



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO.53 OF 2019

JOSEPH MUTUA ZAKAYO (*Suing as the Administrator of the Estate of*

JULIANA KAVINDU (DECEASED)**APPELLANT**

-VERSUS-

DWA ESTATE LTD **RESPONDENT**

(Being an appeal from the Judgment of Honourable J. D Karani RM delivered on 26th June 2019 in Makindu PMCC No. 481 of 2018).

JUDGMENT

1. In a judgment delivered on 20th June 2019, the magistrates' court dismissed the case of the appellant, who was the plaintiff in the trial court, on the ground the appellant had failed to prove his case on the balance of probabilities.

2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel M/s Nduva Kitonga & Company on the following grounds –

a) That the learned magistrate erred in law and fact by considering extraneous factors which were not presented before the court.

b) That the learned magistrate erred in law and fact by disregarding the evidence tendered by the plaintiff before arriving at her decision.

c) That the learned magistrate erred in law and fact by wholly disregarding the submissions tendered by the plaintiff before arriving at the decision.

d) That the learned magistrate erred in law and fact in holding that the plaintiff had not proved his case on a balance of probabilities as required by the law.

e) That the learned magistrate erred in law and fact by dismissing the plaintiff's suit with costs when there was enough evidence against the defendant.

3. The appeal proceeded by way of filing written submissions, and I have perused and considered the submissions filed by the appellant's counsel M/s Nduva Kitonga & Company and those filed by the respondent's counsel M/s Mulwa & Mulwa advocates.

4. In addition to the written submissions, I have perused and considered the trial court proceedings and judgment.

5. This being a first appeal, I have to start by stating that as a first appellate court, I am bound to reconsider the evidence on record, and come to my own inferences and conclusions. This duty of the first appellate court has been restated consistently in several cases. Suffice it, I cite the case of **Dorcias Wagithi Nderi –vs- Samuel Kibuni Mwaura & Another (2015) eKLR** where the court stated as follows with regard to the duty of the first appellate court –

“The court should reconsider the evidence, evaluate 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not introduce extraneous matters not dealt with by the parties in evidence”.

6. From the record, the appellant called 3 witnesses in the trial court. Pw1 Joseph Mutua Zakayo was a son of the deceased, as well as her

estate administrator. He was not at the scene of accident but was informed about the death of the mother and made arrangements to take the body to the mortuary and bury the late mother. He was the plaintiff. According to him, his late mother was a vegetable vender earning about Kshs.9,000/= per month and was aged 54 at the time of death.

7. Pw2 was Cpl. Geoffrey Mutiso attached to DTO Makindu, who testified that on 30/10/2013 there was a fatal traffic accident at DWA sisal estate which was reported and entered in the OB. The accident occurred at 12 noon and was between motor tractor KBB 219P and motor cycle KBE 644X. Matter was investigated by PC Ouma and the motor cycle driver was charged with riding an uninsured motorcycle, but the case was later withdrawn under section 87(a) for lack of appearance of witnesses. He produced a police abstract.

8. Pw3 was William Zakayo Mbithi - the husband of the deceased and the rider of the motor cycle on which the deceased was a pillion passenger. It was his evidence that he was driving in the DWA estate sisal plantation main road, when a tractor failed to stop as it joined the main road thus hitting his motor cycle and his wife died on the spot and he was injured. According to him funeral expenses for his wife amounted to Kshs.80,000/=.

9. The respondent's witness was DW1 Musa Yusuf Luandeli who stated that on the way to the plantation, while driving the tractor on a feeder road, he heard a sound of a bang on the tractor, and on stopping saw two people on the ground and a motor cycle. He then said that he was on the main road heading to the plantation while the rider came from the feeder road and failed to give way.

10. From the above evidence, the trial court found that the appellant failed to prove his case on the balance of probabilities.

11. It is trite that under section 107(1) of the Evidence Act (Cap.80), the legal burden is on a plaintiff to prove his or her case to the court. This being a civil case, the burden of proof is on a balance of probabilities. The standard of proof on balance of probabilities basically means that the plaintiff has to show that it is more probable that his or her allegation is what had occurred. In this regard, in **William Kabogo Gitau -vs- George Thuo & Another (2010) eKLR** the High Court stated –

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has placed in his case are more likely than not to be what took place.”

12. In the present case, the trial court concluded that the appellant did not prove his case firstly, because there was no sketch plan produced, and secondly, because the driver of the motor cycle was charged with dangerous driving.

13. In my view, the versions of the two sides was quite clear and the absence of a sketch plan did not create a hollow or void. Both sides agree that there was a feeder road and a major road in the sisal estate. Pw3 said that he was on the major or main road when the tractor emerged from a feeder road without stopping and hit him and his wife. Dw1 on the other hand said that he was on the feeder road when he was hit, but later changed and said that he was on the main road when he heard a bang. Thus the court had to believe one version as against the other, as the parties described the scene well.

14. With regard to the motor cycle driver being charged with dangerous or speedy driving, there was no such evidence. He was not even charged with careless driving. The evidence of Pw2 was that he was charged with riding an uninsured motor cycle, which charge was later withdrawn.

15. From the evidence on record, in my view it was more probable that the accident occurred the way the motor cycle rider Pw3 stated than what the tractor driver Dw1 stated. The evidence of Dw1 was contradictory. The two people on the motor cycle must have been hit by the tractor, and that is why the pillion passenger died.

16. I thus find that the appellant proved negligence on the respondent's driver on the balance of probabilities. Due to the nature of the accident in which each driver was riding a different machine, I apportion liability at 10% for the appellant and 90% for the respondent.

17. I note that the trial court did not assess quantum of damages. This was a mistake even if the case was dismissed. In this regard, I cite the case of **Gladys Wanjiru Njaramba -vs- Globe pharmacy & Another (2014) eKLR** wherein the court observed as follows –

“It is trite law that the trial court was under a duty to assess the general damages payable to the plaintiff even after dismissal of the suit.”

18. Coming now to quantum of damages, at the trial, the counsel for the appellant asked for damages as follows –

a) Pain & Suffering – Kshs.10,000/=

b) Loss of expectation of life – Kshs.100,000/=

c) Loss of dependency – 1,440,000/=

d) Special damages (as pleaded) – Kshs.90,000/=

Total – Kshs.1,640,000/=

19. The respondent's counsel asked for damages in the following terms –

a) Loss of dependency – Kshs.270,000/=

b) Pain & suffering - Kshs. 10,000/=

c) Lost years - Kshs.100,000/=

Total - Kshs.380.000/=

20. I note that decided court cases were relied upon on both sides. On appeal, counsel for the respondent suggests a total figure of Kshs.470,000/= while counsel for the Plaintiff does not suggest any figures. Thus I presume he relies on the figure proposed in the trial court.

21. The deceased died instantly. I think that a figure of Kshs.10,000/= for pain and suffering is sufficient. Loss of expectation of life appears to be greed at Kshs.100,000/=, loss of dependency will be $Kshs.9,000 \times 12 \times \frac{2}{3} \times 6$ years = 432,000/=; special damages of Kshs.90,500/= is not disputed. I so assess damages. These figures will be subjected to 10% contributory negligence.

22. Thus I allow the appeal, set aside the judgment of the trial court and enter judgment for the appellant. The appellant will bear 10% liability and the respondent 90% liability.

23. I thus enter judgment for the respondent and the quantum will thus be as follows –

a) Pain and suffering – Kshs. 10,000/=

b) Loss of expectation of life - Kshs.100,000/=

c) Loss of dependency $Kshs.9,000 \times 12 \times \frac{2}{3} \times 6$ - Kshs. 432,000/=

d) Special damages – Kshs. 90,500/=

Total - Kshs. 632,500/=

Less 10% contribution -Kshs. 62,250/=

Total - Kshs. 570,250/=

24. The above amount will attract interest at court rates until payment in full. I award the costs of appeal and costs in the trial court to the appellant.

Delivered, signed & dated this 29th day of September, 2021, in open court at Makueni.

.....

George Dulu

Judge