REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. E 025 OF 2021

PAULINE KAINYERA SIMION

(Suing as a legal administrator of the estate of Luka Mutwiri-deceased.......APPELLANT

VERSUS

MARY NAMUNYA...RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. E.Ngigi (PM)

delivered on 19/01/2021 in Isiolo CMCC No. 34 of 2019)

JUDGMENT.

1. By a plaint dated 07/11/2019 filed before the lower court, the appellant sued the respondent seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Ksh. 162,630/= and costs of the suit. In those proceedings, the appellant pleaded that on or about 13/07/2019, the deceased was lawfully walking off Muriri-Isiolo road when the respondent, her driver, agent, servant and/or employees so negligently drove and/or managed Motor Vehicle Registration No. KCT 576 T Isuzu Canta that it lost control and knocked him down thereby occasioning him fatal injuries.

2. In support of her case, the appellant, **PW1** testified that the deceased, who was her son, was a businessman running a shop at Kiithe. She went on to state that, although she was uncertain how much he earned, he supported her, as she depended wholly on him. The deceased also supported his 6 year old son namely Pius Munene. During cross examination, she denied either knowing who had caused the accident or the car involved. **PW2**, Shadrack Bundi, in his evidence maintained that he had witnessed how the accident had occurred. Even when he was thoroughly cross examined, he stood his ground that the motor vehicle was entirely to blame, as it had veered off its lane to where the deceased was. He confirmed that the deceased was hit by the side mirror of the said motor vehicle. He also adopted his witness statement dated 07/11/2019 as his evidence in chief. According to **PW3, P.C Mohamed**, the investigating officer, the deceased was attempting to board the motor vehicle from the side. He fell on the road and was run over by the rear tyre of the motor vehicle. He asserted that the driver of the motor vehicle was charged with drunk driving in Traffic Case No. 232/19. He blamed the deceased for the occurrence of the accident because he was not a passenger and produced the police abstract.

3. The respondent denied the claim by his statement of defence dated the 16/01/2020 and prayed for the appellant's suit to be dismissed. No witness was however called to support that defence. At the conclusion of the production of evidence the defence stood are bare and mere allegations with no probative value.

4. After the evaluation of the evidence led on behalf of the plaintiff, the trial court found that the appellant had failed to prove liability and dismissed her case. In coming to that decision, the court said and held:

> **" P.W 3 and who is the investigating officer says the accident occurred when the deceased in an attempt to steal a ride fell down and was ran over by the lorry.**
>
> **From the above the court finds that the plaintiff's case is contradictory and on a balance of probabilities, it cannot be said that the plaintiff has proved that the accident was caused by the defendant.**
>
> **The above notwithstanding company the two versions i.e Pw 2 an Pw 3 as regard how the accident occurred. I find the evidence of Pw 2 as more credible reliable and objective. He gives his testimony objecting and is not in any way related to any of the parties. Pw 1 on the contrary appears to have been close to the deceased family as he admits he had known the deceased and was the one who had indeed contacted the deceased family. I thus find his evidence may not have been offered**

objectively.

The upshot is that the court finds P.W 3 testimony as a truthful account of how the accident occurred and the court hold that the accident occurred when the deceased in an attempt to steal a ride fell from the lorry and was ran over by the rear wheels. The deceased is thus held liable for the occurrence of the accident."

5. Aggrieved by the said decision, the appellant filed her Memorandum of Appeal on 17/00/2021 setting out five (5) grounds of appeal. In those grounds, the trial court is faulted for overly relying on the hearsay evidence of PW3 as opposed to that of PW2 (eye witness). It is complained that the trial court failed to find that, since the respondent's driver was charged with drunk driving, he was liable for causing the accident. The trial court is further faulted for its failure to construe the respondent's refusal to call any witness, to the appellant's favour. The last complaint is that the trial court disregarded the doctrines of vicarious liability and *res ipsa loquitor* in its decision.

Submissions

6. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 26/04/2021 and 09/06/2021 respectively. The appellant faults the trial court for relying on the hearsay testimony of PW3 while disregarding that of the eye witness (PW2). According to the appellant, the fact that the respondent's driver was charged with drunk driving, was prima facie evidence that he was liable for the accident. The court is beseeched to find that, since the respondent failed to adduce evince to rebut the appellant's evidence, she had proved her case on a balance of probabilities. In support of such submissions, the appellant cited the decisions in ***Abok James Odera T/A A.J Odera & associates v John Patrick Machira & Co. Advocates (2013) eKLR and Susan Kanini Mwangangi & anor v Patrick Mbithi Karita (2019) eKLR.***

7. For the respondent, submissions were offered to the effect that the appeal be dismissed with costs to the respondent as the findings by the trial court was sound and unassailable. The cases of ***China Zhong Xing Construction Company Ltd v Ann Akuru Sophia (2020) eKLR, Selle & anor v Associated Motor Boat Co. Ltd & others (1968) EA123, Peters v Sunday Post Limited(1958)EA 424, , Farah Awad Gullet v CMC Motors Group Ltd(2018)eKLR, Raila Amolo Odinga v IEBC & 2 others(2017), Evans Nyakwana v Cleophas Bwana Ongaro (2015) eKLR, Ngang'a & anor v Owiti & anor(2008)eKLR*** among others were relied on in support of her submissions.

Discussion and Determination

8. This being a first appeal, the court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse and reappraise the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.***

9. I appreciate the determination of the appeal to revolve around the question whether the appellant discharged her burden by proving her case on the balance of probabilities. The provisions of the law in sections 107,109 and 112 of the Evidence Act were extensively dealt with in ***Anne Wambui Ndiritu –vs- 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 case 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."**

10. While the appellant contends that the refusal by the respondent to offer any explanation to exonerate herself meant that she was liable, the respondent maintains that the burden always lied on the appellant to prove her case and the evidence adduced at trial on liability did not tilt in her favour.

11. It is not the law that failure by a defendant to lead evidence entitles a plaintiff to an automatic success. The burden of proof never shifts. It remains incumbent upon the plaintiff, always, to prove his case as pleaded. In the matter at hand, it was always the duty of the appellant to prove the tort of negligence against the respondent and only upon the discharge of that duty would the evidentiary burden shift for the respondent to give an explanation as to controvert and displace the position established by the appellant. That a defendant fails to call evidence in support of the defence pleaded merely means that the defence remains no more than unproven allegations and bereft of any evidentiary value. In the context of this matter in which the defence denied all the allegations by the plaintiff, including the description of the parties, the ownership of the motor vehicle, the occurrence of the accident and the death of the deceased as well as the standing of the plaintiff, put her to strict proof with an alternative defence that, if the accident ever occurred, which was equally denied, then it was wholly or substantially caused by the deceased, failure to lead evidence in proof of the alternative defence was that no finding could be made on it without the requisite evidence.

12. That is the law I find to have been reiterated by the Court of Appeal's position in ***Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR*** where it was espoused that:

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."**

13. What then amounts to proof on a balance of probabilities? ***Kimaru, J*** in ***William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526*** stated that:

> **"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 that 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."**

14. Pursuant to my mandate as a first appellate court, I have carefully weighed the two conflicting sets of evidence given by PW2 and PW3 on how the accident occurred. I however find that the contradiction is not difficult to resolve. The resolution rests on the fact that PW2 was an eye witness while Pw3 was not. Secondly, Pw2 was a witness while PW2 was not but had been called to produce the police record with specific reference to the abstract. I say that PW3 was never a witness because he did not allege being present at the scene and could not say what he observed with the eyes. His appearance in the matter must be viewed on the basis that his was to produce the police records. Section 147 of the Evidence Act says such a person is not a witness till he is called as such a witness. In this case, the witness was not even cross examined in observance of the same provision.

15. That being the case, the only direct evidence was that by PW 2 which I find to have been consistent and unshaken even in cross examination. I find that it was thus not supported by evidence on record for the trial court to prefer the evidence by the non-witness over that by a witness. Having been a non-witness, his evidence was at best hearsay but obviously inadmissible hearsay. I find that in so far the decision was solely grounded on inadmissible evidence, the trial court made an obvious and glaring error that attracts interference by the court. I do set aside the finding on liability, and as there was no evidence to prove the fault in negligence by the appellant, I find that the respondent was to blame wholly for the accident. Consequently, the finding on liability is set aside and in its place substituted a finding that the respondent was to blame 100%

16. There being no challenge on the damages assessed, had the suit succeeded, and being aware that assessment of damages falls to the discretion of the trial court with the appellate court enjoying no right to interfere freely and at will, I find no reason to depart from the trial court's assessment. As was appreciated by the Court of Appeal in ***Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55***

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

17. In the end, the appeal succeeds in whole, the decision of the trial court dismissing the suit is set aside and in its place substituted a judgment assigning liability against, the respondent at 100% in favour of the appellant. Judgment on damages is upheld.

18. I award the costs of the appeal and those at trial to the appellant.

DATED, SIGNED AND DELIVERED AT MERU, BY MS TEAMS, THIS 28TH DAY OF JUNE 2021

Patrick J O Otieno

Judge