



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 505 OF 2016
(CORAM: F. GIKONYO)

JENNIFER NDUKU LAZARUS MASAU &

CYRUS MUTISYA LAZARUS [suing as the administrators

of the estate of the late MARY MUKULU LAZARUS (DECEASED),.....APPELLANT

VERSUS

TRANSFLEET LIMITED.....1ST RESPONDENT

STEPHEN MUSITA MAKAU.....2ND RESPONDENT

[An appeal from the Judgment of Hon A.M. Obura P.M. delivered on 11/7/2016 in Milimani CMCC NO. 22 OF 2015]

JUDGMENT

1. The appellants herein were the plaintiffs in the trial court whereas the Respondents were the Defendants. The suit was commenced by way of the plaint dated 3rd April 2013 and the cause of action arises from a fatal road traffic accident which occurred on 1st April 2011. The appellant alleged that **Mary Mukulu Lazarus** (the deceased herein), then nineteen years of age, was walking way off the road along Mombasa Road when at General Motors the defendant's Motor vehicle Registration Number KAS 341X was so negligently driven that it veered off the road and violently hit the deceased thereby occasioning fatal injuries.

2. The Appellants prayed for special damages and general damages for loss of dependency, loss of expectation of life and pain and suffering under the Law Reform Act and Fatal Accidents Act.

3. The Respondent filed its statement of Defence on 26th June 2013 denying the claim *in toto*. The matter was set down for hearing. Three (3) witnesses testified on behalf of the appellant. One (1) testified on behalf of the Respondent.

4. The trial Court found that the Appellants had not proved their case on a balance of probabilities and dismissed the suit. Aggrieved by the said decision the Appellant filed a memorandum of appeal citing nine (9) grounds of appeal that can be summarised as follows;

a. The Learned Magistrate erred in law and in fact in finding that the accident was solely caused by the deceased when there was evidence to the contrary.

b. The learned Magistrate erred in Law and in fact in failing to consider the admissions made by the defence witness thus arriving at the wrong decision.

c. The learned Magistrate erred in Law and in fact in failing to consider and/or record the expert opinion of the police officer thus arriving at the wrong finding.

d. The Learned Magistrate erred in law and in fact in denying the expert witness namely the police officer from referring and relying on the police file records thus locking out crucial evidence to the disadvantage of the appellants thus arriving at the wrong decision.

5. The court directed parties to canvass the appeal through written submissions. Both parties have filed their written submissions.

Submission of the Parties

6. The appellants narrated the witness testimonies in the trial court. In particular they submitted that Pw1 & Pw2 were categorical that the driver of the motor vehicle was over speeding since if that was not the case the deceased would not have died instantly. They faulted the evidence of DW1 who stated that she was driving at 60 kmph and that the deceased was ten (10) metres apart. They submitted that this was in part an admission on the part of the defence. They also faulted the trial Magistrate in failing to consider the opinion of the police officer. In support of their submissions the Appellants relied on the following cited authorities; **Abok James Odera & Associates v John Patrick t/a Machira & Co. Advocates [2013] eKLR**, **Nandwa vs Kenya Nazi Ltd [1988] eKLR (Coram; Platt, Gachuhi JJA & Massine Ag. JA)**, **Kenya Bus Services Ltd v Dina Kawira Humphrey [2003] eKLR (Coram; Omillo Tunoi & Githinji JJA)**, **Daniel Kaluu Ketu v Mutuvi Ali Nyalo & Another [2016] eKLR**, **Likhanga Shikami & A no rvs Lillian Ingasiala Regina 7 Anor [2015] eKLR (Coram; Maraga, Gatembu & Murgor JJA)**.

7. The Respondents on their part submitted that the appellants had failed to prove ownership of the motor vehicle at the material time of the accident since as per the copy of the record the date of ownership is one year apart from the date of the accident. That the appellant had equally failed to prove that the motor vehicle was defective or speeding. The Respondent denied the submission that the police record was not considered by the trial court and referred this court to the record of appeal. In support of their submissions the Respondents relied on the following cited authorities; **Antony Francis Wareham t/a AF Wareham & 2 Others Kenya Post Office Savings Bank [2004] eKLR**, **Dritoovs West Nile District Administration, Alfred Pengo Mamboleo v Oserian Development Co. Ltd & Anor [2018] eKLR**.

