REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E016 OF 2020

JOSEPH MUTHURI (Suing as a legal administrator of

the estate of KN-deceased.....APPELLANT

VERSUS

NICHOLAS KINOTI KIBERA.....RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. L.N Juma

(SRM) delivered on 8/10/2020 in Meru CMCC No. 148 of 2019)

JUDGMENT

1. By a plaint dated 10/6/2019, the appellant sued the respondent seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Ksh. 250,000/= and costs of the suit plus interest. In those proceedings, the appellant pleaded that on or about 13/4/2017, the deceased was lawfully walking as a pedestrian along Meru-Nanyuki road when he was hit by motor vehicle registration number KBL 345 D, Toyota Pick-up, thereby occasioning him fatal injuries. At the time of his death, the deceased was aged 19 years, he enjoyed good health and he lived a happy and vigorous life. As a result of the death of the deceased, his estate suffered loss, damage and his dependants suffered a lot of emotional pain and damage as well as expenses.

2. The respondent, defence dated 17/9/2019, vehemently denied the claim asserting that he was never negligent and that it was an unknown cyclist, then towing another motorcycle mounted by the deceased, who caused the accident by attempting to overtake a school bus which was also unknown, without paying attention to other road users. It was also pleaded that the deceased and his friend were on the road riding without driving licenses.

3. In seeking to prove his case, the plaintiff gave evidence as PW1 then called two others as witnesses. As **PW1,** he testified that the deceased, who was his son, was a form three student at the time of his death. On the material day, he was at his place of work at Kenya Methodist University, when he was informed by a friend through the phone at 10.00 pm, that his son had been involved in an accident and had succumbed to the injuries sustained. He proceeded to Meru Level Five Hospital Mortuary where he found the body of his son. The postmortem conducted on 18/4/2017 confirmed that the cause of death was the injuries resulting from the road traffic accident. The plaintiff added that the deceased used to help with domestic chores at home and he was looking forward to completing his studies in order to be gainfully employed. As a result of his demise, the plaintiff spent a lot of money on the postmortem examination, funeral expenses and obtaining letters of administration all amounting to Ksh.250,000. He prayed for judgement as per the plaint and produced Police Abstract, Copy of records and receipt, postmortem report, chief's letter, Death Certificate, Limited Grant of Letters of Administration Ad Litem, receipts in support of special damages, copy of demand letter and letter of recommendation from the principal of Mwithumwiru mixed day secondary school as exhibits to support his case.

4. During cross examination, he reiterated that his son was aged 19 years and a form 3 student at the time of his death, who relied on him at all times for school fees, food and clothes, because at the time of his death, the deceased was unemployed. He admitted not being present when the accident took place. They left for the mortuary at 7.30 pm, proceeded to the police station by 10.30 pm where the police informed them that the deceased was rider of an unknown motor cycle. According to the police abstract, the accident occurred at 7.30 pm and that was the time the police arrived at the scene, carried investigations which revealed that the driver of the motor vehicle was not blamed for the accident and that it was the deceased to blame for riding a motor cycle without a number plate at night. The search done on 10/1/2019 showed that the motor vehicle was owned by the respondent although he did not know who the owner was on 13/4/2017.

5. **PW2 P.C Josephine Njoki**, testified on behalf of Sergeant Mwikali, the investigating officer, who had since proceeded on transfer, and said that the investigations had showed that the accident involved motor vehicle KBL 345 D and 2 unknown motor cycles. The accident occurred when the rope used to pull one of the motor cycles, which had a mechanical defect, got cut thus causing the motor cycle being pulled to lose control, veer to the right lane and was hit by an oncoming motor vehicle. The deceased, body was found on the left side of the road besides motor cycle that was being pulled. The motor vehicle that had hit the deceased was burnt by irate mob and that the first report to police was done by a male good Samaritan, who stated that the body of the deceased was on the left lane as you face Meru. From the sketch

plan, the body was beside the road and the investigating officer was not present when the accident occurred. No one was charged for the accident as the matter was pending under investigations. From the abstract, she said, the respondent was the disclosed owner of the motor vehicle registration Number KBL 345 D but there was no registration plate for the motor cycle.

