Karinge & another v Makuthu (Suing as the Legal Representative of the Estate of Timothy Muthambu Makuthu (Deceased)) (Civil Appeal E029 of 2022) [2024] KEHC 11641 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11641 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E029 OF 2022

REA OUGO, J

SEPTEMBER 27, 2024

BETWEEN

PAUL NJIRU KARINGE ..... 1ST APPELLANT

AMOS RUHENI NDGEWA ..... 2ND APPELLANT

AND

ROBERT MAKUTHU ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF TIMOTHY MUTHAMBU MAKUTHU (DECEASED)

JUDGMENT

1. The background of this matter is as follows; the respondent filed suit against the appellant vide a plaint dated 16th September 2019. It was alleged that on the 30th of July 2015, the deceased was lawfully walking along Langata Road near KWS Hostels when motor vehicle registration number KBU 365X was so negligently driven resulting in an accident in which the deceased suffered fatal injuries.

2. The appellants denied the respondents' claim vide a defence dated 27th February 2020. The matter proceeded to hearing and in a judgment dated 10th December 2021 and found the appellants 100%.

3. The appellants being aggrieved by the said judgment lodged the instant appeal vide a Memorandum of Appeal dated 24th January 2022. The appeal is on liability. The appellants' grounds of appeal are as follows that;

    a. The Honorable Magistrate erred in law and in fact in finding the 1st and 2nd appellants liable to the tune of 100%.

b. The Honorable Magistrate erred in law and in fact in disregarding the overwhelming evidence tendered by the defence and further failed to apportion liability between the appellant and the deceased.

c. The Honourable Magistrate erred in law and facts by failing to consider the evidence and the submissions by the Appellants while arriving at the judgment.

d. The Honourable Magistrate erred in Law and fact in relying on extraneous evidence in arriving at the decision on liability.

4. The appellants seek that: the appeal be allowed and, that the Honourable Court be pleased to review the issue of liability against the Appellants. The respondents do pay the costs of this appeal and costs in the lower court.

5. Parties canvassed this appeal by way of written submissions. The appellant submits as follows; the appeal is solely on liability. the principal witness was the respondent. He informed the court that he had no eye witness to the accident and that he was not at the scene of the accident. The allegation that the driver was negligent was not sufficiently proved and it remains an allegation. The police officer who testified informed the court that he was not at the scene when the accident took place nor was he the investigating officer assigned to the matter. He did not produce any sketch maps, investigation reports, and/or photographs in court which would have helped the court know how the accident happened. The police abstract is just an accident that had been reported and not proof of liability as was held in the case of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR it was held, "A police abstract is not proof of occurrence of an accident but of the fact that an accident, the occurrence thereof was " reported," at a particular police station". The respondent told the court that the appellant had been charged with dangerous driving but he did not produce any proceedings of the said traffic case. The existence of the traffic case is inconsequential to this case as it is yet to be determined. The appellant cannot be held liable for the accident based on inclusive traffic charges. No evidence was adduced to prove that the appellants were to blame for the death of the deceased. The respondent based his case on hearsay evidence. For this argument the appellant relied in the decision in the case of Sally Kibii and Another vs Francis Ogaro [2012] eKLR, the court held that "the failure of the police to determine from the scene of the accident which motor vehicle was to blame and the absence of an eye witness diminishes the Appellant's chance to prove a case of negligence against the defendant".

6. The appellant submitted further that the appellant states that the accident was fortuitous and occurred without any negligence on his part. He was driving at 30kmp when suddenly the deceased ran into the road from the left side and was knocked by the left side mirror of the vehicle. The deceased crossed the road at an undesignated place and put himself in danger and there is nothing the driver could have done to avoid the accident as he was driving in the innermost lane and he could not serve any further to avoid the deceased. It was submitted that the evidence was scanty and insufficient to hold the Appellants liable. That he who alleges must prove (see Sections 107 and 109 of the *Evidence Act*). The appellants relied on the case of Kiema Muthuku vs. Kenya Cargo Handling Services Ltd as cited in Mbugu David & Another vs Joyce Gathoni Waithena & Another [2016] eKLR the court held that;

> " There can be no liability without fault and a plaintiff must prove some negligence. Taking into account all the evidence on record. It is apparent that the plaintiff herein has failed to discharge the burden of proof by establishing the link between the defendant's actions and the cause of action".

7. The respondent submitted as follows; the appellant has not raised any issue on quantum and as such the only issue for determination is whether the appellants were wholly liable for the accident. The

occurrence of the accident is not disputed. What is in dispute is who is responsible for the accident? The Respondent called Corporal Dicken Andate who produced a police abstract that confirmed that the accident took place at a zebra crossing along Langata road involving vehicle registration number KBU 365X and the deceased. The 1st appellant was charged with the offence of causing death by dangerous driving in Kibera Traffic case no. 7250/15 and that the police abstract blamed the 1st appellant. The 1st appellant testified that he was driving along Langata Road when he hit a person and that he was driving in the 3rd land and a speed of 30km/h and that after passing the zebra crossing a person suddenly crossed the road at an undesignated place and hit the side mirror of the lorry he was driving. It was submitted further that the death certificate indicated that the cause of death was multiple crash injury due to blunt trauma due to motor vehicle accident. That if the 1st appellant was indeed driving at 30km/h he would have been able to apply the brakes and at the very least minimize the impact. The respondent cited section 3 (2) of the *Evidence Act* Cap 80 which states as follows;

> " A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists".

8. The respondent further submitted that there seem to be two contradicting possibilities on how the accident occurred. One is that the accident occurred at a zebra crossing due to the negligence of the 1st appellant or that the deceased was walking on an undesignated area and was knocked down by the 1st appellant who could not do anything to prevent the occurrence of the accident. The court should decide the case on a balance of probability. The evidence adduced by the respondent disproves the 1st appellant's testimony that the deceased was walking in an undesignated area and that he was driving at 30km/h. The respondent relied on the case of Fraciah Njeri Grace vs Isaiah Ngararika Muindi & Another [2012] eKLR where the court held as follows;

> " A person who drives a vehicle on a highway has a duty to take reasonable and proper precautions in the use of the vehicle, and failure to observe such precaution will give a cause of action to any person who suffers damage as a result.
>
> In the old case of Heaven Vs Pender (1883) , Ii Q.b.d Brett M.r , said at p.507
>
> " Actionable negligence consists in the neglect use of ordinary care of skill towards a person to whom ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his own part, has suffered injury"
>
> " A person, therefore, who drives a vehicle on a highway must always exercise not only care but also skill. He must observe the ordinary rules of the road unless a deviation from such rules is necessary to avoid an accident. he must not drive at an excessive speed in the circumstances. He must keep a proper look out- out for pedestrians or other road users. He must, where expedient, give warnings of his approach, as at crossroads. Even if another user of the road is negligent, he must exercise due skill in trying to avoid the consequences of that negligence."

9. The respondent argues that pedestrian areas are usually marked areas for pedestrians to cross and pedestrian and it is expected that motor vehicles approaching a pedestrian crossing slow down to allow pedestrians to cross before proceeding and since the 1st appellant did not slow down the appellants should be held fully liable, the 1st appellant having failed to exercise care and skill he was thus 100% liable for the accident and the 2nd appellant is vicariously liable.

Analysis And Determination

10. The only issue for determination in this appeal is whether the appellants were wholly liable for the accident. There is no dispute that the accident did occur and that the deceased died as a result of the injuries sustained from the said accident. There was no eye witness to the accident. Being a first Appeal, the court relies on the principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "…..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 into account of particular circumstances or probabilities materially to estimate the evidence."

11. Pw2 Robert Makuthu the plaintiff testified that the deceased was his brother and that the deceased was alone at the time of the accident. Pw1 Corporal Dicken Andete based at Langata police station testified that as per the occurrence book and police abstract, the deceased was knocked while on a Zebra crossing, crossing he road and the deceased Timothy Mutambu died on the spot. Dw1 Paul Njue Kanyingi the 1st defendant testified that on 30.7.2015 at 7.30 am while driving along Langata Road at KWS he hit a person who was crossing the road. He denied that the deceased was crossing at a designated place that he was driving at 30kmph and that he had just crossed the road. He hit someone with his side mirror on the conductor's side. He was driving on the 3rd lane which has rails, he could not swerve. He blamed the deceased for crossing at an undesignated place. Later he reported the accident at the police station.

12. The principles guiding the appellate court's power to interfere with the trial court's finding on liability were well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge".

13. From my evaluation of the evidence adduced there was no eye witness to the accident. The respondent relied on the evidence of the police officer who produced documents from their police station. The police abstract issued on 4.12.2019 indicates that an accident occurred involving vehicle registration number KBU 365X and the deceased who died on the spot. The police abstract indicates that the driver was to blame. The appellant does not deny that the accident happened. There is however no evidence on how it happened. The certificate of death indicates that the cause of death was a multiple crush injury due to blunt trauma due to a motor vehicle accident. The appellant's driver testified that he was driving at 30 kmph , if this was so then he should have been able to bring the vehicle to a halt. The cause was death was multiple crush injuries due to blunt trauma. A vehicle driven at a speed of 30 kmp would not have caused crush injuries, in my view, the driver who was in control of the vehicle was at speed. I agree with the finding of the trial court that the driver was speeding in the circumstances. In the case of Fraciah Njeri Grace vs Isaiah N. Muindi(supra), the court held that a person who drives a vehicle on a highway must always exercise not only care but skill. He must not drive at excessive speed

in the circumstances and he must keep a proper lookout for pedestrians or other road users. The driver therefore had to be extra careful.

14. It is not clear whether the accident took place at a zebra crossing as alleged or that the deceased was crossing the road at an undesignated area. A sketch could have helped establish this fact. Since this is not clear I will apportion liability as follows, at 80:20%. The appellants shall bear 80% liability. The appellants did not appeal on quantum. I therefore set aside the trial court finding of 100% and substituted it with 80:20%. The appellant is awarded half the costs. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 27TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Miss Mwiiri -For the Respondent

Wilkister -C/A