



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 5 OF 2018

JOYCE WANJIKU KIMANI.....APPELLANT

VERSUS

EUNICE MAINA.....1ST RESPONDENT

JOSEPH NDWIGA NYAGA.....2ND RESPONDENT

DIRECT LINE ASSURANCE COMPANY LIMITED.....3RD RESPONDENT

(From the Original Civil Suit No. 114 of 2013 of Chief Magistrate's Court at Kerugoya)

JUDGMENT

1. This appeal arises from the Judgment in the Chief Magistrate's Court Kerugoya Civil Case No. 114 of 2013, in the case the trial magistrate dismissed the plaintiff's suit with no orders as to cost. The appellant who was the plaintiff in the lower court, is dissatisfied with the judgment of the trial magistrate and filed this appeal which raises the following grounds:

(i) The learned magistrate erred in law and in fact in finding that the deceased, John Gakure Wanjiku was to blame fully for the fatal road traffic accident of 9th May, 2010.

(ii) The learned magistrate erred in law and in fact in absolving the 2nd respondent from any blame in respect of the said road traffic accident without supporting evidence or contrary to adduced evidence.

(iii) The learned magistrate erred in law in failing to distinguish criminal liability from civil liability.

(iv) The learned magistrate erred in law and in fact by ignoring the submissions of the plaintiff.

(v) The learned magistrate erred in fact and in law in unduly relying on the evidence of the 2nd respondent and paying little regard, if any, to the other adduced evidence.

(vi) The learned magistrate erred in law and in fact in finding that the plaintiff failed to prove her case on a balance of probability.

(vii) The learned magistrate erred in law and in fact in occasioning injustice upon the appellant.

2. He prays that the appeal be allowed the judgment of the trial magistrate be set aside, and in its place order that special damages be awarded to the plaintiff, general damages under the law reform and fatal accidents act be awarded to the appellant.

Costs and interest in the sub-ordinate court be awarded to the plaintiff.

3. Brief background of the case is that; on the 9th of May, 2010 at around 8p.m the deceased John Gakure Wanjiku who is a son of the appellant, was knocked down by a motor-vehicle registration number KAQ 219 K, which was being driven by the 2nd respondent. The deceased sustained fatal injuries and died soon thereafter. The appellant filed a suit in the Chief Magistrate's court, as the Administrator of the Estate of : John Gakure Wanjiku, claiming special damages **Kshs; 122,075/=**, general damages under the law reform act and fatal accidents act, costs and interest. The respondents had opposed the claim and prayed that the plaintiff's suit

be dismissed with costs. In the Judgment the Trial Magistrate ordered that the plaintiff had failed to prove the case on a balance of probabilities as required and dismissed the suit and no order as to costs.

4. When this appeal came up for directions, the court ordered that the appeal proceed by way of written submissions. The appellant proceeded and filed submissions through the firm of; Otieno Okello & Company Advocates. Though the respondents were given an opportunity to file, they did not file any submissions, and the court proceeded to fix the matter for judgment. The appellant in his submissions, submits that the Trial Magistrate completely dismissed the appellant case, with no order as to costs, on the ground that the appellant had failed to prove her case on a balance of probabilities, and the deceased and not the 2nd respondent was to blame for the whole accident.

5. He submits that; he served the Memorandum of Appeal on the respondents and the respondents did not file any opposing pleadings thereto.

He submits that the appellants' has filed seven(7) grounds of appeal in her memorandum of appeal, but has stated that the grounds can be collapsed to one, that is the Trial magistrate erred in dismissing the appellant's case.

As the first (1st) appellate court, this Honorable court has a duty as reiterated in the case of: **Peter Okello Omedi -versus – Clement Ochieng (2006) eKLR** that the Court,

“is empowered to consider the evidence, evaluate it, and draw its own conclusion, giving some due diligence of the fact that, this court has never seen or heard the plaintiff or the defendant, and therefore must give some allowance to that inability.”

6. It is submitted that the Trial Magistrate failed to take into account the particular circumstances and probabilities of the evidence tendered by the plaintiff and/or defendant. This is given that DW2 (a) a traffic police officer, testified that it was raining heavily during the material time of the subject accident, which was at night - 8.00p.m (***paragraphs 10, page 54; and paragraph 10, page 55 of the record of appeal***). This was confirmed by DW1 (2nd respondent), who testified that it was raining heavily at the material time. The accident spot was dark and had no (traffic) lights (see paragraphs 10 and 20, page 51 of the record of appeal). The foregoing shows that there was poor visibility at the material time of the subject accident. This is further reinforced by considering that DW1 stated during examination –in-chief and cross-examination that he saw the deceased only 10 meters away before the vehicle hit him (see paragraphs 10 and 20, page 51 of the record of appeal).

DW2 testified that the subsequent judicial inquest into the death of the deceased established that nobody was to blame for the subject accident (***see paragraphs 10 and 20, page 54, and paragraph 10, page 55 of the record of appeal***). Noteworthy, the subject inquest was in the nature of a criminal case since it sought to find criminal liability on the part of the 2nd respondent and so it had a higher standard of proof –beyond reasonable doubt.

On the other hand, the appellant's negligence based suit sought to apportion liability against the respondents, especially the 2nd respondent, on the relatively lower standard of proof in civil cases - balance of probability. However, Dw2 contradicted herself by stating that the police investigations blamed the deceased for the subject accident (***see paragraph 20, page 54, paragraph 10, page 55 of the record of appeal***).

Dw2 confirmed during cross –examination that every party has the right to exercise due care on the road (***see paragraph 10, page 55 of the record of appeal***). Therefore, both the deceased and the 2nd respondent had a duty of care to each other at the material time of the subject accident.

7. He submits that even the finding of the said inquest, and the established poor whether condition at the time of the accident, it would have been fair, if at the very minimum the Trial court had apportioned liabilities at 50/50 against the deceased and the 2nd respondent, this was the case, in the aforesaid case of : **Peter Okello Omedi –v- Clement Ochieng (supra)**. Where the High court noted on appeal;

“ the failure by both parties to observe their obligations to each other might have caused the accident, and in the absence of clear and controverted evidence, I set aside the apportionment of liabilities by the trial court, and substitute with 50 against each party.”

8. He urges the court to find that the Trial magistrate erred in dismissing the appellant's case and blaming the deceased 100% and absolving the 2nd respondent for the subject accident.

That the instant appeal should be allowed.

9. I have considered the proceeding and judgment before in the trial court and the submissions by the appellant. The appellant had raised several grounds which I have listed above in her memorandum of appeal, however in the submissions the appellant has narrowed down the issue of determination to liability only.

ANALYSIS AND DETERMINATION;

This is a first appeal, and this court has a duty to analyze the evidence which was adduced before the Trial court, and consider

The evidence before the Trial Magistrate;

(i) The appellant called two (2) witnesses in her case and she testified as PW1, in her evidence she stated that: her son died in road traffic accident, and that she spent 100,000/= shillings and that she had documents to show that the accident occurred. That in total she spent Kshs; **122,075.00/=**, and she prayed that she be compensated.

10. The other witness who was called by the appellant Franco Mwaura Kimani (PW2), testified that he is a supervisor at Nakumatt holding and that he knew the deceased John Gakure, and that he had worked with the deceased who was a shop attendant, for about 6 months, the deceased was single and was about 22 years old.

11. It would seem that the parties had entered into negotiations which did not materialize. The appellant did not call another witness, the respondents' called Joseph Ndwiga Njogu (DW1) who testified that, on 9th May, 2010 he was coming from Nairobi driving a matatu registration KAQ 219 K, it was about 8p.m, it was raining when he reached Makutano Junction from Nairobi. He saw a person who was standing at the edge of the road, and wanted to cross. When he was about 10 meters from him he crossed the road, and he heard noise, and realized that he had knocked him. He was on the left side of the road. He applied emergency brakes, but in vain. He fell down on the road on impact, and that he was driving at a slow speed, as he was going uphill. He stated that, he did not veer off the road, and did not lose control. He rushed him to hospital, but the doctor said the victim had died. He then proceeded to Sagana Police Station and reported. He was charged at Baricho Court, and was acquitted. That It is the deceased, who was at fault, as he jumped on the road abruptly, he was not wearing reflective jacket, the spot was dark there were no lights.

12. The other witness who was called was No. 79440 CP Linet Makuti who is attached to Sagana Police station, traffic department. She produced an abstract issued in fatal accident case which was investigated at Sagana Police station. It involved motor-vehicle KAQ 219K a Toyota Hiace Matatu, and a pedestrian called John Gakure Wanjiku, which occurred along Makutano – Sagana Makuyu Road, and the circumstances are that the driver of the motor-vehicle was driving from Nairobi to Nyeri, and at the scene of the accident he knocked down a pedestrian who was trying to cross from left to right, he was knocked at the centre of the road and sustained severe injuries, he was rushed to Sagana hospital, where he was pronounced dead on arrival.

13. An inquest was opened, the magistrate closed the file, as nobody was to blame. The driver was not charged. The pedestrian was to blame, because he never took the precaution while crossing the road, and it was raining heavily.

DETERMINATION:

- It Is Trite that there is no liability without fault. This was stated in the decision of: **MUTHUKU –VERSUS- KENYA CARGO SERVICES LIMITED (1991) eKLR 464** where it was observed

” in my view it was for the appellant to proof, of course upon a balance of probabilities, one of the forms of negligence, as was alleged in the plaint. Our law has not yet reached the stage of liabilities without fault. The appellant, clearly failed to proof any sort of negligence against the respondent, and in my respective view, his claim was rightly dismissed. ”

14. Where a person alleges negligence, he is supposed to proof that there was breach of a duty of care: It is trite that whoever alleges must proof. And in this case, the burden was on the appellant, to proof the particulars of negligence which were pleaded at paragraph 4 of the plaint, where it was alleged that; the vehicle was being driven at an excessive speed, without due care and attention, failing to brake, swerve, slow down and in any other manner control the motor-vehicle, failing to keep a proper look out, failing to have regard for the safety of pedestrian, and in particular the deceased. **Section 107 of the Evidence Act**, provides that:

“ 1. 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.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In the case of : **Trendsetters Tires limited,-versus – John Wekesa Wepukhulu (2010) Eklr** where Ibrahim J (as he then was) allowed an appeal and quoted ***Charles Worth & Perci*** on negligence 9th Edition at page 387 on the question of proof and burden thereof, where it stated in an action for negligence “

As in every other action, the burden of proofs falls upon the plaintiff alleging it to establish each element of tort, Hence it is for the Plaintiff to adduce evidence of the facts on which he bases his claims for damages. The evidence called on his behalf, must consist of such, either proved or admitted, and after it is concluded two questions arise:

(i) Whether on that evidence, negligence may be reasonably be inferred.

(ii) Whether assuming it may be reasonably inferred, negligence is in fact inferred. ”

15. The court considered the case of; Dare -versus - Pulham (1982) 148 C.L.R. 658, which described the functions of pleadings as follows:

“pleadings and particulars have a number of functions, they furnish a statement of the case, sufficiently clear to allow the other party, a fair opportunity to meet. They define the issues for decision in the litigation, and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of a defendant's right, to make a payment into court.....”

16. The plaintiff did not tender any evidence to discharge the burden of proof, that the driver of motor-vehicle KAQ 219K was negligent. The issue of burden of proof, was settled in a recent decision of court of Appeal, in the case of ; EAST PRODUCE KENYA LIMITED -VERSUS- CHRISTOPHER ASTIADO OSIRO In Civil appeal No. 43. 2001 where it was held that, It is trite law that the onus of proof is on he who alleges, and in matters where negligence is alleged, the position, was well laid in the case of; KIEMA MUTUKU -VERSUS- KENYA CARGO HAULING SERVICES LIMITED (1991). Where it was held that:

“ there is as yet no liability, without fault in the legal system in Kenya, and a plaintiff must proof some negligence against the defendant, where the claim is based on negligence.”

17. The driver of the motor-vehicle KAQ 219 K testified before the trial magistrate and gave the circumstances, under which the accident occurred. The appellant did not tender any evidence on how the accident occurred. Indeed the two witnesses who testified for the plaintiff were not at the scene of the accident.

18. The defence witness number 2 the Police officer confirmed that the driver of the motor-vehicle was not to blame for the accident. As such the appellant did not adduce evidence to establish that the driver of the motor-vehicle, was negligent.

19. The Trial magistrate, reached a finding of facts, that the driver was not to blame, that it is the deceased who was to blame. This finding by the trial magistrate was based on the evidence which was placed before him. And this court cannot interfere with the finding of fact of the Trial magistrate.

20. I find no reason to interfere with the finding of the Trial magistrate, the appellant who had the burden of proof on liabilities was unable to establish negligence, on the part of the respondents’.

21. The claim by the appellant that liability should be apportioned at 50/50 against the deceased and the 2nd respondent, cannot be upheld, he had pleaded negligence and set out the particulars in the pleadings.

22. A party is bound by his own pleadings, and where negligence was alleged, the appellants, had the burden to proof negligence, as the respondents had denied they were negligent at all. The case cited; Peter Okello Omedi -versus- Clement Ochieng (supra) is but persuasive, I am not persuaded by the decision as the respondents had denied negligence, and based on the case of: EAST PRODUCE KENYA LIMITED -VERSUS- CHRISTOPHER ASTIADO OSIRO (Supra), Court of Appeal, it was clearly held that, where negligence is alleged, it must be proved by the party alleging it. In this case the appellant, had the burden of proof which I find she did not discharge.

23. I find that the Appellant's claim was rightly dismissed. I therefore find that the Appeal is without merit, and is dismissed. I make no order as to costs, as the respondents did not file submissions, to oppose the Appeal.

Dated at Kerugoya this 26th Day of May 2020.

L.W GITARI

JUDGE