



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 146 OF 2019

1. EMILY WANGUI NGIGI

2. DANIEL KINUTHIA NGIGI (suing as the Administrators of the estate of

DANIEL GACHUGIA MUGU (Deceased).....APPELLANTS

VERSUS

GATHURA INVESTMENT LIMITED.....RESPONDENT

(Appeal against the judgment of Hon. Sandra Ogot, SRM

delivered on 4th October, 2019 in Limuru CMCC No. 86 of 2018)

JUDGMENT

1. This is an appeal filed by **EMILY WANGUI NGIGI** and **DANIEL KINUTHIA**, the appellants. They have appealed against the judgment of Senior Principal Magistrate, *Hon. Sandra Ogot*. The appeal is opposed by **GATHURA INVESTMENT LIMITED**, the respondent.

2. This is the first appellate court. The principles that govern the hearing and determination of this appeal were set out in the case **SELLE & ANOTHER VS. ASSOCIATED MOTORS 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 ...”

3. Before the trial court the appellants as administrators of the estate of **DANIEL GACHUGIA MUGU**, deceased, sued the respondent seeking damages for the alleged negligence of the respondent’s driver which it was pleaded led to the accident which resulted in the death of the deceased. The respondents, by its defence, denied negligence of their driver and pleaded that the accident occurred due to the alleged negligence of the deceased.

4. **EMILY WANGUI NGIGI**, the wife of the deceased testified in support of the appellant’s case. She stated that on 17th June, 2017 she was a passenger in the motor vehicle KBB 168W which was driven by the deceased. That the deceased’s vehicle was hit by the respondent’s vehicle registration number KBM 568H. That the accident occurred at Mutosi junction along Limuru—Kiambu road. As a consequence of that accident the deceased died at the scene of accident. She blamed the respondent’s driver for that accident and further, although she failed to give details, stated that the respondent’s driver was charged with the criminal offence of causing death by dangerous driving following that accident. On being cross examined this witness confirmed that the deceased was driving from Githiga Limuru road due to join the Limuru-Kiambu road. This witness stated:-

“According to how I remember it, we were hit after we had already made a turn towards Limuru directions.”

5. The respondent relied on the evidence of its driver *George Ruigu Ngurimu* and the turn boy, the loader, *Peter Mbugua Njoge*. The driver

and turn boy gave consistent evidence in chief that they were in the respondent's vehicle coming from Suswa. Their vehicle, a tipper lorry was carrying sand. They were headed to Githunguri. On the day of accident they were on Limuru-Kiambu road heading towards Kiambu. The driver stated that he was familiar with that road because he had used it many times. The weather conditions were dry and visibility was clear. The driver said that he was driving at a speed of 50 KPH. The traffic was low. On reaching Mutosi junction, from the Githiga directions there was a stationery matatu (Public service vehicle). There was a matatu on Limuru-Kiambu road. On that matatu passing the Mutosi junction, a vehicle (deceased's vehicle) joined the road "blindly". The driver stated that he noticed the deceased's vehicle in front of him. He tried to swerve, brake but was unable to avoid hitting the deceased's vehicle. The driver hit the deceased's vehicle on the right side and dragged it for 30 meters where it stopped. The driver then said that as a consequence the lorry overturned.

6. The respondent also relied on the evidence of *PC. Woman, Jacklyne Obayo Mariera* stationed at Tigoni police station where she undertook traffic duties. That officer produced the Occurrence Book (OB) of the Tigoni police station. She stated that a traffic accident occurred on 17th June, 2017 at 6.11 pm along Limuru-Kiambu road at Mutosi junction. The accident scene was attended by *P.C. Wamai Tutgut*. That the deceased, driving KBB 168W on reaching the Mutosi junction failed to give way to the oncoming respondent's vehicle and as a consequence the deceased's vehicle was hit by respondent's vehicle. The officer concluded her evidence in chief by stating that the deceased was blamed, by the officer who attended the scene of the accident, for failing to give way to the oncoming traffic that is, the respondent's vehicle.

7. The appellant's case was dismissed by the trial court for failing to prove negligence of the respondent. That dismissal aggrieved the appellant. This appeal against that dismissal is only as against the finding on liability, by the trial court. It follows therefore, that the appellant has not appealed against the trial court's finding on quantum.

8. The learned trial magistrate stated the following in her considered judgment:-

"To be clear, the deceased was approaching the Mutosi junction which is T junction, from Githiga direction in order to join the Limuru-Kiambu road to the right hand side towards Limuru direction. It is as he joined the Limuru-Kiambu road that the driver of the defendant rammed into him and the accident occurred..."

The defendant has referred to the Highway Code to show what one needs to do when turning right at a junction and I will make reference to it. Same is a document published by the National Transport and Safety Authority (NTSA) Kenya under the auspices of section 68 of the Traffic Act. This Highway Code was published in 2016. At page 34 and in reference to making right turns at the junction, the Code states and I quote:-

"114. Right turn: well before you turn at a junction, take full account of the position and movements of the flowing traffic.

· When safe to do so, signal your intention and take up a position in the middle of the road.

· Wait until there is a safe distance between you and any approaching vehicle before you complete your turn."

It is not disputed that the deceased was turning right at the Mutosi junction to join the Limuru-Kiambu road and headed towards Limuru direction. PW1 confirms it...

Secondly, the code also provides under the same rule that the driver at the junction must first check the flow of traffic before making the turn.

In the present case, DW2 and DW3 have testified that the deceased was on the left side of the matatu that had stopped at the junction and that he joined the road suddenly. If there was a matatu at the junction and the deceased was on his left then it is highly plausible that he did not have a clear vision of the road he was meant to join as he made the right turn and the lorry hit him. This explains the point of impact on the driver's side as asserted to by the plaintiff and her assertion that they were hit as they joined the road. It means that the lorry was well already at the intersection of the junction and was keeping to its lane and the deceased did not confirm this or the flow of traffic before he joined the road. He joined it from a blind spot and was thereafter hit by the lorry at this point. Had he waited until the matatu had left and waited patiently by the junction then it is highly likely he would have seen the lorry of the defendant as it passed. Instead he made a rash decision and joined the road without clearly checking the flow of traffic in direct contravention of the Highway Code.

It is unfortunate that there were fatalities in this accident but it does not mean that simply because the defendant's motor vehicle hit that of the deceased that he must automatically be to blame. The law provides that for the defendant to shoulder any blame he must be shown to have acted negligently and without concern for other road users..."

DISCUSSION

9. It is common ground of all the witnesses who testified for the appellant and the respondent that the deceased approached the T junction of Mutosi. When at that junction, his view of the oncoming vehicles on the main road, Limuru-Kiambu road, was obscured by a public service vehicle. The deceased joined that main road without a clear view and drove into the oncoming respondent's vehicle. The 1st appellant confirmed the accident occurred along Limuru-Kiambu road at Mutosi junction. She stated:-

"Yes, we were on main road. We were coming from Githiga..."

10. The witness did confirm the presence of a matatu on the Limuru road headed to Kiambu direction which was picking passengers. Although this witness in her evidence said that the deceased had a right of way when the accident occurred, that is contradictory to her earlier evidence that the deceased approached the Mutosi junction coming from Githiga on the way to join Limuru-Kiambu road heading towards Limuru. That earlier evidence was confirmed by the police officer who testified from the evidence recorded in the OB.

11. There is no doubt as noted by the trial magistrate that it was incumbent on the deceased to obey the rules of the road. I concur with the finding of the trial court that the evidence clearly showed that the deceased did not follow the dictates of the Highway Code.

12. Contrary to the contention of the appellant there was no evidence that the respondent's driver was either blamed or charged with any criminal traffic offence following the accident. Further there was no preponderance of evidence showing that the respondent's driver was driving at excessive speed.

13. The appellant's failed to establish on a balance of probability, that the respondent's driver was negligent at all. It is for that reason that I uphold the trial court's dismissal of the appellant's case.

DISPOSITION

14. Following the above finding I find no merit in the appellants' appeal. This appeal is hereby dismissed with costs.

JUDGMENT DATED and DELIVERED at KIAMBU this 29th day of April, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Kevin

For the Appellant.....Mr. Kagura

For the Respondent.....Mr. Wangui H/B for Kissinger

COURT

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE