



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 1 OF 2017

(FORMRLY HCCA NO. 27 OF 2015 AT MERU)

LOYFORD MUTHURI GITANGATA (Suing as the Administrator of the estate of the late DENIS MUTHAMIA GITANGATA).....APPELLANT

VERSUS

GEOFFREY GITONGA.....RESPONDENT

(Being an appeal rising out of the Decree emanating from Judgment of the learned Resident Magistrate Hon. H.M. Mbatia at Chuka Principal Magistrate's Court delivered on 10th June, 2015 in Civil Suit No. 25 of 2014)

BETWEEN

LOYFORD MUTHURI GITANGATA (Suing as the administrator of the estate of the late DENIS MUTHAMIA GITANGATA).....PLAINTIFF

VERSUS

GEOFFREY GITONGA.....DEFENDANT

J U D G E M E N T

1. **LOYFORD MUTHURI GITANGATA** (suing as the administrator of the estate of the late **DENIS MUTHAMIA GITANGATA**) is the Appellant herein and is appealing against the judgment in *Chuka Principal Magistrate's Court Civil Case No. 25 of 2014*. The appeal is basically against the trial court's finding on liability.

2. The Appellant had sued the Respondent in the said court on behalf of the estate of the late **DENNIS MUTHAMIA GITANGATA** (hereinafter to be referred to as the deceased) who died due to a road traffic accident that occurred on 11th June 2013 between a lorry Registration No. KAJ 128 W and motor cycle Registration No.KMCQ 583C ridden by the deceased. The accident occurred at Keria along Chuka- Meru Road when the deceased riding the said motor cycle had a near head on collision with the said lorry which was headed the opposite direction from Meru to Chuka.

3. The trial court in its judgment dated 10th June 2015 found the deceased 80% liable with the Respondent shouldering 20% liability. On quantum the trial court gave the following award:-

- a) General damages for pain and suffering - Kshs. 20,000/-
- b) Loss of expectation of life - Kshs.100,000/-
- c) Lost years - Kshs.1,747,584/-
- d) Less loss of expectation of life - Kshs.100,000/-

Kshs.1767,584/-

Less 80% contribution	-	<u>Kshs.1414,067.20</u>
Total	-	<u>Kshs.353,516/80</u>

4. The Appellant felt dissatisfied and filed this appeal raising the following ground namely;

i) That the learned trial magistrate erred in law and fact in attributing liability against the Plaintiff at the percentage ratio of 80%.

ii) That the learned trial magistrate erred in law and fact in laying undue reliance on the evidence of PW3, the traffic police officer.

iii) That the learned trial magistrate erred in law and fact in failing to appreciate that PW3, the traffic police officer was not an eye witness to the road traffic accident.

iv) That the trial magistrate failed to adequately address the issue of liability on the basis of evidence available.

v) That the trial magistrate completely ignored the Appellant's witness on liability.

vi) That the learned trial magistrate erred in law and fact in grossing over the issue of liability.

vii) That the learned trial magistrate erred in law and fact in attributing negligence upon the deceased at a scale that was unreasonably high.

5. In his written submissions done through M/s Basilio Gitonga, Murithi and Associates, the Appellant contends that the trial court failed to analyse the evidence of Appellant's witness who reportedly witnessed the accident. In his view, the Appellant's evidence ought to have been weighed against the evidence of the Respondent's witness.

6. The Appellant further contends that the evidence of the police officer who testified was relied upon by the trial court extensively despite the fact that the officer was not at the scene at the time of the accident.

7. The Appellant faults the trial court for what he terms as "*casual approach*" to issues and failing to "*deeply interrogate*" the competing pieces of evidence placed before her.

8. He has urged this court to find that the trial court arrived at wrong conclusion on liability.

9. He has relied on the case of *David Kajogi M'Mugaa & Another -vs- Francis Muthomi [2012]eKLR* where **Makau J**, observed in part that the evidence of an investigating officer alone cannot be conclusive as to who is to blame for an accident nor is the opinion of such a witness binding on the court because the court can either accept or reject it for various reasons.

10. He has further relied on the decision of **Mulwa J** in *Lochab Brothers Ltd & Another -vs- Johana Kipkosgei Yegon [2017] eKLR*. In that case the court held that the trial court had not made a serious interrogation or analysis of evidence and had not stated reasons for agreeing with a certain party. The court also found that the police officer who only produced the police Abstract and gave hearsay evidence and did not have a police file therefore making his evidence of little probative value.

11. The Respondent has opposed this appeal. In his written submissions through M/s Munene Wambugu and Kiplagat Advocates, the Respondent contends that at the trial neither PW1 nor PW2 recreated the occurrence of the accident as PW1 was not at the scene and his evidence in his view was of no probative value, while PW2 reportedly stated that he was at the scene but was denied the opportunity to record a statement but later stated that he never went to the police to record any statement.

12. They submit the Respondent's driver did all that a reasonable driver could have done to avoid the accident and that the trial court properly directed itself on the facts presented and the law applicable.

13. The Respondent blames the deceased for causing the accident stating that he overtook at a dangerous place without first ensuring that the road was clear and further encroaching onto Respondent's driver's lane. He relies on the case of *M'Itabari M'Ithiri and another suing as legal representative to the Estate of Cyprian Kaberia M'Itabari -vs- Anthony Waweru Mwai & 2 others [2018] eKLR* where the court stated that the evidence on record showed the point of impact to be at the center of the road, and that the deceased had been found to have riding with no riding licence for motor cycle and that the 1st respondent had applied emergency brakes to avoid the collision. The court found that the evidence was overwhelmingly in favour of the respondents and dismissed the appeal on liability.

They also rely on the case of *Daniel Kyalo Mutuku suing as Legal Rep to Estate of Alex Makaoni Mutuku versus Hakika Transporters Services Limited and another Mombasa HCCA 104 of 2016 (2019) eKLR*. Where the plaintiffs suit was dismissed at the trial court with no liability being attached to the respondents as the court found the deceased to have been riding a motor cycle at a high speed before hitting the tractor that killed him. The plaintiff appealed that decision. The court noted that there were no eye witnesses and the plaintiff did not prove any of the particulars of negligence in order to get a decision in his favour. The court was also of the view that the appellant did not plead the doctrine of *res ipsa loquitur* that could have enabled the court make certain assumptions in his favour.

14. This court has considered this appeal and the response made. It is well established that the role of this court on first appeal is to re-

evaluate all the evidence presented to the trial court and come up with own conclusions taking into account that this court unlike the trial court has had no opportunity of hearing the witness first hand. The main issue in this appeal is basically whether the trial court was right, based on the evidence tendered, to hold that the deceased was 80% to blame for the accident.

15. I have carefully considered the evidence tendered. The Appellant himself (PW1) testified and told the trial court that he arrived after the accident and did not find the lorry or the motorcycle involved in the accident at the scene. His evidence had little to offer in determining who was to blame for the accident and to what extent. Loyford Muriungi (PW2) the 2nd appellant's witness stated that he was walking on foot near scene where the accident occurred at the material time and date. According to him the deceased riding on a motorcycle passed him heading to Chogoria direction and that he saw a lorry coming from Meru direction towards Chuka approaching road bumps and at the same time overtaking a Saloon Car before hitting the motorcycle on its left side of the road. He further testified that the deceased helmet came off on impact and fell on the right side of the road and that the lorry was not on high speed because it was going over a bump.

16. The evidence by PW2 when considered alongside the evidence of PW3 presented some inconsistencies which in my view casted doubts about his credibility. The reasons for this conclusion are as follows:-

i) PW2 stated that he was standing around 10 metres away and that the lorry was overtaking a saloon car when the accident occurred. On the other hand he says that the helmet worn by the deceased fell off and dropped on the right side of the road as one faces Meru. The question that arises is how could the helmet fall off the deceased head onto the right side if at all the collision occurred on the left side of the road.

ii) Secondly PW2 stated that the lorry was not speeding because it was going over a big road bump. The Appellant in his pleadings had faulted the Respondent's lorry for being driven at excessively high speed. This meant that the evidence tendered by the Appellant did not support his case against the Respondent.

17. The evidence of PW2 when viewed with the evidence of DW1 and DW2 gives one a clear picture of the accident scene. DW1 states that it was around 7.30 pm when the accident occurred and according to him there were 3 road bumps erected at the scene and that he had gone over 2 bumps and was going over the 3rd bump when a motorcycle suddenly emerged behind a lorry trying to overtake but in the process hit the lorry's front bumper. The driver added that the lorry was loaded and heavy because he was carrying hardcore stones. The lorry driver's evidence was corroborated by DW2. It is quite apparent therefore that on a balance of probability the said lorry was certainly not being driven at high speed at all because of the road bumps and the fact that it was loaded. The evidence of PW1, DW1 and DW2 are in agreement on that score.

