



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 585 OF 2009

ROSE KANAIZA KIDUSU

KENNETH LIMOZI KIDUSU (*Suing as the personal*

representative of John Masambaka Deceased).....APPELLANT

VERSUS

NANCY NYAMBURA GITAU.....RESPONDENT

(Being an appeal from the ruling and order of Hon. Okato Senior

Principal Magistrate delivered on 25th September, 2009)

JUDGEMENT

1. On 20th May 2003, John Masambaka, deceased was lawfully walking along Waiyaki way near Kangemi when he was knocked down by motor vehicle registration no. KAK 923T. As a result, the deceased was fatally injured. The aforesaid motor vehicle was registered in the name of Nancy Nyambura Gitau, the respondent herein. Rose Kanaiza Kidusu and Kenneth Limozi Kidusu, the appellants herein, filed a compensatory suit in their capacity as the legal representatives of the deceased's estate before the chief magistrate's court Milimani for the benefit of the deceased under the Fatal Accidents act and for the estate under the Law Reform Act. The respondent filed a defence to deny the appellants' claim. The suit was heard on 25th September 2009 and the trial magistrate entered judgement in favour of the plaintiff in the sum of kshs. 122,590/= under the Law Reform Act but dismissed the claim under the Fatal Accidents Act. Being aggrieved, the appellants preferred this appeal.

2. On appeal the appellants put forward the following grounds in their memorandum:

1. The learned magistrate erred in fact and in law in failing to frame the issues for trial and determination and evaluate them against the evidence in its totality thereby arriving at a wrong conclusion that the plaintiff did not proof that she was married to the deceased.

2. The learned magistrate erred in law and in fact in finding that it was incumbent upon the appellant to produce documentary evidence and particularly a letter from chief as evidence of a customary marriage in the face of the unchallenged and uncontroverted evidence.

3. The learned magistrate erred in law and in fact in failing to find that the appellant and her

children were dependants of the deceased in the face of the evidence on record.

4. That the learned magistrate erred in law and in fact in requiring the appellant to adduce evidence beyond the required standard of proof applicable in a civil suit.

3. On 7.11.2014, this court directed the appeal to be disposed of by written submission. This being the first appellate court, I am enjoined to re-evaluate the case that was before the trial court. I will do so while considering the grounds of appeal. I have considered the rival written submissions. The appellants argued together all the grounds of appeal. It is argued that the learned trial magistrate erred when he found that the 1st appellant was not a widow yet she had tendered sufficient evidence to show she was a wife. The appellants also faulted the trial magistrate for failing to take into account the children of the deceased as dependants yet evidence was presented to establish that they wholly depended on the deceased.

4. The respondent on the other hand was of the view that the decision of the trial magistrate to dismiss the claim under the Fatal Accidents Act cannot be faulted because the Appellants did not prove their case to the required standards on a balance of probabilities. It is argued that the Appellant did not produce a certificate of marriage nor a letter from the chief of the location she comes from. It is also argued that the 1st appellant failed to summon witnesses to establish that she was married to the deceased.

5. The record shows that Rose Kanaiza Kidusu, the 1st appellant herein testified as PW1 before the trial court. The gist of her evidence in chief is that she was married to the deceased. She specifically stated that she got married to the deceased under customary law. She also stated that their marriage was blessed with four children. She produced an immunization card and baptism cards as proof that the children belonged to the deceased. PW 1 also produced as an exhibit in evidence a birth certificate in respect of the youngest child. The 1st appellant tendered both documentary and oral evidence to show the role she played in organizing and participating in the deceased's burial. In cross-examination, the 1st Appellant stated that she had no documents to prove that she was married to the deceased. The learned senior principal magistrate considered the evidence tendered by the 1st appellant and came to the conclusion that she did not establish the customary marriage between herself and the deceased. He pointed out that PW1 did not summon witnesses nor tender a letter from her location chief to prove her marriage. On this basis, the learned senior principal found that the 1st appellant was not a wife and proceeded to dismiss the claim under the Fatal Accidents Act. I have perused the defence filed by the respondent and it is clear that the respondent did not specifically traverse the particulars stated in the plaint in respect of the claim under the Fatal accident Act.

6. In the plaint, the 1st appellant listed herself as a wife, the 2nd appellant as a brother-in-law and the children of the marriage. There was no specific denial that those specified were not beneficiaries of the deceased's estate. The 1st appellant's capacity was only brought to question at the stage of cross-examination. I am of the view that had the respondent raised the issue in her defence, most probably the 1st appellant would have had prior notice that the issue will be a subject of the hearing. The learned senior principal magistrate should have taken this fact into account before proceeding to dismiss the Appellant's claim under the Fatal Accidents Act. A careful perusal of section 4(1) of the Fatal Accidents Act will show that every action brought by virtue of the provisions of the said act shall be for the benefit of the wife, husband, parent and child of the person whose death was caused.

7. The trial magistrate also fell into error when he imputed that customary marriage could have been proved by the production of a chief's letter. He also failed to attach reasons why it was necessary for the 1st appellant's evidence to be corroborated by the evidence of other witnesses. The 1st appellant had specifically stated in her evidence in chief and in cross-examination that she was married to the deceased. There was no other evidence to prove otherwise.

8. The trial senior principal magistrate did not indicate that he did not believe the 1st appellant. He simply stated that the 1st appellant had failed to prove her status.

9. The learned trial senior principal magistrate further failed to make a finding on whether or not those specified as children and beneficiaries of the deceased were beneficiaries. This was a serious error which must be corrected on appeal.

10. After a careful re-evaluation of the evidence, I am convinced that Rose kanaiza Kidusu on a balance of probabilities proved that she was married to the late John Masambaka, hence she should have been regarded as a widow.

11. Consequently the appeal is allowed. The order dismissing the claim under the Fatal Accident's Act is set aside. The case is remitted back to the chief magistrate's court for a fresh assessment of damages under the aforesaid head by another magistrate of competent jurisdiction other than the then magistrate who had dismissed the suit. Costs of the this appeal is awarded to the 1st appellant.

Dated, Signed and Delivered in open court this 6th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent