



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**CIVIL APPEAL 177 OF 2002**

**SAMMY NGIGI MWAURA .....APPELLANT**

**AND**

**JOHN MBUGUA KAGAI .....1<sup>ST</sup> RESPONDENT**

**GOHIL SOAP FACTORY LIMITED .....2<sup>ND</sup> RESPONDENT**

***(An appeal from the judgment and decree of the High Court of Kenya at Eldoret (Mr. Justice Omondi Tunya) dated***

***28<sup>th</sup> March, 2002***

**in**

**H.C.C.C. NO. 40 OF 1997)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the judgment and decree of the Hon. Mr. Justice Omondi Tunya delivered on 28<sup>th</sup> March 2002 in Eldoret High Court Civil Case No. 40 Of 1997.

The appellant, who was the plaintiff in the superior court, is Sammy Ngigi Mwaura (suing as the Administrator of the Estate of Mwaura Muturi hereinafter "*the deceased*").

The deceased was killed as a result of a road accident which took place on the Nakuru /Eldoret road on 10<sup>th</sup> November 1994.

The accident involved three vehicles. One vehicle was a motor tractor registration number KXS 065 (hereinafter "*the tractor*"). The second vehicle was a trailer attached to the tractor and the third was a lorry.

It was not disputed that the deceased was a passenger lawfully traveling on the trailer when a violent collision occurred between the lorry registration number KAC 135 and the trailer.

At the time of the collision the lorry was being driven by a driver employed by Gohil Soap Factory Ltd in

the course of his employment. The tractor was being driven by one Cyrus Gikonyo who was an employee of the defendant John Mbugua Kagai, who was the owner of the tractor.

In the plaint filed by Kalya & Co Advocates dated 3rd March 1997 in Eldoret HCCC No. 40 of 1997 the only defendant was J.M. Kagai the owner of the tractor. Paragraphs 4, 5 and 6 of the plaint were as follows:-

4. *On or about 10<sup>th</sup> day of November, 1994 on the Nakuru /Eldoret road, the deceased Geoffrey Mwaura Muturi, was lawfully traveling on the said motor tractor registration number KXS 065 when the same was so negligently driven, managed or controlled so as to cause it to violently collide with motor vehicle registration vehicle number KAC 135 B whereof (sic) the said deceased was fatally injured.*

5. *The said accident was solely occasioned by reason of negligence on the part of the Defendant's driver, agent and or servant in the driving, management and or control of the said motor tractor registration number KXS 065.*

***PARTICULARS OF THE DEFENDANT AND OR THE DEFENDANT'S DRIVER'S AGENT AND OR SERVANT'S NEGLIGENCE***

(a) *Driving without due care and or attention.*

(b) *Failing to maintain the said motor tractor in sound mechanical condition.*

(c) *Causing to be put on the road a defective machine.*

(d) *Driving at a speed excessive in the circumstances.*

(e) *Failing to manage and or control the said Motor tractor Registration No. KXS 065 so as to avoid the said collision,*

(f) *Putting the said motor tractor in the care and handle (sic) of an incompetent driver.*

(g) *Causing the said accident.*

6. *The plaintiff brings this action under the Fatal Accident, Act and under the Law Reform Act.*

The particulars under those two acts were then set out which we will omit as nothing turns on them in the appeal now before us.

The prayers in the plaint were as follows:-

***REASONS WHEREFORE*** the plaintiff prays for judgment against the defendant for:-

(a) *General damages for loss of expectation of life.*

(b) *General damages for lost years.*

(c) *General damages for pain and suffering.*

(d) *Special damages.*

(e) *Costs.*

(f) *Interest."*

A defence dated 8<sup>th</sup> May 1997 was filed by Njuguna & Co advocates for the defendant.

The defence denied liability. The paragraph of the defence material to this appeal was paragraph 2 thereof which is as follows:-

**1. The defendant admits the collision referred to in paragraph 4 of the plaint but denies that the said collision was occasioned by negligence on his part and or his agent and puts the plaintiff to strict proof thereof. The defendant denies the particulars of negligence enumerated in paragraph 5 of the plaint.**

As we shall see the most significant aspect of the initial pleading in the plaint and defence in the suit was the absence of any joinder, as a party to the suit, of the lorry driver, or his employer, the owner of the lorry.

On 3<sup>rd</sup> May 1998 the defendant gave notice of change of advocate appointing Geoffrey Kinuthia to be its Advocate in place of Njuguna & Company.

The next relevant development took place when the defendant, through its new advocate, served a Third Party Notice on Gohil Soap Factory Limited on 9<sup>th</sup> March 1999 which Notice to be dated 7<sup>th</sup> December 1998.

The Third Party Notice stated that it was **“ISSUED PURSUANT TO THE ORDER DATED.....1998.”**

The Third Party Notice addressed to Gohil Soap Factory Ltd. was in the following terms:-

**“TAKE NOTICE that this action is brought by the plaintiff against the defendant. In it the plaintiff claims against the defendant in accordance with the attached plaint.**

**The defendant claims against your (sic) indemnity for or contribution to any judgment that may be entered in favour of the plaintiff in respect of the plaintiff’s claims as is set out in the plaint; on the ground that your driver dolely (sic) caused and / or substantially contributed to the occurrence of the accident which occurred on the 10<sup>th</sup> day of November 1994.**

**“AND TAKE NOTICE that if you wish to dispute the plaintiff’s claim against the defendant’s claim against you, you must cause an appearance to be entered for you within 15 (Fifteen) days after service of the notice upon you inclusive of the day of service otherwise you will be taken to admit the plaintiff’s claim against the defendant and the defendant’s claim against you will be bound by the judgment given in the suit.”**

R. L. Aggarwal, Advocate for Gohil Soap Factory filed a Memorandum of Appearance on 8<sup>th</sup> April 1999 and **THIRD PARTY STATEMENT OF DEFENCE** on 19<sup>th</sup> August 1999.

The defence put forward in this pleading can be summarised, as being, firstly, a denial that any accident took place and, secondly, a without prejudice assertion that **“if at all an accident ever occurred as alleged, the same was solely caused and/or substantially contributed to by the negligence on the part of the defendant’s driver, servant and/or agent of the tractor.”** Particulars of such alleged negligence were then set out in some detail but can be summarised as allegations that the accident was solely the fault of the driver of the tractor and in no way the fault of the lorry.

When the case eventually came for hearing in March 2001 witnesses were called, one being an eye witness to the accident called on behalf of the plaintiff. This was PW2 Debei Ng’ang’a who was riding on the tractor together with five others including the deceased. His evidence was **“As we were riding down hill on our side of the road, a lorry came from behind and rammed on to the trailer attached to the tractor. Geoffrey (the deceased) fell off the tractor and was crashed on the head by the lorry.....The lorry driver was to blame. He knocked the tractor while in motion. ....The tractor**

***driver was not at fault at all.”***

DW2 John Kimani Ngotho also described how the accident happened in these words “.....***We were five passengers on top of unshelled maize. A fast speeding lorry approached from behind our trailer. As it attempted to overtake us, it noticed an oncoming vehicle and while veering to the left to avoid a head on collision, it hit our trailer on the rear left wing cutting it from the tractor. The deceased was thrown off the trailer and then ran over by rear right wheel of the lorry killing him instantly. The lorry never slowed down at all.***”

The learned counsel for the 3<sup>rd</sup> party, Mr. Aggarwal, informed the court that he had no evidence to call on behalf of the 3<sup>rd</sup> party. There was therefore no evidence to support the ***THIRD PARTY STATEMENT OF DEFENCE.***

The judgment of the superior court (Omondi Tunya J.) was short and to the point reading as follows:-

***“Sammy Ngigi Mwaura (hereinafter called “the plaintiff”) sued John Mbugua Kagai (hereinafter called “the defendant”) to recover damages under the Fatal Accidents Act for loss of future earnings under the Law Reform Act for lost years. Specials and costs are also prayed for.***

***There was uncontroverted evidence that on 10<sup>th</sup> November 1994 the deceased, one Geoffrey M Muturi, was a passenger lawfully traveling on the tractor registration Number KXS 065 when it violently collided with a lorry belonging to the third party herein, registration Number KAC 135B. At the time of the accident the defendant was keeping to his side of the road and controlling his tractor at a moderate speed, when the driver of the lorry which approached from the rear and was heading towards the same direction knocked the trailer attached to the tractor from behind and hence the accident. These are the undisputed facts. As a result the accident victim died on the spot.***

