



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 139 OF 2018

BETWEEN

GEOFFREY SURREY NYANGARESI AND

WILFRED SOSITENA ONDIMU suing as the legal representative of the estate of

TERESA KWAMBOKA SURREI (DECEASED).....APPELLANT

AND

ZACHARY ABUSA MAGOMA.....RESPONDENT

(Being an appeal from the Judgment and Order of Hon N.S. Lutta, SPM at the Magistrates Court at Kisii in Civil Case No. 516 of 2016 dated 28th November 2018)

JUDGMENT

1. The appeal is against the apportionment of liability by the trial magistrate between the appellant, representing the deceased, and respondent. It is not in dispute that on 14th May 2015, the deceased was walking along the Kisii – Keroka road when the respondent’s driver carelessly drove lorry registration number KAD 162 N causing it to knock the deceased who died instantly. Following a full trial, the trial magistrate apportioned liability equally between the deceased. The appellants were awarded Kshs. 2,210,600 as damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and the **Fatal Accident Act (Chapter 32 of the Laws of Kenya)**.

2. The thrust of the appellant’s case as set out in the memorandum of appeal dated 18th December 2018, is that the trial magistrate erred in apportioning liability equally between the deceased and respondent despite the weight of evidence from the witnesses. Apportionment of liability is a question of fact within the court’s discretion and since this a first appeal, the court is guided by the duty of the first appellate court so clearly set out in the case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De Lestang stated:

This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

3. At the hearing Geoffrey Surrey Nyangaresi (PW 1), Asenath Teresa Sostena (PW 2), PC Caleb Osodo (PW 3) and Janet Nyaboke Otwabe (PW 4) testified. The respondent did not call any evidence. PW 1, PW 3 and PW 4 were formal witness as they did not witness the accident. PW 2 testified on the material day at about 5.30pm, she was walking with the deceased to Gusii Institute of Technology towards Daraja Mbili. She heard a lorry brake as it was on a high speed and was loaded with electricity poles. They tried to run away but the lorry, which had lost control and was on the wrong side, veered off the road and knocked the deceased who died on the spot. PW 3 confirmed that the accident was reported and at the time of the hearing it was still under investigation.

4. Based on the evidence, the trial magistrate concluded as follows:

[15] From the evidence before me it is not in dispute that an accident did occur. It is also not disputed that the victim of the accident died. However, it is uncertain as to who was to blame for the accident. The said lorry was heavily loaded with electricity poles and it was highly possible that the driver was not moving at a very high speed and so he would have managed to control the vehicle and avoid the accident. In light of the foregoing, having considered all the pleadings by both parties, the evidence before me I am

of the considered view that plaintiff has proven his case on the balance of probabilities as such I find the defendant 50% liable.

5. It is noteworthy that in reaching the aforesaid conclusion, the trial magistrate relied on the Court of Appeal decision in **Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR** where the it observed that:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

6. The appellant assailed the finding of the trial magistrate on the ground that the deceased was walking off the road when the accident took place and that there was no evidence that she contributed to the accident. Counsel contended that the appellant's evidence was uncontroverted and as such the trial court reached the wrong conclusion on the apportionment. The respondent supported the decision of the trial magistrate and urged that the conclusion reached was based on the evidence on record.

7. PW 2 was the only witness who witnessed the accident. His testimony was clear that he was walking with the deceased along the road, that they heard the lorry braking and as it veered off the road, they tried to ran away but the lorry hit the deceased. This evidence was uncontroverted. From the decision of the trial magistrate it is not clear how the deceased was to blame for the accident. In other words, the respondent did not bring any evidence to support his allegations of contributory negligence against the deceased. As the Court of Appeal noted in **John Wainaina Kagwe v Hussein Dairy Limited MSA CA Civil Appeal No. 215 of 2010 [2013]eKLR**:

[T]he respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability.

8. This is not a case that was, in the words of the Court of Appeal in **Hussein Omar Farah Case (Supra)** where, **“it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident.”** The respondent did not call any evidence and the only version of events was that of PW 2 which put the blame fully on the respondent. The respondent did not show how the deceased who heard the lorry braking and started running away as the it veered off the road would have avoided being knocked down.

9. Having re-evaluated the evidence before the trial court, I come to the conclusion that the apportionment of liability by the trial magistrate cannot be supported. I set it aside and substitute it with the finding that the respondent was be fully liable. The respondent shall pay costs of the appellant which I assess at Kshs 50,000/- exclusive of any court fees.

DATED and DELIVERED at KISII this 12th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr K. Gichana instructed by Ben K. Gichana and Company Advocates for the appellants.

Mr Omondi instructed by Owiti, Otieno and Ragot Advocates for the respondent.