



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO.40 OF 2019

BEATRICE NABWILE MAELO

(Suing as the legal representative

of the estate of the late GODFREY

BARASA SYANGU).....APPELLANT

VERSES

KHETIA DRAPERS LIMITED.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. V. KARANJA,

SRM in KITALE CMCC NO 47 OF 2017 dated 19th September 2019)

BETWEEN

BEATRICE NABWILE MAELO

(Suing as the legal representative

of the estate of the late GODFREY

BARASA SYANGU).....PLAINTIFF

VERSES

KHETIA DRAPERS LTD.....DEFENDANT

JUDGEMENT

1. A road traffic accident occurred on the 13th September 2016 involving motor vehicles registration number **KBQ 230Z ZC9626** Mercedes Benz lorry belonging to the respondent and motor tractor registration number **KTCB 790H ZC 2578** driven by the deceased who was the husband to the Appellant. The said accident occurred along Webuye- Kitale road at Kiminini bridge. As a result of the accident the deceased lost his life on the spot.

2. The Appellant filed suit claiming damages on her own behalf and on behalf of the deceased estate. In her plaint dated 16th February 2017 she pleaded negligence against the Respondents driver and or agent namely that he drove the lorry at high speed without due regard to other road users especially the deceased and as a result it knocked the tractor which overturned and plunged into the bridge fatally wounding the deceased. She prayed for both general and special damages.

3. On the 17th day of March 2017, the respondent on its part filed a defence denying the appellants allegation and attributed negligence on the deceased in which it claimed that the tractor lost control because it was overloaded with sugarcane and was driven at a high speed by the deceased. It went ahead to deny all the negligence attributed to its driver and stated that the Appellant was not entitled to the prayers sought in the plaint. It prayed for the suit to be dismissed with costs.

4. The matter went to full trial after the parties had complied with the pre-trial rules. After making their submissions the trial court in its

judgement dismissed the suit for the reason that the same was not proved on a balance of probabilities.

5. Aggrieved by the said dismissal the appellant preferred this appeal raising several grounds which this court shall refer to them later. Suffice to state that when the matter came up for directions the court directed the parties to file their written submissions so as to dispose the appeal. The parties have complied and the court has gladly perused them as well as the attendant authorities. For now, it shall be necessary to summarise the evidence as presented at the trial court and thereafter glean out the issues for determination.

6. **PW1**, the appellant herein testified that she was the widow to the deceased and were blessed with 15 children although she only produced certificates of birth for only two of them. She said that she was not at the scene and she was told of the accident where she went and saw the body at Kiminini mortuary. He produced several pieces of evidence including letters of administration as well as demand notices inter alia. She testified that the deceased was helping her cater for the children's school fees and as a result of his death she has suffered immensely and she prayed for damages.

7. **PW2 OLIVER TARUS PROTUS** testified that on 13th September 2016 he was at Toll area buying maize and he decided to take a motorcycle and he rode along Kitale- Webuye road. He said that they decided to follow the tractor and did not overtake. The tractor had a huge load of sugarcane. There was an oncoming lorry which lost control and hit the tractor which fell into the river and the driver died on the spot. He blamed the lorry driver for hitting the tractor.

8. On cross examination he said that the tractor had a wide load and that the lorry's body was not damaged. He also on re-examination said that the lorry did not stop at the scene.

9. **DW1 STANLEY KIPKEMBOI BOR** the respondent driver testified that on the material day he was driving the lorry from Webuye heading towards Kitale. At the Kiminini bridge he found an overloaded tractor which almost hit his lorry's side mirror. The tractor was being driven in a *zigzag* manner and he swerved and continued with his journey. After a while he was stopped by the occupants of a Nissan vehicle which was following them and was told of the accident. He stopped and called his fleet manager. He also met the police officers whom he informed them of the incident.

10. When cross-examined he said that an inspection was done on the vehicle although he did not produce the report. He said that he did not see the tractor overturning on the road and that he was alerted of the accident when he was already 2 km away from the scene.

11. **DW2 SAMWEL NYONGESA** testified that he was the turn boy of the lorry driven by pw1. He said that the tractor was being driven in a *zigzag* manner as they passed it. At St Joseph a matatu alerted them of the accident and they stopped. There was a police roadblock and they were instructed to go to the police where he recorded his statement. He said that there was no impact between their vehicle and the tractor.

12. On cross examination he said that they offloaded the goods they were carrying because of the police instructions. The vehicle was then inspected. He said that the driver tucked in the Lorries side mirror and he thereafter untucked when they passed the tractor. He denied that the driver notified the company's fleet manager.

13. In her submission, the appellant has raised three issues for determination namely whether the respondents motor vehicle caused the accident, who is to blame for the accident and whether the appeal was meritorious.

14. The Appellant submitted that by virtue of the production of the police abstract, the appellant proved that the accident occurred. He said that if it was not so the respondent would have opposed its production. He relied on the case of **JOEL MUGA VERSES EAST AFRICA SEA FOOD LIMITED (2013) eKLR**.

15. On liability the appellant submitted that the trial court failed to appreciate the evidence of PW2 who was an eye witness. He said that the said witness had in fact witness the Respondent's lorry which was over speeding. Further the Respondent's driver after causing the accident was stopped about 2 km away from the scene by the owner of a matatu.

16. The Appellant concluded that the trial court erred in not awarding her damages as prayed in the suit despite overwhelming evidence that negligence had been proved against the respondent. She prayed that this court should make an award of Kshs. 3 million as general damages as well special damages of Kshs. 150,000.

17. The Respondent submissions obviously opposed the appeal. The main substantive issue advanced is whether the Appellant proved her case on a balance of probabilities. According to the appellant the trial court was right in rejecting the suit. It went on to state that there was insufficient evidence to link the respondent to the accident. The eye witness PW2 contradicted himself as he even failed to stop after the accident if indeed he was at the scene.

18. The Respondent submitted that if its driver was involved, then it would have stopped at the scene and not to be notified after 2 Km away from the scene. On the issue of the police abstract, the respondent submitted that the same only indicates that an accident occurred and not who caused it. It therefore prayed that the appeal ought to be dismissed.

ANALYSIS AND DETERMINATION

19. Having read the proceedings and the parties submission, the appellants 5 grounds of appeal can be summarised into two namely, whether liability against the respondent was proved on a balance of probability and whether the trial court was wrong in failing to access the damages.

20. The issue of the accident occurring was not in dispute. The production of the police abstract clearly shows that an accident occurred on

the material day involving the tractor as well as the lorry. It was unfortunate that the Appellants husband who was driving the tractor passed on together with other two people.

21. The accident occurred at Kiminini bridge and from the evidence adduced the tractor plunged into the said bridge. The tractor belonged to West Kenya Sugar and it was ferrying sugarcane. The Respondent's lorry was ferrying sugar.

22. The only eye witness to the incident happened to be PW2 who's evidence has been hotly contested by the respondent and the trial court did not find it strong enough to be believed. This courts mandate is to interfere with the findings of the trial court if it took into consideration extraneous matters as was espoused in the often cited case of **SELLE VS ASSOCIATED MOTORS LIMITED COMPANY (1968) E.A 123**. This authority goes on to advice this court that it did not have the benefit of conducting the trial and therefore seen the demeanour of the witnesses, a benefit only reserved for the trial court.

23. Having stated so, I think it shall be worthwhile to scrutinise the evidence of PW2. It appears from his evidence that either he was riding the motorcycle and carrying a passenger or he was being carried. This is for the simple reason that he kept on referring to "we" "in his testimony. He admitted that the tractor was carrying a big load and they did not overtake but instead they followed it from behind. He went on to state that the lorry lost control and hit the tractor and the tractor plunged into the bridge. He blamed the lorry for hitting the tractor on its lane.

24. The question that begs an answer is, given that they were following the loaded tractor from behind how was he able to see the lorry that was oncoming? Even assuming that he was riding the motorcycle which was not very clear was he in a position to see the oncoming lorry behind the sugarcane mound on the trailer being pulled by the tractor? If he was being carried by the motorcycle rider would he have been able to see ahead?

25. This should be answered in light of the evidence by DW1 that the tractor was heavily loaded with sugarcane which forced him to tuck in his side mirror. Clearly in my view PW2 was not in a good position to see the oncoming lorry or any other motor vehicle while behind the tractor. It would have been different had they overtaken the tractor and went ahead of it. How for instance was he able to determine that the lorry was being driven at a high speed?

26. The other interesting observation about pw2s evidence is the fact that he failed even to stop after the accident had occurred. Naturally it would have been expected that being an eye witness he may have lent a hand to the injured or the deceased persons.

27. Assuming that the lorry had a collision with the tractor how come the lorry failed to stop till it was notified about 2km away about an accident that had occurred behind. In the absence of the police inspection report, it becomes difficult to assume that the lorry actually collided with the tractor as per the evidence of PW2.

28. The production of the inspection report would have demonstrated to the court whether there was any damage to the lorry. It was admitted that the police did carry out the inspection but the appellant failed to demand its production. It was not incumbent upon the respondent to produce the inspection report as there was no notice to produce and more importantly being a public document the Appellant had the right of demanding it from the traffic police department.

29. The Appellant also sought to rely on the fact that the production of police abstract was prove of negligence on the part of the Respondent. The court has perused the said abstract and it clearly indicates that an accident occurred and the details of the parties involved. It however indicates that the same was still under investigation. There is no evidence that the respondent's driver was charged for causing the accident or any other persons associated with the respondent.

30. The mere production of the abstract form whether by consent or through a witness does not respectfully indicate the guilty party. The only evidence of culpability is through a court adjudication where a properly constituted court process finds a party guilty. Other than that a police abstract form on its own does not confer culpability to any party except to indicate what action the police traffic department have done.

31. In view of the above observations, this court does not find any liability proved against the respondent. Although there was a contradiction at some point of the evidence of dw1 and dw2 over the issue of whether the Respondents Fleet Manager came to the scene, the same did not carry much weight. The said fleet manager may or may not have come after the fact.

32. Contrary to the Appellant's submissions there was no evidence that the Respondent's driver was fleeing for his dear life after the accident. One would have expected that if there was any collision the lorry would have been seriously damaged and would not in fact moved from the accident. This court does not find the need to place much emphasis on the lorry's side mirror incident for the reason that it was possible for the sugarcane to have touched the mirror. More importantly is the absence of the inspection report which ought to have indicated any damage to the lorry as a result of the incident.

33. For the above reasons, this court finds that the appellant failed to discharge its mandate as provided under **Sections 107, 108 and 109 of the Evidence Act Cap 80 laws of Kenya**, namely discharging the burden of proof. The absence of the inspection report dealt a blow to the appellant's case as it was necessary to show that there was a damage if any, to the lorry as a result of it colliding with the tractor. This court finds the same relevant as the lorry stopped two kilometres away from the scene.

34. This court for the above reasons dismisses the appeal.

35. The other ground of appeal concerning damages would have succeeded for the simple reason that the practice now is that even when a trial court does not find any merit in the case, as in this one, it behoves the court to indicate the damages it ought in any event to have awarded the Claimant. The trial court went only to the extent of admitting that the appellant was able to produce two certificates of births out

of the 15 children she had with the deceased. The court did not indicate that it believed the two certificates at all.

36. Be it as it may the appellant had 15 children with the deceased. Although there was no strict proof even in her evidence this court is however satisfied that she was the wife to the deceased and had children. Of course in the context we live in children may not necessarily be ones biological but could have been step children or such other relatives living with her. Whichever way the same did not come out clearly except the two whose certificates were produced.

37. The Respondent did not submit on this ground. The Appellant's submission on quantum in my view is reasonable in the circumstances. The only point of departure would have been on the loss of dependency which she has applied a multiplier of 15 years. I find that that the deceased who was a driver would have had about 10 years of active service. A multiplier of 10 years would be reasonable in the circumstances.

38. The quantum would have been assessed at **Kshs2,400,000** being general and special damages as hereunder;

(a) Pain and suffering Kshs 50,000 as he died on the spot.

(b) Loss of expectation of life Kshs. 200,000

(c) Loss of dependency $25000 \times 12 \times 10 \times \frac{2}{3} = \text{Kshs.}2,000,000$

(d) Special damages of kshs. 150,000 being the legal charges in getting the grant and the funeral expenses.

39. The Appellant should have also been awarded costs and interest.

40. The upshot however is that this appeal fails for the fact that the appellant failed to prove any negligence on the part of the Appellant. The trial court in my view was right on this. The appeal is dismissed with no order as to costs.

Signed, dated and delivered at Kitale this 21st day of October 2020.

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H. K. CHEMITEI

JUDGE

21/10/2020

In the presence of:-

Mr Bungei holding brief for Wanyonyi for Appellant

Mr. Khisa for Respondent

Court Assistant - Kirong

Judgement read in open court