ANALYSIS AND DETERMINATION

8. As the first appellate Court, I should re-evaluate the evidence on record and reach its own conclusion in the matter. (See the case of **Selle & Anor. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

9. **Pw1 PC Jim Zangora** testified that the deceased was crossing the road from the left to the right side of the driver's view when he was hit and died on the spot. It was also his testimony that from the motor vehicle inspection report the motor vehicle was faulty. He however did not present the motor vehicle inspection report. In cross-examination it was his testimony that no blame has been apportioned to the driver to date. He produced the police Abstract as **Pexh 1**.

10. **Pw2 Cyrus Mutisya Lazarus and Pw3 Jenniffer Nduku Lazarus**, brother and mother to the deceased respectively, testified to the effect that they were informed of the road traffic accident and on arrival they found the deceased at the road side facing Machakos Direction. Pw2 presented Copy of records and receipt (**Pexh 3a & b**), Death Certificate (**Pexh 4**), Burial Receipts of Kshs 65,950 (**Pexh 5**), Copy of Grant (**Pexh 6**) Chiefs Letter (**Pexh 7**) Demand and statutory notices (**Pexh 8a and b**). They also averred that the deceased worked in a recycling company but there was no proof of employment.

11. **Dw1 Stephen Musila Makau** testified that on 1/4/2011 he was driving Motor vehicle KAS 341X when at around General Motors there was a trailer in the middle lane trying to overtake on the left side. As it overtook a lady suddenly emerged in front of the vehicle. He tried to swerve but he hit her on the road. He told the court that he was driving at moderate speed i.e. 60 kmph and blamed the deceased for crossing the road without due care and attention.

12. On cross-examination he denied he was speeding. He stated that the deceased was 10 metres in front and when he applied the brakes the motor vehicle skid as a result of which he hit the deceased from the left side of the motor vehicle. It was also his testimony that he was not charged with any offence. He could also not tell if the site of the accident was a designated area.

13. The Trial Magistrate assessed the evidence presented in two respects; Liability and Quantum. It was the trial magistrate's decision that there was no evidence to show that the driver was speeding or the vehicle was defective. There was no evidence of police investigations to show how the driver caused the accident or to show that the deceased was knocked on a zebra crossing or designated area. He therefore dismissed the claim. It was however his finding that had the appellant proved its claim he would have awarded the sum of Kshs. 630,088 as general damages for pain and suffering, loss of expectation of life and loss of dependency. He would also have awarded Kshs. 65,960/= as special damages.

14. I shall examine the grounds of appeal. **Did the trial Magistrate fail to record the expert opinion of the police officer and/or allow him to rely on the police file?**

15. I have looked at the Court record. The Respondent had objected to the line of questioning by appellants' advocate in relation to Pw1, a police officer. The court considered the objection and directed counsel for the appellant to lead the witness to lay a basis for the reliance on the police file and how he came to avail it. Pw1 only produced the police abstract and receipts for his attendance. Pw1 later relied on the police file to confirm the direction the deceased took while crossing the road. Accordingly, this court finds that the Trial magistrate allowed the police to fully rely on the police file hence this ground of appeal does not hold.

16. The second issue: **whether the trial Magistrate erred in failing to consider admissions made by the defence witnesses.** In his testimony the defendant admitted having hit the deceased but denied blame for the accident. His defence was to the effect that he was driving within 60 kmph, the deceased crossed the road without due care and attention and that the deceased was not crossing within the designated area.

17. Section 24 of the Evidence Act provides the effect of admissions. It states that

“Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.”

18. Kyalo Mbobu in *The Law and Practice of Evidence in Kenya* LawAfricaPublishing (K) ltd pg. 64, explained the effect of admissions under section 24 of the Evidence Act when he stated;

“According to section 24 of the Evidence Act, admissions are not conclusive proof of matters that they admit but they could operate as estoppels. Critics wonder why parliament enacted that provisions knowing that under the common law, admissions constitute conclusive proof of the admitted facts. But essentially, even though they are not conclusive they amount to estoppel. The idea of estoppel in admission is to prevent a person to assert things that are at variance with things they admitted before.”

19. The evidence clearly shows that D.w1 admitted hitting the deceased. He however did not admit liability on his part. He blamed the deceased for the accident. The trial magistrate took time to consider the evidence of D.w1. In the judgement it was stated that “it is probable that the deceased was crossing the road when she was hit by D.w1”.

20. The trial Magistrate was therefore right in not considering the admission by the defence witness to be an admission of liability. However, I agree with the appellant that there are aspects of the Defendants statement that the trial Magistrate ought to have taken into consideration. He conceded to hitting the deceased. The defendant also conceded that people were being picked at the point where the deceased was hit. It is at this point he submitted that a speed of 60 kmph. The presence of commuters and the fact that passengers were being dropped at that particular point is an important consideration in assessing whether the Respondent drove at a reasonable speed. In such circumstances the driver owed a duty of care to the Pedestrians and ought to have been extra careful. 60 kmph was not commensurate with the care required where there are many commuters alighting from buses or matatus and was not a reasonable speed

21. On another note, in the pleadings the appellant had averred that the deceased was besides/adjacent the road when he was hit. This was contrary to the evidence by Dw1 who averred that the deceased was crossing the road. The trial Magistrate therefore relied on the evidence of Dw1 as the true representation of the unfolding of events on the material date. However taking the evidence of Dw1 in full measure in part he admitted that there were people being dropped at the point of accident, he owed the deceased a duty of care and in the circumstances he ought to have driven at the considerably slow speed and with extreme attention and caution.

22. The law requires any person who drives a motor vehicle on a road not to be recklessly and to drive at a speed or in a manner which does not endanger the public. Similarly, the law places a duty upon such driver to have regard to all the circumstances of the road including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably be expected to be on the road. Again a driver of a motor vehicle on a road should not drive without due care and attention or without reasonable consideration for other persons using the road. The driver herein was without due care and attention or consideration for other persons using the road at the point of the accident.

23. The deceased also bore a duty of care. The Kenyan Highway Code provides that:-

(6) Before you cross the road, stop at the kerb, look right, look left, and right again. Do not cross until the road is clear then cross at right angles keeping a careful lookout all the time. If there is a refuge stop and look towards oncoming traffic before you cross.

(7) Do not cross unless you have a clear view of the road both ways. Take extra care near stationary vehicles or other obstructions and whenever your view is limited

24. See *Teresia Sebastian Massawe (Suing as the Legal Administratrix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another [2018] Eklr* where the Court also cited the case of *M. Jones Versus Livior Quarries Ltd 1992 2QB 608* which took this view on the doctrine of contributory negligence.

“a person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man or woman he or she might be hurt himself or herself and in his or her reckonings he or she must take into account the possibility of others being careless”.

25. The deceased did not fully observe the foregoing.

26. The above recapitulation of facts of the case and the applicable law show that this as a proper case for appropriate apportionment of contributory negligence between the parties. In apportioning liability in such case the court should not strive to attain mathematical precision. The court is guided by good judgment in the circumstances of the case. The circumstances of this case warrant apportionment of liability and I apportion liability in the ratio of 50:50 in favour of the deceased. It is so ordered. It was therefore wrong for the trial court not to appreciate the nuances of blameworthiness portrayed in the evidence and circumstances of this case. The trial court erred in dismissing the case.

Quantum

The Appellant did not contest quantum on damages. However I note that receipts on special damages were produced as exhibits and totals up to Kshs. 65,960 which I award. This is not an appropriate case to apply a multiplier for there was no real proof that the deceased was working in re-cycling company. She was however young and aged 19 years at the time of death. Her mother proved dependency. Therefore, this is an appropriate case for a global award. I award Kshs. 500,000. I also award pain and suffering and loss of expectation of life. The final award is as below:-

a. Pain and suffering.....Kshs.30,000

b. Loss of expectation of life....Kshs. 100,000

c. Loss of dependency.....Kshs.500,00

d. Special damages.....Kshs.65,960

TOTAL.....Kshs.695,960

Less 50% contribution.....Kshs.347,980

NET.....Kshs.347,980

e. Costs and interest thereon.

27. In the upshot, this appeal succeeds to the extent that the trial court's decision on liability is hereby set aside. Liability is apportioned at the ratio 50:50 in favour of the appellant. The award herein is less by 50% contributory negligence. In view of the above, this case is not fit for retrial. It is so ordered.

28. In light of the result of the case, each party shall bear their own costs of the appeal.

Dated and signed at Meru this 29th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 31st day of October, 2019

L. NJUGUNA

JUDGE