REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 138 OF 2018

WEST KENYA SUGAR CO. LIMITED..... APPELLANT

VERSUS

MONICA AKINYI AOL & PATRICK WANJALA KHARINDA

(Suing as the legal representative of the estate of

DONALD AOL ATSANGO (DECEASED)) ..... RESPONDENTS

(from the Judgment and decree of Hon. T. K. Kwambai RM in Butali SRMC Civil Suit No. 269 of 2017 delivered on 27/9/2018)

JUDGMENT

1. The respondents sued the appellant at the lower court seeking for general and special damages after the respondents' relative (the deceased) was fatally injured by the appellant's motor vehicle whilst the deceased was walking along Shilongo – Fuvale road. The trial court held the appellant 100% liable for the accident. The appellant was aggrieved by the holding of the learned trial magistrate and filed this appeal through the firm of **Onyinkwa & Co. Advocates.** The grounds of appeal are that:-

> *(1) The learned trial magistrate erred in fact and law in holding the appellant 100% liable in negligence and/or at all, contrary to the evidence on record.*
>
> *(2) The learned trial magistrate erred in law and fact in failing to hold that the respondent had not proved his case against the appellant on a balance of probability and/or discharged the burden of proof in evidence.*
>
> *(3) The learned trial magistrate erred in law and fact by misapprehending the evidence on record and as a result arrived at an erroneous decision on liability.*

2. The appeal was opposed by the respondent through the written submissions of their advocates, **Alwanga & Company Advocates**.

Case for the Respondent –

3. The respondent called three witnesses in the case – a policeman who produced the police abstract PW1, The 2nd plaintiff Patrick Wanjala Kharinda PW2 and an eye witness to the accident PW3.

4. PW3 was a minor aged 11 years. His evidence was that her home is on the Shilongo – Fuvale road. That on the material day she and her brother were playing next to the road when she saw a tractor coming from the direction of Shilongo going towards Fuvale. She then saw the deceased going towards Shilongo from the direction of Fuvale. He was on the right side of the road as one faces Shilongo. That as the tractor passed them the driver started to talk over a mobile phone. The tractor then hit some stones outside their gate and the driver lost control of the tractor. It moved in a zig zag from the left to the right. It hit the deceased with the rear left tyre of the tractor and left tyre of the trailer. The driver went and stopped ahead. He checked what had happened and disappeared into a maize plantation.

5. PW2 testified that he received a report of the accident and went to the scene. He found the tractor and the body of the deceased at the scene. He later sued.

6. PW1 testified that the case was investigated by a colleague police officer. That the investigation diary indicated that the driver of the tractor reported that the deceased had tried to hike a ride on the tractor when he was knocked down by the tractor. That an eye witness (PW3) had recorded a statement stating that it is the driver of the tractor who had lost control of the vehicle and caused the accident. That the driver of the tractor had stated in his statement that he had not seen what had happened.

Defence Case –

7. The appellant called one witness in the case, the driver of the tractor, DW1. His evidence was that he was a driver for the appellant. That at the time of the accident he was going down a slope towards Fuvale. That some children shouted to him that he had hit a person. He stopped. He saw a person on the middle of the road having been run over by the wheels of the trailer. Villagers rushed there and wanted to beat him. He ran through a maize plantation. He went to Kabras Police Station and reported. He did not know how the accident occurred. That he did not see the deceased before the accident. He denied that he was talking on the phone when the accident occurred.

Submissions –

8. The advocates for the appellant faulted the judgment of the trial magistrate in relying on the evidence of the police officer PW1 to hold that the evidence of DW1 was of no probative value. That the evidence that DW1 told the investigating officer that the deceased had tried to hike a ride hence missing a step and being overrun by the tractor did not form part of the record. That it was wrong for the magistrate to rely on speculative evidence to influence his decision on the issue of liability.

9. Counsel submitted that the evidence of PW3 that the deceased was hit off the road and the body thrown into the middle of the road is not logical. That it is more logical to conclude that the deceased was hit while on the road. That the fact that the deceased was hit by the read tyres of the tractor/trailer would explain the evidence of DW1 that he did not see him before the accident. That PW3 was not a credible witness and her evidence ought to have been taken with a lot of caution. That the deceased was the maker of his own misfortune. That the trial court erred in finding the appellant 100% liable for the accident.

10. The advocates for the respondent on the other hand submitted that since DW1 did not see the circumstances under which the accident occurred, the version of PW3 on the occurrence of the accident remains unchallenged. That none of the particulars of negligence attributed to the deceased were proved. That the trial court was correct in holding the appellant liable for the accident under the doctrine of vicarious liability.

11. It was further submitted that the driver of the tractor indicated in his report to the police that the deceased was knocked down when he was trying to hike a lift on the tractor which evidence was discounted by the driver himself when he said that he did not see how the accident took place. That the evidence of the respondent's witnesses was candid and watertight.

Analysis and Determination –

12. This being a first appeal, the duty of this court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify – See **Selle –Vs- Associated Motor Boat Co. (1968) EA 123**.

13. The appeal is on liability. In finding the appellant 100% liable for occasioning the accident, the learned trial magistrate held that the evidence of the driver of the tractor DW1 was of little probative value as he said that he did not know how the accident occurred. That the initial report that the tractor driver made to the police was that the deceased had tried to hike a ride on the tractor but missed a step and he was overrun by the tractor. However that in his defence DW1 said that he did not see the deceased. The magistrate thereupon disbelieved the evidence of DW1 and held that:-

> ***"The evidence of PW3 is that she saw the driver on phone and that he lost control of the said tractor and subsequently hit the deceased. That piece of evidence remains unchallenged and the said witness was so candid in her evidence. She even stated that the said accident was on 18/6/17 being a Sunday. I have had the benefit of looking at the calendar for the year 2017 and it is true that 18/6/17 was indeed a Sunday. The evidence of PW3 went along way to demonstrate how the said accident occurred and as such I find that the defendants have not disproved negligence on their part hence I hold the defendants 100% liable for causation of the accident."***

14. The standard of proof in civil cases is on a balance of probabilities. In **Kanyangu Njogu –Vs- Daniel Kimani Maingi (2001) eKLR** it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. In **Siraj Din –Vs- Ali Mohamed Khan (1957) EA 25**, it was held that:-

> ***"The quantum of proof required in civil litigations is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other ….." (as cited in BWK –VS- EK & Ano. (2017) eKLR).***

15. The learned trial magistrate relied on the evidence of PW3 to find the appellant liable for the accident. The advocate for the appellant faults the evidence of PW3 on the grounds that her evidence that the deceased was hit off the road and his body thrown in the middle of the road is not logical. That at the same time the witness said that the deceased was hit and overrun by the tractor. Counsel wondered how the body ended up on the middle of the road if it was overrun by the vehicle.

16. Counsel submitted that the fact that the deceased was hit by the left big tyre of the tractor and thereafter overrun by the left tyre of the trailer means that the tractor driver did not see the deceased from the front side of the tractor.

17. Counsel faulted the judgment of the trial magistrate in relying on the evidence of the police officer PW1 who was not investigating officer to influence his view on the probative value of the evidence of DW1. That the trial magistrate relied on speculation that DW1 reported to the police that the deceased was trying to hike a ride on the tractor when he met his death.

18. I have considered the submissions made by both sides. The investigating officer did not testify in the case. There was no credible

evidence that DW1 made a report to the police that the deceased was hit as he tried to hike a lift on the tractor.

19. PW3 was aged 11 years when she testified. She was therefore a child of tender years when she testified in court. Section 19 (1) of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya requires a court before admitting the evidence of a child of tender years to conduct a *voire dire* examination to ascertain whether the child understands the meaning of an oath and if not whether the child was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth. The witness gave sworn evidence without the court ascertaining the above. Though the trial court did not conduct a *voire dire* examination on a child of tender years it was clear from her evidence that she understood the meaning of an oath and she was intelligent enough to warrant her evidence being received.

20. The trial magistrate is the one who heard the witnesses PW3 and DW1 and assessed their credibility. He was satisfied that PW3 was telling the truth. On my own analysis of the evidence there is no reason for me to fault the finding reached by the magistrate on the credibility of PW3. DW1 confirmed the evidence of PW3 that he stopped a distance away from the scene of the accident. He confirmed the evidence of the witness that he disappeared into a maize plantation after the accident. Weighing the evidence of PW1 and that of DW1 there was everything to believe that PW1 was the one telling the truth. PW1 saw DW1 talking over the phone after which he lost control of the tractor and knocked down the deceased. The evidence by DW1 that he was not talking over the phone can only have been mere denials. It was possible for the deceased to be hit on the side of the road and be dragged by the tyres of the tractor to the middle of the road. The submissions by the advocates for the appellant that this was not possible is not factual. I therefore find that the trial magistrate was correct in finding that it is the appellant's driver who lost control of the vehicle and occasioned the accident. There was no evidence placed before the court to demonstrate that the deceased contributed to the occurrence of the accident. The appellant's driver was the one to blame. The appellant was 100% liable for the accident.

21. The appeal was on liability. The upshot is that there is no merit in the appeal. The same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

No appearance for Respondents

Appellant - Absent

Respondents - Absent

Court Assistant - Polycap

30 days right of appeal.