REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 116 OF 2017

SHADRACK MASWILI MUTUKU

CORLINES NDANU MUSYOKI (Suing as the Administrators of the

Estate of the late ALFRED MUTUKU-Deceased).....APPELLANTS

-VERSUS-

HAKIKA TRANSPORTERS LTD.....1ST RESPONDENT

CHRISTOPER IRINGA KINOTI.....2ND RESPONDENT

(An appeal against the entire Judgment of Hon. J. Nang'ea (CM) delivered on 15th May, 2017 at the Chief Magistrate's Court at Mombasa CMCC No. 544 of 2014)

JUDGMENT

1. The Appellants herein, in their capacity as personal representatives of the Estate of **Alfred Kimanthi Mutuku** (hereinafter referred to as "the deceased), filed a suit against the appellant in Mombasa Chief Magistrate's Court being Civil Suit No. 544 of 2014 in which they sought General Damages under the ***Fatal Accidents Act*** and the ***Law Reform Act***, Special Damages, Costs and Interests.

2. According to the plaint, on or around 17th June, 2011, the Deceased was lawfully riding motor cycle registration no. KMCJ 8225 along Mombasa-Nairobi highway when at the Kibarani, motor vehicle registration number KWS 246ZC 5846 Mercedes Benz Lorry was so negligently driven towards Mombasa town that it veered off the lane and knocked the deceased head on collision from the opposite lane with his motor cycle and as a result of which the deceased suffered fatal injuries. The particulars pursuant to statute law and negligence were pleaded.

3. It was pleaded that the deceased was survived by the widow aged 26years, two sons aged 8 years and 5 years respectively, one daughter aged 12years, his Father and Mother aged 88 years and 64 years respectively. According to the Appellants, at the time of his death, the deceased was aged 29 years, and would have lived for more years. It was averred that the deceased enjoyed good health and lived a happy life.

4. As a result of the deceased's death, his estate suffered loss and damage particulars whereof were pleaded.

5. In support of their case, the Appellants called three witnesses. The first witness who testified as PW1 was **PS No. 70875 CPL Abdullahi Didat**. In his testimony, he confirmed that the deceased died in the accident and the driver of motor vehicle registration number KWS 246 C 5846 was charged with causing death by dangerous driving. Pw1 produced the police abstract report, post moterm report and a charge sheet in which the traffic charge was preferred.

6. In cross examination he stated that he was not the investigating officer and that no statement was recorded by an independent eye witness. He further confirmed that the traffic charge was withdrawn under Section 87 (a) of the Criminal Procedure Code and that at the time of accident, the deceased's motor cycle had no insurance. On re-examination, he stated that the deceased wore a reflector at the time of the accident and had a valid driving license.

7. PW2 was **Corlines Ndanu**. She was the deceased's widow. In her witness statement, she stated that on 17/6/2011 she was at home in Makueni County when she received a call that he husband been knocked dead by a lorry. According to her they got married under customary law and had three children aged 12, 8 and 5 years respectively. She stated that the deceased was a cook at Wimpy Restaurant, Mombasa and earned Kshs.12,000/= per month from the job. She prayed for compensation.

8. The third witness for the Plaintiff was Shadrack Mutuku, the 1st Appellant herein. He is the deceased's brother. He testified that on 17/6/2011 he was at work when he received a call from a neighbor who informed him that his brother had been knocked dead by a motor vehicle. He confirmed that the accident was reported at Changamwe Police Station and the deceased's body taken to where a post mortem examination was done. It was his testimony that the deceased was working at Wimpy Hotel in Mombasa and earned Ksh.400/= daily which is equivalent to Kshs.12,000/= per month. He further stated that they purchased a coffin at Kshs.25,000/= and secured transport services at the cost of Ksh.65,000/=. He produced receipts of payment as exhibits 9 and 10 respectively. He sought the court to compensate them.

9. In cross examination he conceded to not having any salary/wage records of the deceased and that he did not witness the accident.

10. On part of the Respondent, they closed the case without calling any witness. After hearing the evidence, the learned trial magistrate found that the Appellants failed to prove the defendants negligence on a balance of probability and dismissed the suit with costs to the Defendant.

11. Aggrieved by the said judgement the Appellant now appeals to this court on the following grounds:-

a) *That the learned magistrate erred in law and in fact in disregarding the appellants' evidence*

b) *That the learned trial magistrate erred in law and in fact in holding that the Appellants failed to prove the Respondents' liability on a balance of probabilities.*

c) *That the learned trial magistrate erred in law and in fact in entangling the civil case with criminal matter.*

d) *That the learned trial magistrate erred in law and fact in insisting the appellants should have called eye witness to establish their case.*

e) *That the learned trial magistrate erred in law and fact in condemning the appellants to costs of the suit despite the overwhelming evidence of their case*

f) *That the learned trial magistrate erred in law and fact in stipulating the defendants should have pleaded res ipsa loquitar.*

g) *That the learned trial magistrate erred in law and fact in considering the outcome of the criminal case in determining this civil matter*

h) *That the learned trial magistrate erred in law and in fact in dismissing the suit despite the evidence that the Respondents owned and controlled the subject motor vehicle in question.*

i) *That the learned trial magistrate erred in law and fact in dismissing the suit despite the appellants proving the dependency of the estate upon the deceased.*

12. The appeal was admitted for hearing on this court gave directions on 30/4/2019 that parties do canvass the appeal by way of written submissions and a date fixed for parties to orally highlight the same. The Appellants' submissions were filed on 04/06/2019 and further reply to the Respondent's submissions on 12/07/2019. The Respondents' submissions are dated 8/7/2019 and filed on 9/7/2019.

13. It was submitted on behalf of the Appellants that it was established and proved that the Respondents were responsible of the accident following the evidence of PW-1 Corporal Didat who testified that the accident occurred when the 2nd Respondent crashed into the deceased when he was riding his motor cycle. PW-1 testified that the 2nd Respondent was charged with causing death by dangerous driving buttressed the same with the police abstract produced as exhibit indicating that the driver was charged as aforementioned contrary to Section 46 of the Traffic Act. According to the Appellants, the burden then shifted to the Respondents to adduce evidence to rebut this assertion by offering an alternative explanation as to the cause of the accident. By failing to so, it is the Appellants' case that their case should succeed. Reliance was placed in the case of ***Rahab Micere Murage (Suing as the legal representative of Esther Wakinii Murage)-vs- Attorney General & others Civil Appeal 179 of 2003.*** It is further argued that the fact that the 2nd Respondents' case is still under investigations does not exonerate the Respondents or in any way rebut the Appellants case. It is the Appellants' case that the deceased died as a result of the accident which fact is confirmed by the Postmortem report as well as the evidence of PW-1 and PW-2.

14. It is further argued that the deceased was wearing a reflector jacket at the time of the accident and the 2nd Respondent ought to have exercised proper lookout to avoid crushing him to death.The Appellants assert that the Respondents ought to be held 100% liable. This line of argument is buttressed by excerpts from the cases of ***Francis Maina Kahara-vs-Nahasho Muriithi Civil Appeal Number 25 of 2013*** and ***Mulwa Musyoka –vs-Wadia Construction HCCC NO. 1321 of 1997.***

15. The Appellants are of the view that if this court is unable to ascertain what caused the collision in question then instead of dismissing the case, both parties should be held equally responsible for the accident. This position is supported by holding in the case of ***Hussein Omar Farah –vs-Lento Agencies Civil Appeal 34 of 2005.***

16. According to the Appellants, the Respondents never called any witnesses and by only relying on the statement of defence and failing to adduce any evidence the Respondents failed to establish the alternative cause of the accident thereby affirming the appellant's case in its entirety. Reliance is placed on the cases of ***CMC Aviation Ltd-vs- Kenya Airways Ltd (cruisair Ltd) Civil Application Number 12 of 1979*** and ***Embu Public Road Services Ltd-vs-Riimi (1968) EA 22***.

17. The Appellants faulted the learned magistrate for his findings that the failure to plead the doctrine of res ipsa loquitor was detrimental to the Appellants' case. It is argued that the court of Appeal held that it is not necessary to plead the doctrine but it is enough to prove the facts which make it applicable. It is further argued that the court can invoke Section 112 of the Evidence Act on failure to invoke the doctrine. This is in accordance with the cases of ***Margret Waithera Maina –vs- Michael Kimaru Civil Appeal Number 16 of 2015***, ***Bennett –vs-Chemical Construction Ltd (GB) 1971/3 All ER 822*** and ***Darlington Francois-v-Well Services Petroleum Company Ltd Claim No. CV 2017.***

18. The Appellants submit that the trial court misdirected itself on pursuing the line of legal reasoning that the 2nd Respondent was acquitted under Section 87 (2) of the Criminal Procedure Code and adopting it as basis of dismissing the suit. The Appellants argue that the proceedings of the criminal case were never produced to enable the trial court establish what circumstances led to the dismissal of the criminal case. It is also argued that the legal threshold of proving a criminal matter is fundamentally different and far higher compared to that of civil disputes. It is the Appellants' submission that even if the 2nd Respondent was acquitted under Section 87 of the Criminal Procedure Code he was not permanently exonerated since the Police can prefer charges in future. The Appellants assert that the absence of eye witness evidence does not negate their case since the court can infer from the facts to establish the root cause of the accident. To buttress this line of argument the Appellants' relied on plethora of judicial precedents including: ***Jackson Muturi Njoroge –vs-Willian Waweru Maina Civil Appeal Number 31 of 2012, Stanley Kimere-Vs- Everigging African Contractors Ltd (2007) eKLR, Commercial Transporters Limited-vs-Registered Trustees of the Catholic Archdiocese of Mombasa HCCC Number 521 of 2007.***

19. When all is said and done, the Appellants submitted that this court be pleased to set aside the Judgment of the trial court delivered on 15/5/2015 in its entirety and enter judgment in their favour by holding the Respondents 100% to blame for the accident or in the worst case scenario this court to apportion liability equally in the ratio of 50%:50% between the parties. On Quantum, the Appellants seek the court to award as follows: Loss of Dependency Kshs.3,168,000.00 or in the alternative Kshs.2,162,952.00; Loss of Expectation of life Kshs.200,000/= ;pain and suffering Kshs.150,000/= and special damages 135,200/=.

20. The Respondents on the other hand submitted that the Appellants failed to file a reply to defence as required under Order VI Rule 9 (previously), now Order 2 Rule 11(i) of the Civil Procedure Rules It is averred that the negligence alleged in the defence therefore stands admitted. Reliance was placed in the case of ***Eastern Produce (K) Ltd-vs- Christopher Atiado Osiro.*** The Respondents' case is that the Appellants were not at the scene of the accident and there were no eye witness hence they cannot prove the allegations in the plaint. The police witness testified that there was an accident but did not explain how it happened. According to the Respondents, the memorandum of appeal did not include a ground appealing the award on quantum and the same amount awarded by the lower court should be relied on if proved. As such, it is submitted that the Appellants alleged negligence but failed to prove their case in the lower court and this court should as well dismiss their appeal.

Analysis and Determination

21. I have considered the issues raised in this appeal read and considered the respective oral arguments by the parties' respective counsels on 24.7.2019. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** cited with approval in **Techard Steam & Power Limited v Mutio Muli & Mutua Ngao [2019] eKLR** 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."**

22. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate them and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

23. On the power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

24. The appropriate standard of review was considered in three complementary principles in the case of **Peter Chege & 2 others v Joyce Litha Kitonyi & 2 others [2017] eKLR** as follows:-

> **i.** *First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
>
> **ii.** *In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
>
> **iii**. *It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.*

25. With the above principles in mind, I will now proceed to dealwith the Appeal. In this appeal, it is clear that the determination of this appeal revolves around the question whether the Appellants proved their case on the balance of probabilities. That the burden of proof was on the Appellants to prove that their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

26. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 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 than 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."**

27. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**
>
> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."**

28. On examining the witnesses presented by the Appellants during trial, the only witness who could lead this court to light with regard to liability is PW1, **PS No. 70875 CPL Abdullahi Didat.** He produced a copy of the Abstract report, the post mortem report and charge sheet concerning the accident. They were produced s P Exhibits 1, P Exhibit 2 and P Exhibit 3 respectively. PW1 was not the Investigating officer and his evidence was therefore based on those three documents he was given to produce in the court. The Appellants' counsel pointed out that the Police Abstract as well the charge sheet included information that the 2nd Respondent faced charges of causing death by dangerous driving. I think the Plaintiff should have made better use of that witness given that the issue of liability was seriously contested. The witness should have been requested to state what the police findings were at the scene of the accident and should also have been requested to give his opinion as to who was to blame for the accident. His evidence would of course not have been conclusively binding upon the court but would have assisted the court in determining the issue of liability.

29. However, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigating officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence.

30. The Appellants submitted and faulted the trial court for finding and applying as a basis for dismissing their case, that the 2nd Respondent was acquitted of the criminal charges against him. Nonetheless, the Appellants argued that by virtue of the said charges inferred negligence on part of the 2nd Respondent.

31. Accordingly, in the case of **Ochieng vs. Ayieko [1985] KLR 494**, **O'kubasu, J** (as he then was) held that:

> **"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."**

32. **Mwera, J** (as he then was) in the case of **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

> **"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it…Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally**

the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."

33. It must always be remembered that the decision of who to charge where a collision has occurred, rests on the police and the parties have no control over that decision. I therefore do not read too much into the fact that the 2nd Respondent was charged and acquitted of the traffic offence.

34. On who is to blame for the accident, the Appellant complains that the learned trial Magistrate erred in finding that no negligence was proved in light of the evidence adduced. The trial magistrate condemned the Appellants for failure to plead the doctrine of res ipsa loquitor. However, I note that the Appellants pleaded particulars of negligence in their plaint. The Defendant denied the allegations and likewise pleaded negligence on part of the deceased. The fact that an accident did occur is not in dispute. Nor is it disputed that it involved deceased's motor cycle and the 1st Respondent's motor vehicle which was at the material time being driven by the 2nd Respondent. How the accident happened was a matter within the knowledge of the deceased and the 2nd Respondent. I suppose that the 2nd Respondent was still at the time the case was heard. His failure to testify must have been a deliberate act on part of the 1stRespondent. **Section 112** of the **Evidence Act** provides thus:

"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."

35. The Appellants alleged negligence against the Respondents as cause of the accident in which the deceased met his death. They were not there at the scene and could not have known how the accident happened. I associate myself with the court of appeal's decision in the case of **Rahab Micere Murage (Suing as a Representative of the Estate of Esther Wakiini Murage) v Attorney General & 2 others [2012] eKLR** wherein the court was faced with similar facts and expressed its view as follows;

"…As stated earlier vehicles driven on public roads in a proper manner do not without cause become involved in accidents. It must be for that reason that the appellant accused the respondents of negligence. Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter…"

36. In the instant case I do hold likewise that the 2nd Respondent had knowledge as to how the accident happened and evidential burden was imposed on him by virtue of Section 112 of the Evidence Act to show how the accident did occur and whether it was the deceased to blame. Having failed to adduce evidence on that regard, the rebuttable presumption of fact as was held in **Rahab Micere Murage case (**supra**)** is that both the 2nd Defendant and the deceased were in one way or another negligent, and through such negligence caused the accident in which the deceased died. I have considered the authorities relied on by the Respondents on failure to plead the doctrine of *res ipsa loquitur*. They are decisions of a court with concurrent jurisdiction and however persuasive they are; are not binding on this court.

37. Moreover, the presumption does not arise out of the doctrine of *res ipsa loquitur*, but from the evidential burden as imposed under **Section 112**, of the Evidence Act.

38. Having come to the foregoing conclusion, it is this court's judgment that the trial magistrate erred in ruling that no negligence was proved. The burden was on the respondents to disprove negligence on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law, as a result of which I apportion the liability at 50:50%.

39. I therefore set aside that decision of the trial court on liability and in its place, do substitute and enter judgment apportioning liability between the Respondents jointly and severally and Appellants equally. Each side bears 50%.

40. As regards quantum, I find no basis for interfering with the figure the trial court arrived at. I agree with the Respondents that there is no ground in the memorandum of appeal touching the issue of quantum. The law is that the assessment of damages is in the province of exercise of judicial discretion and this court as an appellate court must be slow to interfere. It is not enough that I would have awarded a different sum. I can only interfere where and when it has been demonstrated that the award is so low as to demonstrate wholly erroneous estimate of damages. There has been no demonstration has been made and I decline to intervene with the consequence that the award of damages is upheld.

41. The upshot is that the appeal succeeds to the extent of the apportioned liability only.

42. There shall be no orders as to costs.

It is so ordered.

Dated, signed and delivered at Mombasa on this 12th day of March, 2020.

D. O CHEPKWONY

JUDGE