18. The big question that arises is where was the point of impact or put another way, who was overtaking another vehicle between the lorry (Appellant's driver) and the motorcycle (deceased)? The evidence of DW1 and DW2 points to the fact that the point of impact was at the right side as one faces Meru. Their position (defence) was supported by Appellant's own witness named Sgt Eunice Semi (PW3). The police officer who was summoned to testify for the Plaintiff. The officer told the trial court that she was not the investigating officer but had come to testify on behalf of her colleague (Corporal Macharia and P.C Margaret Mutua) who had visited the scene and wrote down their findings. According to the findings on the police file and the initial reports entered on the OB, the motorcycle rider (the deceased) failed to keep to its lane and rode onto the opposite lane and ramped onto oncoming lorry hitting it on the front bumper on the right side and sustained serious injuries as a result. A sketch plan drawn revealed that the lorry and the damaged motorcycle were found on the right side of the road as one faces Meru. This evidence is corroborated by the evidence of both DW1 and DW2 which displaces the evidence by PW2 in respect to where the point of impact was. The fact that he conceded that the helmet fell on the right side of the road, which side the police later found both the damaged motorcycle and the lorry on the right side of the road as one faces Meru direction indicates that in all probabilities, the deceased is the one who had tried to overtake when it was not safe for him to do so. He certainly was principal author of his own misfortune.

19. The Appellant has faulted the trial court for putting undue weight on the evidence of PW3 (police officer) but it is the Appellant who procured the attendance of the said witness. She was his witness and cannot blame the trial court for considering her evidence particularly given that she attended court with the police file that contained the details of how the accident occurred. The Appellant's cited case of ***Lochab Brothers Ltd & Another (Supra)*** is clearly distinguishable from the present case because in the cited case, the police officer had gone to court with only a police Abstract and without the police file. In the present instance PW3 was armed with the police file and the police Abstract which he tendered in evidence. Any party in the proceedings was at liberty to test the veracity of the evidence tendered through cross-examination because of the presence of police file containing investigations done.

20. It is also important to note that the onus of proving of negligence against the Respondent lay on the appellant because of the legal position (**Section 107 of Evidence Act**) that whoever alleges must prove. The Appellant alleged that the accident was caused by the acts of negligence attributed to the Respondent's driver. The law required him to prove that fact on a balance of probability but he failed after the trial court found that he was 80% to blame. In ***Palace Investment Ltd -vs- Geoffrey Karuki Mwenda & Another [2015] eKLR*** the Court 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.”

21. In the present instance the trial court found that the Respondent was 20% to blame and though the trial court found that he

was least to blame for the accident, I do not see any basis for the same. This court has considered the circumstances under which the accident occurred and from the evidence it is hard to attribute even a small percentage of negligence to him because he certainly was not to blame. What could he have done that he did not do to avoid the accident given that he was driving at low speed over bumps and suddenly motorcycle emerges and knocks it on the pumber? There was no much he could do and if that is the case, I do not find basis of attributing some percentage of blame on him. The trial court may have done that out of sympathy or empathy of the deceased's young family but that certainly is not a consideration in law. Where facts clearly show that the claimant is to blame even if that person is a deceased person, a court should be firm and apportion blame where it lies. In this instance the evidence presented to the trial court clearly pointed to the deceased is the sole cause of the accident. The trial court fell into error to apportion 20% blame on the lorry driver there was no evidence to support such apportionment.

In the end this court finds no merit in this appeal. The same is not only dismissed but the finding of the lower court apportioning 20% blame on the Respondent is reversed or set aside. In its place the Appellant's entire suit is dismissed with costs. The Respondent shall also have the costs of this appeal.

Dated, signed and delivered at Chuka this 28th day of May 2020.

R. K. LIMO

JUDGE

28/5/2020

Judgment dated signed and delivered vide zoom in presence of Murithi for the Appellant and Kiplagat for the Respondent.

R.K. LIMO

JUDGE

28/5/2020