



Irungu & another (The legal and personal representatives of the Estate of Peter Mbagari Ndungu - Deceased) v Shalimar Flowers (K) Limited (Civil Appeal 12 of 2020) [2024] KEHC 5638 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 12 OF 2020
GL NZIOKA, J
APRIL 30, 2024**

BETWEEN

JOYCE NJOKI IRUNGU & ESTHER WAITHERA KIMANI (THE LEGAL AND PERSONAL REPRESENTATIVES OF THE ESTATE OF PETER MBAGARI NDUNGU - DECEASED) APPELLANT

AND

SHALIMAR FLOWERS (K) LIMITED RESPONDENT

(Being an appeal against the decision of Hon. K. Bidali Chief Magistrate (CM) delivered on 4th March 2020 vide Naivasha Chief Magistrate's Court vide Civil Case No. 843 of 2016)

JUDGMENT

1. The suit herein was initially instituted by one Peter Bagari Ndungu (herein “the deceased”). The deceased was involved in a traffic road accident on 19th June 2016, while riding motor cycle registration No. KMDQ 129X, which collided with motor vehicle registration No. KAX 757L owned by the defendant.
2. That as a result of that collusion the deceased was injured and eventually passed on. By the subject plaintiff, the plaintiff averred that he sustained injuries on
“the anterior chest wall leading to severe soft tissue injuries, soft tissue injuries of the right hand, blunt injury to the right knee joint leading to severe soft tissue injuries, and blunt injury to the right ankle leading to severe soft tissue injuries”.
3. The plaintiff thus prayed for judgment against the defendant for general damages, special damages as pleaded at paragraph 4 (a) to (b), costs of the suit and such further or other reliefs as the Honourable court may deem fit to grant.



4. As the matter was ongoing the deceased passed on, as a result by an amended plaint dated 10th September 2018, the plaintiffs sought for judgment against the defendant for general damages under the *Fatal Accidents Act* (Cap 32) Laws of Kenya and *Law Reform Act* (Cap 26) Laws of Kenya, special damages as indicated under paragraphs 4 (a) to (e) of the amended plaint, costs and interest on the award above, and any other relief the Honourable court may deem fit to grant.
5. However, the defendant vide an amended statement of defence dated 21st May, 2019 denied liability arguing that, its servant and/or agent drove the subject motor vehicle registration No. KAX 757L causing it to collide with the deceased motor cycle registration No. KMDQ 129X. The defendant further argued that the doctrine of vicarious liability does not apply and pleaded to rely on the doctrine of *volenti non fit injuria*.
6. In the alternative, and on a without prejudice basis, the defendant averred that if the accident occurred, then the deceased contributed thereto substantially by riding the motorcycle at an excessive speed, and on the wrong lane, or failing to keep left and using an uninsured and unroadworthy motorcycle on the road thereby “provoking” and causing the alleged accident.
7. The defendant averred that there was no causation between the injuries the plaintiff sustained and the fatal death.
8. The suit was disposed of vide filing of submissions. Upon considering the evidence adduced, the trial court dismissed the plaintiffs suit on the ground that, the plaintiff had failed to establish the nexus between the death of the deceased and the defendant’s actions. That the plaintiffs did not prove that, the head injury suffered by the deceased was connected to the accident.
9. However, the plaintiffs are aggrieved by the decision of the trial court and have appealed against it on the following grounds:
 - a. The learned trial Magistrate erred in law and in fact in disregarding the evidence on record while assessing liability.
 - b. The learned trial Magistrate erred in Law and in fact in believing in whole that testimony of the Defendant/Respondent and disregarding the testimony of the Plaintiffs/Appellants.
 - c. The learned trial Magistrate erred in Law and in fact by failing to properly and/or at all, evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.
 - d. The learned trial Magistrate made a fundamental error in Law by considering and taking into account various extraneous issues that were not before the Court.
 - e. The learned trial Magistrate erred in Law in failing to assess damages.
 - f. The learned trial Magistrate made a fundamental error in Law by failing to appreciate the fact that the Defendant admitted liability in Court.
 - g. The learned trial Magistrate misdirected himself and erred in Law and in fact by deliberately recording proceedings selectively and failing to record all proceeding in the course of trial against the Rules of Natural Justice and thereby denying the Appellant an opportunity to be properly heard in merited circumstances.
 - h. The learned trial Magistrate misdirected himself and erred in Law and in fact by disregarding the Plaintiffs’/Appellants’ submissions on quantum and liability.



- i. The learned trial Magistrate erred in Law and in fact by delivering an error-prone judgment on Liability and quantum contrary to the evidence on record
10. As a result thereof the appellants seek for the following orders:
 - a. The appeal be allowed.
 - b. The judgment delivered on 4th March. 2020 be set aside, vacated and or replaced with an order which this Honourable court may deem fit.
 - c. Retrial
 - d. The respondent does pay the costs of this appeal.
11. The appeal was disposed of vide filing of submission. The appellants in submissions dated 22nd January 2023, argued that, the respondent was 100% liable for causing the accident. That its authorized driver was charged in court with the offence of careless driving, pleaded guilty and was sentenced to pay a fine of Kshs. 15,000. Further, PW1 No. 76934 PC Rodgers Wafula produced the OB (plaintiff exh 1) that indicated the respondent's driver was to blame for causing the accident.
12. Further, the trial Magistrate failed to consider and appreciate the evidence on record and therefore arrived at the wrong conclusion. That, the evidence on record showed the deceased sustained head injuries from the road traffic accident which were not initially discovered. However, the deceased suffered persistent headaches and sought treatment at Mediheal Hospital and was later referred to Kenyatta National Hospital where he succumbed to the injuries while receiving treatment.
13. That, they produced several documents including: treatment notes from Kenyatta National Hospital showing the deceased had been referred from Mediheal Hospital following a road traffic accident, the death certificate, and the letter from the area Chief indicating the cause of death was a result of a road traffic accident in support of their claim. That, the respondent never objected to the production of the documents.
14. The appellant submitted that, the trial Magistrate relied wholly on the submissions by the respondents and took into account extraneous issues that were not before it. The fact that the deceased passed on long after the accident was not reason enough for the trial Magistrate to find otherwise. That, the respondent did not adduce any evidence to suggest another cause of death and therefore the appellants evidence remained was unshaken.
15. As a result, the trial Magistrate erred in finding that there was no connection between injuries initially sustained and the death of the deceased and erred in failing to assess damages as required by law.
16. The respondent did not file a response to the appeal despite being given an opportunity to do and thereby the appeal stands unopposed.
17. At the conclusion of the hearing of the appeal, I note from the grounds of appeal that, the main issue raised is that, the trial court did not evaluate the whole evidence adduced, and relied heavily on the defendant's evidence as against the plaintiff thus arriving at an erroneous decision. Further, the trial court considered extraneous issues not before the court. Even then, the court failed to assess damages payable had the plaintiffs established liability.
18. Be that, as it may, the role of the first appellate court as held by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.



19. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. Pursuant to the aforesaid I have considered the evidence adduced in this matter in total and from the outset I note that, the accident that gave rise to the litigation herein occurred place on 19th June 2016, and the death of the deceased occurred on 19th July 2017, a period of one year after the accident. This observation is critical, in that the main defence raised was that, the death of the deceased was not occasioned by the road traffic accident and the trial court concurred with that defence.
21. I shall now delve in the evidence adduced. To start with I shall consider the plaintiff’s pleadings. The initial plaint was filed before the deceased passed on. The same was filed alongside the statement of the deceased plaintiff and a list of documents, as indicated at page 8 of the record of appeal. All these documents were in support of the averments that, the deceased was involved in a non-fatal road traffic accident.
22. Subsequently, the plaint was amended upon demise of the plaintiff and it is noteworthy that a supplementary list of documents was filed dated 10th September 2018. That supplementary list of the documents filed are as indicated at page 88 of the record of appeal. Remarkably there is no medical document filed in that list. Evidently therefore, the plaintiffs were relying on the initial medical reports filed with the initial un-amended plaint.
23. In my considered application, it is at this stage that the rain started beating the appellants. The defendant in their amended statement of defence put the plaintiff on strict proof as to whether the injuries that led to the death of the deceased arose as a result of the accident herein. At that point the plaintiffs bore the burden of proof as provided for under section 107 of the *Evidence Act* which states:
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.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
24. It was incumbent upon the plaintiffs to produce medical evidence to prove that the death of the deceased was as a result of the accident, and more so taking into account the duration of one year that lapsed after the accident. The matter is even more convoluted taking into account that, the deceased was not admitted after the accident. He was treated and discharged on oral analgesics and oral antibiotics. It is not clear in evidence when the deceased eventually became unwell thereafter and was admitted. I say so because, in the statement filed by the plaintiff Esther Waithira Kimani dated 16th September 2018, she avers as follows:

“That the deceased was treated at Lake View Maternity and Nursing Home.



That his condition got worse, and I took him to Mediheal Hospital for further treatment.

However, there was no improvement, and he was transferred to Kenyatta National Hospital where he passed on.”

25. Pursuant to the aforesaid, the plaintiff should have produced treatment notes from the three institution, being Lake View Maternity and Nursing Home, Mediheal Hospital and Kenyatta National Hospital. Those treatment notes and the discharge summary were not produced. As a result there is no proof of what the deceased was being treated of at Mediheal and Kenyatta National Hospital and the court cannot just assume that, it was in relation to the injuries sustained in the subject road accident herein.
26. The consequences of the aforesaid is that, the only medical evidence availed is what was filed with the initial plaint. An analysis thereof reveals that, the doctor who filled the P3 form indicated that, the deceased sustained soft tissue injuries, evidenced by resultant healed scars on the anterior chest, right hand dorsal, knee joint and right ankle. At the time of examination, the injuries were eight (8) days old. The degree of injury was classified as harm.
27. Similarly, the report of Dr. Obed Omuyoma dated 16th September 2015, indicates that the deceased sustained blunt injuries to the anterior chest walls, right knee and right ankle and soft tissue injury to the right hand. That upon examination the deceased was found to be in fair state of health. His vital were within normal limits. There were multiple scars noted on the right-hand dorsal aspect, and movement on the right knee was restricted due to pain. The conclusion by the doctor was that, the deceased was involved in a road traffic accident and sustained the injuries as stated in the report. The doctor formed the opinion that the degree of injury was harm.
28. Based on the aforesaid, there is no indication that, the deceased succumbed to death as a result of the injuries sustained in the road traffic accident herein.
29. Furthermore, I have considered the cause of death of the deceased as indicated in the certificate of death. It is indicated as follows: -

“ Head injury due to blunt force due to motor vehicle accident”
30. Pursuant thereof several questions arise, when did that accident occur. This question is critical in that, the deceased was a Boda boda rider. He was therefore prone to an accident just as any other road user. As such, the treatment notes from the facilities where he was treated were critical to give the evidence as to the date of the accident or the history thereof.
31. Indeed, the cause of death indicated above is not supported by the medical reports produced herein. The P3 form indicates that

“ no injuries were noted”

on the head and neck of the deceased when he was examined on 22nd June 2016, being eight (8) days after the accident. Similarly, when Dr. Obed Omuyoma examined the deceased on 16th September 2015 (*sic*-2016), the deceased did not complain of any injury on the head.
32. As a consequence of the aforesaid, I find and hold that the plaintiff’s evidence as adduced did not support and prove the averments in the amended plaint. The same are more supportive of the initial pleadings. I find no error in the judgment of the trial court that found that the plaintiff failed to



establish the nexus between the injuries suffered in the accident herein and cause of death. I uphold the decision dismissing the suit.

33. The appellant argues that, the trial court should have assessed damages had the plaintiff proved the case. I find that, it would have not been tenable in this matter in view of the fact that, the pleadings were not supported by evidence. More so by virtue of the fact that, the pleadings supported the initial plaint and not the amended plaint, the trial court indeed appreciated the difficulty situation it found itself in stating that, had the plaintiff not amended the plaint, it would have found in their favour.
34. I also hold the view that, if the plaintiff were to reconsider further action, an indication of how much money is payable at this stage may prejudice any subsequent claim. I hesitate to make a finding thereof.
35. In summation I find and hold that the appeal lacks merit and I dismiss it with costs to the respondent.
36. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 30TH DAY OF APRIL, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Masese for the appellant

N/A for the respondent

Ms. Ogutu: Court Assistant

