



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO 63 OF 2016

CHANNAN AGRICULTURE CONTRACTORS.....APPELLANT

VERSUS

MARY WANJALA & RAFAILI OTIENO OGUTU

(suing on behalf of Peter Ouma Ogutu-Deceased).....RESPONDENT

[An appeal from the judgment and decree of Senior Principal Magistrate, Webuye

in civil suit No.114 of 2014 delivered on the 24-11-2016]

JUDGEMENT

By plaint dated 18TH June 2014, the respondent in this appeal MARY WANJALA & RAFAILI OTIENO OGUTU (suing on behalf of Peter Ouma Ogutu-Deceased) sued the Appellant CHANNAN AGRICULTURE CONTRACTORS orders for general damages, special damages and cost of the suit plus interest at court rate for accident that occurred on or about 2/1/2014 that whilst the deceased was in the course of his employment driving tractor/trailer registration number KTCA 522C/ZA 9954 new Holland along Lagoon-Nzoia Murram Road at Nuclear area when the said tractor developed mechanical conditions due to negligence of appellant that it lost control, veered off the road and threw the deceased off the tractor thereby occasioning fatal injuries to the deceased that he succumbed to the injuries and died the Respondent sued for damages in Webuye CC 114/2014.

By Judgment of the Senior Resident Magistrate, Webuye in CC No.114 Of 2014 delivered on the 24.11.2016. The Appellant Channan Agriculture Contractors was the Defendant in that case while the Respondent herein was the Plaintiff. Judgment was entered in favour of the Respondent against the Appellant on liability. General damages and special damages of Kshs.6975/= all totaling to Kshs.1,827,975/=. The Appellant was aggrieved by both the finding on liability and the quantum of damages and appealed against the said award.

By Judgement appellant filed this appeal faulting the judgment and decision on the following grounds:

- i. That the learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same;***
- ii. That the learned trial Magistrate did not in alternative consider or sufficiently consider demand of contributory negligence based on evidence adduced and submissions filed by the applicant.***
- iii. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.***
- iv. That the learned trial Magistrate misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.***
- v. That the learned trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.***
- vi. That the learned trial Magistrate erred in failing to hold that the Respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the Respondent.***

vii. That the learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.

viii. That the learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis- a vis Respondent's claim.

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Menezes for the appellant submitted the ground of appeal which raised two pertinent issues being that negligence was not proved against the Defendant and that damages awarded were inordinately high and excessive. He submitted that the Respondent did not prove on balance of probability the particulars of negligence raised against the appellant. He submitted that looking at the post-accident certificate of inspection there were no pre-accident defects noted in the tractor and the witness could not shed light on how he attributed the blame of the said accident on the Defendant. He further submitted that Respondent had failed to lay evidence before the court to prove the facts they allege are backed up by real evidence. He stated that PW2 evidence was fictitious on ground that if he alleges the tractor was on a moderate low speed and then deceased tried to control the tractor but he was defeated then how did the same lose speed and/or control and throw off the deceased. He submitted on contributory negligence of the deceased that how did the deceased fail to control a tractor at such a low speed. He argued that Respondent contradicted himself on numerous occasions in his testimony casting into doubt all the evidence he has testified to and lower court should have taken cognizance of this when apportioning the liability of the parties and opined that since Respondent did not prove negligence this court should order a retrial of the suit or liability should be apportioned 50:50 between the parties. He also referred this court to the following authorities **FRANCIS MAINA KAHURA V NAHASHON WANJAU MURIITHI[2015]EKLR, PAUL NG'ANGA & OTHERS V THE ATTORNEY GENERAL & OTHERS PETITION NO.518 OF 2012, STATPACK INDUSTRIES V JAMES MBITHI MUNYAO C.A NO.152 OF 2003 and FRANCIS MAINA KAHURA V NAHASHON WANJAU MURIITHI[2015]EKLR**, in support of his argument which I have considered.

Mr. Juma opposed the appeal submitting that the Respondent adduced evidence on negligence which led the court to find that the appellant was fully liable. He submitted on liability that the appellant did not give explanation as to why his tractor moved in zigzag manner putting into consideration the appellant's tractor had not undergone mandatory major mechanical service for more than 2 months and he did not call a mechanic to give evidence on the condition of the tractor during and after the accident and only relied on evidence of the administrator. He submitted that the appellant did not give evidence to show how the deceased contributed to the accident. He also argued on quantum that the measure of quantum damages to be awarded is a matter of discretion of the individual judge which exercised judicially. He also referred the following authorities **JAMES AIKONYO MWANGI VERSUS IMO(HCCA NO.1 OF 2012 AT KISII and HCA NO.16 OF 2014 KARIUKI LYDIA & ANOTHER VS AM** in support of his argument which I have considered.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

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

The evidence before trial court was that Pw1 Maria Nafula Wanjala testified that the deceased was her husband and employed as a tractor driver by the defendant/appellant. That on 2/1/2014 the deceased left for work where he was working as a driver to Respondent and produced driving licence to that effect. She stated that she was called at 4pm and told that deceased had overturned in a tractor in road accident and died and she produced a death certificate.

Pw2 Dancan Sitima a boda-boda rider testified that he was on his way to Bukembe when he saw a tractor coming and the tractor was not at high speed and driver tried to control it but was defeated that it threw him down and ran over him and he stated he carried the deceased but never smelled alcohol on him.

The defence called one witness who is Chanan Agriculture contactor and administrator of the defendant he stated that he knew the deceased as a tractor driver in the company and he stated that an accident occurred in 2014 but it was not due to mechanical problem that the tractor was under regular service and produced a service book and he testified that that regular maintenance is done daily. He testified that from his experience the road was slopping downwards and the deceased had engaged the neutral gear to save fuel and he jumped off the tractor and produced the tractor ignition report.

I have carefully have carefully considered pleadings, the evidence adduced, submissions taking into account all the decisions relied on. In my view, the issues for determination in this appeal are Whether the appellant was negligent thereof should be held liable for the said and whether this court can grant orders sought.

On issue of negligence the particulars of negligence on part of it is the contention of the Appellant that Respondent did not prove on balance of probability the particulars of negligence raised against the appellant. It submitted that when apportioning the liability of the parties since Respondent did not prove negligence the court should order a retrial of the suit or liability should be apportioned 50:50 between the parties. The Respondent on the other hand submitted that the appellant did not give explanation as to why his tractor moved in zigzag manner putting into consideration the appellant's tractor had not undergone mandatory major mechanical service for more than 2 months and did not call a mechanic to testify on status of the tractor before and during the accident only relied on evidence of the administrator. The Respondent contention is that it has proved particulars of negligence against the appellant.

Looking at evidence adduced DW1 testified that he visited scene of accident and saw marks of tyres that moved left and right this collaborated evidence of PW 2 that he saw the tractor that was not in a staple motion when the accident occurred and also not evidence was adduced to show that the respondent was driving at high speed that might have occasioned the said accident.

It is also my further finding that the Respondent blamed the appellant for not maintaining the said tractor and that it had a mechanical problem at the time of the accident .The Appellant produced certificate of inspection through its administrator but it did not engage a

mechanic to give a report of condition of the tractor during the accident which could have helped the trial court to assess the liability but the instead ignored this fact and it cannot be held that the administrator had full knowledge of the tractor. The appellant herein failed to prove how the Respondent contributed to the said accident. I am satisfied that the magistrate was right in his finding that the appellant was wholly liable for the accident.

On issue of quantum the principles upon which appellant court can consider in reversing the finding of an award of a lower court are well stated in **Butler Vs. Butler CIVIL APPEAL NO.49 OF 1993**.The appellant must demonstrate that the court in exercising its discretion acted on wrong principles, failed to take into consideration matters which ought to have been considered or that the award is so excessive or low as would reflect on erroneous application of the principles of assessment of damages. On issue of special damages the trial court awarded special damages on what was proved and I have analyzed and I find the same is in order.

On issue of time of death the Respondent was awarded damages of Kshs.40,000/= and Appellant is praying for an award of Kshs.10000/= .It is clear from evidence adduced by PW2 that the deceased did not die on the spot and was alive while being ferried to hospital which to my finding he suffered pain before death and thereof award of Kshs.40,000/= was proper and I won't interfere with the same.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and Delivered at BUNGOMA this 25th day of June 2019.

S.N. RIECHI

JUDGE.