Mogoi v Makori (Civil Appeal 71 of 2019)
[2025] KECA 418 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 418 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 71 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 28, 2025

BETWEEN

FRANCISCO NYABUTO MOGOI ..... APPELLANT

AND

MOFFAT NYAMBOGA MAKORI ..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Majanja, J.) dated 18th March, 2019 in HCCA No. 91 of 2018)

JUDGMENT

1. What is before us is a second appeal arising from the judgment of the High Court (Majanja, J.), in an appeal from the judgment of the Magistrate's Court. Litigation leading to the appeal was commenced in the Senior Principal Magistrate's Court at Kisii by Fransisco Nyabuto Mogoi, who was the plaintiff, and is now the appellant in this appeal.

2. The appellant had sued Moffat Nyamboga Makori, the respondent in this appeal, seeking general and special damages arising from an accident involving a Truck Registration No. KCC 326C (the subject vehicle), which truck he contended the respondent was the beneficial owner.

3. The appellant pleaded that the accident which resulted in the death of his son, Elkanah Nyabuto Mogoi (herein deceased), was caused by the negligence of the respondent and or his agents or servants. Consequently, the appellant claimed damages under the *Fatal Accidents Act*.

4. The respondent filed a defence in which he denied the appellant's claim. In particular, the respondent denied that he was the beneficial owner of the subject vehicle, or that the subject vehicle caused an accident in which the deceased was fatally injured, or that he was liable for the accident. Without prejudice to that denial, the respondent pleaded the doctrine of res ipsa loquitur, contending that the accident was caused by the negligence, carelessness and or recklessness of the deceased. The respondent also pleaded that the appellant's suit did not disclose any reasonable or known cause of action.

5. During the trial, three witnesses testified on behalf of the appellant. The witnesses were the appellant, Jerusha Nyaboke Nyabuto (Jerusha) and PC Alfred Komen (PC Komen) of Gucha Traffic Base. According to the appellant, who adopted the statement he filed in support of the plaint, the deceased, who was his son, was on 13th November, 2015, walking along Roisiri Market when he was fatally knocked and crushed by the subject vehicle. The appellant stated that the police abstract report showed that the respondent was the beneficial owner of the subject vehicle; and that the deceased was employed as an untrained teacher earning Kshs.12,000/- per month. He, therefore, sought damages for pain and suffering at Kshs.30,000/, loss of expectation of life at Kshs.100,000/- and loss of dependency at Kshs.1.2million, as well as special damages which he put at Kshs.76,500/-.

6. Jerusha, (who did not specify his relationship with the deceased) claimed that the deceased was taking care of the family. She did not witness the accident but was only called after the accident. PC Komen testified that the accident which occurred at Roisiri market along Roisiri Rongo Road, involved the subject vehicle and a pedestrian who was offloading sand, after which the subject vehicle reversed and as the pedestrian was pulling his jacket he was knocked and pressed onto the wall. Under cross examination PC Komen explained that the pedestrian rushed to pull his jacket and it is then that he was knocked and crushed by the subject vehicle.

7. The trial court in its judgment dismissed the appellant's suit, finding that the appellant failed to prove that the respondent was liable for the accident. The trial court also found that the appellant failed to produce letters of administration, and was, therefore, not the authorized administrator of the deceased's estate nor did he deserve the damages claimed.

8. Being aggrieved by the judgment of the trial court, the appellant moved to the High Court challenging the findings of the trial court on both liability and damages. Upon hearing the appeal, the learned Judge of the High Court found that the appellant failed to prove any liability against the respondent. In addition, though it was not necessary for the appellant to have letters of administration for the estate of the deceased to enable him pursue a claim for loss of dependency for the deceased's dependents, letters of administration were necessary for an administrator of the estate to pursue a claim for pain and suffering, and loss of expectation of life. The learned Judge, therefore, dismissed the appeal, but did not award any costs.

9. In the appeal before us, the appellant has raised five grounds, which we reproduce herein verbatim.

> "(i) that the learned Hon. Judge in the superior court ignored the law and contradicted himself and failed to award the claim after agreeing with the appellant on claims agitated under Fatal Accidents Act;
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> ii. that the Hon. Judge in the superior court below ignored (sic) to uphold the law and dealt with technical justice;
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> iii. that the Hon. Judge in the superior court below ignored the issue on special damages (sic) was raised therein in the plaint and more particularly that it was pleaded, proved and paid for (sic) that the deceased was earning a salary which was itemized with the letter of appointment;
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> iv. that the learned Hon. Judge in the superior court below erred and failed to (sic) read that the plaint in the subordinate court below was filed pursuant (sic) *Fatal Accidents Act*;

v. the learned trial Judge erred in law and ignored persuasive and binding authorities."

10. In support of his appeal, the appellant filed written submissions in which he identified five issues for determination as follows:

    i. whether or not the Hon. Judge was right in upholding the dismissal of the suit by the learned magistrate;

    ii. whether or not the appellant had legal standing to file the suit;

    iii. whether or not the appellant had proved liability as against the defendant;

    iv. whether or not the learned Judge ignored substantive justice;

    v. who should bear the costs of this appeal?

11. The appellant faulted the learned Judge for failing to analyze the evidence which was adduced before the trial court and coming to his own conclusion, but instead entirely relying on the same grounds and reasons as given by the trial magistrate, which grounds and reasons were totally misconceived and fraught with contradictions and inconsistencies.

12. The appellant argued that since it was not disputed that a road traffic accident occurred on the material date, wherein the deceased sustained fatal injuries, nor was it disputed that the appellant was the father of the deceased, the finding of the learned Judge that the appellant did not have legal capacity or standing to file the suit was misconceived and contrary to the court's duty to render substantive justice.

13. On the issue of liability, the appellant pointed out that whereas the respondent did not call any witness, he called four witnesses, one of whom, was the police officer who investigated the accident. The appellant submitted that the investigation officer did not entirely blame the deceased for the accident, but only stated that he substantially contributed to the occurrence of the accident. Therefore, at the very least, the learned Judge should have apportioned blame for the accident and not just find that the deceased was entirely to blame. The appellant reiterated that both the trial court and the first appellate court ignored substantive justice contrary to Article 159 of the *Constitution* of Kenya. The appellant therefore urged the Court to allow the appeal and award it costs.

14. The respondent also filed written submissions in which it argued that the appeal was incompetent because contrary to Rule 87 of the Court of Appeal Rules, no decree was attached to the record of appeal. In this regard, the respondent relied on Supreme Court decision in Bwana Mohammed Bwana -vs- Silvano Buko Bonaya & 2 others [2015] eKLR.

15. The respondent argued that although the learned Judge found that it was mandatory for one to have letters of administration to agitate a case for damages under the *Law Reform Act*, the learned Judge held that letters of administration were not necessary for a claim under the *Fatal Accidents Act*. Consequently, the learned Judge assessed a lump sum amount of Kshs.500,000/- under the *Fatal Accidents Act*, but could not award the same, since the appellant did not prove liability against the respondent. To the contrary, the evidence on record showed that the deceased well aware of the impending danger, rushed in the line of a moving vehicle. The respondent, therefore, argued that the learned Judge did not err in dismissing the appeal. He, therefore, urged the Court to dismiss this second appeal, with costs.

16. Our duty as a second appellate court is confined to matters of law. However, the Court may consider matters of fact where it is shown that the two courts below considered matters they should not have

considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse to? See Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR.

17. Having carefully considered the record, the submissions by counsel, and the law, the main issue for determination is whether the appellant proved his case on a balance of probabilities and what damages if any that he should be awarded?

18. In Ndiritu vs Kapkoi & Another [2005] 1 EA 334, the Court of Appeal (O'Kubasu, Githinji & Waki, JJA) stated as follows:

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* (Chapter 80), which provides:
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> > " 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.'
>
> There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:
>
> > " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.
> >
> > 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'
>
> The two sections carry forward the often-repeated evidential adage. He who asserts must prove."

19. The burden was upon the appellant to prove that the accident was caused by the negligence of the respondent and or his driver. However, it is evident that none of the three witnesses who testified saw how the accident occurred. The appellant attributed blame to the driver of the subject vehicle whom it was claimed, reversed crushing the deceased against the wall. The appellant relied on the evidence of PC Komen. Apart from the fact that PC Komen was not an eye witness, when PC Komen was cross-examined, he stated that the deceased was knocked down when he tried to pull his jacket from the reversing subject vehicle.