6. During cross examination, the witness stated that she did not witness the accident and the traffic charges had not been brought to court because investigations were incomplete, as they did not know who to charge. It was dark and at night but she did not know whether it had rained but insisted that there had been no carelessness on the part of the driver of the motor vehicle, as it was the motor cycle that went to the wrong lane. She did not know whether the deceased rider had a driving licence just as she had no knowledge whether the motor cycle pulling the other one was insured. She blamed the rider for the accident and was unaware whether he was a student. On ownership of the motor vehicle, the witness identified the previous owner, the respondent, was Equity Bank, but did not know when Equity Bank ceased to be the owner of the motor vehicle. She denied being misled in her evidence adding that no motor cycle was recovered but she did not know who ran away with the motor cycles.

7. During re-examination, she stated that as at 10/1/2019, the current owner of the motor vehicle was the respondent since Equity Bank was not in the insurance details and that the abstract issued by the police disclosed the respondent as the owner of the motor vehicle whose insurance policy was active at the time of the accident.

8. **PW3 Naftali Mwenda**, a boda boda rider at the time of giving evidence said that he was heading to Kambakia village from Makutano on the material day, with he deceased who was his friend, and witnessed the deceased get hit by motor vehicle registration number KBL 345 D as he was crossing the road thereby sustaining severe injuries. He blamed the driver of the motor vehicle for causing the accident.

9. During cross examination, he stated that at the time of the accident, he was not a boda boda rider, that they were going to Kambakia village and both wanted to cross the road but it was the deceased who crossed first. They were only the 2 of them and the motor vehicle involved in the accident was a Toyota Hilux registration number KBL 345 D greyish in colour. The deceased was knocked on the right side heading towards the forest by the motor vehicle which was on its lane. He denied the allegation that the deceased was hit and thrown to the left side and maintained that he saw the deceased under the vehicle. He blamed the driver of the motor vehicle as he was over speeding and failed to apply brakes. He did not see a crowd at the scene or the motor vehicle being torched, because he had already left the scene and did not make a report to the police.

10. On re-examination, he reiterated that they walked and the deceased was in the process of crossing from the left to the right on foot while very fine and denied that they were riding any motor cycle at the time of the accident. The driver stopped at the pavement after hitting the deceased who was trapped under the motor vehicle and died as a result of the accident.

11. **DW1**, the respondent described himself as a contractor and testified that in 2017, he had a project at Kithoka and was on the material day, at around 7.30 pm, driving towards Meru town when at the scene of the accident, he met 2 motor cycle riders between the show ground and Meru Polytechnic. The 2 motor cycles were towing one another with a rope, wanted to overtake a bus, but the bus was too fast for them. The motor cyclist pulling the other one applied brakes causing the motor cycle being pulled to come off its lane onto his own lane. The deceased was on the motor cycle being pulled. PW1 was the one riding the pulling motor cycle and he put the motor cycle he was pulling on DW1's lane and that being a bit dark, he did not see them very well. He denied having been on high speed because there was a road bump. The police officers came to the scene, observed what had happened, and absolved him from blame because the appellant and the deceased came to his lane. He denied seeing the number plate of the bus the plaintiff was attempting to overtake and that the allegations that he lied to the police.

12. He relied on the abstract which indicated that the matter was pending under investigations and stressed the fact that he had not been arrested or charged with regard to the accident and finally that the vehicle was owned by Equity Bank Limited, which was not joined to the suit.

13. During cross examination, he stated that the copy of records showed that he was the current owner of motor vehicle registration number KBL 345 D a fact confirmed by the police abstract and that he had taken a CIC insurance policy in his name. He admitted that he was the one driving the motor vehicle at the time of the accident and that the deceased died as a result of the accident involving his motor vehicle while confirming that he had not brought any evidence that the deceased was riding a motor cycle. He said that the police officers, who came to the scene later, did not find any motor cycles there and that he was the one who had made the initial report to the police on the day he recorded his statement. He said that his insurer sent their investigators but he did not have the report by them, he did not cater for the funeral expenses of the deceased and had no evidence that there was a bus the cyclists were attempting to overtake. He denied that he was over speeding, stated that he was driving at 70 kmh and that the accident occurred because the deceased was pushed to his lane.

14. On re-examination, he stated being a contractor and not a police officer, that the search showed that he was the current owner of the motor vehicle and the inspection was not done because the motor vehicle was burned.

15. At the conclusion of the trial, the trial court found that the appellant was 100% liable for the accident and dismissed his case. He was aggrieved by the said decision and filed his Memorandum of Appeal on 5/11/2020 setting out ten (10) grounds of appeal by which he faults the trial court for placing more weight on the evidence by the respondent and dismissing his case, despite the overwhelming and cogent evidence tendered by the eye witness. He further faults the trial court for finding that the evidence of PW1 and PW2 was contradictory and that there were 2 motor cycles involved in the accident despite there being no evidence of the same. He further faults the trial court for failing to appreciate that the evidence presented by the police officer was what had been reported by the respondent and was not the best basis to hold that the deceased was to blame for the accident despite there being evidence to the contrary. He faults the trial court for failing to consider the submissions and authorities cited by the parties and for failing to assess the damages that would have been awardable had the appellant's suit succeeded.

Submissions

16. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 2/7/2021 and 27/10/2021 respectively. The appellant submitted that he had adduced sufficient evidence and on a balance of probabilities, the trial court ought to have made a decision in his favour. He then reiterated that it was erroneous for the court to find and conclude that the evidence by PW2 and PW3 was contradictory then cited cited ***Peter Kanithi Kimunya v Aden Guyo Haro(2014) eKLR***, for the proposition that a police abstract is proof that the occurrence of an accident was reported to a particular police station. It was then contended that the evidence of PW2 on how the accident occurred ought to have been disregarded since no sketch plans were produced and relied on ***PAS v George Onyango Orodi(2020) eKLR***, where the court held that the evidence of a police officer on who was to blame for the accident, based on an entry into the Occurrence Book, which book was not produced in court, was hearsay and therefore inadmissible. He submitted that since the police officers did not find motor cycles at the scene, the trial court ought to have made a finding that no motor cycle was involved then relied on ***Stellah Muthoni v Japhet Mutegi(2016) eKLR***, where the court dealt with the issue of a person blaming a party who is not a party to the suit. The trial court was then faulted for completely ignoring the parties' submissions together with the authorities they had cited in particular the submissions that liability ought to have been apportioned at the ratio of 20: 80 in favour of the appellant against the respondent. The trial court was accused of having clearly misdirected itself as to the legal position with regard to assessment of damages even where a suit has been dismissed and the decision in ***Gladys Wanjiru Njaramba v Global Pharmacy & anor(2014)eKLR*** cited to the holding that a trial court was under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. He prayed for the appeal to be allowed with costs.

17. For the respondent, submissions were offered to the effect that that the only credible evidence on how the accident occurred was that of PW2 and DW1, as the evidence by PW3, the purported eye witness, was found to be unreliable. He submitted that the deceased was indeed riding a motor cycle, a fact admitted by the appellant in his demand letter produced as exhibit in court. He submitted that the oral testimony of the purported eye witness contradicted what he had recorded in his witness statement. He submitted that the inconsistencies in the testimonies tendered by the appellant and his witnesses on how the accident occurred raised doubt as to whether it was the respondent who had caused the accident. He submitted that the trial court rightly dismissed the appellant's suit after correctly finding the evidence tendered therein to be contradictory but conceded that the trial court did not assess the damages that would have been awardable had the appellant's suit succeeded, however such omission did not affect the legality of the judgement. He urged the court to uphold the findings of the trial court and dismiss the appeal with costs.

Analysis and Determination

18. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify.

19. It is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities. The provisions of sections 107,109 and 112 of the Evidence Act, on the burden of proof, were extensively dealt with in ***Anne Wambui Ndiritu v 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 cast 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."**

20. The admitted facts are that the deceased was fatally injured by motor vehicle registration number KBL 345 D which was being driven by the respondent at the material time. The respondent was on his lane at the time of the accident. What is in dispute is who was to blame for the accident. That issue fell for determination before the trial court which observed: -

> **"In view of the contradictory evidence between the 2 key witnesses in this case it is difficult for this court to determine who is liable for the accident. The inconsistencies from the plaintiff's witnesses on how the accident occurred raises doubt in the mind of this court as to whether it is the defendant in this case who caused the accident. I however note that the evidence of PW2 the police officer and that of DW1 the defendant are similar and consistent. The deceased was on a motor cycle that was being pulled. He veered off to the defendant's lane. From this evidence it appears that unfortunately the deceased was to blame for the accident as he veered off to the defendant's lane by riding or being pulled in a dangerous manner leading to the accident. He was therefore the author of his own misfortune. I therefore agree with the defendant's submissions that the deceased KN was 100% liable for the accident. The suit herein is therefore dismissed with costs as it lacks merit."**

21. PW1 and PW2 did not witness the accident take place, but PW3, the eye witness did. That PW3 was an eye witness is not subject to debate because it emerged that he even recorded a witness statement with the police. Even Dw1 admitted to the witness having been at the scene. He, PW3, testified that the deceased was a pedestrian who was crossing the road at a corner when he was hit and trapped under the respondent's vehicle. He however admitted that the accident occurred on the respondent's lane. That evidence ties with that of DW1 who said that he saw the two motorcyclists pulling each other and trying to overtake a bus which overtook them before the one infront applying brakes and forcing the rear one to swerve to his lane and getting hit. While DW1 insisted that he was not over speeding because there was a bump, he said that it was dark and did not see well and that he was the one who had reported the occurrence of the accident to the police. It is therefore understandable why PW2's testimony tallied with that of DW1. In cross-examination, DW1 stated, that on the material date of the accident, he was the one driving the vehicle, that the deceased died as a result of an accident involving motor vehicle, that he did not blame any witness in this case and that he had no witness to confirm that the plaintiff was not crossing the road.

22. Both PW2 and DW1 confirmed that there were no motor cycles at the scene when the police officers arrived there. The trial court while taking the view that the testimonies of PW2 and PW3 were contradictory hence the deceased was 100% liable for the accident, made no comment of the absence of the alleged motorcycles from the scene. That when taken together with the fact that no particulars of the motor cycles were given puts to doubt the pleading and evidence of the respondent of how the accident occurred.

23. However, even if the account of the respondent was to be believed, then his failure to see the deceased in time on account of a little

darkness, when he had the option to put on head-lumps to enhance his vision must be seen to have contributed to the accident. A reasonable driver facing darkness is reasonably expected to engage the use of head-lumps. Failure to do so is not expected of a reasonable man and is thus *ipso facto* negligence. I find that whichever way the accident occurred, the respondent had the duty to exercise care and attention, as a driver of a motorised vehicle in order to injuring other road users. The court takes judicial notice that the accident occurred within a built up area and within Meru municipality where the law limits speed at 70kph yet in re- examination, the respondent on own accord asserted to have been doing 70kph. That is another evidence of unreasonable conduct. Doing or failing to do what a reasonable would not do or do in the circumstance is what the law terms negligence.

24. In ***Masembe v Sugar Corporation and Another [2002] 2 EA 434,*** it was held that:

> **"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it… A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."**

25. Applying the foregoing principle to the facts of this case, I find that there was sufficient evidence that the respondent failed in his expectation as a reasonable driver and should not have been wholly absolved from liability in the causation of the accident and injury to the deceased. It was thus not in sync with the evidence the finding by the trial court that it was difficult for the court to determine who is liable for the accident and the inconsistencies from the plaintiff's witnesses on how the accident occurred raises doubt in the mind of this court as to whether it is the defendant in this case who caused the accident. While the court must always record the incidence of burden of proof to be that it was always the duty upon the appellant, as plaintiff then, to prove the case on a balance of probabilities, that burden is never higher. He testified in court, produced exhibits in support of his testimony and even called an eye witness, PW3. In my considered view, therefore, the appellant vividly proved his case on a balance of probabilities. That is my comprehension of balance of probabilities as defined in ***William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 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."**

26. Contrary to the finding by the trial court that he was in doubt who between the two parties was to blame hence the appellant was to wholly blame, the law states that where the court is in such doubt it is only fair to apportion liability equally. The court of Appeal in ***Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005*** **[2006]eKLR** *while dealing with the issue observed: -*

> **In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. I*t has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.***

27. On the ownership of the motor vehicle, the copy of records and police abstract established that the accident motor vehicle was owned by the respondent in accord with the evidence of DW1 that he had taken out an insurance policy in respect to the subject motor vehicle. I therefore find that the respondent was the owner of the said motor vehicle at the time of the accident.

28. In my view, the trial court erred in dismissing the suit against the respondent, who did not dispute the occurrence of the accident that led to the demise of the deceased. I find that the respondent contributed to the occurrence of the accident, because he was expected to exercise a duty of care to other road users, including the deceased herein. The deceased ought to shoulder some bit of blame since he was also expected to exercise care and caution when crossing the road. I am of the view that both the appellant and respondent were equally to blame for the occurrence of the accident and I hereby apportion liability in the ratio of 50:50.

29. Regarding assessment of damages due, the trial court did not assess any damages, for the reason that it had dismissed the suit. That was manifestly erroneous on the face of the binding decision in ***Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua [2015] eKLR,*** *where the court* held that:-

> ***"Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment."***

30. Similarly in ***Lei Masaku versus Kalpama Builders Ltd [2014] eKLR,*** *it was observed thus:*

> ***" It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."***

31. With such trite position of the law, I find that there was an obvious error must cannot be left to stand but must be set aside in compliance with the law. I reiterate that a trial court has the duty to assess damages even where the suit fails. I will thus perform the duty of the court on

first appeal and assess damages

32. Starting with the head of loss of expectation of life, the appellant proposed Kshs. 150,000/- while respondent proposed Kshs. 70,000/-. I am guided by the decision of ***Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR*** where the court observed that:-

> ***"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/- while pain and suffering the awards range from Kshs.10,000/- with higher damages being awarded if the pain and suffering was prolonged before death."***

33. All the parties herein are in agreement that the deceased died on the spot, and there is no evidence that he endured a lot of pain before breathing his last. I will thus award Kshs. 30,000 for pain and suffering and Kshs.100,000 for loss of expectation of life.

34. On loss of dependency, PW1 testified that the deceased was a 19 year old student who depended on him for everything. He produced a letter from the school which the deceased attended, to proof that fact. His evidence was buttressed by PW3 who confirmed that indeed the deceased was a student. The deceased thus had no income with which to support PW1 with, since he was not gainfully employed. The appellant rather submitted that a multiplicand of Kshs. 35,000, a multiplier of 25 years and a dependency ratio of 1/3 would be reasonable. The respondent urged the trial court not to award anything under this head.

35. Although the deceased herein was a student at the time of his death, it would reasonably be expected that he would finish his studies, get into the job market and support his father. I will therefore adopt a global figure to assess the damages payable under this head. Taking into account the evidence that was adduced in court that the deceased was a healthy young man, enjoying robust life, but also considering the uncertainties and vicissitudes of life, I will award Kshs. 1,000,000 for loss of dependency.

36. Out of the appellant's claim for special damages in the sum of Kshs. 250,000, only Ksh.216,600 was proved by way of receipts that is the sum that is due to the appellant.

37. Accordingly, I do set aside the judgment at trial and in its place substitute a judgment as hereunder:

(a) Liability 50:50 as between the appellant and respondent

(b) Pain and Suffering Kshs 20,000

(c) Loss of expectation of life Kshs 100,000

(d) Loss of dependency Kshs 1,000,000

(e) Special damages Kshs 216,600

Total Kshs 1,356,600

less 50% contribution Kshs (678,300)

Nett due Kshs 678,000

38. Lastly, there was the complaint about non-consideration of the appellant's and respondent's submissions, the court in which I consider not meriting much consideration here as its consideration appears to ignore the mandate of a first appellate court. Since the ground seems to recur in every appeal in this registry. I reiterate what the court said in **Joshua Mung'athia v Evarick Muthuri Ntoiba & another (suing as the legal Representative of the Estate of Fredrick Ntoiba Baraya (Deceased) 2021) eKLR.**

> **" this grievance in reality ought not be taken seriously when regard is taken of the court's mandate on a first appeal. It bears no premium that the submissions were not regarded when the appellate court is to carry out a re-evaluation in order that it comes to its own conclusion. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellant's submissions. While I consider it important that parties 'industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal"**

39. In conclusion, it is my finding that the appellant's appeal has every merit, and must be allowed. The judgment of the trial court is hereby set aside and substituted with judgment being entered for the appellant against the respondent as above. The appellant is awarded costs of the appeal and those of the lower court as well as interests. Interest on general damages shall be computed from the date of the judgment of the lower court while those on special damages will accrue from the date of the suit.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF FEBRUARY, 2022

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Muriera for respondent

Mr. Mutuma for the appellant

PATRICK J.O OTIENO

JUDGE