REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 124 OF 2017

(Formerly; Machakos Hcca No. 168 Of 2015)

AUTO BUS LTD ….....…….. APPELLANT

-VERSUS-

THOMAS MUTUA KIEMA (Suing as the legal representative

of the estate of) **JENIFFER MWIKALI MUTUA..RESPONDENT**

(Being an Appeal from the Judgment of Hon. G.M Mutiso in the Senior Resident Magistrate's Court at Makindu Civil Case No. 58 of 2011, delivered on 6th October 2015).

JUDGEMENT

INTRODUCTION

1. The appellant had instituted a suit in the lower Court against the respondent seeking general damages under the Law Reform Act and the Fatal Accidents Act on behalf of the Estate of *Jeniffer Mwikali Mutua* and her dependants following a fatal road accident on 6th September 2008. He also sought special damages of Kshs. 500, costs of the suit and interest.

2. The respondent filed it's defence on 22nd September 2011 and after a full trial, the learned trial magistrate apportioned liability in the ratio of 80:20 in favour of the plaintiff.

3. On quantum, judgment was entered for the respondent and the net award was Kshs. 949,328 together with costs and interest.

4. In his memorandum of appeal, the appellant listed four grounds of appeal as follows;

i. The learned trial Magistrate erred in law and fact by apportioning liability of 20% against the respondent holding the appellant 80% liable despite the overwhelming evidence adduced by DW1, the executive officer who produced the inquest file No. 13 of 2012 which exonerated the appellant from any liability as far as the subject matter was concerned

ii. The learned trial magistrate erred in law and fact by relying on the evidence of PW3 in assessing liability despite the fact that he never testified as an eye witness in inquest No. 13 of 2012 which was produced as defence exhibit No.1.

iii. The learned trial magistrate erred in fact and law in failing to use the minimum wage applicable for the year the alleged accident occurred as the law provides where proof of income has not been furnished before Court in assessing the damages under loss of dependency.

iv. The learned Magistrate's decision on liability and assessment of quantum was unjust, against the weight of the evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.

v. The respondent filed a cross appeal against part of the judgment apportioning liability at 80:20 and listed the following grounds.

vi. ***The learned Magistrate erred in law and fact in apportioning 20% liability against the plaintiff when there was no evidence tendered by the defence whatsoever to controvert the evidence of PW3 that the defendant's driver was solely the one to blame for the accident.***

vii. The learned Magistrate erred in law and fact in putting up a theory in favour of the defendant when the defendant did not call any evidence to show that the plaintiff contributed to the accident in any way.

5. The parties agreed to canvass the appeal by way of written submissions. Accordingly, both parties filed their submissions on 1st November 2017.

6. The duty of a first appellate Court as was held in the cases of ***Mwana Sokoni –vs- Kenya Bus Service Ltd (1985) KLR 931*** *and* Selle ***–vs- Associated Motor Boat company ltd (1968) EA 123*** is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

7. Having looked at the grounds of appeal, cross appeal and the rival submissions, the issues for determination in my view are;

i. Whether the findings of inquest No. 13/12 were binding on the trial Court.

ii. If question one is answered in the negative, who was liable for the accident herein and to what extent?

iii. Whether the damages awarded were based on wrong principles such that they were manifestly excessive/exorbitant thus requiring interference by this Court.

8. I will proceed to deal with the issues under the distinct heads.

THE INQUEST

9. The appellant placed heavy reliance on Makindu SRM's Court Inquest No. 13 of 2012 and submitted that it was exonerated from any liability and as such, the learned trial Magistrate erred in his decision.

10. According to the respondent, it had submitted extensively on this issue before the lower Court. I did not find the said submissions in the record of appeal. The respondent contended that the appellant had refused to include them. Further, the respondent stated that it had attached them in its submissions dated 30th October 2017; still, they were nowhere to be found. Accordingly, the Court did not benefit from the extensive submissions alluded to by the respondent.

11. Be that as it may, the Court will still analyze the issue. At this juncture, it is important to reproduce the order by Hon. Muiru. It stated thus;

a. "Having perused the entire contents of the police file and the statements herein which have been duly corroborated, I opine that indeed, the pedestrian was the author of her own misfortune due to the negligent act of crossing the road at night without ensuring whether it was safe to do so"

12. DW1, the executive officer of Makindu Law Courts is the one who produced the above Court order. On cross examination, he confirmed that no hearing took place. It therefore follows without saying that the evidence of the witnesses who had recorded statements at the police station was not tested in cross examination. Further, the materials relied upon by the Inquest Court were not produced in evidence, therefore, the trial Court had no way of evaluating them independently.

