REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 4 OF 2020

KAHINDI KIFARU CHENGO (legal representative of the deceased of the Estate

BARAKA KAHINDI KIFARU (Deceased).....APPELLANT

VERSUS

1. AUTO INDUSTRIES LTD.....1ST RESPONDENT

2. JONATHAN CHARO KALAMA.....2ND RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. D. Wasike, Senior Resident Magistrate, on the 17th December 2019 in CMCC No. 380 of 2018)

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocate for the appellant

C. B. Gor & Gor Advocate for the respondent

JUDGMENT

This appeal arises from a decision of the Senior Resident Magistrate Court **(Hon. Wasike)** delivered on 17.12.2019 in **CMCC No. 380 of 2018** in a claim between the appellant and the respondents wherein the appellant alleged that the respondents were negligent and in breach of the duty of care. The appellant filed suit claiming damages under the Law Reform Act and the Fatal Accidents Act respectively. The issue of negligence was determined and apportioned in equal ratio of **50%:50%** as against the appellant and the respondent.

Consequently, the Learned trial Magistrate assessed both general and special damages as follows:

(a). Pain and suffering Kshs. 70,000/=

(b). Less of expectation of life Kshs. 200,000/=

(c). Less of dependency Kshs.1,620,000/=

(d). Special damages of Kshs. 36,150/=

It is out of this decision the appellant lodged an appeal disputing apportionment on liability concluded in the following language:

1. The Learned Magistrate erred in fact and Law by applying the wrong principles in finding the appellant 50% liable when there was no evidence. On record to support such a finding.

2. The Learned trial Magistrate erred in Law and facts in factoring to appreciate the evidence of the appellant thereby leading to a miscarriage of justice.

3. The Learned trial Magistrate greatly misdirected herself in ignoring and treating the submissions of the appellants on liability very superficially thereby arriving at the wrong conclusion on liability and the Learned Magistrate erred in Law and in fact by

not considering the evidence and submissions presented before her on liability by the appellants consequently apportioning an erroneous assessment on liability against the appellant.

4. The Learned trial Magistrate's Judgment is against the weight and had placed before her consequently she proceeded on wrong principles when assessing liability to be apportioned by the appellant.

Submissions on appeal

Mr. Kilonzo for the appellant argued and submitted that the facts and further evidence never supported the findings on apportionment of liability. Learned counsel made these observations by having a second appraisal to the evidence of **(PW1)** and **(PW2)** on the cause of the accident. There is also another aspect of the trial Learned counsel invited the Court to take into account, the fact of the matter that the respondents adduced no adverse evidence to challenge what the appellant witness demonstrated on the collision.

Mr. Kilonzo especially relied upon the cases of **John Gitonga Family Health International v Jackson Musita Asira {2006} eKLR, Wesley Ngugi v Brenda Khalaye {2019} eKLR, Hussein Farah v Lento Agencies CA 34 of 2006**

Following the submissions, Learned counsel contention was to the effect that no sufficient material availed to the trial Court to pronounce Judgment on liability at an apportionment of **50%**.

In relation to the allegation that the appeal was filed in total contravention of Section 79 (G) of the Civil Procedure Act, Learned counsel submitted none of the issues raised by the respondent are worthy of considerations under the aforesaid provisions of the Act.

The appellant strength in answer to this issue as submitted by the respondent was in the approach taken and provided for under Section 50 Rule 4 of the Civil Procedure Rules. The explanation given is that the impugned Judgment was delivered on the 17.12.2019 and the appeal in question filed on 22.1.2020. It was counsel's contention that the appeal was properly instituted and within timeline of thirty (30) days period.

In the instant issue, the Learned counsel rely on the decisions of **Nyota Tissue Products v Charles Wanga & 4 Others {2020} eKLR** as demonstrating the objection taken on the appeal by the respondents being filed out of time appropriately lacks merits.

Mr. Gor for the respondents submitted and arguing in opposition to the appellant's appeal contended that Section 79 (G) of the Act did not provide the window referred to by the appellant. In substance, Learned counsel submitted that there is no evidence of leave being sought by the appellant to file his appeal out of time. He therefore attacked the legal validity of the appeal. learned counsel on this legal proposition relied upon the case of **Nicholas Kiptoo arap Korir Salat v IEBC & 7 others {2014} eKLR.**

On the question specifically pleaded on apportionment of liability Learned counsel argued that the burden of proof on a balance of probabilities rested with the appellant. Further, Learned counsel submitted that it was the duty of the appellant to call or make available witnesses to establish the cause of the accident.

However, in this case argued Learned counsel the appellant failed to discharge the burden of proof to justify the drawing of an inference of contributory negligence. At the time of evaluating the appellants evidence by the Learned trial Magistrate counsel contended she had no primafacie evidence to rule against the respondent.

Regarding the issues of the standard of proof, the test to be applied on negligence or contributory negligence, and whether a primafacie case existed to warrant rebuttal from the respondent, Learned counsel placed reliance on the following authorities. **Blyth v The Company of Proprietors of the Birmingham Waterworks cited in (Kenya Power & Lighting Co. Ltd v Mathew Kabage Wanyiri {2016} eKLR) Maria Ciabaitaru M'mairanyi v Blue Shield Insurance Co. Ltd CA NO. 101 of 2000 {2005} E. A. 280, Patrick Omutere v Accurate Steel Mills Ltd {2019} eKLR, Evans Mogire Omwansa v Bernard Otieno Omolo & Another {2016} eKLR , Freda Stores Ltd v National Oil Corporation of Kenya Ltd {2017} eKLR, Timsales Ltd v Harun Thuo Ndungu {2010} eklr, Rosemary Murithi v Benson Njeru Muthitu & 3 others {2020} eKLR.**

Further, **Mr. Gor** submitted that one of the principal issues is whether the appellant failure to attach a decree or order appealed from rendered the appeal incompetent and fatally defective. In reliance to this position counsel cited the case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo {2016} eKLR . Mr. Gor's** contention was to the effect that the appeal instituted by the appellant must be struck out because some essential step in the proceedings the lodging of the appeal has not been taken. This procedural underpinnings and respective submissions from the foundation to set out appeal path to achieve the outcome.

Analysis and Determination

It would be appropriate to commence the analysis of this appeal with a restatement of the Law and power of the Court to review or vary or affirm the impugned Judgment. **G. V. Odunga's Digest on civil case Law and Procedure 3rd Edition Vol. 2 at page 501 paragraph (K) citing with approval the principles in Peters v Sunday Post Ltd {1958} EA 429 and Shah v Aguto {1970} EA 265** stated:

"The Court on first appeal has jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence should stand. It is a strong thing for the appellate Court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing, hearing witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate Court might itself come to a different conclusion." **(See also Sotiros Shipping Inc v Slmeler Solholt {1983} 1 Lloyds Rep 605).**

Having held as above following the grounds of appeal by the appellant, I consider that there are two central issues stand out to determine fully concerns to be tackled by the Court.

> **1. Whether the appellant discharged the burden of proof required of him to proof breach of duty of care and acts of negligence.**
>
> **2. Whether the two twin issues on liability and quantum were judiciously determined and sustained by the Learned trial Magistrate with proper assessment of the evidence.**

This is on whether the conclusion reached to apportion liability was valid and further the Court decision on the award of damages was consistent with the applicable legal principles.

Standard of proof

It is true as expressly stated under Section 107 (1) of the Evidence Act:

> ***"That whoever deserts 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. Further in Section 108 "the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. In consonant with these express statutory provisions the value Judgment of the Supreme Court in Raila Amolo Odinga & another v IEBC & 2 others {2017} eklr stated thus interalia " though the legal and evidence burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at anytime is determined by answering the question as to who would lose if no further evidence were introduced."***

G. V. Odunga J in his book on Digest on Civil Case Law and procedure 2nd Edition at page 3711 paragraph 7986 at par (b) used similar language:

> ***"If the plaintiff in his testimony does not say how the driver of the bus was negligent although negligence is pleaded, the plaintiff has failed to prove any fault attributable to the driver and thereof he has failed to prove his case on a balance of probabilities."***

Another aspect of Section 107 which requires proof on a balance of probabilities is to the effect once the plaintiff who bears the burden of proving negligence against the defendent tortious causation of the harm allegedly done and suffered, it turns out that the defendant bears the burden of setting up a defence to the primafacie case. It will also suffice that shifting the burden of proof to the defendant may be explicitly established through a rebuttable presumptions given the level of persuasion of the evidence adduced before the trial Court. As **Michael Taruffo AJCL 51 {2003} 666 (Clermour Sherwin) (The Exclusionary Rule Journal of Criminal Law and Police Science)** it was observed:

> ***"The Law does not ask the Judges (Jurors) to account for the means by which they convinced themselves. It does not charge them with any rule from which they shall specifically derive the fullness and the adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The Law asks them but this single question, which encloses the full scope of their duties are you inwardly convinced?"***

It is therefore trite that the standard of proof in civil cases is merely on preponderance of the evidence. Based on these principles, the appellant case against the respondent was to proof causation and wrongdoing for loss and damage to attach, to enable the Court to conclude and assess damages. The core of this instructions is essentially on the elements of negligence. In **Treadsetters Tyres Ltd v John Wekesa Wephukhulu {2010} eKLR:**

> ***"In an action for, negligence as in every action the burden of proof falls upon the plaintiff alleging to establish…. That the defendant was reasonably negligent or from the circumstances negligence is infact inferred."***

Thus in the case of **Stapley v Gypsum Mines Ltd {1953} AC 663**, the Court held as follows:

> ***"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical scientific Theory of causation it is quite irrelevant in this connection. In a Court of Law, this question must be decided as a properly instructed and reasonable jury would decide it the question must be determined by applying common sense to the facts of each particular case one may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but does not mean that the accident must be regard as having been caused by the faults of them."*** **(See Tread Setters Tyres Ltd v John Wekesa Wephukulu {2010} eKLR Nickson Muthoka Mutavi v Kenya Agricultural Research Institute {2016} eKLR).**

In considering this question on negligence as reflected from the Judgment of the Learned trial Magistrate the respondent was 50% liable for the accident. Therefore quite apart from the issue on vicarious liability the Learned trial Magistrate put emphasis on the evidence of **Mr. Liwai, PC Omar** of Malindi Police Station and the eye-witness **Mr. Lokale**. To make good sense of the evidence in its entirety she exercised discretion that though the appellant evidence was not controverted the overall impression on the set of facts reasonably and substantially held both drivers to blame for the collision.

It can be successfully argued that the distinction drawn by the Learned trial Magistrate postulates what **Clerk and Lindsell on Torts in their 18th Edition** where they pointed out as follows on the ingredients of the tort of negligence:

> ***"There are four requirements for the tort namely:***
>
> ***(1). The existence in Law of a duty of care situation i.e. out in which the Law attaches liability to carelessness. There has to be recognition by Law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionably.***
>
> ***(2). Breach of the duty of care by the defendant i.e. that it failed to measure up to the standard set by Law.***
>
> ***(3). A causal connection between the defendants careless conduct and the damage.***
>
> ***(4). That the particular kind of damage to the particular claimant is not so unforeseen as to be too remote when these four requirements are satisfied the defendant is liable in negligence.***
>
> ***"The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson: Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do."The key notion of reasonableness provides the Law with a flexible test, capable of being adapted to the circumstances of each case."***

Its against this background in this case the Learned trial Magistrate who had the advantage of seeing, and hearing witnesses made a significant findings that there was no dispute of occurrence of the accident involving motor cycle KMDE – 362M and KMJA 461H. That on scrutiny and assessment of the issues that emerged on negligence there was serious doubt to solely blame the 2nd defendant for the accident. She also hastened to observe the glarring contradictions on assertion, made in regard to the nature of the road and scene of the accident. The eye-witness **Lokale** maintained existence of a bend whereas **PC Omar** in his valuable evidence distanced himself on this features of the road given by **Lokale.**

In the circumstances, I am constrained to agree that the findings by the Learned trial Magistrate on liability should not be interfered with in absence of a rebuttal from the respondent witnesses. I am of the conceded view generally speaking that in traffic accidents vehicles collisions on the road normally manifests some negligence on the part of the drivers.

In addition to the principles set out above. I find the position taken by the comparative jurisprudence in **Calvin Grant v David Pareedon et al Supreme Court Civil Appeal No. 91 of 1987 {EWCA}** relevant thus:

> ***"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scruphous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks if any location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical accident may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth,"***

In the present case it would seem to me that there was more than ample evidence to conclude that the two drivers contributed to some measure to the collision in which the victim suffered fatal injuries capable of her estate to claim compensation under the Law Reform Miscellaneous Act and Fatal Accidents Act.

It is notable that all these quotients of assigning a ratio in some way on contribution has been left to the realm of judicial discretion of the trier of facts in this case a Judge or Magistrate who has the best opportunity to perfect the bar on contributory negligence. In other words all the scattered degrees of contributory negligence in the various judicial decisions are case specific borne out of a compilation of evidential material and data permissible to apportion some measure of contribution in mathematical percentages.

When all these factors are taken into account, I hold the view that from the record and submissions canvassed by the appellant on appeal, has failed nevertheless to show that contributory negligence attributed to facts of the case was an error or misdirection of the established rules and principles. The contention by the appellant is inconsistent with either of the scenarios developed by the Learned trial Magistrate in her Judgment subject matter of this appeal.

She was entitled to conclude in that manner within such probative value evidence given by the witnesses.

Being an Appellate Court in approaching this task I bear in mind the principles in **Peters v Sunday Post Ltd {1958} EA 429** to the effect that the Learned trial Magistrate had the opportunity of seeing and hearing the witnesses as well as on cross-examination. There is no discernible error in the Learned Magistrate approach to call for interference from the appeals Court. I echo the words in the case of **Mccusker v Save Heat Cavity Wall Insulation Ltd {1987} SLT 24, 29** the Court held:

> ***"An appeal Court will not lightly interfere with an apportionment fixed by the Judge of first instance. It will only do so if it appears that he has manifestly and to a substantial degree gone wrong."***

Unfortunately, that is not the case here in the respective levels argued by the appellant.

The same approach is in principle applicable on an appeal against the award of damages. The test is as propounded in the case of **Henry Hidaya Ilunga v Manyema Manyoka {1961} 1EA 705** what the Court said:

> ***"When discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge." "The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or a Jury, the appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had filed the case in the first instance. Even if the tribunal of first instance was a Judge, sitting alone, before the appellate Court can properly intervene, it must be satisfied either that the Judge is assessing damages, applied a wrong principle of Law as by being into account. Some irrelevant factors or leaving out of account some relevant one, or short of this, that the amount awarded is so inordinately low or so inordinately high that clause be a wholly erroneous estimate of the damage. The question therefore is whether the Learned trial Magistrate went wrong in assessing damages payable to the estate of the deceased."***

In the instant case, I have reviewed the record and evidence in support of the claim on compensation. I am of the conceded view that the trial Court findings on quantum is based on the guided authorities provided by the parties coupled with the evidence. Looking at the fair corners of the Judgment, there is no identifiable error or taking into account of irrelevant factor or misdirection which brings the assessment within the ambit of the appellate Court. In these circumstances, there is no evidence to call upon this Court to review and substitute the award duly considered in favour of the Estate of the deceased.

Lastly, the respondent raised an issue on the incompetence of the appeal being filed out of time contrary to the express provisions of Section 79 (G) of the Civil Procedure Act without leave of the Court. Having regard to the facts of the case the answer to the respondent submissions is to be factored under Order 50 Rule 4 of the Civil Procedure Rules:

> ***"except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any years and the thirteenth day of January in the year next following, both days included shall be omitted from any compensation of time whether under these Rules or any order of the Court, for the amending, delivering or following of any pleading or the doing of any other Act."***

In the present case, Judgment was delivered on 17.12.2019 I construe therefore that applying the express processions under Order 50 Rule 4 I am not persuaded by the contention and arguments by the respondents' counsel on computation of time. The Law which is today is the same as it was when the appellant filed his appeal. There was no violation of Section 79 (G) of the Act as it relates to time bound of thirty days for one to lodge an appeal. That in the event there is an overreach likewise an appellant is at liberty to seek leave to file an appeal out of time. The appeal measured by this test is strictly not fatal in which a fundamental wrath of the Court will be directed at it to have the same struck out. That part of the ground fails.

In the end on the central issue raised on contributory negligence having evaluated the evidence there is no doubt the appellant has failed to persuade the Court to overturn the decision. Even on the other collateral issues there is no merit in this appeal. The result is to have it dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF NOVEMBER, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Kiponda advocate holding brief for Wambua Kilonzo for the appellant