Masika (Suing as personal representative to the Estate of Douglas Juma Masika - Deceased) v Odongo (Civil Appeal 142 of 2023) [2024] KEHC 16384 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16384 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 142 OF 2023

S MBUNGI, J

DECEMBER 23, 2024

BETWEEN

JELLISON JUMA MASIKA (SUING AS PERSONAL REPRESENTATIVE TO THE ESTATE OF DOUGLAS JUMA MASIKA - DECEASED) .... APPELLANT

AND

FAUSTINE ATORI ODONGO .... RESPONDENT

(Appeal from the judgement of the Hon C.N Njalale Magistrate(SRM) in Butali MCCC No. 96 of 2016 delivered on 24/8/2019)

JUDGMENT

Introduction

1. This Appeal arises from the judgment of Hon C.N Njalale Magistrate (SRM) in Butali MCCC No. 96 of 2016 delivered on 24/8/2019).

2. The plaintiff/respondent had sued the defendant/Respondent in a personal injury claim arising from a fatal motor vehicle accident which occurred on 25th October 2015 in which the plaintiff Douglas Juma Masika died leaving behind four (4) brothers and a father.

3. The appellant submitted that Douglas Juma Masika's who is also his son died on 25th October 2015 owing to an accident involving his motor cycle registration number KMCR 317S and a Motor vehicle Registration Number KBY 363J at Holiday Inn filing station situated along Kakamega Webuye road at Malava. The time of the accident he was a boda boda rider.

4. The Appellant being dissatisfied with the judgement of the lower court filed an appeal on the following grounds.

    a. That the trial learned magistrate grossly erred in evaluation of evidence before her.

b. That the trial magistrate grossly erred on relying on evidence of DW2 which was basically hearsay as no independent witness were called as witnesses in the case.

c. That the learned trial magistrate grossly erred in not finding that the defendant's evidence was contradictory and wishy-washy and could therefore not be relied upon.

d. That the learned trial magistrate erred in not talking judicial notice of road in issue.

e. That the leaned trial magistrate finding on quantum was manifestly low.

f. That the learned trial magistrate chose to totally ignore the submissions made by the Appellants.

5. The Appellant in his Memorandum of Appeal dated 2nd February 2023 seeks for the following orders: -

i. That the entire judgment be set aside.

ii. That this court do make a decision as to liability and quantum

iii. That the respondent do bear the cost of this appeal as well as those of the lower court.

6. The court directed both parties to file their written submission which they did.

Appellant's Submissions

The appellant identified two issues for determination:

i. Whether or not the appellant has satisfied the ground for setting aside the entire judgment delivered on 24th August 2023 by Hon.C.N. Njalale, Senior Resident Magistrate in Butali MCC NO 96/2016?

7. The Appellant submitted that being a first appeal, this court was under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusion and establish whether the conclusion reached by the Hon C.N. Njalale (SRM) was consistent with the evidence and the applicable law. The Appellants also relied on the case of Gitobu Imanyara & 2 Others VS-Attorney General (2016) eKLR where the court held that "this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial court by the High court is by way of a retrial and the principles upon which this court acts in such an appeal are well stated...."

8. The appellant further submitted that Hon. C.N. Njalale SRM dismissed the plaintiff's claim against the respondents with costs because she was more convinced with DW2's testimony in which he stated that the deceased herein sought to overtake two motor vehicles in a corner, and because he did not manage to overtake the two vehicles it resulted in him being hit by the oncoming motor vehicle.

9. DW2 Being a police officer produced as evidence a copy of a police abstract, according to him the road had no shoulders to allow the plaintiff to overtake the two motor vehicles and produced a police file which indicated that the deceased was hit while on the wrong side of the road or rather in the middle of the road.

10. DW2 also produced an inspection report which also indicated the motor vehicle which the deceased was on was also defective hence the trial magistrate concluded that the deceased was 100% to blame for overtaking at a corner and no liability was apportioned to the respondents.

11. The Appellant further submitted that PW2 produced a police abstract which stated that the deceased was hit when the motor vehicle registration number KBY 363J, while trying to avoid a head on collision with KBC 633S, swerved to the left and knocked the deceased.PW2 also stated that the accident involved motor vehicle lorry registration number KBY 363J ,motor vehicle registration number KBC 633S and motor cycle registration number KMCR 317S.He also submitted that the deceased motor cycle and the motor vehicle lorry registration number KBY 363J were heading towards the same direction.

12. The appellant also submitted that the glaring errors between the PW2 and DW2 testimonies were apparent but were not appreciated by the honorable trial magistrate which led the estate of Douglas Juma Masika to suffer gross miscarriage of justice.

13. The appellant further relied on the case of Moses Kipkolum Kogo Versus Nyamogo Advocates(2000)Eklr where the court held that...there is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could be reasonably be no two opinions a clear case of error apparent on the face of the record would be made ....”

ii. Whether or not the court erred in entering judgment in favour of the respondent as against the appellant?

14. On this the appellant submitted that the judgment and conclusion by Hon. C.N. Njalale (SRM) was not supported by the evidence placed before her. Further a gross miscarriage of justice was occasioned on the appellant basing on the glaring evidence that was brought to the honorable magistrate’s attention which was not fully appreciated. The appellant further submitted that it was therefore necessary that the entire judgement entered in favour of the respondent as against the appellant be set aside and that the apportioning of the 100/ was wrong.

Respondent’s Submissions

15. The respondents submitted on each ground of appeal as raised by the appellant as follows:

    i. The learned magistrate grossly erred in evaluation of evidence before her.

    The respondents submitted that the honorable magistrate correctly evaluated the evidence presented before her and arrived at a fair judgment which they humbly urged the court to uphold in its entirety.

    ii. That the learned trial magistrate grossly erred in not attributing any contributory negligence on the part of the response from the circumstances of the case.

    The respondents submitted that the attribution of contributory negligence in road traffic cases is not automatic and the court has to weigh evidence before it and decide whether contributory negligence applies. The respondent further supported the position of the trial court that the circumstances surrounding the instance case pointed that the appellant was to blame 100% for the accident and the respondent did not contribute to the occurrence of the accident.

    iii. That the learned trial magistrate grossly erred on relying on the evidence of DW2, which was hearsay as no independent witnesses were called as witnesses in the case.

    The respondents averred that it was incumbent upon the appellant to call independent witnesses in support of his case and not blame DW2 who stated precisely what happened on the date of the accident.DW2 was CPL Kiprono Bett who produced the police file and from

the investigations the deceased was entirely to blame. The respondent further urged court to uphold the reasoning on the trial magistrate in relying on the evidence of DW2.

iv. That the trial magistrate grossly erred in not finding that the Defendant's evidence was contradictory and wishy wishy.

The respondent averred that the evidence tendered by them was water tight and pointed to the irrefutable fact that the deceased was to blame 100/ for the accident that claimed his life.

The respondent also submitted that the trial magistrate applied her mind to the facts presented before her and the decision was above board and should be upheld.

v. That the learned trial magistrate erred in not taking judicial notice of the road in issue.

The respondent submitted that this ground had no substance at all and the court should discard it in its entirety and uphold the judgment of the trial court.

vi. That the learned magistrate chose to totally ignore the submissions made by the appellant.

The respondents stated that the appellant had not placed anything before the honorable court to support this issue. In their view the trial magistrate examined both sides of the coin and made a well-reasoned judgment, which they urged court to uphold.

vii. That the trial magistrate's finding on quantum was manifestly low.

The respondent submitted that the trial magistrate was guided by judicial precedents on quantum, stating that the appellant did not provide any earnings by the deceased, who was a motor cycle rider and did not have a license. On the estate of the deceased depending on his earning capacity, the respondent averred that that fact was not put before court to enable it to come up with a higher quantum.

They further relied on their submissions filed before the trial court in support of the judgment delivered by Hon. C.N Njalale and urged the court to dismiss the appellant's appeal with cost to the respondent since the same is devoid of any merit.

16. I have looked at the grounds of appeal, submissions by the parties, the judgment and the proceedings of the magistrate's court. I have reevaluated the evidence of the lower court and keenly looked at the judgment in line with the holding in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR where it was held:

> "…This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way…"

17. From the materials before me, I isolate the following issues for determination;

i. Whether the learned trial magistrate grossly erred in evaluation of evidence before her making her arrive to the wrong conclusion on the issue of liability;

ii. Whether the learned magistrate's finding on quantum was manifestly low;

Determination

18. On the issue of liability, I note that the appellant never called any eye witness to tell the trial court exactly what happened. He relied on the evidence of PW2 the policeman who produced a police

abstract which had details of an accident which occurred on 25th of October 2015 along Kakamega Webuye road, Malava area involving motor vehicle KBY 363J Mitsubishi lorry KBC 633S Nissan Caravan and motor cycle Registration Number KMCR 317S TVS. He said both motor vehicles were going towards Kakamega direction. Motor vehicle KBC 633S was ahead followed by motor cycle Registration Number KMCR 317S TVS. He further testified that at the scene the lorry overtook the Nissan and the motor cycle and as it was overtaking the motor cycle to the left it hit the motor cyclist causing him serious injuries. He further told the court that the file was still pending under investigation. He produced the police abstract as an exhibit and said that the driver of the lorry was blamed for carelessly overtaking. When he was recalled again on the 7th of April, 2022 he said the lorry and motor cycle were heading towards the same direction Kakamega on reaching the scene the lorry tried to overtake the motor cycle there was oncoming motor vehicle KBC 633S, and to avoid head on collision the lorry swerved to the left and hit the motor cycle rider on the rear tires. Due to the impact the rider sustained injuries and later died. He said he obtained the facts from the initial report made at the police station. On examination by Mr. Anyona for the respondent, he said he did not produce the occurrence book to show the initial report, he said he cannot tell who was to blame for the accident. He further said he cannot tell whether the two motor vehicles were inspected. He further said the driver of the lorry was not charged. He further said that all relevant information was contained in the police file which he did not produce and admitted that he did not peruse the police file before he came to court. On re-examination by Mr. Kiveu he said there was no evidence to show how motor vehicle KBY 363J Mitsubishi lorry contributed to the accident.

19. The respondent was the first defence witness. She adopted her recorded statement as evidence in chief. She recalled that on 25.10.2015 she was travelling in a lorry reg. no. KBY 363J from Chavakali to Kitale to go and purchase maize when they were involved in a road accident. She stated that the accident was between the lorry and a Nissan GK vehicle. She recalled that she saw a motor cyclist overtake the GK Nissan and banged into the rear right tyres of the lorry, then pushed and hit the GK Nissan and the motor cyclist was blamed for the accident. She stated that the motor vehicle was not hers, despite the police abstract showing her as the owner of the motor vehicle and the insurance cover bearing her names as the insured.

20. On cross examination, the respondent reiterated that she was merely a passenger in the lorry. She denied ownership of the vehicle and insisted that she had only hired the vehicle. She also admitted that she was the one who reported about the accident to the insurance after the accident.

21. On re-examination, she stated that it was only the driver who was called to record his statement and further insisted that the motor vehicle did not belong to her.

22. The second defence witness was CPL Kiprono Bett No. 66053 based at Kabras Police Station in the traffic department. He produced police file No. 18A relating to the accident which occurred on 25.10.2015 at around 9:30 am in Holiday area Kakamega-Webuye road involving motor vehicle reg. No. KBY 363J Isuzu Lorry, KBC 633S Nissan and motor cycle Reg. No. KMCR 317S of make TVS Star. He testified that the motor vehicle No. KBC 633S Nissan was moving towards Kakamega and on reaching a corner, it was passed by the motor vehicle Reg. No KBY 363J. All of a sudden, the motor cycle Reg. No. KMCR 317S overtook the Nissan.

23. He told the court that the deceased unsuccessfully tried to overtake two motor vehicles in a corner. Further, the motor cyclist had no driving license and neither was the motor cycle insured. He produced the inspection report in court which showed that the motor cycle was defective and that investigations showed that the motor cyclist was entirely to blame for the accident and this fact was corroborated by an eye witness, Joel Muyekho Burudi who was the driver of the motor vehicle reg. No. KBY 363J.

24. On cross-examination, he indicated that the two vehicles were headed in opposite directions, and gave a description of the place where the accident occurred. He testified that it was a corner and one is not able to see the road clearly. He also told the court that the sketch maps of the scene showed that the impact was in the middle of the road.

25. On re-examination, he testified that there was no collusion of the motor vehicles and that the driver of the lorry tried to swerve to the left side to avoid the accident. He also denied that the Nissan was stationary at the time of the accident.

26. The legal burden of proof fell on the appellant in the lower court and the evidential burden of proof fell on the respondent in the lower court. However, it is noteworthy that the appellant pleaded the doctrine of res ipsa loquitor.

27. Section 107 of the *Evidence Act*, Section 109 and Section 112 of the *Evidence Act* were dealt with in the case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

28. Similarly, in WILLIAM KABOGO GITAU -VS- GEORGE THUO & 2 OTHERS [201011 KLE 526 it was stated that:

> " In ordinary civil cases a case may be determined in favor 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."

29. The doctrine of res ipsa loquitor operates on the principle that things speak for themselves. No explanation is needed.

30. When a party relies on this doctrine, the ball is thrown to the opposing party to dispute and show that things do not look like the way the other party sees them.

31. In the case of Tonui v Kuber Agency (Civil Appeal E015 of 2023) [2024] KEHC 11084 (KLR) the court held as follows:

> " ...The Appellant stated that he had pleaded the doctrine of res ipsa loquitor and as a result, the burden of proof shifted to the Respondent to prove that it was not negligent in causing the accident.
>
> In Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita (2019) eKLR, Odunga J. (as he then was) held:-
>
> "Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent. The exception to this rule however is where the doctrine of res ipsa loquitor applies."

32. In Embu Public Road Services Ltd. vs. Riimi [1968] EA 22, the East African Court of Appeal held that:

> "The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident.
>
> The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant.
>
> The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident… Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."

33. In this case, the appellant did not call any eye witness to testify on how the accident occurred, neither was she at the scene at the time the accident occurred. She relied on the evidence of PW2, a policeman who produced a police abstract and said that according to the initial report, minuted the occurrence book, the driver of the respondent's vehicle was to blame.

34. On cross examination, by the counsel of the respondent he said he did not produce the occurrence book or its extract and even the police file and thus he could not tell who was to blame for causing the accident for he was not the investigator. Having said that he was not able to tell who was to blame, then his evidence is of no value to the appellant's case.

35. The respondent said she was a passenger and saw what happened as captured in paragraphs 19-21.

36. Her evidence was supported by the evidence of DW2, a police officer who came with the police file and told the court that according to the investigation, the motor cycle rider was to blame for he overtook at a corner without ascertaining whether it was safe to do so.

37. There being no other independent evidence as to how the accident occurred, the trial court had no choice other than to go by the evidence of the respondent and DW2. The trial court cannot be faulted for that. I have looked at the court judgment, the magistrate succinctly analyzed and evaluated the evidence of each and every witness and arrived at the correct finding that the deceased was to blame 100% for overtaking at a corner.

38. From the evidence of the respondent and DW2 it was clear that it was the deceased who was to blame so there was no evidence that the driver of the motor vehicle contributed to the accident thus making the issue of contributory negligence as raised by the appellant untenable.

39. On the issue of whether the trial court finding the quantum was manifestly low, the court is alive to the principles considered when an appellate court finds it fit to interfere with a finding of a trial court on quantum. See the case of *Kemfro Africa Limited T/a Meru Express Service, Gathogo Kanini Vs A. M. Lubia And Olive Lubia; Civil Appeal No. 21 Of 1984* where the Court of Appeal held:

> "The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, 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 the damages."

40. The trial magistrate opted to apply global award option for there was no proof of income of the deceased. On this he said:

> "Had the plaintiff proved his case, I would have awarded him a global sum of Kshs. 600,000/- given that there was no prove that the deceased was a bodaboda rider making an income out of the same and further there was no prove evidence that he earned Kshs. 8000/- per month. PW1 in her evidence indicated that the deceased earned Kshs. 1,000/- per day culminating to Kshs. 30,000/- per day and not Kshs. 8,000/- as the plaintiff counsel proposed in his submissions."

41. I find that the trial magistrate was not in error to apply the second option. The reasons the court gave for applying that option are reasonable. Therefore, I have no reason to interfere with the award.

42. In a nutshell, I find that the appeal for reasons given herein above has no merit. Therefore, the appeal is dismissed. Costs to the respondent.

43. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Mr. Mondia for the Appellant present online

Mr. Anyona for the Respondent present online

Court Assistant – Elizabeth Angong'a