Mukwana v Mulilu & another (Suing as the legal representatives of the estate of the late Johnson Mulilu Shiangalangwa) (Civil Appeal 137 of 2018) [2022] KEHC 15497 (KLR) (Civ) (17 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 137 OF 2018

CW MEOLI, J

NOVEMBER 17, 2022

BETWEEN

PETER MAKOKHA MUKWANA .... APPELLANT

AND

MARY EMBOSA MULILU .... 1ST RESPONDENT

LILLIAN NABARI MULIRO .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JOHNSON MULILU SHIANGALANGWA

(Being an appeal from the judgment of E.K. Usui (Mrs.) (SPM) delivered on 6th March 2018 in Nairobi Milimani CMCC No. 7830 of 2013)

JUDGMENT

1. This appeal emanates from the judgment delivered on March 6, 2018 in Nairobi Milimani CMCC No. 7830 of 2013. The suit was commenced by way of a plaint filed on 11.12.2013 by Mary Embosa Mulilu and Lillian Nabari Muliro the Plaintiffs in the lower court (hereafter the Respondents) against Peter Makokha Mukwana the 1st Defendant in the lower court (hereafter the Appellant) and Abraham Mark the 2nd Defendant in the lower court. The claim was for damages under the *Law Reform Act* and the *Fatal Accidents Act* in respect of fatal injuries sustained by Johnson Mulilu Shiangalangwa (hereafter the deceased) in a road traffic accident on 07.10.2012. The Appellant was sued as the driver of motor vehicle registration number KBT 958D. It was averred that the deceased was walking as a lawful pedestrian along Waiyaki Way, when the Appellant so negligently drove his motor vehicle that he lost control and veered off the road where it knocked down the deceased causing him fatal injuries.

2. The Appellant filed a statement of defence denying the key averments in the plaint and liability. On 08.11.2017 interlocutory judgment was entered as against Abraham Mark the 2nd Defendant in the lower court, who despite having been duly served has failed to enter appearance and file a defence. The suit proceeded to full hearing during which both the Appellant and Respondents adduced evidence. In its judgment, the trial court found in favour of the Respondents holding the Appellant wholly liable for the accident. The court proceeded to award damages as hereunder: -

   Pain and Suffering – Kshs. 50,000/-

   Loss of Expectation of Life – Kshs. 150,000/-

   Loss of Dependency – Kshs. 624,000/-

   Special Damages – Kshs. 95,000/-

   Total Kshs. 919,000/-

3. Aggrieved with the outcome, the Appellant preferred this appeal which is anchored on the following grounds: -

   > “1. The learned magistrate erred in law and on facts in finding both the Defendants jointly and severally liable without any evidence tendered by the 2nd Defendant save for the interlocutory judgment on record.
   >
   > 2. The learned magistrate erred in law and facts in admitting as credible and truthful the Respondent’s evidence even though she was not an eye witness and without corroboration by any other witness.
   >
   > 3. The learned magistrate erred in law and on fact for admitting as credible and truthful that the Deceased was employed by Gosure Insurance Agency earning a salary of Kshs. 13,000.00 per month without tendering proper and credible evidence.
   >
   > 4. The learned magistrate erred in law and on facts for failure to admit the Respondent’s own admission that she was not at the scene of the accident.
   >
   > 5. The learned magistrate erred in law and on facts for failure to admit the Appellants evidence that he was not negligent in any way.
   >
   > 6. The learned magistrate erred in law and on fact for failure to admit the police officers own admission that it was not clear from the records as to who was to blame for the accident.
   >
   > 7. The learned magistrate erred in law in shifting the burden of proof to the Appellant (to prove Defence) instead of demanding strict proof of the Respondent’s case against the Appellant.
   >
   > 8. The learned magistrate erred in law and in fact by failing to address and make a finding on all issues raised by the Appellant in his pleadings, evidence, submissions and authorities cited by the Appellant.
   >
   > 9. The learned magistrate erred in law and fact in considering hearsay, irrelevant and or immaterial evidence in finding the Appellant wholly or particularly liable in suit.

10. The learned magistrate erred in law and in fact in finding the Appellant 100% liable without any documentary proof.

11. The learned magistrate erred in law and fact in finding the 1st Defendant liable to pay Kshs. 50,000.00 for pain and suffering, loss at expectation of Kshs. 150,000.00, loss of dependency of Kshs. 624,000.00 without giving reasons or citing any authority as to her decision.

12. The learned magistrate erred in law and in fact in finding the 1st Defendant liable to pay Kshs. 95,000.00 as special damages without any documentary prove.

13. The learned magistrate erred in law and in fact in making an award in favour of the Respondent without proving her case in the required standard (balance of probability)." (sic)

4. The appeal was canvassed by way of written submissions. Counsel for the Appellant condensed the grounds of appeal into two issues for this court's determination. Regarding the first issue which touched on liability, counsel placed reliance on the decisions in Dun Onyango Odera v Aineah Amakumbe Mbuyia [2015] eKLR, Sally Kibii & Another v Francis Ogaro [2012] eKLR and Bahari Parents Academy v LBZ (Minor suing through next friend) BNZ [2020] eKLR . He asserted that there was no eye witness to the accident and complained concerning the trial court's reliance on the Respondents' evidence and shifting of the burden of proof on the Appellant rather than demanding strict proof of the Respondent. Counsel stated that the court erred by considering hearsay, irrelevant and or immaterial evidence in finding the Appellant wholly liable; by disregarding the police officer's evidence absolving the Appellant from blame; and by failing to consider the Appellant's evidence on the circumstances of the accident that the deceased was the partly to blame. Invoking the sections 107, 108 and 109 of the Evidence and citing the case of Lilian Birir (Suing as legal representative of the Estate of) Linah Kereng Koech v Ambrose Leamon [2016] eKLR counsel asserted that the burden of proof lay with the Respondents who failed to discharge it.

5. Addressing the second issue regarding quantum of damages, counsel restated the provisions of Section 107, 108 and 109 of the *Evidence Act* to submit that the Respondents did not tender evidence of the deceased's alleged monthly income of Kshs. 13,000/ from employment. That the petty cash voucher exhibited as evidence of income ought to have been disregarded by the trial court as it related to salary for July of 2013 whereas the accident occurred in the year 2012. Asserting that the Respondents failed to prove their case on both negligence and loss of dependency counsel prayed that the appeal be allowed.

6. The Respondent's counsel in defending the trial court's cited several decisions including John Kibicho Thirima v Emmanuel Parsmei Mkoitiko [2017] eKLR and Nandwa v Kenya Kazi Ltd [1988] eKLR. He pointed out that the police officer's evidence was based on the police abstract and the Occurrence Book (OB) which are both public documents and the fact that the police witness did not investigate the accident did not affect the veracity of the said documents. He asserted that even though there was no eyewitness to the accident the trial court properly analyzed the evidence including the Appellant's in arriving at the finding that he was solely to blame for the accident for failing to have regard for other road users. And that the accident would not have occurred if the Appellant had allowed the deceased to cross the road before overtaking.

7. Concerning the award of damages for loss of dependency counsel called to aid the decision in Joseph Ayiga Maruga v Simeon Obuya [2005] eKLR, and contended that the Appellant did not object to

the production of salary voucher and as such, the trial court was entitled to consider it as part of the Respondents' evidence. That in any event, even in the absence of proof of earnings, the court could still make an award by applying the relevant minimum wage. Defending the application by the trial court of the 2/3 multiplier, counsel cited the decision in Jane Chelagat Bor v Andrew Otieno Onduu [1988-92] 2 KAR 288 and reiterated evidence that the deceased had a family dependent on him at the time of his demise and asserted that the award on pain suffering and loss of expectation of life were reasonable. In conclusion while calling to aid the decision in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 and restating the principles to be observed by an appellate court in determining an appeal, counsel contended that the Respondents had proved their case on a balance of probabilities as correctly found by the trial court. Further that the appellate court can only interfere with an award of damages by the trial court if satisfied it was erroneous.

8. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> "An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> 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 demeanor of a witness is inconsistent with the evidence in the case generally."

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. Upon review of the memorandum of appeal, the original record of proceedings and submissions before this court it is the court's view that the appeal turns on the two issues canvassed, namely, whether the finding of the trial court on liability was well founded and if so, whether the award on general damages was justified.

10. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree

thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

11. The Respondents by their plaint averred at paragraphs 5 and 6 that:

"

" 5. On or about the 7th day of October 2012, the deceased was a lawful pedestrian along Waiyaki Way at Mountain View Opposite the Shell Filling Station, when the 1st Defendant negligently drove motor vehicle registration number KBT 958D permitting it to lose control veer off the road and violently collide with the deceased resulting in his untimely death

Particulars of negligence on 1st Defendant

a. Driving without due care, caution and or attention.

b. Failing to keep any or at all proper look out or to have any sufficient regard for other lawful road users especially the deceased.

c. Driving at a speed(s) that was/were excessive in the circumstances.

d. Losing control of the said motor vehicle.

e. Failing to slow, stop swerve and brake or in any other way maneuver the said motor vehicle so as to avoid the said accident.

f. Failing to stop in time or at all so as to avoid the said accident.

g. Failing to adhere to the provisions of the Highway Code.

h. Causing the said accident and the death of the deceased.

So far as is necessary, the Plaintiffs shall rely on the doctrine of Res Ipsa Loquitor." (sic)

12. The Appellant filed a statement of defence denying the key averments in the plaint and liability and stating at paragraph 4 that:

"

" 4. The 1st Defendant denies the particulars of negligence pleaded in paragraph 5 of the plaint as if her is not liable to the same." (sic)

Section 107, 108 and 109 of the *Evidence Act*

13. The Appellant complains in this appeal that the findings of the trial court were against the weight of evidence presented before it. The trial court having restating the said evidence rendered itself inter ala as follows:-

" ....The court will determine liability and quantum. There is only eye witness evidence of the 1st Defendant who says that he is the owner and driver of the motor vehicle in issues. He readily admits that he was overtaking a slow moving motor vehicle when he hit the deceased. There is no dispute that the Plaintiff was crossing the road and it was at night. From the 1st

Defendant's evidence, it is clear that he was overtaking another motor vehicle at a high speed without any due care for pedestrians expected on the road. That is why he realized too late that a life was at stake. Since he was overtaking, he should have remembered that a pedestrian who had seen him behind another motor vehicle would cross his path thus the 1st defendant should have exercised extra caution to avoid any possible accident. He drove too fast in the circumstances. The court finds that the accident was caused solely by his negligence and hold him 100% liable. Although he admits that he was the owner of motor vehicle, judgment has been obtained against the 2nd Defendant who is stated as the owner in the copy of records produced in court." (sic).

14. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR while discussing the standard of proof in civil liability claims had this to say:-

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> "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."
>
> The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was 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 recognises 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."

15. Similarly, in this case, the duty of proving the averments contained in the plaint lay squarely on the Respondents. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal

evidence by the defendant…--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

16. The mere occurrence, of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

17. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it …
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

18. Before the trial court, the 1st Respondent Mary Embosa Mulilu testified as PW1 on behalf of the Respondents. She identified herself as the wife of the deceased and her co-plaintiff as their daughter. She adopted her witness statement as her evidence –in- chief. The sum of her evidence was that on 07.10.2012 she learned of the death of the deceased from the deceased's and travelled to Nairobi and at city mortuary identified the deceased's body. She stated that the deceased worked as a security guard at Goshi Insurance Agency and earned a salary of Kshs. 13,000/- per month; that between her and the deceased they had five children, and that the deceased maintained his family and catered for the education of the children. She tendered several documents attached to her list of documents dated 19.11.2013. These include P. Exh.1 (acknowledgement of receipt of body at the city mortuary); PExh.2 (Receipts showing funeral expenses); PExh.3 (Receipt for mortuary charges); PExh.4a (Death Certificate); PExh.4b (Burial Permit); PExh.5a (Demand Letter to Appellant)); PExh.5b (Statutory Notice); PExh.5c (Notice of intention to Sue); PExh.6 (Grant of Letters Ad Litem); PExh.7 (Copy of Records); PExh.8 (Letter from the Chief); and PExh.9(a-c) (Petty Cash Vouchers).

19. During cross-examination she stated to be unemployed, and that the deceased supported the family by monthly remittances of Kshs. 7,000/- to 8,000/- monthly. She admitted that she did not witness the accident but only received the phone call in respect of the accident three days after it had occurred. In re-examination she reiterated that the deceased was employed as a security guard and that the petty

cash vouchers produced were genuine. She asserted that all their children were in school at the time of the deceased's demise.

20. PC Charles Ondieki (PW2) stated in his evidence that an accident occurred on 07.10.2012 at 10.00pm along Waiyaki Way, Mountain View area involving motor vehicle KBT 958D driven by the Appellant and a pedestrian (deceased) who was hit by the vehicle while crossing from the right side of the road to the left and that the victim succumbed to his injuries on the spot. That the incident was reported at Kabete Police Station and recorded vide O.B No. 13/7/10/12 after which a police abstract was issued in respect of the accident. He produced the police abstract as PExh.10. Under cross-examination he admitted that he was not the investigating officer and did not visit the scene of the accident. He stated that one PC Bobby was the officer who visited the scene and confirmed that at the time of issuance of the police abstract the accident was still pending under investigation (PUI) and that it was not clear from the record who was to blame for the accident. In re-examination he stated that the investigation officer PC Bobby had been moved from Kabete Police Station.

21. The Appellant testified as DW1 and equally adopted his witness statement as his evidence in chief. The gist of his evidence was that on 07.10.2012 he was travelling from Kitale and after Kabete Police Station, opposite Shell Petrol Station there was a slow lorry on his left lane while he was driving along the right lane. That he was slightly behind the lorry when suddenly he spotted a man crossing in front of the lorry as he overtook the lorry. He further stated that he swerved to avoid hitting him but unfortunately hit the pedestrian. He blamed the deceased for failing to exercise care by ensuring it was safe to cross. That he had reported the matter at the police station but never received any communication from the police thereafter. He asserted that he was not blamed for the accident and that his vehicle was inspected and was found not to have any pre-accident defects. He produced the certificate of examination as DExh.1.

22. Under cross-examination he confirmed that the motor vehicle involved belonged to him; that visibility was good enabling him to see the lorry well and the deceased as he crossed in front of the lorry; that he was driving at speed of about 80Kmph and at the time, the scene of the accident did not have many people. He reiterated that he applied emergency brakes to avoid hitting the deceased but could not avert the accident as the distance was too close. It was his contention that the accident could still have occurred even if he was driving at a lower speed given the sudden manner in which the deceased emerged onto the road. He concluded by stating that he was issued with cash bail at the police station but was never charged.

23. Clearly, neither PW1 nor PW2 witnessed the accident. PW2 was not the investigating officer and from his records it was not clear from the record who was to blame for the accident. PW2's evidence was entirely gleaned from the entries made in PExh.10 ordinarily after the fact. Neither the O.B extract nor the police file were exhibited before the trial court. Not even a sketch plan of the accident scene was produced at the hearing. Thus, other than merely confirming the occurrence of the accident, PW2's testimony did not contain any admissible and or credible evidence as to how the accident occurred and was of no probative value to the question of liability. In sum, the Respondents did not tender evidence in proof of their allegations of negligence against the Appellant, key among them being that the Appellant having lost control of the vehicle veered off the road and knocked down the deceased.

24. The Appellant (DW1) was the sole eyewitness to the accident. His evidence was not controverted by any other eyewitness account. He stated that he was driving on the right lane and the accident occurred when a pedestrian (deceased) suddenly crossed in front of the lorry to his left as DW1 overtook the said lorry which was ahead of his vehicle. He further stated that although he swerved to avert the accident the distance was too close, and the vehicle unfortunately hit the pedestrian. Based on this narration, could negligence be attributed to the Appellant?

25. Undisputedly, the accident occurred at night along Waiyaki Highway which is a dual carriage way. From the description of the Appellant, the lorry and his vehicle were on the Nakuru/Nairobi side of the carriage way, the former on the left lane but slightly ahead of the latter vehicle which was on the right lane. The lorry was moving slowly while the Appellant was at 80KPH and there were few people at the scene. It is therefore conceivable that the deceased was able to dash in front of the slow lorry from the left side while oblivious of the oncoming DW1's vehicle on the right lane, which must have been almost shoulder to shoulder with the lorry at the time it hit him. Therefore, it may well be that the deceased miscalculated and entered the road without regard to traffic on the road and checking that the road was clear to ensure his own safety.

26. The trial court appears not to have considered that the two vehicles were moving on separate lanes but in the same direction, the lorry being ahead of the Appellant's vehicle. And hence the trial court did not appreciate the full purport of Appellant's evidence and in its judgment emphasized that he was at fault for overtaking the lorry without due care and attention when he hit the pedestrian who, according to the court, having seen the Appellant's vehicle behind the lorry had assumed it to be safe to cross. There was no evidence to confirm what the court imputed on the deceased, but even more significantly, the Appellant was from his evidence driving on the overtaking lane while the lorry was on the outer left lane. The fact that he was at 80KPH in the circumstances he described, and which were not controverted could not by itself be taken as proof of negligence. Indeed, the Appellant told the court that because the deceased suddenly entered the road in front of the lorry, the accident would still have happened even if the Appellant had been driving at a slower speed.

27. Had the trial court properly addressed its mind to the evidence before it, it would have arrived at a different conclusion, namely, that the Respondents failed to establish on a balance of probabilities that the Appellant was blameworthy and liable for the accident. Under section 107 of the *Evidence Act*, the burden of proof lay with the Respondents and if their evidence did not support the facts pleaded, they failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra).

28. In the result, the lower court's finding on liability cannot stand and the court allows the appeal in that regard. That being the case, the issue of quantum is rendered moot. The court therefore sets aside the judgment of the lower court and substitutes therefor an order dismissing the Respondents' suit in the lower court. However, given the circumstances of this matter, the court will order that each party will bear its own costs both in the lower court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 17TH DAY OF NOVEMBER 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mrs. Githaiga

For the Respondent: Mr Muriungi

C/A: Carol