13. Section 385 of the **Criminal Procedure Code Cap 75**(Laws of Kenya) provides that a Magistrate of first and second class or one specially empowered by the Chief Justice shall be empowered to hold inquests. The inquest Court and the trial Court had concurrent jurisdiction. It is therefore my considered view that the trial Court had an obligation to hear the civil case, independent of the findings of the inquest, and determine it on a balance of probability.

14. In the case of **Charles Munyeki Kimiti –vs- Joel Mwenda & 3 Others [2010] eKLR** Lenaola J rendered himself as follows:-

"It is clear that the Resident Magistrate upon inquiry absolved them from blame. It does not however follow that the inquest exonerates the respondents from tort. If negligence is established…just as a person who has been convicted for careless driving under the Traffic Act is entitled to show in subsequent civil proceedings against him for damages that the driver of the other vehicle or the victim of the accident is equally liable for contributory negligence…"

15. In the case of **Chemwolo & Another –vs- Kubende [1986] KLR 492**at page 498, the Court of Appeal expressed itself as follows:-

"With respect, it was not for the learned judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well-known that both parties to an accident might have driven carelessly and each could be convicted to careless driving for their respective types of carelessness….. ….It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of proceedings in the traffic case."

16. The appellant submitted that the Court order from the inquest was never appealed and urged the Court to dismiss the respondent's suit.

17. Section 47 of the Evidence Act, Cap 80 Laws of Kenya, provides as follows;

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

18. Faced with a similar situation in the case of **Joshua Muriungi Ng'anatha –vs- Benson Kataka Lemureiyani [2016] eKLR** Kamau J expressed herself as follows;

"This does not, however, follow that such a convicted person will be found wholly liable in civil proceedings that a complainant institutes arising out of such criminal or traffic proceedings because the civil case will be determined on a balance of probability. This is notwithstanding that the witnesses who testified in the criminal proceedings are the same ones who testified in the civil proceedings.

In the same breathe; the fact that a person has been exonerated in an inquest does not discharge him from any liability in tort if negligence is actually established. Similarly, a person who has been found wholly liable in inquest proceedings need not necessarily be found to be wholly liable in civil proceedings"

19. There are instances where the findings of an inquest Court will be of probative value in subsequent civil cases. In the circumstances of this case however, the outcome of the inquest could not be relied on by the learned trial Magistrate to make a finding on liability. The respondent was therefore correct in submitting that the learned trial Magistrate was not bound by the finding of the Inquest.

WHO WAS LIABLE FOR THE ACCIDENT AND TO WHAT EXTENT?

20. Having opined that the findings of the inquest were not binding on the trial Court, I will deal with grounds 1 and 2 of the appeal as well as grounds 1 and 2 of the cross appeal under this head.

21. PW1, Thomas Mutua Kiema, the deceased's husband was not at the scene of the accident. He said he was informed about it by the people who were with the deceased at the time through a call.

22. PW2, PC Reuben Kibet Rono produced the police abstract from Sultan Hamud police station. He said that the deceased was a pedestrian. He was not the investigating officer.

23. PW3 Nzioka Maithya was the eye witness. He testified that on 06/09/2009, he was travelling from Kangundo to Makindu along the Nairobi-Mombasa road. At pipeline area, the matatu he was travelling in got a puncture and stopped. It did not completely get out of the road. They put branches on the road to warn other vehicles.

24. The deceased who was also travelling in the matatu alighted. They crossed the road to answer a call of nature. They crossed to the right as you face the general direction of Mombasa. While going back to the matatu, motor vehicle registration No. KBD 606G (*bus*) hit the deceased. It was moving towards Nairobi from Mombasa.

25. According to this witness, there was a lorry coming from the opposite direction (*from Nairobi*). It flashed it lights to warn the bus driver of the presence of the matatu but the bus ignored the warning. The bus and the lorry met at the point where the matatu was parked. The bus swerved to its left (*as you face Nairobi*) and hit the deceased while she was standing.

26. On cross examination, the witness said that the matatu had stopped partly on the road as two of its wheels were still on the road. He said that they had crossed towards the right, facing Makindu, to answer calls of nature and that the deceased was at the side of the road when she was hit. He did not know the lorry's registration number.

27. On re-examination, he said that the deceased was two meters off the road and she fell beside the road. The front left headlights side of the bus is the one that hit the deceased. She died on the spot and police found her on the scene. He stated that the deceased was not in the middle of the road when she was hit.

28. According to the appellant, the evidence of PW3 was contradictory because the police abstract stated that the deceased was a pedestrian and did not mention the presence of a stalled vehicle at the scene of the accident.

29. The witness statement of the bus driver, Juma Matata Kilungi, was attached to the appellant's (*defendant*) list of documents. He said that he was ferrying passengers from Mombasa headed to Busia. As he approached pipeline area, he noticed a minibus on the right verge. The minibus had stopped facing the Mombasa direction. He saw that there was a crowd outside the minibus and put on his full lights. This statement corroborates PW3's testimony that indeed their vehicle had stalled at pipeline area.

30. Although the bus driver, in his statement, gave a different account of how the deceased was hit, he was not called as a witness and therefore, his evidence was not tested in cross examination. On the other hand, PW3 was cross examined and his testimony remained consistent throughout. No inspection report was produced to dislodge PW3's evidence that indeed the deceased was hit by the left side of the bus as it swerved further left (*where deceased was standing*) to avoid colliding with the oncoming lorry which had encroached on its lane.

31. I found no contradiction in the police abstract by indicating that the deceased was a pedestrian. It must have indicated as much because she was on the road. Indeed, I am convinced that the deceased was a passenger in the stalled minibus and had crossed the road to answer a call of nature. It is my considered view that PW3 was a credible witness and the learned trial Magistrate did not err by relying on his

evidence.

32. As for the apportionment of liability I am inclined to agree with the respondent that indeed the learned trial Magistrate devised a theory when he stated thus;

> **a. "I trust that my sister must have noted some negligence on the part of the deceased for her to make those findings"**

33. The learned trial Magistrate admitted that he had not seen the contents of the police file. With respect, I find that his sentiments were speculative and they influenced the way he apportioned liability. I am however in agreement with him that indeed, the bus driver ought to have been more careful than a pedestrian because within his control was a lethal machine while the pedestrian had none.

34. The circumstances of this case are such that, the liability apportioned to the deceased should have been very minimal. The respondent had proved its case on a balance of probabilities and no rebuttal was offered by the appellant. In my view, an apportionment of liability at 90:10 against the deceased would have been reasonable in the circumstances.

QUANTUM

35. The guiding principles in deciding whether or not to interfere with the award of damages made by the trial Court have been established in various judicial pronouncements.

36. In the celebrated case of ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another*** **[1982-88] 1 KAR 727** the Court of Appeal held that in order for an appellate court to disturb the quantum of damages awarded by a trial judge

> **"it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…"**

37. Ground 3 of the appellant's memorandum of appeal was that the learned trial Magistrate erred in fact and law by failing to use the minimum wage applicable for the year the alleged accident occurred. This essentially means that the complaint is about the multiplicand and that the appellant was satisfied with the rest of the formula.

38. PW1 testified that the deceased was in the business of selling clothes and would earn Kshs. 500 per day.

39. Due to non-availability of records in that kind of business, the learned trial Magistrate adopted the minimum wage that was in force in 2006 for a tailor.

40. The deceased died on 06/09/2008. As rightly submitted by the respondent, the 2006 minimum wage guidelines were not reviewed in 2007 and 2008. Therefore, the multiplicand used by the learned trial Magistrate was correct.

41. The upshot is that the award of quantum will not be disturbed save as regards apportionment of liability.

42. For avoidance of doubt, the award should be as follows:

a. Damages under the Fatal Accidents Act	1,156,160
b. Damages under the Law Reform Act	120,000
c. Special damages	30,500
d. Total	1,306,660
e. Less double entitlement	120,000
	1,186,660
f. Less 10% contribution	118,666
g. Award	**1,067,994**

43. CONCLUSION

> **i. The appeal fails and the cross appeal succeeds partially.**
>
> **ii. On costs the appellant will get 10% of the costs in the appeal.**

SIGNED, DATED AND DELIVERED THIS 12TH DAY OF APRIL 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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