REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 17 OF 2018

BETWEEN

WINSTON JAMES OSORE

(Suing as the Administrator of the Estate of

Melissa Wairimu Osore (Deceased).....APPELLANT

-VERSUS-

SAMUEL GITAU WANJIRU.....1ST RESPONDENT

BWANA MARTHA.....2ND RESPONDENT

(Appeal from the judgment and decree of the Chief Magistrate's court Kajiado (Hon. Chesang RM) dated 5th June 2018 in CMCC No. 330 of 2013)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Chief Magistrate's Court, Kajiado, **Hon. Chesang, (Resident Magistrate),** dated 5th June 2018. In that appeal, the trial court dismissed the appellant suit. The appellant was aggrieved by that decision and lodged a Memorandum of Appeal dated 11th June 2018 against both liability and quantum and raised the following grounds of appeal; namely that;

> ***1. The Learned trial Magistrate erred in law and fact in holding that the appellant failed to prove his case on a balance of probabilities that the residents were jointly and severally liable for the accident that occasioned the fatal injuries to the deceased.***
>
> ***2. The Learned trial Magistrate erred in law and fact in failing to take into account principle in the doctrine of res Ipsa loquitur as pleaded by the appellant.***
>
> ***3. The Learned Trial Magistrate misdirected herself on the evidence on record thereby arriving at the wrong conclusion on liability.***
>
> ***4. The Learned Trial Magistrate erred in fact and in law in failing to evaluate the evidence on record thereby arriving at a wrong conclusion.***

2. The appellant therefore prayed that the appeal be allowed with costs, judgment and consequential decree of the trial court be set aside.

3. During the hearing of the appeal, Mr. Mburu, learned counsel for the appellant, submitted highlighting their written submissions dated 23rd July 2019 and filed in court on 27th August 2019, that their appeal was against both liability and quantum.

4. On liability, learned counsel submitted that the respondents were liable for the accident that occurred on 30th December 2009 causing the deceased's death. According to counsel, the police abstract dated 7th April 2010 (PEX 1), showed that the 1st respondent was the driver of motor vehicle KBA 558B and that a copy of records from the Registra Motor Vehicles, (PEX 4 dated 5th November 2013,showed that the 2nd respondent was the registered owner of the motor vehicle as at 30th December 2009.

5. Counsel submitted that the respondents produced another exhibit, DEX 5 which showed that the 2nd respondent was the owner of the motor vehicle as at 2nd March 2017. He submitted that the trial court erred by relying on DEX5 instead of the appellant exhibits a copy of the

records as well as the police Abstract. In counsel's view, the documentary evidence produced by the appellant proved that the 2nd respondent was the owner of the motor vehicle and, therefore, liability had been proved.

6. Counsel further submitted that the suit was filed after leave had been obtained in an application filed on 1st October 2013 and allowed on 24th October 2013 and was not an issue contested before the trial court. Regarding quantum, counsel submitted that the trial court did not assess damages which it ought to have done. He relied on several decisions and urged the court to allow the appeal.

7. Mr. Muriithi, learned counsel to the respondent, opposed the appeal relying on their written submissions dated 3rd October 2019 and filed in court on 7th October 2019. On liability; counsel submitted that the respondents were not liable. According to counsel, at the time of the accident, the motor vehicle did not belong to the 2nd respondent and was not registered in her name. Counsel referred to the police abstract PEX 1 which showed that the motor vehicle was registered in the name of Wheels on Hire Limited as at 30th December 2009 the date of the accident.

8. Counsel pointed out that the copy of records produced by the appellant, PEX iv is dated 5th November2013, three years after the date of accident. In their view, it was not be sufficient proof that the 2nd respondent was the owner of the motor vehicle at the time of the accident.

9. Mr. Mburu contended that the 2nd respondent produced evidence to show that she acquired the vehicle on 14th August2012 when she paid the purchase price to the seller; that she produced a bank statement dated 16th September2012 showing that she paid Kshs. 920,000/= to the seller Billow Hassan and, therefore, as the time of the accident, the vehicle did not belong to her but belonged to Wheels on Hire Limited.

10. Learned counsel argued that the 2nd respondent conducted a search from National Transport and Safety Authority and was issued with a copy of records dated 2nd March 2017 showing that as at the time of the accident, the motor vehicle belonged to Wheels on Hire Limited. On the basis of that evidence, the 2nd respondent was not the owner of the motor vehicle and the trial court could not attribute liability to the 2nd respondent not being the owner of the motor vehicle.

11. He also submitted that the appellant did not prove that the 1st respondent was an employee of the 2nd respondent; that he was acting on the Instructions of the 2nd respondent and that he was acting within the scope of his employment or authority. For that reason, the 2nd respondent could not be vicariously liable for the actions of the 1st respondent.

12. On quantum; counsel submitted that the award of Kshs. 120,000 would be sufficient should the court find in favour of the appellant given the deceased was a minor aged 17 years and in High School. He relied on several decisions in support of their position.

13. I have considered this appeal's submission by counsel for the parties and the authorities relied on. I have also perused the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court to reconsider the evidence afresh, reanalyze and reevaluate it and come to its own conclusion on that evidence. It should however bear in mind that it never saw the witnesses testify and give due allowance for that.

14. In ***Selle and Another v Associated Motor Boat Company Limited and others*** [1968] EA 123, the East African Court of Appeal held that:

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."***

15. Further in ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the same court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

16. See also ***Gitobu Imanyara & 2 otheres v Attorney General*** [2018] eKLR***).***

17. **PW1 Winston James Osore**, the appellant, testified that he was called and informed that his daughter had been involved in an accident. He proceeded to Karen Hospital where he found that his daughter already dead. He told the court that the deceased was hit by motor vehicle registration number KBS 558B Toyota RAV4 Silver in colour; that she was a student at St. Lawrence High School in Kampala and that she was 17 years old and of good health. He blamed the driver of the motor vehicle who he said was charged at Kibera Law Courts and fined. He produced documents as PEX (i) – (x). In cross-examination, the witness told the court that a search done on 5th November 2013 showed that the owner of the motor vehicle was Bwana Martha; that the police abstract indicated Wheels on Hire as the owner of the vehicle and that this also appeared on the insurance cover of the motor vehicle.

18. The 2nd respondent who testified as **DW1** told the court that she was not the owner of the motor vehicle at the time it caused the accident. She produced her documents as DEX 1-6 to show that she was not the owner of the vehicle on 30th December 2009. She testified that whereas the accident occurred in 2009, she bought the motor vehicle in August 2012 and that she did not know that the motor vehicle had been involved in an accident earlier.

19. The witness testified that in 2013 the vehicle was stolen; that she obtained an abstract which she took to her insurance company and was compensated; that she conducted a search for the vehicle which indicated that the vehicle was owned by Wheels on Hire Ltd at the time of

the accident and that her name should have been indicated as the owner after 2012. She also denied knowing the 1st respondent and told the court that she had not employed him as driver of the motor vehicle at the time of the accident since it did not belong to her.

20. After considering the above evidence, the trial court identified the issue of liability as contentious. The court considered the evidence adduced before it and the fact that the 2nd respondent denied owning he vehicle at the time of the accident or that the 1st respondent was her driver. The court found as a fact that although there was an allegation that the driver was charged at the Kibera Law Courts and fined, no evidence was placed before it and therefore there was no proof that the 1st defendant had been charged and convicted for causing the accident.

21. The trial court also observed that the appellant's documents, especially the copy of records, showed ownership as at 5th January 2013, the period when the motor vehicle was said to have been stolen but not the time of the accident, 30th December 2009. The trial concluded that the appellant had not proved that the 2nd respondent was the owner of the vehicle as at the time of the accident and, therefore, liability had not been proved. The court further concluded that that the relationship between the 1st and 2nd respondents had not been established. The court therefore found that liability against the 2nd respondent was not proved and dismissed the suit on that account.

22. The court was of the view that having dismissed the issue of liability, there was no need to go into the issue of quantum. The trial court also held that the suit had been filed more than 3 years after the date of the accident and was therefore time barred. It is these findings of fact that aggrieved the appellant and led them to mount this appeal blaming the trial court that it was wrong in dismissing the appellant's suit.

23. I have carefully considered this appeal, perused the record of the trial court, and reevaluated the evidence as well as the exhibits produced by either side. The claim before the trial court arose from a road traffic accident involving motor vehicle registration number KBA 558B and Melissa Wairimu Osore (deceased),a pedestrian, along Olekasasi-Nazarene University road.

24. According to the police Abstract No. 0212376 issued on 7th April2010, the accident occurred 30th December2009, at 2pm at Olekasasi trading Centre along Olekasasi- Nazarene University road. The driver of the motor vehicle was Samuel Gitau Wanjiru of P O Box 22712 Nairobi, the 1st respondent herein. According to the police Abstract, the owner of the vehicle was Wheels on Hire Company Limited and the insurance company was British American Insurance Company Limited, under Policy Number 590/084/1/000111/2009/1COMP.

25. The police records, police abstract, showed that the owner of the motor vehicle at the time of the accident was not the 2nd respondent. There is also a copy of records from Kenya Revenue Authority produced by the appellant showing that the owner of the motor vehicle as at 2nd March 2017 was Martha Bwana, the 2nd respondent. At the bottom of the document there are handwritten notes stating; **"As AT DECEMBER 2009 WHEELS ON HIRE LTD."**

26. There is another copy of records dated 5th November 2013 again from Kenya Revenue Authority the document has two different details. At the top left corner, the document has KBS 558B, and the name Njoroge and showing as at 30/12/2009 NBI. Then it shows that it is a copy of records for Registration Vehicle No. KBA 558B, as at 5th Nov, 2013.The document shows the details of registered owner of the vehicle KBA 558B as at 5/11/2013 to be Bwana Martha. It is printed by P. Warui.

27. That document is capable of bearing two different messages. One; that as at the date of the accident, 30th December 2009, the motor vehicle was owned by the 2nd respondent. Second; that the vehicle was owned by the 2nd respondent as at 5th November 2013, the date of the search. That document is not conclusive. This fact must also be considered alongside the Police Abstract which shows that the motor vehicle was owned by Wheels on Hire Limited at the time of the accident, 30th December 2009.This is information from the police who took details of the accident.

28. The 2nd respondent denied owning the vehicle at the time. She adduced evidence to show when she purchased the motor vehicle. She also denied knowing the 1st respondent.

29. On the basis of the above conflicting evidence over ownership, there was need for the appellant to do more than just rely on the copy of records dated 5th November 2013 which was obtained 3 years after the accident and did not show whether the information on the ownership of the offending motor vehicle was as at the tie mof the accident or at the time of the search.

30. The appellant was required to prove his case on a balance of probabilities. In this regard, the law placed the burden of proof on the appellant as the person who wanted the court to believe the fact of ownership in his favour. ***In Treadsetters Tyres Ltd v John Wekesa Wepukhulu*** [2010] eKLR, the Court quoting ***Charles worth & Percy On Negligence,*** 9th edition at P. 387 stated:-

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."***

31. Similarly, sections 107 to 109 of the Evidence Act place the burden of proof on the person who wants the court to believe certain facts stated by the party who wants the court to believe them thus;

> ***"107. (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.

108. The of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109. 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 provided by any law that the proof of that fact shall lie on any particular person."

32. And in ***East Produce (K) Limited v Christopher Astiado Osiro*** (Civil Appeal N0. 43 of2001), it was held that:

"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

33. The appellant was required to prove on a balance of probability, that the 2nd respondent was the owner of the motor vehicle that caused the accident and that at the time, the 1st respondent was her driver or was acting with the authority of the 2nd respondent or was acting within the scope of his employment. This he did not do, the documents that he produced to prove ownership of the vehicle at the time of the accident were not conclusive on this aspect. I am unable to fault the trial magistrate on her finding to this effect. The trial court's finding that liability had not been proved is therefore upheld and the appeal on this ground dismissed.

34. The trial court also found that the suit was filed out of time. The appellant has argued that the suit was filed with leave of the court. according to the appellant, leave was granted before the suit filed. The appellant pleaded at paragraph 5 of his plaint that the accident occurred on 30th December 2009. That is the date of the accident according to the police record, the police Abstract issued to the appellant and produced in court.

35. The limitation of Actions Act allows a period of 3 years for a tortious claim based on negligence such as road accident. The suit in the lower court was therefore without a doubt filed outside the three years allowed. I have perused the documents attached to the appellant's pleadings which he produced as evidence before the trial court. there is no order allowing filing of the suit out of time.

36. The appellant has also argued that the issue of the suit having been filed out of time did not arise before the trial court. I have perused the defence and it is true that the issue of limitation was not raised in the defence. Even if the issue was not raised, this was a point of law which could be taken up at the trial because it went to the root of the suit. Even where leave had been granted such leave could be challenged during the trial of the case since the law allows such challenge under section 5 of the Limitation of Actions Act. since this was not the main reason why the suit was dismissed, I see no fault on the part of the trial court in this respect.

37. Finally the appellant complained that the trial court did not assess damages. It is true from the judgment of the trial court that no damages were assessed. According to the trial court, having determined that the suit was not sustainable on account of liability, there was no need to go into the issue of quantum of damages.

38. Whereas there is need to assess damages even where the court is dismissing the suit for a personal injury claim, there was no prejudice caused to the appellant for the trial court's failure to do so not being the main ground for dismissing the suit.

39. From my analysis above the inevitable conclusion I come to is that this appeal has no merit. The appellant failed to prove his case against the respondents. Consequently. The trial court's decision is upheld. The appeal is dismissed with costs.

Dated Signed and Delivered at Kajiado this 29th Day of November 2019

E C MWITA

JUDGE