20. The circumstances before us are similar to that in Mary Wambui Kabugu vs. Kenya Bus Services Limited 1997) KECA 402 (KLR), wherein, Bosire, JA, stated as follows:

> " The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor

did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone, I would dismiss the appeal."

21. The appellant in his plaint had given particulars of the negligence of the respondent and or his agents as follows:

> " (i) driving at a speed which was too excessive in the circumstances;
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> ii. driving without due care and attention to other road users including the deceased;
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> iii. driving on a zigzag manner till the said motor vehicle lost control;
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> iv. disobeying the *Traffic Act* and Highway Code on slowing along market centers and schools;
>
> v. failing to show any prudence in driving motor vehicle registration KCC 326C; and
>
> vi. allowing an incompetent driver to drive such a heavy motor vehicle."

22. The appellant did not adduce any evidence in support of any of the particulars of negligence pleaded against the respondent. To the contrary, there was no evidence that the subject vehicle was being driven at an excessive speed, or in a zigzag manner, or that, it was being driven by an incompetent driver. Despite the respondent not tendering any evidence in support of his defence, the burden of proof lay and remained with the appellant to prove negligence on the part of the respondent, as it was the appellant asserting that fact and therefore having the duty to prove the respondent's liability.

23. The evidence on record is that, contrary to what the appellant pleaded, the accident happened when the subject vehicle was reversing, and when the deceased ran behind the subject vehicle in a bid to recover his jacket. In light of the above, the appellant failed to discharge the burden of establishing the causation of the accident and the negligence he alleged against the respondent. In the circumstances, the trial court and the learned Judge cannot be faulted for finding the respondent not liable.

24. On the issue of damages, the appellant maintained that as the father of the deceased he had legal standing in filing the suit, and that the trial court and the learned Judge ought to have exercised substantial justice and not guided by technicalities. In this regard, the learned Judge of the High Court rendered himself as follows:

> " 6. As regards the issue of quantum, the trial magistrate declined to award damages because the appellant did not produce letters of administration to show that he could make the claim as an administrator of the deceased's estate. While it is correct that letters of administration are required to agitate a case for damages under the *Law Reform Act* (Chapter 26 of the Law of Kenya), they are not necessary for a claim under the *Fatal Accidents Act*. Section 4(1) of the *Fatal Accidents Act* whose side note reads, 'action to be for benefit for families of deceased,' and which provides as follows:
>
> > " 4(1) every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband,

> parent and child of the person whose death was so caused, and shall, subject to the provisions of Section 7 be brought by and in the name of the executor or administrator of the person deceased; and in every action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought...'

7. Section 7 thereof referred to in Section 4(1) aforesaid, makes provision for 'action by persons beneficially interested' and it states as follows: if at any time in any case intended and provided for by this Act, there is no executor or administrator of the person deceased or if no action is brought by the executor or administrator within six months after the death of the deceased person then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the actions would have been brought....

8. A reading of Section 4(1) and 7 of the *Fatal Accidents Act* show that either the administrator or executor of the deceased's estate or the persons for whose benefit the action is brought, that is the wife, parents, husband or child of the deceased have a right to bring an action for damages. The purpose of the *Fatal Accidents Act* is to provide compensation for the deceased's dependents following his or her death hence it is not necessary for the plaintiff to have letters of administration to agitate the suit. In this case the claim was by the deceased's father who was entitled to claim damages for loss of dependency."

25. We are entirely in agreement with the learned Judge. The appellant's action anchored on the *Fatal Accidents Act* was properly before the court, even without the letters of administration. However, such an action is limited to damages for loss of dependency. The only reason why the appellant's claim in this regard failed, is because the appellant failed to prove liability on behalf of the respondent. That was the main reason why his claim failed.

26. The upshot of the above is that the appeal has no merit. It is accordingly dismissed. Like the learned Judge of the High Court, we sympathize with the appellant and therefore will not award any costs. Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR