident where he noted that the drivers of the canter and tanker had died on the spot. The turn boys of both vehicles survived the accident but, according to him, were seriously injured. He stated that the tanker was from the direction of Mombasa whilst the canter was headed to Mombasa. He blamed the driver of the canter for the accident because, according to him, that driver had driven on the left hand side of the road, which was the rightful Lane for the tanker. He estimated the speed at which the tanker was traveling to be 60 km per hour.
7. The second Plaintiff in the case gave evidence as the second witness. He stated that he was the brother of the Deceased. His evidence was that the first Defendant employed the Deceased as a driver/turn boy. He gave evidence relating to the expenses that were incurred towards the burial of the Deceased. On being cross-examined the second Plaintiff stated that it was only him who signed the verifying affidavit and that the first Plaintiff had not authorized him to sign it. He also stated that he was not a dependent of the Deceased but that the Deceased gave financial assistance to the first Plaintiff, their father. In that regard he stated that the Deceased employed a servant to look after their father.
8. The first Plaintiff, the father of the deceased, did not give evidence and accordingly the evidence of the second Plaintiff in regard to the dependency of the first Plaintiff was not corroborated.
9. The defence did not offer any evidence in support of the defences filed.

### **The Appeal**

10. As stated before the Plaintiffs/Appellants being dissatisfied with the judgment of the lower court filed this appeal presenting five grounds of appeal. Those five grounds are as follows: -
  - i. **THAT the Learned Magistrate erred in law and facts in finding that the Plaintiffs had not proved their case against the Defendants on a balance of probability.**
  - ii. **THAT the Learned Magistrate erred in law and facts in failing to analyze the Plaintiffs unchallenged evidence which clearly attached liability against the Defendants and thus came to a wrong and misleading conclusion.**
  - iii. **THAT the Magistrate misdirected herself on the law and facts and failed to find that the deceased met his death while in the employment of the first Defendant and which death was**

caused by the negligence of the Defendants thereby dismissed the suit on wrong principals of law.

- iv. **THAT the Magistrate failed to address herself judiciously on the issues as presented to her in the pleadings and Plaintiffs written submissions both on the law and facts thus dismissed the case for no sound or good reasons or at all.**
- v. **THAT the Learned Magistrate failed to appreciate the evidence submitted to Court by the Police Officers whose evidence was clear as to which party was to blame hence arrived at a wrong decision.**

11. In my view, grounds number one, two, four and five can be dealt with together. They relate to the appellants contention that the lower court failed to appreciate the evidence which was unchallenged by the Defendants. The third ground faults the lower Court in failing to find that the Deceased died as a result of the negligence of his employer, the first Defendant.

12. In my considered view, contrary to the Appellant's submissions, the learned trial Magistrate sufficiently considered the evidence tendered by the Appellants. The learned trial Magistrate had this to say in respect of the evidence of the Traffic Commander who visited the scene of accident:

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**“ He said on cross-examination that when he visited the scene the vehicles had been moved and that he had drawn sketch maps. He produced the police file..... I have looked at the police file and I am amazed at how scanty it is. For one, various sub files seem to be empty. I never saw any sketch maps there in. Apart from the statement of a turn boy of the canter who is blaming the deceased here, the other statements in the file are by people who identified the victim's bodies, for postmortem. It is not clear how the investigating officer arrived at the decision to blame the second defendant's driver. The police file was not of any assistance to the case. No eyewitness testified it is therefore not known how the accident occurred. I am therefore unable to blame anyone over the accident in view to the above. I therefore find that the plaintiff has failed to prove that the second defendant or any defendant for that matter is to blame.”**

13. It will be recalled that no eyewitness was called to testify before the lower Court. The Traffic Commander who testified stated that he arrived at the scene of the accident after it had occurred. Although in his testimony he blamed the second Respondents' driver, driving the canter, the police file, which was produced before the trial court did not support his conclusions. The Police file had one statement of the turn boy of the canter, who laid the blame on the deceased for the accident. Curiously the Police file did not have sketch maps, which would have assisted in determining the positioning of the vehicles when the accident occurred. It therefore follows that no evidence was adduced before court showing who was responsible for the accident. The Police Traffic, Commander was not an eyewitness, and I, just like the trial Magistrate, I am unable to understand how he blamed the second Defendant's driver in those circumstances. I am unable to understand how he could have estimated the speed of the tanker, when he was not present when the accident occurred. On that basis alone the appellants' grounds numbers one, two, four and five fail. The learned trial Magistrate cannot be faulted for having found that the Plaintiff/Appellant failed to prove their case on liability.

14. I have considered the Appellant's submissions and in particular the authorities relied upon. Looking at those authorities it is clear that although there was evidence that an accident occurred, there is no clear evidence of which party was to blame. It was on that basis that the courts in those authorities held that each party was 50% to blame for the accident. It is in view of that in the case **NAIROBI HCCC NO. 3321 OF 1993 SUSAN MUMBI WAITITU –V- KEFALA GREBEDHIN** the court stated-

**"In that instant case there was a collision between two motor vehicles and in the absence of any evidence as to how the accident occurred the Court of Appeal has held that liability be apportioned**

**on 50/50 basis. I therefore hold that the defendant was 50% to blame for the collision. “**

15. The lower Court case however had very different circumstances. Although there was a collision of the two vehicles, and there was no eyewitness of the accident who testified, the Police file, which was produced in evidence, had a statement of one of the turn boys, who clearly blamed the driver of the tanker that is the Deceased. That being the case, since there was no other eyewitness evidence the learned trial Magistrate was correct to have held that the Appellants had failed to prove their case.
16. On that basis ground number three of the Appellants' appeal must and does fail because, other than the evidence of salary payment made by the first Defendant, there was no evidence tendered to show that the first Defendant was in breach of duty towards the deceased. The learned Magistrate therefore, cannot be faulted for not having found that the first Defendant was in breach of its duty as an employer. Further I have noted that in the further amended plaint filed in the lower Court on 21st January 2008 the Appellants deleted their claim of negligence against the first Defendant. Additionally therefore, the learned Magistrate could not have found the first Defendant negligent because there was no pleadings of negligence against that Defendant.
17. It is also instructive to note that the documents produced by the Appellants relating to the Deceased's employment with the first Defendant company show clearly that the Deceased was employed by the first Defendant as a turn boy and not as a driver. If that were so was the deceased doing a job he was not employed to do when he drove the tanker? It is interesting to note that the deceased had only held his driver license for one year when the accident occurred. All in all the learned Magistrate cannot be faulted for not finding the first Defendant liable for the accident as the Deceased employer.
18. In addition the case does fail because the only evidence adduced before the trial court was by the second Plaintiff the brother to the deceased. The claim before the trial Court was filed under the Fatal Accident Act. Under that Act dependent as provided under Section 4(1) are wife or husband, children and parents. This was clearly stated in the case **ELIZABETH CHELAGAT TANUI & ANOTHER –V-ARTHUR MWANGI KANYUA (2013) eKLR**, viz:-

**“To properly assess damages under the Fatal Accidents Act it is necessary to determine the Deceased's income, the dependency ratio of his dependents and the multiplier to be used. Only his wife, children and parents are entitled under the statute upon proof of dependency. See section 4(1) of the Act.”**

19. It follows that since there was no evidence tendered by that first Plaintiff, the father of the Deceased, in respect of his dependency, the Court could not make an award under that Act. Even if the lower court was to rely on the evidence of the second Plaintiff, that evidence did not meet the required standards of proof. There ought to have been clear evidence of the salary, if any, which was paid by deceased for the servant who looked after their father the first plaintiff.

### **Conclusion**

20. I have carefully considered the lower Courts evidence, the parties submissions and authorities and having done so I find that the Appellant's appeal is without merit. The same is hereby dismissed with costs to the second Respondent.

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**