REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 45 OF 2019

FRANCIS KARANJA KIMANI.....APPELLANT

=VRS=

WELLS FARGO LIMITED.....RESPONDENT

{Being an appeal against the Judgement of Hon. Sandra Ogot – SRM Limuru dated and delivered on the 1st day of March 2019 in the original Limuru Principal Magistrate's Court Civil Case No. 24 of 2015}

JUDGEMENT

This appeal challenges the trial court's findings on the issue of liability. It is however instructive to note that the respondent paid the damages awarded to the appellant by the court in full. This appeal contests the apportionment of contributory negligence to the appellant. The appeal is premised on grounds that: -

> **"1. THAT the Trial Magistrate erred in law and in fact by wrongly evaluating the evidence on record more so Pw2's evidence as to the occurrence of the accident and therefore arrived at a wrong conclusion and Judgement on liability.**
>
> **2. THAT the Learned Magistrate erred in law and in fact misdirected herself in holding that Pw2's evidence an eye witness at the scene of the accident required corroboration in the absence of any evidence contradicting, controverting, disputing and/or challenging the same thereby arrived in the wrong Judgement on liability.**
>
> **3. THAT the Learned Magistrate erred in law and in fact misdirected herself in holding that the Appellant has not proved her case on a balance of probability as required by law but nevertheless proceeded to apportion liability in the ratio 70:30 in favour of the Appellant and entered Judgement accordingly when there was not evidence on record to warrant such apportionment.**
>
> **4. THAT the Learned Magistrate erred in law and in fact in giving a lot of reliance to the Respondent's submissions in the matter the accident might have happened which submissions dwelt on presumption as opposed to evidence and facts on record.**
>
> **5. THAT the Learned Magistrate erred in law and in disregarding the Appellant's submissions on liability and the applicable laws thereby arriving into wrong decision and Judgement."**

The background of the case is that on 3rd December 2013 the deceased in this case was lawfully walking along the Nairobi – Naivasha Highway when he was hit by a motor vehicle Registration No. KBM 548V belonging to the respondent. He sustained bodily injuries and was rushed and admitted to Kijabe Mission Hospital where he was treated and subsequently discharged. On 29th January 2015 he filed a suit against the respondent and sought damages for the injuries. Unfortunately, however he died following another motor accident even before the hearing of that suit commenced.

By an application dated 1st December 2015 his wife sought and obtained leave to be substituted as the plaintiff and the suit proceeded to trial. Three witnesses testified at the hearing. One of the witnesses Ephantus Kangoro Ngugi (Pw2) gave evidence that he witnessed the accident as he himself was on the opposite side of the road when it occurred. He stated that he was waiting to cross the road to go to the stage on the side where the deceased was when the victim, now deceased, was hit by the respondent's motor vehicle. He was emphatic that the deceased was walking besides the road. He stated that the driver of the motor vehicle veered off the road and hit the deceased who was off the road. The respondent did not adduce any evidence on the manner in which the accident occurred and the gravamen of this appeal is that the evidence adduced by the appellant and which clearly pointed to negligence on the part of the respondent was not controverted and hence the court ought not to have attributed contributory negligence to the appellant.

The appeal was canvassed by way of written submissions. As the first appellate court I am entitled to re-consider and evaluate the evidence

in the court below so as to arrive at my own independent conclusion ***(See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123***. I am also guided by the principle that an appellate court should be slow to interfere with the trial court's finding of fact unless such finding is based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the finding. In the case of **Mwangi v Wambugu [1984] KLR 453** the Court of Appeal expounded the above principle by holding: -

> ***"….and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.***

In regard to liability the trial Magistrate stated as follows in her judgement: -

"

Plaintiff's Submissions

The Plaintiff submitted that the Defendant was wholly to blame for the accident at 100% and further submitted on quantum.

Defence Submissions

The Defendant on the other hand submitted that the Plaintiff was not of sound mind sand dashed across the road and was equally to blame for the accident. They opined that liability should attach at 80% on the Plaintiff. They further submitted on quantum.

Issues

Having considered the pleadings, the evidence and the submissions herein, it is my view that the following issues fall for determination:

i. Who is to blame for the accident?

ii. Is the Plaintiff entitled to any damages from the Defendant and if so, what is the quantum?

iii. Who should bear costs of this suit?

1. Liability

From the evidence adduced there is no contention that an accident occurred. From the evidence adduced by the parties PW2 testified that the driver of the motor vehicle in question veered off the road and hit the Plaintiff. He was adamant during cross examination that this is what happened. Yet for all these assertions the Plaintiffs did not provide corroborative evidence to support his assertion as to how the accident occurred. There is no sketch map that confirms that he actually was on the pathway and not on the road as asserted by the Defendant. This situation is further exacerbated by the police abstract that was presented as Exhibit 4 which does not lay blame on the defendant as the one that caused the accident. It notes that it is pending investigations. It is the duty of the Plaintiff to prove their case on a balance of probabilities more so where the Plaintiff is put to strict proof and in this instance he did not. We confirm he was hit but did he prove the circumstances under which he was hit? PW2 stated that the person veered off the road and hit him; whilst the Defence has argued in their submissions that the wife of the deceased noted that the deceased was not of sound mind after the 1st accident he had had and before this second one. Their argument is that it is likely he may have wandered into the road. With no supporting evidence as to how the accident occurred, I am inclined to believe that the Plaintiff may have contributed to this. I am guided by Sections 107 and 109 of the Evidence Act Cap 80 provides:

Section 107 states

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. "

Section 109 further provides that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person."

Having stated that the Plaintiff has not proved its case on a balance of probabilities I am swayed to apportion liability in the ratio of 70:30 in favour of the Plaintiff.

2. Quantum

Having determined and apportioned liability I am now tasked with the duty of determining how much damages is due the Plaintiff.

Majanja J. in Sino Hydro Corporation Ltd v Daniela Atela Kamuda [2016] eKLR stated "I also accept the advice given by Potter J.A., in *Rahima Tayah and Another v. Anna Mary Kinaru* [1987-88] 1 KAR 90."

I find two problems with this. Firstly, by stating that the deceased ought to have provided a sketch plan to prove that the deceased was on the pathway and not on the road the trial Magistrate imposed a standard of proof higher than is expected in a claim for negligence. She imposed a standard of proof beyond reasonable doubt instead of on a balance of probabilities. Pw2 clearly stated that the deceased was walking beside the road when the respondent's motor vehicle veered off the road and hit him. This was credible evidence that was not controverted. The fact that there was no sketch plan or that the police abstract did not lay blame upon the respondent as the accident was still under investigation did not in my considered view provide a rebuttal to the eye witness account. Only evidence from the respondent on causation and blameworthiness could have rebutted that evidence yet no such evidence was adduced. Secondly, the trial Magistrate relied on submissions to come to the conclusion that the deceased ***"may have wandered into the road."*** She was clearly wrong. Submissions are not evidence just like averments in a pleading are mere allegations unless and until proved through evidence.

In the case of **Daniel Toroitich Arap Moi & another v Mwangi Stephen Muriithi & another [2014] eKLR** the Court of Appeal made it clear that: -

> ***"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."***

The trial Magistrate misdirected herself in relying on a speculation in the submissions of the respondent that because the deceased's wife said he was not of sound mind after the first accident then he could have wandered into the road. She also misdirected herself in finding that ***"there was no supporting evidence as to how the accident occurred"*** yet there was cogent evidence of causation from an eye witness. Her finding of contributory negligence was based on no evidence and was also based on a wrong principle and this court is entitled to interfere. Accordingly, **this court shall set aside the trial court's apportionment of 30% contributory negligence to the deceased and substitute it with a finding that the respondent was wholly to blame for the accident.**

This appeal was only in regard to liability so **the damages awarded shall remain undisturbed and the respondent shall be required to make good the difference.** As costs follow the course the **costs of this appeal are awarded to the appellant.** It is so ordered.

Signed and dated in 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