***I do not comprehend as to why the lorry driver and his employer, if they be different persons were not sued. All indications on the ground and in evidence before me point to them as the principal cause of the accident. This is not controverted even in Mr. Nyachiro’s submissions who, I tend to think, blames the defendant simply by the fact of his tractor colliding with the lorry. A mere collision of two vehicles or of a vehicle and a person by itself without proof of negligence is insufficient for establishing liability. Throughout the evidence, and as correctly submitted by Mr. Aggarwal for the 3<sup>rd</sup> party, I am unable to find any material before me on which to hold the defendant at all liable to the plaintiff. The 3<sup>rd</sup> party has not been directly sued on its own right and has only been brought in by the defendant for indemnity should he be found liable. As against the plaintiff, there being no suit between them, I would also find him not liable for purposes of this suit. His liability in this suit would only be through the defendant and, to the defendant in indemnity. The suit is dismissed with costs.***

***Should I be wrong in my above findings, I would award general damages as follows:***

***Under Fatal Accidents Act, a sum of Kshs. 1.0 million and under the Law Reform Act a sum of Kshs. 70,000/- together with special damages as prayed with costs of this suit and interest thereon at court rates. These are the orders of the court.”***

We have no hesitation in deciding that the learned Judge was entirely correct in his decision as to the lack of any liability resting upon the Third Party in view of the state of the pleadings. We also share in his lack of comprehension as to why the lorry driver and his employer were not sued as sole defendants or co-defendants at the outset of the case.

Mr. C.S. Maundo learned counsel appearing for the appellant/plaintiff, in his submissions before us, relied heavily upon grounds 1 and 2 in the Memorandum of Appeal which were as follows:-

***1. The learned judge erred in law and in fact in giving a narrow interpretation to the provisions of Order I Rule 14 of the Civil Procedure Rules.***

2. ***The learned judge erred in law and in fact in failing to appreciate that the provisions of Order I Rule 14 gave him wide powers to entertain and determine the issues of liability as against the Plaintiff, the Defendant and the Third Party or between any or either of them and enter judgment against any of them.***

In his submissions before us Mr. Maundo relied heavily on ***Order I Rule 14 (1)*** which we now set out in full.

***14. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—***

***(a) that he is entitled to contribution or indemnity; or***

***(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***

***(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any of them, he may, by leave of the court, issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.***

Mr. Maundo emphasised ***sub rule (c)*** and particularly the words “*should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any of them.*” He argued that those words clearly bestowed upon the superior court the jurisdiction in the present case to determine the issue as to whether the accident was the fault of the defendant or the fault of the third party. This, he argued, was so despite the fact that no liability for the accident was established as against the defendant who took out the Third Party Notice. Mr. Maundo particularly emphasised the words “*or between any of them*”.

Mr. Maundo further relied on the *The Supreme Court Practice [1976] Vol 1 pages 224 - 225,230* which is similar to though not identical to our ***Order I Rule 14 (1)***.

In our view, it should be noted that the three sub paragraphs (a), (b) and (c) of ***Order I Rule 14 (1)*** are each in the alternative and that the only alternative chosen to be relied upon by the defendant/respondent in his Third Party Notice was a claim for “***indemnity or contribution to any judgment that may be entered in favour of the plaintiff in respect of the plaintiff’s claims as is set out in the plaint.***”

If, as was the position in this case, there was no judgment entered in favour of the plaintiff against the defendant for the very good reason that there was no evidence of any negligence by the defendant or his employee, there could not be any amount in respect of which the defendant could be indemnified by the Third Party or to which the Third Party could contribute however negligent the Third Party or its employee, driver of the lorry may have been.

This is a sad case for the dependants of the deceased arising from the suing of the wrong party in the first place which could not, in the circumstances, be properly remedied through the joinder of a Third Party. The blame for the said situation must lie wholly with the appellant’s legal advisors who chose to sue the wrong party.

We therefore have no alternative but to dismiss the appeal with costs.

***Dated and delivered at Nairobi this 13<sup>th</sup> day of October, 2006***

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**