REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 24 OF 2018

FELISTAS NJERI MUIRU.....1ST APPELLANT

ANDREW GICHUHI MUIRU.....2ND APPELLANT

(Both suing as the personal legal representatives of the estate of Michael Muhika Muiru (Deceased)

-VERSUS-

SAID MOHAMED MUSTAF.....1ST RESPONDENT

JOAEPH WARUNGU MWANGI.....2ND RESPONDNET

(Being an appeal from the Judgment /Decree of Hon. J. J Masiga, S.R.M in Garissa CMCC.254 of 2013)

JUDGEMENT

Introduction

1. This appeal herein is premised on the judgment of the learned trial magistrate Hon. J.J. Masiga in the Senior Resident Magistrate Court at Garissa in Civil Suit No. 254 of 2013 delivered on 31st October, 2018.

2. The genesis of the case is a plaint dated the 12th May, 2016 filed by the appellants herein suing on behalf of the Michael Muhika Muiru (Deceased) as against the Respondents herein. They alleged that on or about the 16th June, 2015 at around 4pm the deceased Michael Muhika Muiru was lawfully driving motor vehicle registration Number KBR 020T(Toyota fielder) along Garissa-Mwingi road, near Madogo-Hola Junction, when the 2nd Respondent so negligently and/or controlled and or managed motor vehicle number KBS 077K Scania bus as a result of which it lost control and hit the deceased motor vehicle in consequence whereof the deceased sustained fatal injuries and his estate has suffered loss and damages.

3. The listed particulars of negligence on the part of the 2nd Defendant now 2nd Respondent were as follows:

a) Driving at an excessive speed in the circumstances.

b) Driving without due care and attention.

c) Failing to keep any or any proper lookout.

d) Failing to have any or any sufficient regard to the safety of other road users.

e) Failing to stop, to brake, slow down or in any other way so as to manage and control the said motor vehicle.

f) Disregarding the provisions of the Highway Code.

g) Hitting motor vehicle registration number KBR 020T without any lawful cause and/or justification at all.

h) Driving on the wrong side of the road and thus hitting motor vehicle registration number KBR 020T.

4. They sought the following prayers: -

a) Kshs. 101, 985/= being special damages.

b) General damages under the fatal accidents Act and Law Reform Act.

c) Costs and interest at court rates.

d) Any other or further relief as the court may deem fit to grant.

5. The lower court upon hearing all parties and their evidence reached a finding that the Respondents were not liable and dismissed the appellants' suit with costs. The Appellant being aggrieved and dissatisfied with the judgment and decree of the lower court, filed the instant appeal on the following grounds:-

1) The learned trial magistrate erred in law and in fact in dismissing the plaintiff suit and holding the deceased 100% liable for the occurrence of the accident when he knew that evidence had been adduced to the effect that the 2nd Respondent herein contributed substantially to the occurrence of the death, and hence arrived at a wrong conclusion.

2) The learned trial magistrate erred in law and in fact in that he delivered a judgment that is generally against the evidence adduced and the submissions made and in particular he ignored the evidence of PW2 Joseph Njoroge Muhika and DW2 Joseph Warungu Mwangi which showed that DW1 substantially contributed to the occurrence of the accident.

3) The learned trial magistrate erred in law and in fact in that he solely based his judgment on the evidence of the police officer (PW4) who did not witness the accident and he ignored the evidence of PW3 and DW1 which evidence was to the effect that DW1 was negligent in the manner he drove the bus registration number KBS 077K, and hence arrived at a wrong conclusion.

4) The learned trial magistrate failed to take into consideration the fact that DW1 had adduced evidence to the effect that the accident occurred at an idle wide part of the road and thereby failed to apportion liability against the two drivers.

5) The learned trial magistrate erred in law and in fact in that he ignored the evidence adduced and submissions made in favour of the plaintiff and thus arrived at the wrong conclusion.

6. This being the first Appellate Court there is need to give a fresh look at the evidence adduced before the lower court bearing in mind that this court did not have the benefit of having seen or heard the witnesses as they testified. This is the principle espoused in the case of ***Selle vs Associated Motor Boat Co. [1968] EA 123***

Evidence

7. The following is the summary of the appellants and respondents' cases at the lower court.

Plaintiffs/Appellant Case

8. **PW1 Andrew Gichohi Muiri** testified that he is the brother of the deceased Michael Muhuka Muiru the driver of the motor vehicle registration number KBR 020T(Toyota Fielder), and that he has taken succession papers and he is suing together with the 1st Plaintiff on behalf of his estate. He told the court that the two vehicles were involved in an accident, where only Joseph Njoroge Muhika the son of his deceased survived the accident. It was his further evidence that they spent Kshs. 101,285/= as costs for funeral. He did not witness the accident, but told the court that the impact was on the left side.

9. **PW2 Joseph Njoroge Muhika** testified that the deceased Michael Muhika Muiru was his father and that he was in the motor vehicle that was involved in an accident killing him on 6/6/2015. He told the court that he was 12 years then and at standard 7, and that he was seated at the back seat in the middle. He told the court that the bus driver was driving fast, left his lane and hit them. He blamed the bus driver for the accident.

10. **PW3 Felistas Njeri Muiru** testified that the deceased was her second born child, and that he had four children and three of them died in the said accident leaving behind PW2. It was her testimony that they used to depend on the deceased.

11. **PW4 Phillip Osino** testified that at the material time of the accident, he was stationed at Garissa Traffic Police base as a ridder. He told the court that the subject accident occurred on 6/6/2015 at 1500 hours where 6 people were killed. He visited the scene with Inspector Njogu and Sergeant Kirimi and he prepared the police abstract herein. He told the court that the deceased who was driving motor vehicle Reg. No. KBR 020T was to blame for the accident. It was his evidence that the bus was coming from Garissa heading to Nairobi and the fielder was heading to Garissa from Mwingi, and the point of impact was on the left side of the road towards Nairobi. In addition, he stated that the driver of the bus tried as much to avoid the collision but the driver of the fielder was not conversant with the road and while negotiating a sharp corner he went towards the bus causing the accident killing all those onboard the fielder except Joseph Njoroge Muhika aged 13 year old. Further, it was his evidence that the deceased was driving the motor vehicle at the speed of 120 km/ph and from the sketch marks and the point of impact the deceased was to blame for the accident.

Defense/Respondents Case

12. **DW1 Joseph Wavungu Mwangi** testified that he was the driver of the Scania bus Reg. No. KBS 077K that was involved in an accident with Motor vehicle KBR 020T. He stated that the accident occurred at around 3Pm, and that prior to the accident he had stopped 3 times and therefore his speed was at 50 to 70 Km per hour. He told the court that he saw the fielder car at 30 meters away skid, and the driver swerved, he lost control and went off the road on his side, and when he attempted to join the road the car skidded and came to his side and this point he had already left the road completely trying to avoid the collision, however the fielder hit him head on and those inside the fielder died except a minor. He stated that there was a sharp corner and he blamed the deceased for the accident.

Submissions

13. Both parties herein agreed to dispose of the appeal by way of written submissions. The appellant filed their written submissions on 27th September, 2019 and dated 26th September2019 whereas the Respondents filed their submissions on 19th November, 2019 and are dated 14th November, 2019.

14. The appellants submitted on the various ground in support of the appeal. The first issue is that the trial magistrates solely relied on the evidence of PW4 the Police rider in reaching his decisions. In this regard they argue that the learned magistrate used the sketches in the police file and extract from the radar speed gun indicating that the deceased was driving at the speed of 120 Kilometers per hour. This they submit was erroneous because the police officer never witnessed the accident as it occurred.

15. In addition, they submitted that the lower court in its judgment ignored the evidence of the two eye witnesses who saw the accident occur, that is PW2 and DW1, which evidence they argue was not analyzed by the trial magistrate in his judgment and instead chose the evidence of the police officer who was not a witness to the accident in question.

16. Further, they submitted that evidence of DW1 point out that he was negligent, which fact they allege the trial magistrate ignored. The alleged instances of the said negligence, they submit is that DW1 was driving in excessive speed, drove without due care and attention or proper outlook of other road users, and that failure to apply beaks caused the accident.

17. Furthermore, the appellants submitted that the trial magistrate failed to consider the contradictions of the evidence of PW4 (Police Officer) who alleged that the scene of the accident was on a corner whereas DW1 stated that it was a bend, where he was able to see the deceased car prior to the accident. And on the speed gun radar they submitted that the magistrate erred in relying on the same as it was taken 30 kilometers from the scene and it cannot be accurate in view of the distance covered.

18. Moreover, they submitted that DW1 blatantly disregarded the provisions of the Highway Code by the manner he drove and controlled the bus and, in this regard they rely in the evidence of PW2. They denied that the deceased swerved as alleged by DW1 and urged the court to find that both drivers are liable and apportion liability on the respondents or alternatively on the two drivers respectively. The appellant rely on the following authorities ***Mary Njeri Murigi vs Peter Macharia & Another (2016) eKLR, Commercial Transporters Limited vs Registered Trustees of the Catholic Archdiocese of Mombasa (2015) eKLR*** *and* ***W.K (Minor suing through Next friend and mother L.K) vs Ghalib Khan & Another(2011) eKLR.***

19. In sum they urged the court to allow the appeal with cost being awarded to the appellant at the both the appeal and at lower court.

20. The Respondents vide their written submissions summited that the appellants never proved their claim on liability. In this regard they stated that all blame for the accident pointed to the deceased, the driver of the KBS 077K that is DW1 was not charged by the police for the offence, the evidence of PW4 clearly absolved the Respondents of blame and that the radar speed gun pointed out that the deceased was over speeding at 120 Km/ph.

21. Additionally, they submitted that in an action for negligence each element of the tort ought to be proven by the plaintiff by adducing evidence of fact in support of his case, and in this regard they argue that the appellant failed to discharge that burden. They rely in Sections 107,108 and 109 of the Evidence Act and the cases of ***Treadsetters Tyres Ltd vs John Wekesa Wepukulu (2010) eKLR*** and ***East Produce (K) Limited vs Christopher Astiado Osiro*** in **Civil Appeal No. 43 of 2001.**

22. In sum they urged the court to upheld the lower court decision and dismiss this appeal with costs. 4

DETERMINATION

23. I have considered the issues raised in this appeal. This being a first appellate court, it was held in ***Selle vs Associated Motor Boat Co. [1968] EA 123 cited above*** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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."**

24. On the power of this court to interfere with factual findings of the trial court, it was held by the then East African Court of Appeal in ***Peters vs Sunday Post Limited [1958] EA 424,*** that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

Burden of Proof

25. In this appeal, it is clear that its determination revolves around the question whether the appellant proved his case on the balance of probabilities. Section 107(1) of the **Evidence Act**, Cap 80 Laws of Kenya provides that:

> **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.**

26. The evidential burden of proof is captured in sections 109 and 112 of the same Act as follows:

> **"109. 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.**
>
> **112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

27. The two provisions were 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 cast 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."**

28. It follows that the initial burden of proof lies on the appellant in this appeal, but the same may shift to the respondents depending on the circumstances of the case. According to **Phipson on the Law of Evidence**, the term 'burden of proof' has two distinct meanings:

> **1.** ***Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.***
>
> **2.** ***The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.***

29. This court has considered the appeal herein, the evidence before the trial court, the grounds of appeal and the rival submissions by both the appellants' and respondents' counsel both in the lower court and before this court. In my humble view, the only issue for, consideration is whether the lower court erred in finding that the appellant was solely liable for the accident that led to death of deceased herein and that of his other members of his family.

30. On this sole important issue, the law is clear that he who alleges must proof as explained above. The appellant alleges that the Trial

Magistrate erred in his decision finding that the deceased appellant was solely to blame for the resultant accident that caused his death, and have argued that he failed to consider the evidence of PW2 who was in the accident motor vehicle (Fielder) and solely relied in the evidence of PW4, The Traffic Police Officer.

31. It is clear PW4 who purportedly relied on the police file wherein he got information on what he called the speed gun. The said devise allegedly took fielder's speed prior to accident about 30km away. There was no record produced from the said speed gun under the provisions of the evidence Act. Thus the information therein is un-reliable on the possible speed at the time of the impact 30km later.

32. On alleged point of impact, no sketch plan (if any was on record but not availed before High Court) was produced pointing at what point on road the motor vehicles collided. The fact that the two motor vehicles landed on left side of the road after collision on a corner or bend part of the road does not automatically imply the motor vehicle fielder was the one on the wrong 100%.

33. PW2 eye witness told court that the driver of the Scania Bus (DW1) left his lane and went to their lane while over speeding. DW1 said the fielder motor vehicle while at 30m swerved and lost control, went off road on his side skidded and came to his side. He said he left road for trying to avoid collision but it hit his motor vehicle. At the same time, he says there was sharp corner and blames driver of the fielder for the accident. These are some (i.e corners, bends, and point of impact) of the features which sketch plan and investigation officer ought to have clarified.

34. We are left with the PW2 and DW1 conflicting evidence which we cannot rule out each favouring his side.

35. In ***Eliud Papoi Papa v Jigneshkumar Rameshbai Patel & another [2017] eKLR (High Court of Kenya at Naivasha Civil Case No. 23 of 2015)*** where the court held as follows:

> ***"Thus, the court is confronted with conflicting and irreconcilable evidence regarding how the collision occurred and which driver is to blame. It is true that under Section 107 of the Evidence Act the Plaintiff was obligated to prove his allegations of negligence against the Defendants. However, the existence of conflicting versions on the collision does not necessarily mean that nobody was liable; a collision involving two vehicles almost always involves fault on the part of one or both drivers….***
>
> ***The Plaintiff's and Defendant's account of the accident was equally doubtful. Of the collision however there is no dispute. In the circumstances, and based on the decision of the Court of Appeal …..cited, I must find that the deceased and DW1 contributed equally in causing the collision and both must shoulder liability at 50:50%"***

36. In the circumstances of the of the instant matter, it is difficulty to hold that the fielder driver was 100% to blame. The circumstances of the case dictate that both drivers are to blame equally in absence of clear evidence as to what point of the road the motor vehicles collided and who occasioned the accident. Thus I hold that both drivers are 50:50 to blame. I thus make **judgment on liability apportioned at 50% against each of the drivers.**

37. To that extent the trial court's judgement is set aside.

38. The trial court did not state possible award it would have assessed in plaintiffs' favour in event the suit on liability was successful. Thus I refer this matter back to the trial court to assess the damages based on the liability as apportioned by this court.

39. Thus the court makes the following orders:-

> **(i) Trial court's judgement is set aside.**
>
> **(ii) Judgement on liability is entered against respondents apportioned at 50:50%.**
>
> **(iii) Matter referred to trial court for assessment of damages.**
>
> **(iv) Parties to bear their costs.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE