Syuma & another (Suing as the Administrators of the Estate of Gabriel Shakora Kisabuli (DCD)) v Chikati (Civil Appeal 65 of 2019) [2022] KEHC 13473 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 13473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 65 OF 2019

DK KEMEI, J

JULY 25, 2022

BETWEEN

DAVID KISABULI SYUMA .... 1ST APPELLANT

IMMACULATE SIAKORA KISABULI .... 2ND APPELLANT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF GABRIEL SHAKORA KISABULI (DCD)

AND

PETER WAFULA CHIKATI .... RESPONDENT

(Being an Appeal from the Judgement and decree of Honourable G.A Olimo Resident Magistrate in Kimilili Principal Magistrate's Court in Civil Suit No. 132 of 2017 delivered on 2nd July, 2019)

JUDGMENT

Background

1. The principal claim in a plaint dated July 4, 2017 was for liability arising out of a road accident which involved the respondent's motor vehicle registration No KAK xxxE which allegedly knocked down the deceased, Gabriel Shakora Kisabuli along Kimilili-Chwele road.

2. It is asserted that on or about the February 5, 2017 the deceased was lawfully walking on the verge of the road along Kimilili-Chwele road at Lutonyi area when the respondent negligently drove motor vehicle registration No KAK xxxE Toyota Saloon which lost control and veered off the road knocking down the deceased. As a result, whereof the deceased sustained injuries to which he succumbed. The appellants sought for general as well as special damages including costs of the suit.

3. A defence was filed in court on January 23, 2018 in which the respondent denied all the allegations contained in the plaint and put the appellants to strict proof thereof.

4. On consideration of the matter as a whole, the learned trial magistrate apportioned liability in the ratio of 80%:20% between the appellants and respondent respectively and awarded general damages of Kshs 197, 325/= which were to carry interest at court rates from the date of judgement.

The appeal

5. Aggrieved by the decision on liability by the trial court, the appellant appealed to this court putting forward three grounds of appeal all of which are pivotal only to the issue whether or not the learned trial magistrate was right in the apportionment of liability on the deceased at 80%.

6. By directions of the court, the appeal was canvassed by way of written submissions. Mr Mukisu for the appellants argued cumulatively on the three grounds of appeal and submitted that the trial court acted on wrong principles in overlooking the evidence tendered and the testimony of the eye witness in reaching its decision. It was his contention that at the trial, the learned magistrate ignored the testimony of PW2 and exclusively relied on the testimony of DW1 in making it's finding.

7. In this regard the learned counsel submitted that there was no contributory negligence on the part of the deceased and urged this court to hold the respondent 100% liable for the accident.

8. Mr Wattangah for the respondent on his part contended that the evidence presented by the appellant's witness, pw2, had no clear-cut line and was full of contradictions. It was the respondent's submissions that the proceedings and the evidence so far tendered at the trial court failed to discharge the burden of proof that the respondent was wholly to blame for the accident. The respondent submitted that the issue of liability was determined based on the evidence as appraised by the learned trial magistrate, in which the appellant has failed to demonstrate any error or application of wrong principles of law. learned counsel sought for the dismissal of the appeal.

Determination

9. Having given due consideration to the grounds of appeal and the respective submissions, it is now my task to delve into the merits or otherwise of the appeal. It is trite that this is a first appeal and as provided in the well settled principles, I am entitled to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before her, that advantage is not availed this court. After doing the same, I must come to my independent conclusion as to whether to uphold the judgement of the trial court. (See *Peters Vs Sunday Post Limited [1958] EA 424.)*

10. The court also in the cases of *Bundi Murube V Joseph Omkuba Nyamuro [1982-88]1KAR 108* had this to say; -

> ' However, a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did.' And also, in Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90 Law JA also stated; -
>
> 'An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him.'

11. There is no doubt that these principles lie at the heart of this appeal. Whereas it is true that the accident involved one vehicle and a pedestrian, the burden of proof that the accident was caused by the negligence on the part of the respondent lay squarely with the appellants. That is the issue which stood out throughout the trial before the learned magistrate.

12. From the judgement, the learned trial magistrate had to decide on a balance of probabilities who between the appellants and the respondent caused the accident. The starting point was for the appellants under section 107 (i) of the *Evidence Act* to present admissible material evidence for the trial court to give judgement in his favour on the proven facts to support negligence on the part of the respondent. The court in *Ciabaitani M'Mairanyi & Others V Blue Shield Insurance Co Ltd CA No 101 of 2000(2005) 1EA 280* held that; -

> ' Whereas under section 107 of the *Evidence Act*, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes, the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence.'

13. In my interpretation of sections 107 and 108 of the *Evidence Act*, it places the burden of proving a fact on the party who asserts the existence of any fact in issue relevant to form the onus of prove which may shift from him or her to the defendant. Lord *Denning in Miller V Minister of Pensions [1947] 2 All ER at 374* held as follows;

> ' If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determinate conclusion the way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'We think it more probably than not', the burden is discharged, but, if the probabilities are equal, it is not.'

14. Thus, in civil cases pleadings continue to play an essential part as the basis in which evidence is adduced to prove matters in issue. From this perspective, the appellant had the burden to prove the existence of a fact on occurrence of the accident and the interaction of it was due to the negligence on the part of the respondent. It is also important under section 109 of the *Evidence Act* the court to presume existence of certain facts. Herein the act states that; -

> ' The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.'

15. In the case of *Raila Amolo Odinga & Another V IEBC & 2 Others [2017] eKLR* the Supreme Court expounded the evidential burden of proof as follows;

> ' (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and 'remains constant through a trial with the plaintiff, however, 'depending on the effectiveness with which he or she discharges this, this, evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.'

16. It is clear from this exposition that the form of proof that is required of litigating parties varies widely, as do the duties that each form of burden of proof imposes on a party. In the present instance, the learned

trial magistrate had to decide whether the appellant had proven the existence of a fact demonstrating the respondent's negligence. In the event of a prima facie case the appellant establishes existence of a fact that signifies transfer of the evidential burden to the respondent to bring into question the truthfulness of the presumed facts, otherwise the trial court is required to uphold the drawn conclusion.

17. The entire trial was basically 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 i.e., 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, i.e., 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.'

    As a matter of fact, these were the ingredients of the appellant's claim.

18. What impact did the court's determination that the Appellant had contributed negligently to the accident by 80% have? It means, in the legal and legitimate sense, that the respondent presented rebuttal and presumptive evidence on the basis of the pled facts that the appellant shared immensely in the responsibility for the accident's cause. The goal of contributory negligence is to bar the appellant from receiving the full amount of damages for pain and suffering due to ownership of risk.

19. The applicability of contributory negligence against the appellant had the effect of reducing the claim for damages thereby in proportion to the degree or percentage of negligence attributable to him at 80%. That indeed is the corner stone in this appeal.

20. The question before me is whether there was cogent evidence to show the existence of sufficient cause of connection between the appellant and the respondent's breach duty of care to trigger the element on contributory negligence. A case involving contributory negligence calls upon the trial court to question on what the other party ought or ought not to have done under the circumstances in that particular accident to apportion negligence. Two things must concur to support a finding on contributory negligence, an obstruction on the road being used by the parties and the default of each of the drivers, and their want of ordinary care to avoid it.

21. What transpired at the trial court, was a demonstration by the appellant's witness, PW2, that she witnessed the accident which occurred at about 8.30pm. She told the court that she was on the opposite side of the road about 10 meters away from the tarmac road when she observed the respondent's motor vehicle being driven at an excessive speed coming from Chwele direction and which had only one headlight on. On cross examination, she testified that the appellant was on the left-hand side of the road as one approaches Kimilili direction and that the deceased was running towards the road in a bid to cross the road and on his attempt to cross the road, she heard a loud bang. She immediately rushed towards the pavement on that side of the road and found the appellant lying on the pavement.

    In the case of *MacDrugall App V Central Railroad Co. Rbr 63 Cal 431* the court held that; -

    'In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence'.

22. Therefore, in my view where any person suffers damage as the result partly of his own fault and partly of the fault of the defendant, the court can only apportion contributory negligence based on the pleadings and evidence. It is for the plaintiff in this case being the appellant who had the burden to prove that the respondent was negligent in not taking positive steps while driving to avoid the accident. The question confronting the learned trial magistrate when considering whether the appellant was negligent was whether the appellant had acted in breach of duty of care in a situation which ultimately gave rise to contributory negligence.

23. In the case at hand, the defence of contributory negligence was only available if it was pleaded and proved in all circumstances that satisfied the criteria that the appellant was partly to blame for the accident. Fortunately, in this case there was an eye witness being PW2 who, in her contradictory evidence, averred that the deceased was running and just as he was attempting to cross the road the next thing, she heard was a loud bang and the deceased was lying on the pavement. So, where a person drives his motor vehicle at a speed in the circumstances which he fails to keep a proper look out for other road users and the pedestrian not being on the lookout for an oncoming vehicle and an accident occurs, that kind of behavior would very likely attract contributory negligence. I find the facts as accepted by the learned trial magistrate on apportionment can be supported by evidence on the part of the respondent. i am of the further view that the appellant did not approach the scene of the accident with due care and attention to possibly call for non-apportionment on liability.

24. In the evidence adduced by PW2, the accident which caused the death of the deceased was as the result of contributory negligence or want of reasonable care and caution on the part of the respondent, who drove his motor vehicle on high speed and the deceased's part, who was running attempting to cross the road without proper look out and caution of on coming vehicles.

25. It is settled in this country that the burden of proving contributory negligence on the part of the plaintiff is on the defendant. This is the rule in *Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No 46 of 1962* in which the courts held inter alia; -

    > ' Where the circumstances of the accident gave 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 create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the respondent shows that the

probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence'. See also Odunga's Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

26. The approach to the facts to the case in issue on appeal was for the trial court to determine whether a prima face case exist requiring the respondent to give a rebuttal. Here, the respondent told the trial court that he was driving at an average speed limit of 70-80 km/hr to which the court in its judgement, termed it as reasonable but driving at a market centre with poor visibility and having only a single head lamp, the respondent ought to have driven below 50km/hr and his veering off the road into a ditch was an indication that he was over speeding.

27. As far as the course and scope of enquiry is concerned, I am persuaded with the dicta in *Jones V Livox Quarries Ltd [1952] 2 QB608* in which the court stated that; -

> ' An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court. In such circumstances the appellate court may reassess the apportionment if it is satisfied that the assessment made by the judge was plainly incorrect'

28. In the judgement on the scope of liability, the trial court ignored to give weight to the nature of the cause of connection between the breach and the harm. In my view the trial begged the question whether the respondent's failure to drive below 50km/hr and driving with a single head lamp at night was the factual cause of the deceased's death. The respondent's altered behavior while driving on the said road was just enough to bring it into conformity with his duty as mandated by law. Ultimately, the analysis of the evidence by the learned trial magistrate failed to demonstrate that he conducted a proper analysis of the evidence before him to come to the conclusions that the critical issues of the duty of care, breach of duty and the resulting damage was due to contributory negligence. The decision went against the claim of the principle in *Hay or Bourhill V Young [1942] 2 ALL ER 396* where the court had this to say on proper care that; -

> ' Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on. Then to whom is the duty owed? again, I quote and accept the words of Lord Jamieson:
>
> 'to persons so placed that they may reasonably be expected to be injured by the omission to take such care'
>
> 'The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those whom injury may reasonably and probably be anticipated if the duty is not observed.'

29. So far as the case stands and giving effect to the principles in *Jones V Livox Quarries Ltd, Peters V Sunday Post [1958] EA* I am reminded of the advantages enjoyed by the learned trial magistrate who saw and heard the evidence of the two critical witnesses in support of the appellant's case. Notwithstanding that position, the reasons given by the learned trial magistrate are unsatisfactory on the findings made on contributory negligence. In so saying in respect of this appeal, my assessment and scrutiny of the evidence calls for interference on the findings arrived by the trial court on liability. If one has to evaluate the process of motoring in this case on the basis of the judgement and the evidence adduced any apportionment of liability could not have attracted more than 10% ratio on the appellants. Suffice here to add that the deceased could have avoided being hit had the respondent's vehicle's headlights were

all functioning as he could have spotted the vehicle on the road. The use of only one headlamp by the respondent coupled with high speed as well as the deceased's slow speed to cross the road contributed to the accident. Looking at the evidence as presented, I find the respondent had a higher duty of care to other road users by ensuring that he drove at moderate speed and that the vehicle's lights ought to be in top notch form.

30. Given the emphasis alluded to in this judgement on the elements to be proven both on negligence and weight on contribution in the circumstances of this particular case and on the hindsight the scope of duty of care on liability, the appellant bears the burden of breach at 10% and the respondent 90%.

31. For the foregoing reasons, it is my conclusion that the facts and the evidence in the case did not warrant 80%:20% apportionment of contributory negligence.

32. In the upshot, the appeal has merit. The same is allowed. The trial court; judgment on liability is hereby set aside and substituted with judgement on liability as between the appellants and respondent in the ratio of 10%:90% in favour of the appellants. As the appeal was strictly on liability, I find no reason to interfere with the award on quantum. The costs of this appeal are awarded to the appellant.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF JULY, 2022

D.KEMEI

JUDGE

In the presence of:

Shiku for Mukisu for appellants

Obudho for Watangah for respondent

Kizito Court Assistant