REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 91 OF 2019

BENSON GITAU MWAURA & RECHEL NYAMBURA NJIHIA

(Suing as the Legal Representatives of the Estate of

Dennis Mwaura Gitau (Deceased).....APPELLANTS

=VRS=

PIUS NDUNGU NGANGA.....-RESPONDENT

{Being an appeal against the Judgement of Hon. L. M. Wachira (Mrs.) – CM Gatundu dated and delivered on the 27th day of May 2019 in the original Gatundu Chief Magistrate's Court Civil Case No. 136 of 2017}

JUDGEMENT

The appellants preferred this appeal following dismissal of their claim for compensation for the death of their son Dennis Mwaura Gitau, deceased, following a motor accident involving him and the respondent's motor vehicle Registration No. KCF 113S. The appeal is premised on three grounds:

> **"1. The Learned Magistrate erred in law in dismissing the suit against the weight of evidence.**
>
> **2. The Learned Magistrate misdirected herself on points of Law and arrived at an erroneous finding.**
>
> **3. The Learned Magistrate erred in Law by disregarding the plaintiff's evidence."**

By the appeal, this court is urged to determine the issue of liability and general damages in Gatundu PMCC 136 of 2017.

The appeal which is vehemently opposed proceeded by way of written submissions. Counsel for the appellants faulted the trial Magistrate for coming to the conclusion that the appellants did not prove negligence on a balance of probabilities. Counsel submitted that because the deceased who was a pedestrian died on the spot the trial Magistrate should have deduced from this that the respondent's motor vehicle was being driven at an extremely high speed and because the driver could not brake, swerve, stop or in any way avoid the accident, this connotes recklessness on the part of the driver. Counsel submitted that a motor vehicle is a lethal machine and the respondent therefore bore a higher duty of care to the deceased. She cited the words of Chesoni JA in the case of **Isabella Wanjiku Karanja v Washington Malele Civil Appeal No. 50 of 1991** that: -

> ***"What I find makes the distinction in their blameworthiness is the fact that Isabella had under her control a lethal machine……."***

Counsel asserted that the driver's duty of care was higher than that of the deceased and the respondent was under a duty to maintain a proper lookout for pedestrians and to drive at a speed which would enable him to brake, stop or control the vehicle in the event of unforeseen circumstances. Counsel urged this court to find that the trial Magistrate misdirected herself on a point of law when she concluded that without a witness to confirm the particulars of negligence the appellants' claim could not succeed. Counsel also relied on the case of **Abdi Kadir Mohamed alias Mohammed Osman & Kenya Ports Authority v John Wakaba Mwangi (Suing as the legal representative of the late David Karanja Mwangi Nakuru HCCA No. 133 of 2003** where it was held that a child of tender years cannot be guilty of contributory negligence. Counsel submitted that the case is relevant to the instant case because there was no credible eye witness just like in the present case. Counsel further submitted that the deceased was a bright student who aspired to be a lawyer. Counsel proposed a reasonable contribution ratio of 10%:90% in favour of the appellants.

As I stated the appeal is vehemently opposed. In summary Counsel for the respondent submitted that the appellants did not prove

negligence against the respondent and hence liability was not demonstrated. Counsel asserted that there can be no liability without fault. Counsel urged this court to uphold the trial court's finding and therefore dismiss this appeal. Counsel relied on the following cases: -

· **Hon. Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi [2014] eKLR.**

· **William Kabogo Gitau v George Thuo & 2 others [2010] eKLR.**

· **Sally Kibii & another v Francis Ogaro [2012] eKLR.**

· **Florence Rebecca Kalume v Coastline Safaris & another [1996] eKLR.**

· **Statpack Industries v James Mbithi Munyao [2005] eKLR.**

· **Nzoia Sugar Company Limited v David Nalyanya [2008] eKLR.**

· **Kiema Muthuku v Kenya Cargo Handling Services Ltd.**

As the first appellate court I must reconsider the evidence in the court below, evaluate it and make my own conclusions while bearing in mind that I did not see or hear the witnesses. I am also guided by the principle that I should not be quick to interfere with the lower court's finding of fact unless it is based on no evidence, or on a misapprehension of the evidence or on a wrong principle(s) – ***(See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123*** *and also* ***Kamau v Mungai & another [2006] 1 KLR 150).***

In dismissing the claim for damages by the appellant the trial Magistrate held: -

> **"It is not in dispute that the deceased was involved in an accident that led to his death. This has been confirmed by the police abstract that has been produced in court, and which has not been challenged by the defendant.**
>
> **Similarly the ownership of the vehicle involved has not been disputed. A copy of the records was produced in court and confirms the ownership. Again this document has not been challenged by the defence.**
>
> **The only issue is who was to blame for the accident. The plaintiff blames the defendant for the accident. However, the plaintiff was not at the scene during the occurrence of the accident. He tells court that he was informed that the defendant was to blame for the accident. This is hearsay evidence that is not admissible…….**
>
> **I have considered the particulars of negligence as pleaded in the plaint and the defence filed by the defendant in court. The onus of proof of the particulars is on the plaintiff who alleges negligence. Without a witness to confirm the particulars of negligence, the plaintiff's claim cannot succeed.**
>
> **Thus in as much as an accident occurred and the deceased was injured in the said accident, there is no evidence to show that the defendant was to blame for the said accident. It could as well have been that the deceased was to blame for the accident. The evidence required by the court to shed light on the question of liability is missing and therefore the court finds that the plaintiff has not been able to establish liability on the part of the defendant. In conclusion, I find that the plaintiff has not established the particulars of negligence as set out on the face of the plaint and I therefore dismiss the plaintiff's claim against the defendant with costs."**

It is indeed correct that the evidence adduced by the appellant did not prove negligence against the respondent as the same was based on hearsay. It is also equally correct that the respondent did not adduce evidence to establish how the accident occurred let alone that it was as a result of negligence on the part of the deceased. Whereas the onus of proof lay on the appellants the courts have accepted the principle that in such circumstances where there is evidence that an accident occurred the law requires that both parties be found equally to blame. This principle was restated in the case of **Farah v Lento Agencies [2006] 1 KLR 125** where the Court of Appeal held: -

> ***"5. Where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was equally to blame."*** **See also Berkely Steward v Waiyaki (1982 – 88) 1 KAR 1118.**

Similarly, in this case none of the parties gave concrete evidence to determine which of them was to blame for the accident and it is my finding that both should have been found equally to blame. As the trial Magistrate acted on a wrong principle this court is entitled to reverse her finding dismissing the appellant's suit for lack of evidence and to substitute it with a finding that both the deceased and the respondent were equally to blame.

In regard to the assessment of damages there is no appeal or cross appeal on the awards by the trial Magistrate. I shall therefore adopt the same and enter judgement for the appellants against the respondent as follows: -

(a) Liability – 50%:50%

(b) Pain & suffering – Kshs. 80,000/=

(c) Lost years – Kshs. 600,000/=

(d) Loss of expectation of life – Kshs. 100,000/=

(e) Special damages – Kshs. 31,285/=

Total – Kshs. 811,285/=

(f) Less 50% contributory

negligence – Kshs. 405,642.50/=

Net – Kshs. 405,642.50/=

(g) Costs of the suit in this appeal and in the court below.

It is so ordered.

Signed and dated at Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE