



**Mukundi (Suing in her capacity as the personal representative of the Estate of Kevin Wachira - Deceased) v Macharia & another (Civil Appeal E259 of 2023) [2024] KEHC 10902 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 10902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E259 OF 2023  
BK NJOROGE, J  
JUNE 28, 2024**

**BETWEEN**

**HARRIET GATAAKA MUKUNDI ..... APPELLANT  
SUING IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE  
ESTATE OF KEVIN WACHIRA - DECEASED**

**AND**

**NICHOLAS KIMARI MACHARIA ..... 1<sup>ST</sup> RESPONDENT  
DAVID NJOROGE MBUGUA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the decision of the learned Principal Magistrate Hon. Catherine Mburu (Ms.) given on 19/07/2023 in Nairobi CMCC No. 2020 of 2020)*

**JUDGMENT**

1. This Appeal arises from the decision of Hon. Catherine Mburu (PM) delivered on 19/7/2023. The Court dismissed the Appellant's suit with costs, as liability had not been proved. This was a claim brought to Court under the Fatal Accidents Act and the Law Reform Act.
2. Directions for filing written submissions were granted on 29/4/2024. Both parties proceeded to file their respective submissions. The matter was thereafter flagged for the Rapid Results Initiative for the month of June 2024. The Court has considered the submissions filed as well as the authorities attached.

**Background facts**

3. The Appellant filed a claim before the trial Court seeking damages arising from the death of her son. The son was said to have been a passenger in the 1<sup>st</sup> Respondent's motor vehicle registration number KBU 064S a Mercedes Benz (Tanker) Actros. It was driven by the 2<sup>nd</sup> Respondent, an employee of



- the 1<sup>st</sup> Respondent. The accident happened on 3/3/2019 around Acre Tano Area along the Naivasha-Nairobi highway.
4. The Appellant attributed blame to the 2<sup>nd</sup> Respondent for the accident and held the 1<sup>st</sup> Respondent vicariously liable.
  5. The Respondents denied any liability for the accident. In any event the 1<sup>st</sup> Respondent denied that the deceased was permitted to board the vehicle.
  6. The trial Court agreed with the Respondents that the deceased was not authorized to be on board the motor vehicle. This is because he was not the 1<sup>st</sup> Respondent's employee. That liability was not proved.
  7. The Court proceeded to assess quantum, but ultimately the suit was lost.

### **Issues for determination**

8. Having perused the submissions filed herein, the Court identifies three (3) issues for determination as follows;
  - a. Whether failure to attach the decree to the Record of Appeal is fatal to this appeal?
  - b. Whether liability was proved?
  - c. What reliefs flow from this appeal.
9. This is a first appeal so the Court's duty is to appraise of itself of the evidence afresh, re look and re analyze the same. Thereafter reach an independent conclusion.

All this while bearing in mind that the Court did not have the opportunity to look at or hear the witnesses. See *Selle vs Associated Motor Boat Company* (1968) E.A 123.

### **Analysis**

10. The Appellant has filed a Record of Appeal that sets out Four (4) grounds. The only complaint the Appellant has is on the issue of liability. In her written submissions, she has conceded that she is amenable to the award of damages as proposed by the trial Court.
11. The Court will proceed to consider the three (3) issues framed for consideration herein.

#### **a. Whether failure to attach a decree to the record of appeal is fatal to this appeal?**

12. The Court has perused the Record of Appeal filed, as well as the index. It contains no reference to the copy of the Decree.
13. The Respondents referred the Court to Order 42 Rule 2 and 13 of the Civil Procedure Rules. They also rely upon *South Nyanza Sugar Co. Ltd vs. Simeona A. Opola* (2020) eKLR and *Lucas Otieno Masange vs Lucia Olewe Kich* (2022) eKLR. In those two suits, failure to attach a decree to the Record of Appeal was raised as a jurisdictional issue. The two courts upheld the objections. They held that such an Appeal is fatally defective, incompetent and liable for striking out with costs.
14. The Appellant has not responded to this serious omission or sought to make amends or file any authorities to convince the Court otherwise.
15. The Court finds that in absence of the decree in the Record of Appeal, the entire appeal is incompetent.



**b. Whether liability is proved?**

16. The Court has looked and relooked at the proceedings on the manner in which the Appellant tackled the issue of liability.
17. Firstly, the duty to prove negligence at all times lay upon the Appellant. That is what Section 107 of the Evidence Act demanded of her. The duty to prove what she alleged at all times lay with her.
18. The Appellant pleaded ten (10) particulars of negligence on the part of the 2<sup>nd</sup> Respondent. At paragraph 9 of her statement (which was admitted as her evidence in chief) she blamed the 2<sup>nd</sup> Respondent. She alleged that he was negligent in failing to keep a look out or observe the various directions along the Naivasha-Nairobi highway that was under construction. If she had been an eye witness at the accident, the Court would have taken this as her evidence. However, she cannot testify to that which she did not witness.
19. Her oral testimony does not attach any particular of negligence to the Respondents. No police officer was called to produce the investigation file or the sketch plan of the accident scene. The police abstract admitted in evidence does not blame the Respondents. It indicates PUI or pending under investigations.
20. The Respondents have denied any negligence. They have referred the Court to the decision in Midans Services Ltd & Ano. Vs Ronald Kapute (2022) eKLR where it was held that when negligence is not proved, a suit fails. The Court is persuaded by that decision.
21. The Court has considered the decision of Beatrice William Muthoka & Ano. (Both suing as legal representatives of the estate of the late William Muthoka Yumbia (Deceased) vs Agility Logistics Limited (2020) eKLR. It is correct, that if a driver of a motor vehicle allowed a passenger to board, the employer will be estopped from denying vicarious liability. The employer cannot be heard to plead “no unauthorized passenger” when his own driver allowed him in.
22. The Appeal at hand does not turn on this issue, but whether negligence in this case was proved.
23. Liability in cases of such a nature falls upon the party at fault, therefore its crucial to prove negligence.

**c. What reliefs flow from this appeal?**

24. The Appellant does not challenge the award on quantum and there is no cross appeal on the same. The Court will not therefore delve into the issue of quantum.
25. Taking all factors into consideration the appeal lacks merit and the decision of the trial Court is upheld.
26. As costs are at the discretion of the Court, this is matter where each party ought to bear their own costs.

**Determination**

27. The appeal is dismissed with each party to bear their own costs.
28. It is so ordered.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**NJOROGE BENJAMIN K.**



**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

