REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 1 OF 2016

KYULI MUTUA.....1ST APPELLANT

NANCY MWENYA MANTHI (Suing on behalf of the

Estate of **KYALO MUTUA.....2ND APPELLANT**

VERSUS

DAVID MUIRURI NJUGUNA.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

*(Being an appeal from the Judgment of Honourable G. O. Shikwe (Senior Resident Magistrate delivered on 16th December, 2015 in the Principal Magistrate's Court at Kithimani in **SRMCC No.36 of 2014**)*

JUDGEMENT

1. The appeal arises from Judgement of Hon. G. O. Shikwe (SRM) in **Yatta SRMCC No. 36 of 2014** delivered on the 16/12/2015 whereby the trial magistrate dismissed the Appellants case with costs.

2. Being aggrieved by the said dismissal, the Appellant raised the following grounds of appeal namely:-

(a) That the learned trial magistrate erred in law and in fact when he failed to find that the Appellants had proved their case against the Respondents on a balance of probability.

(b) That the learned trial magistrate erred in law and in fact by dismissing the Appellant's case when the evidence on record was sufficient to hold the Respondents liable.

(c) That the learned trial magistrate erred in law and in fact in failing to find that the Appellant had proved their case to the required standards.

(d) That the learned trial magistrate erred in law and in fact in coming to the conclusion that he did without any or any good or sufficient cause.

(e) That the learned trial magistrate erred in law and in fact in considering extraneous matters while making his decision which were based on speculation and not supported by evidence on record.

(f) That the learned trial magistrate erred in law and in fact in failing to apportion liability between the deceased and the Respondents.

3. This being a first appeal, the role of this court is well settled namely to re-evaluate and analyze the evidence afresh and reach its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify and to make an allowance for that. T he evidence tendered before the trial court was as follows:-

4. **Kyuli Mutua (PW.1)** was the father to the deceased. He confirmed that he did not witness the accident that claimed the life of his son. He stated that the deceased was a bachelor and used to work for one Rose Nthenya Matheka and earned Kshs. 10,000/= per month out of which he used to give the family Kshs.7,000/= for upkeep.

5. **Nancy Mulekyo Mwanthi (PW.2)** was the mother to the deceased. She confirmed that the deceased used to work as a casual labourer for one Rose Matheka where he earned Kshs.10,000/= per month out of which he used to give them Kshs.7,000/= monthly for upkeep.

6. **Stephen Kithuka Charles (PW.3)** stated that he was in the company of the deceased on the fateful day. He stated that they each had bicycles and were headed to the river to fetch water and that the deceased was ahead of him. He stated that the deceased was knocked down as he crossed the Matuu – Mwingi Highway.

7. The Respondent called two (2) witnesses in their defence. David Muiruri Njuguna (DW.1) was the 1st Respondent and the driver of Motor vehicle KBR 463 K. He stated that he was driving along Mwingi – Matuu road when the deceased who was then riding a bicycle emerged from a foot path hidden from view by bushes and suddenly entered the road suddenly and he was forced to swerve to the right but the distance was too close and he knocked him. He maintained that he was then driving at a speed of between 75 – 80 KPH and he stopped about six metres from the point of impact. He finally stated that the deceased was too close and could not apply brakes.

8. **Chief Inspector of Police Dorcas Nyaga (DW.2)** of Matuu Traffic Base was the Base commander at the time of the accident. She stated that she visited the scene and established that the 1st Respondent who was then driving motor vehicle registration No. KBR 463 K had knocked the deceased who had joined the highway without observing other motor vehicles. She confirmed that upon investigations she formed the opinion that the 1st Respondent had no way of avoiding the accident because the deceased had emerged abruptly and joined the road suddenly. She then recommended that an inquest file be opened. She further stated that she established that there was no sign board showing a junction at the road. On cross-examination she stated that there were skid marks of about 4 metres from the point of impact which according to her did not indicate high speed. She further confirmed that the driver had swerved since the impact was near the yellow line.

Submissions

9. Parties agreed to canvass the appeal by way of written submissions. However, it is only the counsel for the Appellant who filed submissions. It was the submissions of learned counsel for the Appellant that the trial court ought to have held the Respondents liable for the accident because the 1st Respondent drove without due care and attention yet it was around 5 p.m. and was expected to have seen the deceased. It was also submitted that the 1st Respondent was over speeding at the time of the accident as he stopped about 26 metres from the point of impact and failed to apply brakes even after spotting the deceased. It was further submitted for the Appellant that the circumstances of the accident warranted apportionment of liability between Appellant and Respondents and hence the trial courts finding in wholly blaming the deceased was erroneous and in this regard it was proposed that liability be apportioned in the ration of 80:20 in favour of the deceased.

On the quantum of damages, the learned counsel for the Appellant proposed the sum of Kshs.100,000/= as general damages for pain and suffering. On loss of expectation of life the sum of Kshs.250,000/= was proposed. On loss of dependency a multiplier of 35 years was proposed with a multiplicand of Kshs.4,861/= per month and a dependency ratio of half which is worked out as 4,861x12x35x1/2=1,020,810/=. On special damages the sum of Kshs.43,469/=was proposed as per receipts produced. The following cases were relied upon namely:-

(i) **Alice O. Alukwe (suing on behalf of Maureen Alukwe (deceased) =vs= Akamba Public Road Services Ltd & 3 Others [2013] eKLR** where a deceased aged 24 years was awarded Kshs.50,000/= for pain and suffering as well as Kshs.100,000/= for loss of expectation of life with a multiplier of 30 years.

(ii) **Janet Njoki Kigo (suing as a personal representative of the late Benson Irungu Wanjohi =Vs= Daniel Karani Gichuki [2016] eKLR** where the deceased aged 26 years was awarded Kshs.50,000/= for pain and suffering and Khss.80,000/= for loss of expectation of life as well as a multiplier of 34 years.

(iii) **Francis Wainaina Irungu (suing on behalf of John Karanja Wainaina (deceased) =vs= Elijah Oketch Adellah [2014] eKLR** where the sum of Kshs.50,000/= was awarded for pain and suffering as well as Kshs.100,000/= for loss of expectation of life and a multiplier of 35 years for a deceased who was aged 28 years.

10. I have considered the evidence adduced before the trial court and the submissions presented as well as the cited authorities. It is not in dispute that an accident took place on the material date involving motor vehicle KBR 463 K then driven by the 1st Respondent and which knocked down the deceased herein. I find the following issues necessary for determination namely:-

(i) Whether the Appellant proved negligence against the Respondents;

(ii) If so, what is the apportionment of liability?

(iii) Quantum of general and special damages if any to be awarded to the appellant if (a) and (b) above is established.

11. As regards the first issue, it is noted that the deceased's parents (PW.1 and PW.2) did not witness the accident and only received the report from the deceased's companion Stephen Kithuka Charles (PW.3). It was the evidence of the said PW.3 that he and the deceased were riding their bicycles as they headed to the river to fetch water when the deceased was knocked down as he crossed the Matuu - Garissa Highway. The witness confirmed that he was behind the deceased and that he witnessed the incident. The 1st Respondent was the one in control of Motor vehicle KBR 463 K and who stated that he was driving from Kanyonyo to Matuu when the deceased who was riding a bicycle suddenly emerged from a dirt road on the left side and joined the highway. He stated that the deceased emerged from a footpath hidden from view by bushes with no road sign. He went on to add that the distance between his vehicle and deceased was too close and he could not brake but swerved to the right side of the road but knocked him still on the left lane of the road. He further stated that he was then driving at a speed of between 75 – 80 KPH. The accident scene was visited by the Matuu Traffic Base Commander Dorcas Nyagah (DW.2) who was the investigating officer. According to her, the deceased had joined the road without observing other motor vehicles and after

being knocked, he landed on the roof of the vehicle and fell at the edge of the tarmac on the right hand side. According to her observations, the 1st Respondent could have done nothing to avoid hitting the deceased as he emerged abruptly and joined the highway. She further established that there was no signboard showing a junction at the road. She confirmed on cross – examination that there were skid marks about 4 metres from the point of impact and that the vehicle stopped about 26 – 60 metres from the point of impact. She went on to add that the point of impact was on the yellow line because the driver had swerved to the right form the left lane. From the versions of the deceased's companion and the driver as well as the investigating officer, it is quite clear that the deceased had joined the highway from a foot path without having a proper lookout for other motorists. The Matuu – Garissa road was a highway where several vehicles ply and with moderately high speeds. Hence it was prudent for the deceased who intended to join and cross the busy highway to ensure that the road was clear of traffic and if there were vehicles, he was duty bound to stop and/or yield so as to allow the vehicles on the highway to pass since he was joining it from a feeder road or foot path. Indeed the deceased threw out caution to the wind and endangered his life. The evidence of the driver and investigating officer is clear that the deceased suddenly and abruptly entered the highway without any warning and the driver could only swerve to the right but then it was too late. The point of impact was on the yellow line and that the skid marks was 4 metres from the point of impact indicating that the driver applied brakes at close range. This would further imply that the distance between the vehicle and deceased was too close for comfort. The only prudent thing then for the driver was to try to swerve to the right which he did. In the circumstances, I am unable to find fault with the findings of the learned trial magistrate that the accident could not be avoided due to the negligence of the deceased. The trial magistrate's finding of liability wholly on the deceased was quite sound in the circumstances. The investigating officer upon visiting the scene did draw the sketch plans and formed the opinion that the driver was not at fault but she preferred the matter being disposed of by way of an inquest. It is noted that at the hearing of this matter before the trial court no such inquest had been instituted and as such the trial court could only proceed with the evidence presented to it which did not establish any negligence on the Respondents. Even though there was a collision between the deceased and Respondents, vehicle the same did not connote negligence upon the Respondents. It was the duty of the Appellant to prove the negligence on the part of the Respondents which in my view was not established on a balance of probability. I find the deceased was the author of his own misfortune as he had endangered his life by suddenly riding onto a highway without stopping or even having a proper lookout. The evidence of the 1st Respondent and the investigating officer left no doubt that the accident was inevitable due to the negligence by the deceased.

12. As regards the second issue and in view of my observations hereinabove, I find that the Appellants counsel's submissions that liability be apportioned not convincing. The deceased therefore was solely to blame for the accident and liability is thus wholly attributed to him. The Respondents did not in any way contribute to the said accident.

13. Even though the Appellant has not succeeded in proving negligence against the Respondents, I am mandated to determine the remaining issue of quantum of damages.

Under the Law Reform Act, I note that the deceased did not die on impact but succumbed to the injuries while in hospital. He must have therefore felt a lot o excruciating pain before he breathed his last. I find a sum of Kshs.50,000/= would have been adequate for pain and suffering. As regards loss of expectation of life, I find the conventional awards would be Kshs.100,000/=. Under the Fatal Accidents Act on loss of dependency, the deceased is reported to have been employed by one Rose Nthenya Matheka as a farm hand earning a monthly wage of Kshs.10,000/=. The parents of the deceased confirmed that he was not married and used to give them Kshs.7,000/= for upkeep. However no proof of income was availed and therefore the deceased should be placed under the category of unskilled labourers under the Wage Guidelines vide Legal Notice No. 70 of 2/7/2012 in which a house servant's wage is Kshs.4,861/=. The deceased died at the age of 25 years old and due to the vagaries of life and high mortality rates in sub – Saharan Africa, the deceased could have had an active life of about 30 years. Hence I find a multiplier of 30 years would have been adequate. As deceased was unmarried a dependency ration of 1/3 would have been appropriate. The loss on dependency would therefore have been worked out as 4861x12x30x1/3 = 583,320/=.

14. In view of the aforegoing observations, it is the finding of this court that this appeal is devoid of merit. The same is dismissed with costs to the Respondents.

Orders accordingly.

Dated and delivered at Machakos this 23rd day of January,2019.

D.K. KEMEI

JUDGE