



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 13 OF 2019

ANTHONY KITHUKU KATHYOLI &

MARIETTA SYEVU SITA (*Suing as the Administrators of the estate of*)

DANIEL NYAMAI KATUA.....**APPELLANTS**

-VERSUS-

ROBERT NZOMO MASILA.....**1ST RESPONDENT**

CHARITY MARIGU KIKUMU.....**2ND RESPONDENT**

(An Appeal from the Judgment of Hon. A Ndung'u (SRM) in the Senior Principal Magistrate's Court at Makindu, Civil Case No.69 of 2015, delivered on 7th February 2019).

JUDGMENT

1. The Appellants filed a suit in the lower court seeking general damages under the Law Reform Act (*LRA*) and the Fatal Accidents Act (*FAA*) on behalf of the Estate of *Daniel Nyamai Katua* pursuant to a fatal road accident on 24/07/2014 (*material day*) along the Kasikeu-Muangine rough road at Kativo area. They also prayed for special damages, costs of the suit and interest.

2. The 1st Respondent filed his statement of defence denying the claim. An interlocutory judgment was entered against the 2nd Respondent who failed to enter appearance on 18/05/2017. The matter later proceeded for hearing and judgment was delivered on 07/02/2019. The learned trial Magistrate apportioned liability between the deceased and 1st Respondent in the ratio of 85:15 respectively and assessed damages as follows;

Pain & suffering.....	Kshs 50,000/=
Loss of expectation of life.....	Kshs 100,000/=
Loss of dependency.....	Kshs 2,000,000/=
Special damages.....	Kshs 40,500/=
Total.....	Kshs 2,190,500/=
Less 85%.....	Kshs 1,861,925/=
Net award.....	Kshs 328,575/=

3. Aggrieved by the award, the Appellants filed this appeal through the firm of Mutuku Wambua & advocates. They listed four (4) grounds stating that the learned trial magistrate erred in law and fact by;

a) *Apportioning liability in the ratio of 85:15 between the plaintiff and defendant respectively.*

b) *Upholding the defence witnesses evidence on liability when the same was full of contradictions.*

c) Failing to consider the fact that evidence on liability of the defence witnesses was full of contradiction.

d) Completely ignoring Pw1's evidence on liability.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Appellants submit that Pw1's evidence was uncontroverted because he was never cross examined despite the Respondent being given an opportunity to do so. They also submit that in reaching its judgment, the trial court considered photographs that were never produced in evidence. They contend that the photographs did not form part of the court record and had no evidential value. To support them they rely on the case of **Kenneth Nyaga Mwige –vs- Austin Kiguta & 2 others (2015) eKLR** where the Court of Appeal held that;

“22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the Respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the Respondent's case. The documents did not become exhibits before the trial court; they have simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document “MFI 2” that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.”

6. They also submit that Dw2 gave evidence which was neither pleaded nor brought up during the hearing of their case. They contend that Dw2 could only comment on which lane the deceased was because he got to the scene after the accident. They rely on the case of **West Kenya Sugar Co. Ltd –vs- Gabriel Okumu (2018) eKLR** where the Court held that;

“The foundation or base of any cause or suit is its pleadings. The pleadings originate it. They form the base from which the conduct of the case is generally directed. The nature of the evidence to be presented or produced or adduced is guided by what has been pleaded. That then means that the evidence presented must be geared to prove the allegations made in the pleadings and therefore the evidence must be in tandem or sync with the pleadings. Evidence however well presented is irrelevant and useless so long as it does not tend to prove the matters pleaded.”

7. Accordingly, they submit that the evidence by the Respondent's witnesses differed from their pleadings and should have been disregarded by the trial court. The Appellants also wonder how Dw3 could have witnessed the accident while 20 meters away yet the dust was rising as the motorcycle sped.

8. On the issue of contradictions, they submit that Dw1 pleaded that there was no collision but testified that there was a collision. Further, his statement indicated that he was alone but he called witnesses who claimed to have witnessed the accident. Dw2 testified that there was a curve on the road but Dw3 claimed to have witnessed the accident while 20 meters away. Dw1 claimed that the deceased was riding in the middle but Dw3 testified that the deceased was on the motor vehicle's lane. Dw1's statement indicated that he was hit from behind but he testified that it was the front side that was hit.

