REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 172 OF 2013

LAWRENCE ASAVA.....APPELLANT

VERSUS

GESALT GILD LIMITED.....1ST RESPONDENT

ANTHONY MUNYUA NJOROGE.....2ND RESPONDENT

(Being an appeal from the judgement of Hon. Ms. Cheruto C. Kipkorir – Resident Magistrate

delivered on 27th February, 2013 in the Chief Magistrate's Court

at Nairobi in Civil Case No. 5983 of 2011)

JUDGEMENT

1. The appeal arose from judgment of Magistrate's Court at Milimani in which a fatal accident claim was filed. The same being as a result of suit against the respondents by appellant on allegation that on 10/7/2010 the appellant son was walking along Waiyaki Way near the Uthiru Junction while the 2nd respondent was driving the 1st respondent's motor vehicle KAS 479P negligently that it hit him while crossing the road.

2. The respondents denied the claim and the matter was heard in full and the suit was dismissed as negligence on respondents' part was not established.

3. The appellant was aggrieved thus filed the instant appeal and set out the following grounds –

(1) That the learned magistrate erred in law and fact in ignoring the evidence given by the appellant's witnesses.

(2) That the learned magistrate erred in law and in fact in failing to consider the documentary evidence precedent by the appellant.

(3) That the learned magistrate erred in law and in fact in ignoring all the legal authorities and precedents supplied to the court.

(4) That the learned magistrate erred in fact in not finding the respondents liable for the death of the deceased.

(5) That the learned magistrate erred in law in awarding the respondents costs.

(6) That the learned magistrate erred in law and in fact in failing to award damages under the Fatal Accident Act.

4. The parties were directed to file submissions to canvass appeal.

APPELLANT'S SUBMISSIONS:

5. The appellant submitted that, he did produce two witnesses at trial but the learned trial magistrate did not consider their evidences fully on the grounds that none of the appellant's witnesses witnessed the occurrence of the accident.

6. The trial magistrate in her judgment did acknowledge the fact that PW1, DW1 and DW2 managed to prove that the deceased was knocked whilst on the road. Most importantly, PW1 was the police officer who visited the scene of the accident and took measurements. He did describe how the accident occurred as evidenced in the court proceedings.

7. It is contended the trial magistrate erred when she failed to acknowledge the evidence of the respondents which was contradictory as to how the accident occurred, the speed of the motor vehicle and evasive measures taken to avoid hitting the deceased as evidenced in the court proceedings. The evidence clearly pointed that the 1st respondent knocked and hit the deceased whilst the deceased was about to cross the road and this clearly proved the 1st respondent's negligence.

8. The courts have previously observed that the determination of liability in a road traffic case is not a scientific affair. He relies on the case of ***Michael Hubert Kloss & Another vs David Seroney & 5 Others [2009] eKLR,*** the Court of Appeal quoted ***Lord Reid who stated in Stapley vs Gypsum Mines Ltd (2) [1953] AC 663*** where court held;

> **"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is a very valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....**
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> **The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."**

9. It is argued that, in this case there were specific acts of negligence pleaded and proved by the respondents in their pleadings which the trial magistrate should have taken into consideration.

10. Based on the appellant's and respondents' evidence on record in relation to liability, it is clear that there was sufficient probability and the accident would have been avoided if the 1st respondent slowed down at the instance of seeing the deceased crossing the highway.

11. The trial magistrate also ignored the evidence of PW1 who was the police officer who visited the scene, made sketch plans of the scene, tendered evidence on how the accident happened and produced the police abstract. This critical evidence was ignored while making her determination that no evidence of negligence by the respondents was tendered.

12. He cites the case of ***Jackson Mutuku Ndetai vs A.O Bayusuf & Sons HCCA No. 231 of 2012 Nairobi*** quoting ***Grant vs Sun Shipping C. Ltd [1948] 2 ALL ER 238*** where it was observed that;

> **"A prudent man will guard against the possible negligence of others when experience shows such negligence to be common and that a driver ought to do all that he can in the circumstances to prevent the accident occurring. This stretch of the road is a well-known busy pedestrian crossing especially in the mornings and evenings when persons are going to and from work."**

13. It is the appellant's submission that the 1st respondent was indeed negligent as he was over speeding and never slowed down at the instance of the pedestrian who was crossing the road until it was too late to allow the deceased his right of way.

14. The 1st respondent ought to have known that one must slow down or even stop when a pedestrian is crossing the road to avoid knocking down pedestrians who are lawful road users. The court failed to appreciate this duty in dismissing this claim for want of the appellant producing an eye witness.

15. The court also failed to appreciate the difficult of procuring an eye witnesses to accidents, more so where the victim is deceased. In any event it did disregard the testimony of a police officer who actually visited the scene of accident.

16. It is also the appellant's submission that the 1st respondent having seen the deceased intend to cross the road at a stage, he should have stopped to allow the deceased cross before proceeding with his journey, as a prudent driver would have been expected to do.

17. The respondent was also not on the lookout for other road users especially pedestrians such as the deceased.

RESPONDENTS' SUBMISSIONS:

18. Respondents submitted that, on whether the learned magistrate erred in finding that the respondent was not negligent, the main issue in this appeal revolves around whether the appellant proved their case on a balance of probabilities. It is trite law that in civil case a party has the onus to prove their claim on a balance of probabilities as per **Section 108 and 109 of the Evidence Act Cap 80 Laws of Kenya**.

19. They rely on the case of ***Evans Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR*** where it was held that:

> **"As general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (i) of the Evidence Act, Cap. 80 Laws of Kenya. Furthermore, the evidential burden....is cast upon any party, the burden of proving any particular fact which he desires the court to believe**

in its existence. That is captured in section 109 and 112 of Law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the Evidence Act provides that burden lies in that person who would fail if no evidence at all were given as either side."

20. Similarly, in ***Treadsetters Tyres Ltd vs John Wekesa Wepukhulu [2010] eKLR*** **Ibrahim J** allowed an appeal quoted Charlesworth & Percy on negligence, 9th Edition at p. 387 on the question of proof, and burden thereof where it is stated:

"In an action for negligence, as in every other action, the burden of proof fails upon the appellant alleging it to establish each element of the tort. Hence it is for the appellant to adduce evidence of the facts on which he bases his claim for damages."

21. Therefore, the appellant had the duty of proving the facts constituting negligence on the part of the respondent even if the appellant chose to remain silent.

22. Being the first appeal, the court is obliged to re-evaluate the evidence however it must give consideration to the fact that it did not hear or see the witness. An appellate court of first must not be quick to review a trial court's finding of fact since the trial magistrate had the advantage of assessing the demeanor and draw relevant conclusions from them from the matter.

23. Also in the case of ***Susan Njoki (Suing as the Administrator of the estate of Francis Mwaniki Theuri) vs Joseph Kiiru & Another [2017] eKLR*** the court stated that:

"This being a first appeal this court is mandated in law to consider a fresh the evidence adduced before the lower court and be able to come up with its own decision. In discharging this duty this court has to bear in mind that it neither saw or heard the witnesses which the trial magistrate had the advantage of assessing the demeanor and draw relevant conclusions from them for the matter."

24. In this case, the appellant called two witnesses who testified. PW1 is a police officer who testified that he did not witness the accident and the case was still pending investigations by the time he left the station and he doesn't know the results thereof. He further produced the police abstract produced and marked as Pexhibit 1 which indicated that the case was still pending under investigations.

25. PW2 was the appellant and the father of the deceased. He also testified on cross examination that he did not witness the accident and was only called and informed of it.

26. The respondent on the other hand called two witnesses to the stand. DW1 who was the 2nd respondent and Simon Kinuthia Wachira who was a passenger in the respondent's car.

27. DW1 testified that he was driving at about 60km/hr when he noticed the deceased crossing the road about five meters ahead of him. The deceased had already crossed his lane when he stepped back into it and was hit by the motor vehicle. He further testified that he tried to hoot and break but he could not stop the motor vehicle in time.

28. DW2 corroborated this evidence by testifying that he estimated the speed to be about 40-50km/hr. He confirmed the distance between the deceased and the car as outlined by DW1 and that the deceased was run over and not thrown and his body was behind the car.

29. The trial magistrate also considered the respondent's submissions that the deceased was negligent by failing to observe the provisions of the Traffic Act and the Highway Code. The testimony of the respondent's witnesses was that the deceased stepped back into their lane without regard for his own safety or that of the respondent.

30. They submitted relying on a Court of Appeal case that a pedestrian owes a duty to other road users see the case of ***Patrick Mutie Kimau & Another vs Judy Wambui Ndurumo [1997] eKLR*** where it stated that:

"But before returning to the circumstances leading to that accident as we have endeavored to outline above, we think it necessary to emphasis the statement in paragraph 186 of Charlesworth on Negligence, Third Edition which is as follows:

"A pedestrian owes a duty to other highway users to move with due care."

31. The appellant in his submissions has argued that since he pleaded the doctrine of res *ipsa loquitor* the burden of proof shifted to the respondent to prove that the accident was not as a result of his negligence.

32. In principle, *res ipsa loquitor* only apples when the party seeking to rely on it has already established a prima facie case or laid out certain facts. This was discussed in the case of ***Mary Ayo Wanyama & 2 Others vs Nairobi City Council Civil Appeal No. 252 of 1998 VR*** as quoted in the case of ***PMM (Minor suing through the mother and next friend MBM vs Family Bank Limited & Another [2018] eKLR***. The Court of Appeal in the **Mary Ayo case (Supra)** stated that:

"It is not right to describe *res ipsa loquitor* as a doctrine as it is on more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was prima facie case. It means the appellant prima facie establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the respondent or of someone for whom the respondent is responsible, which act or omission constitutes a failure to take proper

care for the appellant's safety.... *Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the appellant to proceed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the respondent to take due care for the appellant's safety. This applies also to situations where no submission of no case is made...The appellant must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not have been caused by negligence, is by itself evidence of negligence."

33. The appellant has not proved facts giving rise to the application of *res ipsa loquitor*. He has not established a prima facie case for negligence. The only facts that he has been able to prove (through the respondent's admission) is that the accident occurred and not that the same was caused out of an act or omission by the respondent.

DUTY OF THE FIRST APPELLATE COURT:

34. The duty of the first appellate court are set out in the case of ***Susan Njoki (Suing as the Administrator of The Estate of Francis Mwaniki Theuri) vs Joseph Kiiru & Another [2017] eKLR*** the court stated that:

"This being a first appeal this court is mandated in law to consider a fresh the evidence adduced before the lower court and be able to come up with its own decision. In discharging this duty this court has to bear in mind that it neither saw or heard the witnesses which the trial magistrate had the advantage of assessing the demeanor and draw relevant conclusions from them for the matter."

EVIDENCE ADDUCED:

35. PW1 was the Joseph Kimaiyo. He informed the court that on 10/7/2008 the drier of motor vehicle No. KAS 479P, came to the station to report an accident, and he was advised to take the victim to hospital and that is when they realised that he had passed on.

36. He stated that the police visited the scene of the accident and they established that the accident occurred. He stated that he drew a sketch and the victim was found to have been hit on the road. The police abstract was produced as appellant exhibit 1.

37. On cross examination, he stated that he revisited scene and confirmed he did not see the accident when it occurred. He concluded by stating that he did not know the state of the investigations.

38. PW2 was the appellant. He adopted his witness statement as his evidence herein. The same was filed in court on 7/12/11. In it he did indicate that on 10/7/2010 he was informed that his son was carefully walking along Waiyaki Way near the Uthiru Junction when the 2 nd respondent hit his son and he did suffer fatal injuries as a result.

39. He indicated that his son was on the pavement waiting to cross the road when he was hit from behind. He stated that the deceased was an intern at KAPS with prospects of considerable advancement in his career and he had left behind 8 siblings and his parents. He stated that they were his beneficiaries.

40. The list of documents was produced in evidence and the same were produced as appellant exhibit 2-9 respectively. The documents in the supplementary list documents were produced as appellant exhibit 10 and 11 respectively.

41. On cross examination, he stated that he was not at the scene of the accident and what he wrote on his statement he was told by other people.

42. DW1 was the 2nd respondent. He stated that he was employed by the 1st respondent and he was issued with a motor vehicle registration number KAS 479P. He informed the court that on 10/7/2019 he was driving and he had a passenger, he indicated that as he approached Uthiru Junction he saw a man crossing the road, he stated that he was driving on the right lane, when the victim decided to go back to the right lane and that is where he was at and that is when he hit him.

43. He stated he did hoot and applied brakes. He reiterated what PW1 stated when they went to the police station. He stated that the motor vehicle was inspected and it was later released to them. He produced his driving licence as defence exhibit 1.

44. On cross examination he indicated that he was driving to town and the pedestrian was crossing from the right side to the left side and he was about 5 meters ahead. He confirmed he did not see the deceased waving at matatu on the side of the road. He reiterated how the accident occurred and stated that his motor vehicle was hit on the driver's side. He stated that the motor vehicle was being driven at 60km/hr and he did hoot but he was not able to brake and stop to avoid the accident.

