



REPUBLIC OF KENYA



KENYA LAW

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Akinyi (Suing as the legal representative of the Estate of Wycliffe Odhiambo (Deceased) v Multiple Hauliers E.A Ltd (Civil Appeal E056 of 2021) [2022] KEHC 15454 (KLR) (21 June 2022) (Judgment)

Neutral citation: [2022] KEHC 15454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E056 OF 2021
SM GITHINJI, J
JUNE 21, 2022**

BETWEEN

MAUREEN AKINYI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WYCLIFFE ODHIAMBO (DECEASED)) APPELLANT

AND

MULTIPLE HAULIERS E.A LTD RESPONDENT

(Being an appeal against the judgement of Honourable S.K Ngii Principal Magistrate delivered on 12th May 2021 in Mariakani CMCC NO. 181 of 2019 Maureen Akinyi V Multiple Hauliers E.A LTD)

JUDGMENT

CORAM: Hon. Justice S.M Githinji

Simiyu Opondo Kiranga Advocates for the Appellant

Kishore Nanji Advocates for the Respondent

1. This appeal arises from the judgment and decree of Hon SK Ngii (PM) in Mariakani CMCC No 181 of 2019 wherein he dismissed the plaintiff's suit.
2. Aggrieved with the judgment, the appellant preferred an appeal based on the following grounds;
 1. That the learned magistrate erred in law and in fact in finding the deceased wholly liable.
 2. That the learned magistrate erred in law and in fact in failing to award special and general damages to the appellant.
 3. That the learned magistrate misdirected himself by failing to consider the submissions by the appellant while arriving at the judgment.



4. That the learned magistrate misdirected himself by awarding costs to the defendant.
3. The appellant herein Maureen Akinyi had sued the respondent Multiple Hauliers EA Ltd in her capacity as the legal representative of the estate of Wycliffe Odhiambo (deceased) for damages arising out of a fatal road traffic accident that occurred on March 8, 2019 at Maji ya Chumvi area along Mombasa-Nairobi road.

Evidence at Trial

4. PW1 Maureen Akinyi the plaintiff, adopted her witness statement dated July 27, 2020 and added that she learnt about the accident from neighbours who informed her that the body of the deceased had been moved to Makadara Hospital Mortuary. She informed the court that the deceased was 30 years at the time of his death and earned Kshs 1,000 per day as a rider. She blamed the driver for the occurrence of the accident.
5. In cross examination, she stated that she could not tell how the accident occurred and further that she had no record of the deceased's earnings.
6. PW2 PC Ann Wambui told the court the accident occurred while the deceased was riding from Mombasa direction towards Nairobi where he slid and fell on the road as a result of which he was hit by an oncoming defendant's motor vehicle KBD 621G dying on the spot.
7. On cross examination, she clarified that the deceased skid and fell as he tried to overtake a saloon car when the defendant's motor vehicle ran over him. It was her testimony that there were no charges preferred against the driver of the motor vehicle.
8. DW1 Kasyoki Mutiso the driver with the defendant adopted his witness statement dated July 8, 2019 and added that the deceased had just overtaken a lorry that was following a car but did not manage to overtake the car successfully. That he was hit by the car which threw him onto his lane. He told the court that he tried to swerve to avert the accident but he could not pull off the road since the edges were not even.
9. On cross examination he stated that it was the deceased who hit the car he was trying to overtake and on impact he slid into his lane.

Submissions, Analysis and Determination

10. I have perused and evaluated the contents of the pleadings, evidence adduced, judgment, grounds of appeal, submissions and decisions referred to by the parties.
11. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. This duty was well stated in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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.



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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* [1955], 22 EACA 270)."

12. The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

13. The discretion of this court to interfere with the determination of the trial court also exercising its discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows:

"I think it is well settled that this court will not interfere in the exercise of its discretion with the decision of an inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion"

14. The issues arising out of the appeal herein are;

1. Whether the appellant discharged her burden of proof on a balance of probabilities at the trial court?
2. Whether the appellant is entitled to damages.

15. The legal basis for the legal burden of proof is provided in section 107 of the [Evidence Act](#), cap 80 of the laws of Kenya. The said section states as follows: -

- "1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

16. On the standard of proof, the *Black's Law Dictionary*, (9th edition, 2009) at page 1535 defines 'the standard of proof' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed.'

17. The standard of proof in civil cases is on the balance of probability.

18. In respect of the above sections, in my view, the trial court had a duty to test whether the evidence by the appellant discharged to the required threshold of balance of probabilities liability on part of the respondent and damages arising out of the said accident.



19. The trial was premised on the law of negligence and liability on the part of the respondent. The correct statement of the test on the ingredients of this tort is as defined by *Clerk & Lindsell on Torts* 18th edition in the following passage; -

"There are four requirements for the tort of negligence namely; -

1. the existence of law of a duty of care situation ie, one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.
2. breach of the duty of care by the defendant, ie that it failed to measure up to the standard set by law;
3. a causal connection between the defendant's careless conduct and the damage;
4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence.

"A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."

20. It is not in dispute that the accident occurred resulting to the loss of life of the deceased. What is in contest is who is to be blamed for the occurrence of the accident. From the evidence on record and material placed before me I am of the position that the plaintiff did not discharge the burden of proof on a balance of probabilities. There were no eye witnesses to give weight to the plaintiff's case. Further from the two police abstracts referenced, the element of negligence on part of the driver has not been established. The defence case is clear that the deceased was the cause of the accident. From a human perspective, I do sympathize with the plaintiff for the loss suffered, but I am confined within the law to make a just determination. I do agree with the trial magistrate that the deceased was entirely to blame for the accident in which he died on March 8, 2019. The defendant is not liable.
21. Having found that the defendant is not liable, it then follows that the plaintiff is not entitled to damages attendant to the accident.
22. That said, the appeal fails in its entirety and the same is hereby dismissed with no orders as to costs.
- It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 21ST DAY OF JUNE, 2022.



.....

S.M. GITHINJI

JUDGE

In the presence of; -

1. Mr Muriuki holding brief for Simiyu Opondo Kiranga Advocates for the Appellant
2. Kishore Nanji Advocates for the Respondent