9. According to the Appellants, the trial court applied wrong principles in its judgment by;

a) Ignoring Pw1's evidence despite the fact that he was never cross examined.

b) Considering the defence evidence which was completely new and full of contradictions.

10. They submit that the trial court should have held the Respondent 100% liable and in the event that the evidence on occurrence was not clear, liability should have been apportioned on a 50:50 basis. They rely *inter alia* on the case of **Hussein Omar Farah –vs- Lento Agencies (2006) eKLR** where the Court held that;

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

11. In their further submissions, they submit that payment of the decretal sum by the Respondent does not bar them (*Appellants*) from proceeding with this appeal.

12. The 1st Respondent through O.N Makau & Mulei advocates submits that his evidence, to the effect that the deceased was to blame, was corroborated by Dw2 and Dw3. Further he submits that the photographs adduced at trial confirm that the motor vehicle's front head lamp was broken and that the deceased was laying a step from the motor vehicle. He submits that the trial court was right in upholding the evidence of his witnesses.

13. He also submits that in as much as Pw1 was not cross examined, his evidence was rebutted by the defence case which was sufficiently corroborated. He contends that the trial court's finding on liability was solely based on the credible evidence tabled before it. He relies on the case of **Imperial Bank Ltd –vs- David Kamanza Nguta alias David Kamaanza HCCA No. 37 of 2013 (2017) eKLR** where the Court stated that;

“For this court to interfere with the conclusions of facts by the trial court, it must be convinced as said before, that the finding is based on no evidence at all or just perverse. This is because the trial court had the benefit of seeing and observing the witnesses as they testified...in this matter, one cannot say that there was no evidence to support the trial court's findings apportioning liability at 70:30% in favor of the Respondent. The upshot is that the appeal lacks merit and is dismissed with cost to the Respondent.”

Analysis and determination

14. This is a first appeal and it is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123**.

15. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the only issue for determination is whether the finding on liability should be disturbed. I now wish to consider the evidence that was adduced before the trial court.

16. Pw1 **Manyeke Nduva** adopted his statement dated 16/02/2015 as his evidence in chief. He stated that on the material day, he was on a bicycle headed to Kasikeu. The deceased passed him at Kitivo area riding a motor cycle. He recalled seeing motor vehicle registration No. KSG 120, from the opposite direction, which was being driven at a very high speed.

17. Initially, both the vehicle and deceased were on their respective lanes but all of a sudden, the vehicle lost control, got into the deceased's lane and hit his motor cycle. The deceased was thrown off the motor cycle. He saw the deceased fall on his head and heard his scream. After the accident, the vehicle driver moved back abit. The driver was nick named Kafaya and he (Pw1) had known him as the vehicle's owner for a while.

18. **Pw2 P.C Galgalo Adi** was from Sultan Hamud Traffic base. He testified that on the material day at around 4.30pm, there was an accident involving motor cycle KMCV 195U Skygo and motor vehicle KSG 120. He produced the police abstract as PEXB1.

19. Upon cross examination, he said that he was not at Sultan Hamud Traffic base at the time of the accident and was not the investigating officer. He didn't have the occurrence book or police file and could not explain the circumstances surrounding the accident. It was not possible to tell from the abstract whether the motor cycle was insured, and he didn't know whether the deceased had a licence. He couldn't say who was to blame for the accident and he didn't know whether an inquest was opened. He had no sketch maps in respect to the incident.

20. **Pw3 Marrietta Syevu Sita** is the deceased's wife. She testified that she was attending a school meeting when she saw people running towards the road. She followed them and found an accident between the motorcycle and motor vehicle. The deceased died on his way to the hospital. After the testimony of Pw3, and cross examination by Mr. Onyancha and re-examination on 01/02/2018. The following proceedings were recorded:

“Cross examination by Mr. Onyancha

Pw3 sworn and states in Kiswahili as follows;

The accident happened on 24/07/2014 at around 5.00pm. I was a herder then while herding for Muangine heading to Kasieku I witnessed an accident between a motor cycle and a motor vehicle. I can't recall the registration of the motor cycle. The motor vehicle was KSG 120. I was on a bicycle when I witnessed the accident. The accident happened 30 meters from where I was. The motor cycle was coming from Muangine direction. The motor cycle was from Kaiskeu direction. The motor cycle was being ridden by Daniel Nyamai (deceased). I knew him from before. I knew he was the one riding the motor cycle on that day as I saw him. The collision was head on collision. Karaya was driving the motor vehicle. I don't know his other names. I don't know the owner of the motor vehicle. I recorded a statement at Sultan Hamud police station. I don't have any identity card. I have not registered. I am now 18 years old. I stopped school in class 7. I am called Munyeke Nduva (emphasis mine). I don't have any other name. I went to record my statement. I don't know the names on the police abstract. I am not lying to Court I was a witness. I blame the driver of the motor vehicle for the accident. He is the one who hit the boda boda. I know how to drive a motor cycle and motor vehicle. I don't have a license. The motor vehicle was on the right side hence hitting the boda boda.

Re-examination

I blame the driver of the motor vehicle. The motor vehicle left his lane and hit the boda boda. He was on very high speed as well. The motor vehicle was from kasikeu and the motor cycle from Muangine. The motor vehicle was on high speed on the boda boda (motor cycle) lane hence the head on collision. I am called Mayeye Nzila”

21. Dw1 **Robert Nzomo Masila** was the driver of motor vehicle KSG 120 Nissan Pickup. He adopted his statement dated 26/02/2015 in which he stated that on the material day, he was driving from his Kasikeu home and as he approached Kitivo trading centre, he saw a motor bike rider from the opposite direction who was alone. The rider was riding in the middle of the road between 80-100kmh.

22. At a distance of about 3 metres, he lost control and fell off the motor bike. By that time, he (Dw1) had stopped his motor vehicle and never touched the motor bike. It was the motor bike that hit the behind of the stationary motor vehicle. He called the members of the public who witnessed as his witnesses. He was released on a cash bail of Kshs.15,000/= but was never charged with any traffic offence.

23. In his oral evidence, he said that when the rider fell, the motor cycle rolled and turned and hit the vehicle's head lamp on the front driver's side. He said that he had photographs. At that juncture, his counsel said that the photographs were not filed but the court could have a look. The court proceeded to look at them and noted that there was a man lying a step from the motor vehicle and that the right head lamp was broken but there was no glass debris on the road. He said that he had been a driver for over 20 years and had never been charged for a traffic offence before any court. He blamed the deceased for speeding.

24. Upon cross examination, he said that the motor cycle must have been in high speed because of the way it was moving. He saw the rider taking the emergency break and falling off. He reiterated that it was the motor cycle that hit the motor vehicle. Further that it was the motor cycle back that hit the motor vehicle and not that it hit the backside of the motor vehicle as written in the statement. He said that the witness called by the Appellant was not present even in the photograph.

25. Dw2 **Benjamin Kongeli Kisasi**, adopted his statement dated 26/02/2015 in which he stated that on the material day, he saw motor vehicle KSG 120 coming from Kasikeu direction and the driver waved at him. After about 20 metres he saw a motor bike coming from the opposite direction. He heard a sound which was as a result of a collision between the motor vehicle and motorbike.

26. He rushed to the scene and saw that the deceased had fallen out of the motor bike and blood was oozing from the right foot and right side of the head. The motor bike was lying on the ground. His observation was that the deceased had left his lane at the time of hitting the motor vehicle.

27. Upon cross examination, he said that he witnessed the accident and was involved in assisting. The rider left his lane to that of the oncoming vehicle and applied emergency brakes upon seeing the vehicle. The motor cycle then turned and hit the vehicle. The road is blurred where the accident occurred, he said.

28. Dw3 **Francista Kavete Kilungya**, adopted her statement dated 26/02/2015 in which she stated that on the material day at about 5.00pm, the vehicle had stopped about 20 meters from her shop. She was standing outside her shop when she saw the deceased riding his motor bike at a high speed. The vehicle had stopped on its left side of the road. She heard one single bang and rushed to the scene together with other members of the public. The motor bike was lying in the middle of the road with the rider on the ground.

29. Upon cross examination, he reiterated that the motor cycle was in high speed and it turned and hit the motor vehicle. In re-examination, she said that she had witnessed the accident while sitting in her shop which was 20 meters from the scene.

30. It is not in dispute that an accident involving motor vehicle KSG 120 and motor cycle KMCV 195U occurred on the material day. The Appellants' version is that the deceased was thrown off the motor cycle after being hit by the speeding vehicle while the Respondent's version is that the deceased fell off the speeding motor cycle after applying emergency brakes. The trial magistrate expressed herself as follows;

"If the accident was a head on collision between the motor cycle and motor vehicle while the motor vehicle was on high speed as stated by PW3, the rider of the motor cycle would have been thrown on to the windscreen of the motor vehicle or at least the bumper following the impact. I got to see the photographs taken which clearly showed the only damage on the motor vehicle was broken right front head lamp with no grass debris on the ground and a man lying a step from the motor vehicle which is consistent with the evidence of the defence."

31. Contrary to the submissions by the parties, the extract from the proceedings (*supra*) shows that Pw1 was actually cross-examined. The cross examination after Pw3's evidence is actually that of Pw1. At one point, he said that he was riding a bicycle at the time of the accident, then said that he was actually herding, then he said that his name was Mulyeke Nduva and did not have any other name.

32. In re-examination he said that his name was Mayele Nzila. He did not have an Identity card or anything that could identify him. In my view, he does not come out as a credible witness. The police officer (Pw2) was not very helpful as he did not seem to know anything about the accident since he was not the investigating officer and did not read the file. Pw3 was not an eye witness as she arrived at the scene after the fact.

33. On the other hand, Dw1 was an eyewitness as he was the driver of the motor vehicle. With regard to the alleged contradictions, Dw1's statement is clear that it was the rider who was alone and not him (Dw1). In any case, it was also indicated in his statement that he would be calling members of the public who witnessed the accident.

34. The issue of whether the motor vehicle was hit at the front or back was satisfactorily explained during cross examination of Dw1. His explanation was consistent with his evidence in chief where he said that the motorcycle rolled and turned and hit the vehicle's head lamp on the driver's side. I also found no contradiction on the issue of collision because a sound would still be made even where a moving motor cycle hit a stationary vehicle.

35. I agree with the Appellants that it was erroneous for the trial magistrate to rely on photographs which were never produced in evidence. In my view however, that error does not shake Dw1's evidence which I found consistent and logical. Dw3 in her evidence said she saw a stationary motor vehicle on the side of the road which confirmed Dw1's evidence. Dw2 and Dw3 said they were about 20 metres from the scene and saw everything. This was not too long a distance for them to notice that the motor cycle was speeding.

36. Dw1 and Dw3 said the motor vehicle was stationary but Dw2 said the motor vehicle was in motion. He further said, the motorbike was

speeding and got into the lane of the moving motor vehicle and applied emergency brakes on seeing the motor vehicle. He added that the area at the scene is blurred.

37. Besides the police abstract (PEXB1) there were no sketch plans of the scene of accident produced to enable the court know the section of the road where the accident occurred. The court must not lose sight of the fact that the rider of the motor bike died and he is the only one who could have known who witnessed the accident. Pw1 has not been disqualified as being unreliable.

38. Dw1 told the court that there was contact between the motorbike and the behind part of his motor vehicle. Does it mean when the rider dropped off the motor bike the said motor bike continued moving until it hit the motor vehicle on the behind part? This did not come out clearly from the evidence of the witnesses.

39. From my re-evaluation of the evidence on record, I am convinced that something happened between the motor bike and the motor vehicle which contributed to the deceased's death in as much as he may have been speeding. I therefore agree with the learned trial Magistrate on apportionment of liability but not in the ratio she gave.

40. I set aside the judgment on liability and substitute it with one of 60:40 between the deceased and 1st Respondent respectively. The quantum was not challenged and it shall remain as follows:

Pain & Suffering.....	Kshs.50,000/=
Loss of expectation of life.....	Kshs.100,000/=
Loss of dependency.....	Kshs.2,000,000/=
Special damages.....	Kshs. 40,500/=
Total.....	Kshs.2,190,500
Less 60%	Kshs.1,314,300/=
Net award.....	Kshs.876,200/=

41.I therefore set aside the judgment by the lower court and enter judgment for the Appellants against Respondents jointly and severally in the sum of Kshs.876,200/= (**eight hundred and seventy six thousand two hundred only**) plus interest an costs.

- The Appellants will get half the cost of the appeal.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge