REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NUMBER 26 OF 2016

SIMPLICIOUS MAENDE OSICHE. …….....…….... 1ST APPELLANT

WEST KENYA SUGAR CO. LTD. …….....…….. 2ND APPELLANT

VERSUS

CLEOPHAS KUNDU MASIBO (*Suing as the legal administrator and*

***representative of Estate of Salton Walunywa Kungu – Deceased)*. …… RESPONDENT**

(being appeal from the judgment and decree of Hon. King'ori Chief Magistrate – Bungoma Law Court in Bungoma CMCC No. 580 of 2013 delivered on the 23/3/2016)

J U D G M E N T

By plaint dated 16th December, 2013 the Respondent Cleopas Kundu Masibo (complainant in the Magistrate's court) sued the appellants, Simplicious Maende Osiche and West Kenya Sugar Co.Ltd (the defendants) in the magistrate's court, seeking general damages under the Law Reform Act and Fatal Accidents Act, special damages, interest and costs. The damages claimed were as a result of a traffic road accident that occurred long Webuye-Kitale road involving motor vehicle registration KBG 983 Toyota Pick-up owned by the appellant and motor cycle registration No. KMCP 254F where the deceased Salton Walunywa Kundu sustained serious injuries from which he died.

The Respondent blamed the accident on the negligence on the part of the driver of the 1st Respondent/defendant who was an employee of the 2nd appellant/defendant and, therefore liable for this tort. The particulars of negligence were tabulated in paragraph 7 of the plaint.

The Appellant/defendants in lower court filed a statement of defence denying the claim and any negligence. In the alternative and without prejudice the appellant averred that if an accident occurred, the same was caused by or contributed to by the negligence of the deceased Slaton Walunywa Kundu who was the rider of motor cycle KMCP 254F. The particulars of contributory negligence were specified in paragraph 15 of the defence.

Upon full hearing of the suit, the trial magistrate by judgment dated 2nd March, 2016 he apportioned liability at 50:50 and awarded grand total damages of Kshs.1,022,000/- in favour of the respondent after apportionment.

Dissatisfied with the judgment and decree, the appellant filed this appeal on the following grounds: -

> ***1) The learned trial magistrate erred in fact and in law in treating the evidence and submission before him superficially and consequently coming to a wrong conclusion on the same.***
>
> ***2) The learned trial magistrate erred in fact and in law in finding that the Respondent had proved his case on a balance of probability.***
>
> ***3) The learned trial magistrate erred in fact and in law in ignoring the pleadings and submissions for the defence.***
>
> ***4) Without prejudice to the foregoing, the award of damages in the circumstances was excessive.***

The plaintiff called two witnesses PW 1 Cleophas Kundu Masibo the plaintiff and father of the deceased, gave evidence. He stated that the deceased was married with three (3) wives but one died and 2 left the deceased. He testified that he had children from the three (3) wives and produced their birth certificates. He stated the deceased was a boda boda rider and used to earn Ksh.1,300 per day. He gave receipts for expenses incurred in the burial of deceased as special damages. He confirmed he was not at the scene of accident and, therefore, did not witness how it occurred.

PW 2 PC Omar Amusa attached to Webuye Police Station produced the traffic file in respect of the accident which was compiled by another officer who was the investigating officer. From the investigations, he testified: -

> ***"Driver of Motor vehicle was Simplicius Maende Osiche. Motorcyclist Zalton Kuloba and Pillion passengers is Maina Sirengo. The motor vehicle was heading to Kitale from Webuye and motorcyclist from Kitale towards Webuye and at Malaha junction there was a trailer from Kitale towards Webuye. The motor vehicle paved way for trailer to pass as the road is narrow and when the trailer passed the motor vehicle resurfaced to the road at a high speed and went to the ongoing lane. When he tried to go back to his lane he knocked the mot-cycle and motorcyclist died instantly and pillion passenger at Webuye District Hospital. The PW 1 impact was right side of the road facing Kitale. That is the lane where motor-cycle was supposed to use. The driver of motor vehicle was charged with offence of causing death in dangerous driving in traffic case No. 17 of 2013 in Webuye Court. The case is still on."***

The defence called one witness Simplicious Maende the 1st Appellant. His evidence in respect of the accident was as follows: -

> ***"On 6th April, 2012 I had been engaged to deliver diesel to Misikhu. Between Webuye and Lugulu. I was going uphill at Malaha area, there was a cover. I was driving a motor vehicle KBG 083 a pick up land cruiser. I was driving a speed of 35Km per hour. Thee was oncoming motorcycle, another motor vehicle overtook it. It was KMCP 254F. The motor cycle had a pillion passenger. The motor cycle came to my side and hit my vehicle behind the driver soon stopped my vehicle. The motorcycle landed in a ditch on the right hand side. We assisted with members of the public to put the injured in my pick-up. I was carrying 800 litres of diesel. I was not speeding. There was no lorry ahead of me to overtake. If the rider had not overtaken the other motor cycle, the accident would not have occurred. I was charged with traffic case. The case is still pending."***

Upon cross-examination by Oyando counsel for plaintiff he admitted he was employed by West Kenya Sugar Company. It is upon his evidence that the trial magistrate found each of the parties to have contributed to the accident and apportioned liability at 50:50.

M/s Ogejo Olundo & Co. Advocates for the appellant filed written submissions in support of the appeal. Counsel submitted that there was no proof of causation by the 1st defendant/appellant. Counsel submitted that the trial magistrate erred when he made a finding that it was not clear that it was 1st defendant (1st appellant) who caused the accident or which part of the road where the accident occurred and went ahead to find the appellants 50% liable. Counsel submitted that the evidence of PW 2 the purported eye witness was contradictory and therefore not a truthful witness. Counsel submitted that the evidence of DW 1 Simplicious was clear that it is the motor cycle which went to his lane while trying to overtake another motor cycle and hit the right side of the vehicle thereby causing the accident.

Counsel further submitted that where a court finds the probability is equal to either side then it means no case has been proved by the plaintiff. He submitted that the degree of balance of probability is not attained when a court finds that the probability is equal as a draw is not enough to establish a degree of balance of probability. On quantum, counsel submitted that 1/3 of the earning of the deceased should have been deducted to arrive at a probable take home income.

Mr. Oyando for the Respondent submitted this appellate court can only disturb the findings on liability and quantum of the trial court where it has been demonstrated that the trial court applied wrong principles of law or fact, or that the quantum was too low or so high as to invite the interference by the appellate court.

On liability, counsel submitted that the appellant had proposed that the court finds deceased 80% contribution but the court arrived at 50:50 basis. This was a finding of fact which the court should not interfere with as the court had discretion to apportion liability. Counsel further submitted that counsel for appellant had filed submissions in the lower court and proposed quantum and the court took submissions into account. Finally, counsel submitted it has not been demonstrated in this appeal that the trial court's findings was based on no evidence, or that the trial magistrate misapprehended the evidence or applied wrong principles.

This is a first appeal. The duty of the first appellant court was well stated in **Siele and another Vs Association Motor Boat Co. Ltd and Other** 1968 EA 123 where the court of Appeal stated: -

> ***"Briefly put this court must consider the evidence evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect."***

In **Peter Vs Sunday Post Ltd (1958) EA 424** the court stated: -

> ***"While an appellate court has jurisdiction to review the evidence, to determine whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion or it's shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellant court will not hesitate to decide…."***

Bearing the duty of this court in mind and upon considering the grounds of appeal and submissions. I find that there are two issues for determination: -

i) Whether the plaintiff/respondent proved this case on a balance of probability.

ii) Whether the trial court erred in law in apportioning liability.

iii) Whether the trial magistrate applied wrong principles in assessment of damages.

In civil cases the burden of proof is on the plaintiff or the person who requires the court to make a finding of fact in his favour. The general rule is stated in the Latin maxim "*ei incumbit probatio ani dicit nm quo negat"* meaning he who avers must prove. The person who avers, therefore bears the burden of proof. He can do this by adducing evidence, the opponent admitting a fact or the court taking judicial notice of a fact. In a claim based on negligence as in this case, it is for the plaintiff to prove how the defendant was negligent.

The standard of proof in civil cases is on a balance of probability. In **Miller Vs Minister of Pensions (1947) 2 ALL ER 372** in discussing this Denning J, stated: -

> ***"That degree is were settled. It must not reach certainty bar it must … a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law should prevail to protect the community if it is submitted tactful possibilities to defeat the cause of justice. If the evidence is so sworn against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of cause it is doubt but nothing short of that will survive"***

In **Trendsetter Tyres ltd Vs John Wekesa Wepukila (2010) eKLR**, Ibrahim J (as he then was) said: -

> ***"On question of proof and burden thereof it is stated in Charlesworth and pray on negligence 9th Edition at page 387.***
>
> ***'in an action for negligence as the every other action the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence on the facts on which he as is his claim for damages. The evidence called on his behalf must consist of such either proved or admitted and after it is concluded two questions arise***
>
> ***1) Whether on the evidence of negligence may be reasonably inferred and 2***
>
> ***2) Whether assuming it may be reasonably inferred, negligence is in fact inferred."***

The English case of the **Re H (Minors) 1996 AC 563 at 586 and Nicolls** explained: -

> ***"The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence the occurrence of the event was more likely than not".***

In **Miller Vs Minister for Pensions** (Supra) Denning said: -

> ***"If the evidence is such that a tribunal can say, 'we think it more probable than not, the burden is discharged but if the probability are equal it is not"***

The appellant submitted in this appeal that the plaintiff did not prove his case on the balance of probability that the appellant was negligent. He submitted that the plaintiff/respondent did not prove any negligence on the port of the 1st defendant/Respondent. In a claim of negligence arising from a road traffic accident, the plaintiff must prove: -

> ***i) That the defendant was the owner/driver of the motor vehicle.***
>
> ***ii) That the motor vehicle was being driven on a public or private road.***
>
> ***iii) That the driver drove the vehicle without due care and attention or regard to other road users.***
>
> ***iv) That as a consequence of that negligent driving there occurred an accident.***
>
> ***v) That the plaintiff was injured or died in the accident.***
>
> ***vi) As consequence thereof he deserves the damages.***

Negligent piece of driving can be demonstrated by leading evidence that he was driving at excessive speed in the circumstances, driving without due care and attention or regard to other road users. It can also be demonstrated by driving under influence of drink or drugs, inability to exercise control of the motor vehicle, or driving while not following the Highway Code and Traffic Act.

PW 1 Cleophas Kundu Masibo did not witness the accident. PW 3 the police officer relied on what was recorded by his colleague who was the investigating officer. The parties by consent adopted the evidence of one Dickson Simiyu Wamalwa tendered in CMCC 579 of 2013 relating to the same accident. His evidence was that: -

> ***"On 6th April, 2013 at around 8.30 a.m. he was herding cattle on the road when I saw a lorry or West Kenya carrying cane towards Webuye. There was a land cruiser KBG 083R from the opposite direction heading to Kitale and the land cruiser move to the site to give way to the lorry. There was motorcycle behind the lorry and as the land cruiser moved to give way to lorry it collided with the motorbike which was on the left (right lane) he stooped the land cruiser and informed the driver that he had caused an accident. One person died a rider while his passenger sustained fractures. He assisted the driver to take them to Webuye District Hospital and with the driver they reported the accident to Webuye Police. He also recorded his statement on***

the same day. He blames the driver of KBG 083R for not giving way and for driving at a speed of about 120KM per hour."

The evidence of DW 1 Simplicious Maende Ogiche is the witness statement which he adopted as evidence in chief. He stated: -

> ***"On 6th April, 2012 I had been engaged to deliver diesel to Misikhu. Between Webuye and Lugulu. I was going uphill at Malaha area, there was a cover. I was driving a motor vehicle KBG 083 a pick up land cruiser. I was driving a speed of 35Km per hour. Thee was oncoming motorcycle, another motor vehicle overtook it. It was KMCP 254F. The motor cycle had a pillion passenger. The motor cycle came to my side and hit my vehicle behind the driver soon stopped my vehicle. The motorcycle landed in a ditch on the right hand side. We assisted with members of the public to put the injured in my pick-up. I was carrying 800 litres of diesel. I was not speeding. There was no lorry ahead of me to overtake. If the rider had not overtaken the other motor cycle, the accident would not have occurred. I was charged with traffic case. The case is still pending."***

There were the eye witnesses to the accident. The driver of the motor vehicle testified that he was driving along Kitale-Webuye road. He was driving from Webuye towards Kitale. His proper lane was on the left when facing Kitale. The motor cyclist was oncoming that means it was from Kitale towards Webuye and its proper lane would be left when facing Webuye. The driver testified that the motor cyclist hit him on the right side of the driver's door. If the point of collision is as on the right side of the motor vehicle, it then means that the motor cyclist was on his side and the motor vehicle collided when one or both moved off their proper lane. While the PW 2 stated that it was the driver who moved to the lane. Where the motor cyclist was the driver stated it is the motor cyclist who moved to his (drivers) lane.

The one thing that is clear from their evidence is that there was collision between the motor vehicle and the motor cycle with the impact being on the driver's door of the motor vehicle. The cause here having been founded on negligence, the question to determine is whether the appellant driver has been shown not to have acted as a prudent driver and therefore acted negligently. For the court to determine this, it only needs to employ flowing logic which means that a decision is arrived at which reasonably flows from a premised foundation. In **Shapley Vs Gypsum Mines Ltd (1953) 2 AC 663 at page 681 Lord Reid** in explaining this stated: -

> ***"To determine what caused an accident from the point of view of new legal liability is a most difficult task. If there is any valid logical or scientific theory, it is quite irrelevant in this connection to a court of law. This question must be decided as a properly instructed and reasonable jury would decide it. The question must be decided by applying common sense to the facts of each particular case one way find that as a matter of history several people have been at fault and that if any of them had acted properly the accident would not have happened but that does not mean that the accident must be discarded and those which must not. Sometimes it is proper to discard all but one and to regard one as the sole cause but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."***

In this case, there is evidence that the motor vehicle and the motor cycle were from the opposite sides of the road. The motor vehicle was from Webuye side being driven towards Kitale. The motor cycle was from the Kitale side going towards Webuye. Both under the Highway Code were supposed to maintain their proper lane. The evidence, however, is that they had a collision with driver saying that the motor cycle hit his vehicle on the driver's door. The driver admitted in his evidence that he had seen the on-coming motor cycle which overtook another motor cycle. This version is disputed by PW 2 who testified that it was while the driver of the motor vehicle moved to give way to another motor vehicle that he collided with the motor vehicle where there is a collision of two vehicles or vehicle and motor cycle the logical conclusion is that either one or both of the drivers did not comply with Highway Code. Where as in this one where the other driver or rider died, the trial court must determine liability.

In **Abbay Abubakr & Fatuma Ali Vs Marair Freight Agencies CA 17 of 1983** the Court of Appeal said: -

> ***"The trial judge rightly applied to the facts before him the relevant law enunciated by Spry VP in Lakamishi Attorney General (1971) EA 118 on 120 for such cases which it is not settled law in East Africa that where the evidence is relating to a traffic accident is insufficient to establish the negligence of any part the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible as a balance of probabilities to conclude that one other party was guilt of both parties were guilt of negligence. In many cases as for example where vehicles collide near the middle of the wide straight road in conditions of good visibility with no corners, there is in absence of any explanation an irresoluble inference of negligence on the part of both drivers because of one was negligent in moving to the centre of the road, the other must have negligent in failing to take evasive action."***

It is now, therefore, settled that where there is a collision of two vehicles, a vehicle and motor cycle as in the case and there is no means of distinguishing between the two drivers as to who should be blamed, the court should apportion the blame equally.

In this case, the appellant indeed in their submission urged the trial court to apportion liability between the two drivers. Proposed that the appellant bear 20% liability. In my view, therefore I do find that the trial magistrate apportionment of liability at 50:50 is well founded in fact.

The last issue is whether the trial court applied wrong principles in assessment of damages. Counsel for the appellant submitted that the trial magistrate ought to have deduced 30% from the probable monthly earnings of the deceased. This he submits that the 305 would be for tax deductions due form his earnings. Counsel relied on the decisions in **Hyder Nthenya Musili & Another Vs China Wuyi Ltd & another (2017) eKLR** and **Simeon Kiplimo Murey & 3 others Vs Kenya bus management Services Ltd & 4 Others (2014) Eklr** where the court held: -

> ***"Although the statutory deductions were not disclosed, the curt would readily ascertain these form relevant law. I would estimate that statutory deductions … would amount to about one kind of the gross salary."***

It is now settled that the assessment of quantum of damages is a duty at the discretion of the trial court. Being a discretion, it must be exercised judiciously and within established principles. An appellate should approach the invitation to distort the finding of the trial magistrate as to the amount of damages with caution. The principles upon which an appellate court can interfere with the trial courts discretion are now known having been enunciated in **Rook Vs Rairrier (1941) 1 ALL E.R. 297** and echoed by Court in **Butt Vs Khan (1981) KLR 349**, where Law J. A said: -

> ***"An Appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

The assessment of the damages by the trial magistrate was as hereunder: -

> ***"The Plaintiff's counsel proposed that the deceased be treated as a driver under the regularities of Wages Amendment Order 211 where the wages was 12,205/- per month, but while this appears reasonable the deceased was not a driver but a bodaboda rider. I would still find that he earned about ksh.300/- per day which would all work for Ksh.12,000/- per month. I will use that as the multiplier loss of dependency, therefore, works as follows: -***
>
> ***12,000 X 12 X 21 X 2/3 = 2,016,000/-***
>
> ***The plaintiff is entitled to costs of the suit with interest. I, therefore, enter judgment for the plaintiff as follows:***
>
> ***a) Pain and suffering 10,000***
>
> ***b) Loss of expectation of life 100,000***
>
> ***c) Special damages 18,000***
>
> ***d) Loss of dependency 2,016,000***
>
> ***Subtotal 2,144,000***
>
> ***Less b) above 10,000***
>
> ***2,144,000***
>
> =========
>
> ***Less 50% contribution 1,022,000***
>
> ***Grand total 1,022,000***
>
> ***f) Interest at court rates"***

The appellants' main submission on quantum of damages is that the trial magistrate did not provide for statutory deduction in form of tax, which he submitted was to be at 30% of the gross earning. This is a claim under the Law Reform Act and Fatal Accidents Act. The way of assessing damages under the Fatal Accidents Act was set out by the Court of Appeal of Eastern Africa in **Chanubai J Patel and Another Vs P F Hayes and Others (1957) EA 748 at 749** where it stated: -

> ***"The court should find the age and expectation of working life of the deceased and consider the ages and expectations of life of the defendants the net earning power of the deceased (i.e. the income less tax) and the proportion of his net income which h would have made available for his dependents. From this it should be possible to arrive at the annual value for the dependency which must then be capitalized by multiplying by a figure representing some any years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and in certain cases of the acceleration of the receipt by the widow of what the husband left her as a result of the pre-mature death. A deduction must be made for the value of the estate of the deceased because the dependable will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lumpsum that the court should apportion among the dependants.***

It is evident, therefore, that while the trial magistrate rightly in my mind pegged earning on the minimum wage as per the regulation of wages and assessed income to be 12,000/- per month, he when calculating the next income show have factored in taxation. This would have made him to arrive at the net income. I, however, note that the earning of Ksh.12,000/- per month would not be within the bracket for taxable income. Consequently, I find the assessment of damages was property determined by the trial magistrate. I, therefore, find no merit in this appeal which is hereby dismissed with costs.

Dated, signed and delivered at Bungoma this 29th day of May, 2020.

……..

S N RIECHI

JUDGE