45. He stated on impact he did stop the car and he saw members of public holding the appellant. He was referred to page 14 of the respondents list of documents, in which he had stated that the appellant was on the ditch after being bit and he stated he was under shock when he wrote that statement and he informed the court that the distance outlined in his statement were estimates.

46. On cross examination, he stated that the appellant walked back suddenly and he stated he was shocked to see him come back and in his shocked state he did not remember anything he did.

47. DW2 was Simon Kinuthia Wachira. He indicated he was the passenger DW1 referred to. He reiterated what DW1 stated on how the accident occurred and measures he took to avoid it.

48. On cross examination he stated that the accident occurred at around 7.00 am and despite not being able to see the speedometer, he stated that the motor vehicle was being driven at 40-50km/hr. He confirmed the distance between the victim and the car as outlined by DW1.

49. He did state that the appellant was not thrown but he was run over and the body of the victim was behind the car. He stated that there was very little distance between where the car was and the point of impact. He stated that they did go to Kabete police station and then to Kikuyu hospital.

ISSUES

50. After going through evidence and submissions on record, I find the issues are; ***whether the appellant proved his case on balance of probabilities? What is the order as to costs?***

ANALYSIS ANS DETERMINATION

51. On liability, none of the appellant's witnesses witnessed the occurrence of the accident. The respondent witnesses did. It was outlined in their evidence hereinabove. The respondents in their submissions outlined that the appellant did not prove that the respondents were negligent and thus should not be liable. They further stated that what was pleaded with respect to the conduct of the appellant whilst the accident occurred and the evidence adduced was in contradiction and thus the appellant should be bound by their pleadings.

52. It was submitted that since the accident occurred in the highway, the deceased was in breach of the provisions of the Highway Code and the Traffic Act. A number of relevant sections of the two pieces of legislation were paraphrased in the submissions in great detail to buttress the fact that the appellant did owe a duty of care to other road users. The respondent also cited a number of authorities in support of each of their submissions outlined hereinabove.

53. In conclusion the respondents stated that the appellant in order to sustain an action in negligence the injury complained of must have been caused by the negligence of the respondent.

54. The appellant in their submissions did pray for the court to find the 1st respondent 100% liable for the reason that he was driving too fast in the circumstances and he failed to keep any proper lookout or to have any sufficient regards for pedestrian walking along the road.

55. The appellants witness did not witness the accident, PW2 evidence as rightly pointed out by the respondents and admitted by him in cross examination, was pure hearsay as far as it related to the occurrence of the accident.

56. DW1, DW2 and PW1 managed to prove that the appellant was knocked whilst on the road. It was also proved that the deceased was crossing the road and then decided to walk back in the direction of where the motor vehicle was being driven, by DW1.In the case of ***Patrick Mutie Kimau & Another vs Judy Wambui Ndurumo [1997] eKLR*** the court of appeal stated that:

> ***"A pedestrian owes a duty to other highway users to move with due care."***

57. DW1 stated that he did apply brakes and did hoot but he was not able to avoid hitting the deceased. It is trial court considered opinion even from the plain reading of the evidence on record that the appellant did prove that the accident did occur but did not prove how the respondents herein were negligent and caused the accident.

58. In ***Evans Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR*** where it was held that:

> ***"As general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (i) of the Evidence Act, Cap. 80 Laws of Kenya. Furthermore, the evidential burden....is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of Law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the Evidence Act provides that burden lies in that person who would fail if no evidence at all were given as either side."***

59. Similarly, in ***Treadsetters Tyres Ltd vs John Wekesa Wepukhulu [2010] eKLR,*** **Ibrahim J** allowed an appeal quoted ***Charlesworth & Percy on Negligence, 9th Edition at p. 387*** on the question of proof, and burden thereof where it is stated:

> ***"In an action for negligence, as in every other action, the burden of proof fails upon the appellant alleging it to establish each element of the tort. Hence it is for the appellant to adduce evidence of the facts on which he bases his claim for damages."***

60. Therefore, the appellant had the duty of proving the facts constituting negligence on the part of the respondents even if the respondents chose to remain silent.

> ***i. In the instant case same was not established on balance of probabilities, thus the court finds no merit and dismisses the appeal with no orders as to costs.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE