Ngeta (Suing as the Personal Representative of the Estate of Tom Mulinge Makau - Deceased) v Njuguna & another (Civil Appeal 80 of 2021) [2024] KEHC 6856 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6856 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL 80 OF 2021

G MUTAI, J

MAY 30, 2024

BETWEEN

JAMES MAKAU NGETA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF TOM MULINGE MAKAU - DECEASED) ..... APPELLANT

AND

JAMES MBURU NJUGUNA ..... 1ST RESPONDENT

JOSEPH WACHIRA KAMAU ..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 17th November 2021 by Hon. J.N. Nthuku, Principal Magistrate in Loitokitok PMCC No. 2 of 2021.
2. The Trial Court dismissed the Appellant's suit for failure to prove negligence on the part of the Defendants.
3. The Appellant being aggrieved by the dismissal filed this Appeal and preferred the following grounds in the Memorandum of Appeal:-
    a. The Trial Court erred in law and fact in finding that the Appellant did not call an eye witness to prove the case;
    b. The Trial Court erred in law and fact in relying on the evidence of DW2 who was not impartial for he had been hired and paid by the insurers;
    c. The Trial Court erred in law and fact in failing to evaluate the evidence of the Plaintiff; and
    d. The Trial Court erred in law and fact in failing to award damages.

Pleadings

4. The Appellant filed the suit vide the Plaint dated 17th August 2018.

5. The Appellant instituted the lower court suit in his capacity as the Administrator ad item of the Estate of the late Tom Mulinge Makau.

6. In the Plaint dated 25th January 2021 and filed on 28th January 2021, the Plaintiff claimed damages following an accident that allegedly occurred on 21st January 2020 in which the Deceased was said to be lawfully on board Motor vehicle Registration No. KBZ 769Y along the Emali-Loitokitok Road when the 2nd Defendant negligently drove the motor vehicle owned by the 1st Defendant and caused the accident in which the Deceased suffered fatal injuries.

7. The Appellant particularized negligence on the part of the Defendants and pleaded Special Damages of Kes.500/- and General Damages.

The Respondents case

8. The Respondent entered appearance and filed Defence denying the averments in the Plaint and blaming the accident on the Deceased.

Evidence

9. During testimony, PW1, CPL Bitok Abraham testified for the Appellant. It was his case that the 2nd Defendant was carrying uninsured passengers.

10. He testified that the Deceased was not on board the motor vehicle involved in the accident. He said that he jumped to board the Lorry but slipped and fell, and the rear tyre ran over him.

11. He testified that he was not the investigating officer. Further, the driver of the second motor vehicle was charged with carrying uninsured passengers and fined Kes.10,000/-.

12. On cross-examination, it was his case that the Deceased stole a ride on the motor vehicle and stealing a ride was a traffic offence. He also stated that the Deceased had not boarded the motor vehicle as he was attempting to jump and board.

13. Finally, he testified that the investigations did not find the driver blameworthy, and that is why he was not charged with causing death by dangerous driving.

14. PW2 testified that he was the father to the Deceased. It was his case that he was notified on the phone about the demise of his son by a neighbour, and he confirmed when he found the body lying at the Mortuary.

15. It was his case that the Deceased was aged 19 years and was engaged in tomato farming. He earned Kes.1,000/- per day and Kes.30,000/= per month from the said activity.

16. The Respondents called DW1, the 2nd Respondent, who testified that he was the driver of the accident motor vehicle. He testified that the accident occurred without his knowledge, and he was not to blame. He testified that he was not charged with causing death by dangerous driving.

17. On cross-examination, it was his case that he did not see the Deceased before the accident. He was making a turn and was just informed by onlookers that he had run over a person. Further, he did not know the Deceased before.

The Appellant's Submissions

18. It was the submission of the Appellant that the Trial Court erred in dismissing the suit despite the evidence produced in support of the case.

19. Counsel relied on the case of William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

20. It was this submitted that the Appellant had proved his case on a balance of probabilities and the Trial Court dismissed the suit in error.

21. The Appellant further submitted that the case ought not to have collapsed merely for absence of an eye witness as circumstantial evidence would point to negligence on the part of the Respondents. Reliance was placed inter alia on the case of EWO (suing as the next friend of a minor COW) vs Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR.

22. Counsel further submitted that the charges against the 2nd Appellant were not sufficient evidence that the 2nd Appellant was not negligent and the trial court erred in finding no negligence. They relied inter alia on the case of David Kimilu Mutinda vs Masinde W Samuel (2021)eKLR.

23. It was also submitted that the trial court disregarded the methodology proposed by the Appellant in his written submissions and as such ended up stating applicable damages in case negligence was found, that were inordinately low.

24. I was urged to set aside the award of damages and substitute with a commensurate value should the Court find negligence on the part of the Respondents.

Respondent's Submissions

25. It was the submission by counsel that the Appellant failed to prove negligence on the part of the Respondents and that the court correctly dismissed the suit.

26. Counsel relied among others on the case of Timsales Limited vs Starnely Njihia Macharia (2016)eKLR to canvass the submission that the Appellant had not proved the case as required under Sections 107 and 108 of the *Evidence Act*.

27. It was the submission of the Respondent that there cannot be liability without fault and the Trial Court correctly dismissed the suit for want of prove of fault on the part of the Respondents. They relied on the case of Midam Services Limited & Another vs Ronald Kapute (2022)eKLR.

28. I was urged to dismiss the Appeal.

Analysis

29. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal.

30. The issue that fall for this Court's determination is whether the Trial Court erred in law and fact in dismissing the Appellant's case.

31. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

32. In the case of Peters vs Sunday Post Limited [1958] EA 424 , the court stated as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

33. In Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

34. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

35. Clearly, the burden of proof was on the Appellant to avail evidence to prove on a balance of probabilities that the Respondents were liable for the accident leading to the demise of the Deceased.

36. I understand the occurrence of the accident was not disputed. Indeed, the accident occurred through which the Deceased lost their life; this was the common position of the parties in the Trial Court and even this Court.

37. What is disputed is whether the Respondents were negligent. The standard is a simple one on the preponderance of probabilities or balance of probability. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J (as he then was) in William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526 as follows:-

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred."

Amounts due

38. In my reevaluation of the pleadings and evidence, I note that the Appellant's case was that the Deceased was lawfully aboard Motor Vehicle Registration Number KBZ 769Y. However, the evidence tendered to prove this fact was remote. There was an attempt to blame PW1, the Police Office for the reason that he skewed the evidence in favour of the Respondents and was as such not independent and impartial. In my view, Traffic Police Officers as civil servants need not necessarily find for the Plaintiff in a case. They may testify in court as witnesses of the Plaintiff but produce a report that does not support the Plaintiff's case. They may also testify in court for the Defendant but produce a report that does not support the Defendant's case. That is their role. Their duty is to present as accurately as possible a report on the circumstances that led to the accident. It does not matter that the report will support one or the other case. The report might as well find no one to blame.

39. Inasmuch as the Appellant maintained that the Appellant had proved his case, there are concerns which were not addressed. There was no evidence to connect the Deceased and the defendants and to prove the allegation that the Deceased was lawfully aboard the motor vehicle. More so, the motor vehicle was not a public transport one commonly known as matatu. It was a lorry.

40. The Plaintiff who pleaded in the Plaint that the Deceased was lawfully on board had the legal burden to avail evidence to support this allegation. In my view, if the Deceased had been found to be a passenger or lawfully on board, then a duty of care could have been easily traced to the 2nd Respondent because, without this, it remained unproved how the Deceased could have fallen from the motor vehicle he had lawfully boarded and got run over.

41. Further, I understand the Respondent's case, just like the Police Officer who testified for the Plaintiff, to be that the Deceased was trying to jump and hang on the moving lorry and ended up slipping and falling, after which he was run over by the rear wheels. This does not bring out the Deceased as lawfully boarding the motor vehicle. Circumstances of the case are crucial in determining the natural cause of events. In the case of Berkley Steward vs Waiyaki Vol 1 KAR 1118 [1986 – 1989] it was held:-

> "Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."

42. Whereas I agree with submission by counsel for the Appellant that it was not mandatory that an eye witness testifies in order to find negligence, I do not think the Trial Court's reasoning was based solely on the absence of the eye witness. Even where there is no eyewitness, there must be evidence that will fill the gaps that an eyewitness would have filled. And again, the court may find the evidence of an eyewitness quite incredible and invaluable. Therefore, even without an eyewitness, negligence could be inferred from the general factors surrounding the case. As was held in the case of EWO (suing as the next friend of a minor COW) vs Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR:

> A case cannot collapse merely on the basis that there were no eye witnesses. The court can, on the basis of circumstantial evidence or evidence adduced by the Defendant that tends to prove his involvement in the alleged act infer culpability on the part of the Defendant.

43. In this case, it is difficult to find error on the part of the Trial Court in dismissing the suit for want of proof. Indeed, it is the Appellant who failed to prove negligence on the part of the Respondents. It was simple. What the Appellant ought to have done is avail evidence to the extent that the Deceased was a passenger or lawfully boarding the accident motor vehicle as pleaded. Then, the Appellant should have established how the Deceased then fell from the accident motor vehicle that he boarded. Definitely, this would have assisted the court to infer duty of care and breach of duty of care on the part of the Respondents. In the absence of this, it was not possible to find duty of care since the 2nd Respondent who was driver testified and his testimony was supported by the police officer that the Deceased was unlawfully jumping to hang on the accident motor vehicle when the accident occurred. In such circumstances, the existence of duty of care, breach of duty of care, proximity or neighborhood and foreseeability as crucial ingredients of negligence on the part of the Respondents were diminished and unavailable.

44. In the case of Caparo Industries PLC vs Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal [1988] RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

45. In Caparo case (supra) the Court stated:

> " What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

46. I gather from this case that the nexus between the harm and negligence on the part of the Respondents also ought to have been established in order to find negligence. This was, the Appellant would have clearly proved negligence thus:

that the respondents owed a duty of care to the appellant.

that the respondents breached that duty of care in the manner of their driving.

that the breach caused the appellant to suffer personal injuries attracting recoverable damages at Law.

that the injury suffered by the appellant was as a result of the breach and negligence which was reasonably foreseeable.

47. Having found that the trial court was correct in dismissing the suit for want of prove of negligence on the part the Respondents, I do not find it desirable to venture into the arena of the quantum of damages. I let this issue to rest.

Determination

48. In the upshot, I make the following Orders:

i. The Appeal lacks merit and is dismissed with costs to the Respondents.

49. Orders accordingly.

DATED AND SIGNED AT MOMBASA VIRTUALLY THIS 30TH DAY OF MAY 2024.

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

GREGORY MUTAI

JUDGE

In the presence of: -

No appearance for the Appellant;

No appearance for the Respondent; and

Arthur – Court Assistant