



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 34 OF 2012

M'ITABARI M'ITIRI AND JULIETA KANGAI

(Suing as legal Representatives of the Estate of

CYPRIAN KABERIA M'ITABARI).....APPELLANTS

-VERSUS-

ANTONY WAWERU MWAI.....1ST RESPONDENT

KENYA POWER AND

LIGHTING COMPANY LIMITED.....2ND RESPONDENT

(An appeal from the Judgment and Decree made by Hon. M. Maundu,

SPM in the Isiolo PMCC No. 65 of 2010 on 13th March, 2012)

JUDGMENT

- 1.** By a plaint dated 14th December, 2010 before the Principal Magistrate's Court at Isiolo, the appellant's personal representatives of the Estate of the late CYPRIAN KABERIA M'ITABARI, sued the respondents for damages as a result of a road traffic accident which occurred on 25th December, 2009 out of which the deceased had perished.
- 2.** The appellants pleaded that on the material date, the deceased was riding motor cycle registration no. KMCE 581X along Isiolo – Meru road when the 1st respondent negligently drove and/controlled motor vehicle registration no. KAT 922X (the subject motor vehicle”) that he crushed the deceased thereby occasioning him fatal injuries.
- 3.** It was alleged that the subject motor vehicle belonged to the 2nd respondent. Six particulars of negligence were set out against the 1st respondent. It was contended that as a result of the demise of the deceased, his estate had suffered loss and damage. The appellants set out the particulars of damages as well as particulars under statute in their statement of claim and claimed damages under both the Law Reform Act and the Fatal Accidents Act.
- 4.** In their joint defence dated 19th August, 2011, the respondents denied every aspect of the appellants'

claim and put them to strict proof thereof. They denied ownership of the complained of motor vehicle or that the 1st respondent was its driver. They also denied the occurrence of the accident.

5. In the alternative, the respondents pleaded that the accident was caused by the deceased and set forth several particulars of what they considered to constitute his negligence. They further pleaded in the alternative that the accident was inevitable in the circumstances and that they were therefore not to blame for the same.

6. After hearing the parties, the trial court found that the deceased caused the accident and dismissed the suit with costs thereby provoking this appeal.

7. In the Memorandum of Appeal, the appellants set forth eight grounds of appeal which can be summarized as follows:-

a) that the trial court erred in failing to find that the 1st respondent was negligent or contributed to the accident;

b) that the trial court erred in failing to find that the evidence of the 1st respondent departed from his defence;

c) that the trial court erred in relying on the evidence of a single defence witness and that the 1st respondent did not explain why he did not avoid the accident; and

d) that the decision of the trial court was against the weight of evidence.

8. This being a first appeal, this court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See the case of **Selle vs. Associated Motor Boat Company (1968) EA 123.**

9. **PW1 Julieta Kangai**, the wife of the deceased, testified that her husband was involved in a road accident on the 25th December, 2009 from which he died. That he was riding a motor cycle that was hit by the subject motor vehicle which belonged to the 2nd respondent. She told the court that the deceased was in good health and operated a *boda boda* taxi and that he also worked at Isiolo slaughterhouse with a total monthly income of 30,000/=.

10. PW1 further stated that the deceased used to maintain his father and mother. That the burial expenses were KShs.30,000/= . She admitted that she was not at the scene of the accident and that she did not have any documents to show that the deceased owned the subject motorcycle. She told the court that her husband had a licence to ride the motorcycle.

11. **PW2 M'Itabari M'Itiri** told the court that the deceased was his son. That the deceased owned a motorcycle with which he operated a *boda boda* business from which he gave him Kshs. 6,000/- every week. He admitted that he had other children apart from the deceased who also looked after him.

12. **PW3 James Nthambura** testified that, on the material day at about 7.00 p.m. he was from Kulamawe to visit his brother. That when he reached the Catholic Church at Isiolo, he saw two vehicles belonging to the 2nd respondent coming from the direction of Meru to Isiolo. One of the vehicles tried to overtake the one ahead of it whereby it collided with an oncoming motor cycle. It dragged the motor cycles for some distance. That he rushed to where the vehicle stopped and found only a female passenger seated at the passenger's seat as the driver had run away. PW3 assisted in taking the rider to hospital where he died. He admitted in cross-examination that he had testified in the **Isiolo PMC Traffic Case No. 20 of 2010 Republic v. Antony Waweru Mwai (hereinafter "the Traffic Case")**.

13. In his defence, the 1st respondent told the court that on the material day and time, he was driving the subject motor vehicle towards Isiolo in the company of one Geoffrey Mwangi, a technician with the 2nd respondent. On reaching the Isiolo Catholic Church, he saw an oncoming saloon car from the opposite direction. Suddenly, a motorcycle appeared from behind the saloon car and attempted to overtake. In the process, the rider hit his vehicle on the right headlamp.

14. He told the court that the rider was not wearing any helmet at the time. He blamed the rider for the accident and produced the proceedings in the traffic case where he was acquitted of the charge of dangerous driving.

15. This Court ordered the parties to file written submissions. However, only the appellants' Advocates complied. Mrs. Kauma submitted that since the respondents had pleaded contributory negligence, the trial court was wrong in failing to apportion liability. That the respondents had submitted for a 70:30 liability in favour of the plaintiff. That the trial court was biased against the appellants as it used the knowledge it had acquired while trying the traffic case to decide this matter.

16. Mrs. Kaume further submitted that the trial court wrongly held that the deceased had no driving licence; that it relied on extraneous matters to arrive at its decision. She criticized the court for failing to believe the appellants' evidence as opposed to that of the respondents. She emphasized that the trial court was wrong in relying entirely on the traffic proceedings to arrive at its decision and therefore urged the court to rule in favour for the appellants.

17. The first ground of appeal was that the trial court had erred in failing to find that the 1st respondent was negligent or contributed to the accident. The trial court found that the evidence of the 1st respondent was consistent with that of the investigating officer in the traffic case. That the 1st respondent was driving on his right side of the road when the deceased emerged from behind a saloon car trying to overtake thereby hitting the motor vehicle that was being driven by the 1st respondent. Mrs. Kaume submitted that since the respondents had submitted for contributory negligence of 70:30, the trial court should have found that there was contributory negligence.

18. The evidence of the 1st respondent was that at the material time, he was driving the subject vehicle on the left side of the road as one approaches Isiolo. That suddenly, he saw a motor cycle rider swerve onto his way in an attempt to overtake a saloon car whereby a collision occurred. That the collision occurred on the left side of the road as one approaches Isiolo. He denied the evidence of PW3 that he was overtaking another vehicle when the collision occurred.

19. This Court has reviewed the proceedings in the Isiolo traffic case and this case. The testimonies of the 1st respondent and the investigations are consistent on how the accident occurred. They contradict the testimony of PW3 who also testified in the traffic case. The trial court had to decide who to believe between the 1st respondent and PW3. While the 1st respondent's testimony was consistent and firm, not so for PW3. PW3 told the traffic court on oath that he saw only one vehicle at the scene of the accident. However before the trial court, he talked of two vehicles belonging to KPLC. PW3 did not explain the inconsistency in his testimony. In this regard, the trial court cannot be faulted for believing the testimony of the 1st respondent as opposed to that of PW3.

20. On the submission that the respondents had admitted liability in their defence, I have found no such admission in the defence dated 19th August, 2011. Neither can the issue of contribution arise considering the evidence on record. Save for the collision of the motor cycle and the subject motor vehicle, the appellants did not prove any negligence against the respondents. To the contrary, the respondents proved substantially all the particulars of negligence pleaded against the deceased.

21. In this regard, the trial court was not bound by the submissions of the respondent's Counsel that liability be apportioned at 70:30. That submission cannot be taken to be admission and was without any basis. The first ground fails.

22. The 2nd ground was that the trial court erred in failing to find that the evidence of the 1st respondent was inconsistent with the defence that was filed on behalf of the respondents. Mrs. Kaume did not submit on this ground. I have carefully considered the defence and the testimony of the 1st respondent. I have not found any point of departure between the pleaded defence and the testimony of the 1st respondent. To my mind the testimony of the 1st respondent reinforced the defence of the respondents. That ground also fails.

23. The 3rd ground of appeal was that the trial court erred in relying on the evidence of a single defence witness and that the 1st respondent did not explain why he did not swerve to avoid the accident. There is no requirement in law that a fact should be proved by evidence of more than one witness. It is only in criminal matters that evidence of a witness requires corroboration. In civil matters, satisfactory evidence of even one witness is sufficient to prove a fact. In the present case, the testimony of the 1st respondent dislodged the evidence of the three witnesses paraded by the appellants.

24. Regarding the criticism that the 1st respondent did not explain why he did not avoid the accident, the record shows that the 1st respondent clearly explained that the road was narrow; the road shoulders were about 3 to 4 inches and that the vehicle would have overturned had he swerved to his left. He explained that it is for that reason that he decided to apply emergency brakes. In the circumstances, that ground also fails.

25. The final ground was that the decision of the trial court was against the weight of evidence. Mrs. Kaume submitted that the trial court was biased against the appellant. That the trial court having tried the traffic case, it was unable to disabuse its mind. I have considered the proceedings in the traffic case. It is not true that it is the trial court that heard the traffic case. The traffic case was presided over by Hon. C. O. Owiye while the trial court in the civil matter was presided over by Hon. M. Maundu, SPM. The allegations of bias therefore have no basis.

26. On the other hand, the evidence on record is clear as to how the accident occurred. The respondents evidence was that the accident was caused by the attempt by the deceased to overtake a moving vehicle; that the impact was at the middle of the road; that the deceased wore no helmet; that the road was narrow and that the 1st respondent applied emergency brakes in an attempt to avoid the collision. It was further contended by the respondents that there was only one vehicle at the scene.

27. On the part of the appellants, they told the court that the motor cycle belonged to the deceased. However, they failed to produce any evidence of ownership. They also told the court that the deceased had a driving licence but failed to produce any evidence to prove that allegation. In the traffic case, it was established that the deceased did not have a driving licence and that the subject motor cycle belonged to one Elkana Mwirigi and not the deceased. Further, it was established that there was only one vehicle at the scene of the accident and not two as contended by the appellants.

28. In view of the foregoing, I find that the evidence tendered on behalf of the respondents was overwhelming and the decision of the trial court cannot be faulted. That ground also fails.

29. As there was no appeal against quantum I need not make any reference to it. However, I find that the award by the trial court was reasonable and I accept it.

30. Accordingly, the appeal is without merit and is hereby dismissed.

DATED and DELIVERED this 18th day of January, 2018.

MABEYA

JUDGE

18/01/2018