



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 68 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

I A suing as the administrator of the estate of CM.....APPELLANT

AND

ABRAHAM IMATHIU.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. Mungai, CM dated 1st August 2017 at the Chief Magistrates Court at Isiolo in Civil Case No.40 of 2016)

JUDGMENT

1. The deceased was a child. Although the proceedings make reference to him as a minor, I prefer to use the term child as this is consistent with the provisions of the *Children Act (Act No. 8 of 2001)* which sought to do away with the old terminology.
2. The appellant's case was that on 5th March 2016, the child was walking off the Isiolo-Modogashe road when the respondent's motor vehicle registration number KBP 962J veered off the road and hit him causing him fatal injuries. His mother, as administrator of his estate and dependant, lodged the claim for damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*. The trial magistrate dismissed the case thus precipitating this appeal.
3. In the memorandum of appeal dated 15th August 2017, the appellant complained that the trial magistrate erred in holding the appellant fully liable particularly in view of the fact that the appellant was a child and he did not have a sense of road safety and could not be held fully liable for the accident. The appellant contended that the trial magistrate failed to appreciate the fact that the respondent was fully responsible for the accident. Counsel for the appellant fortified these submissions by oral and written submissions.
4. The respondent opposed the appeal through his counsel who submitted that the trial court analysed the evidence and came to the correct conclusion and that therefore the court should dismiss the appeal.
5. In resolving the issue of liability I am called upon to review the evidence. In this regard, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).
6. Although she did not witness the accident, the appellant (PW 1) testified that the deceased was 15 years old. Stephen EROTO (PW 2) adopted his written statement and recalled that on the material day, he was in a shop when he saw the respondent's motor vehicle hit the child. He recalled that the child was on the left side about 3 meters off the tarmac road, when a vehicle came speeding from Isiolo heading to Modogashe, veered off the road and hit the child who was thrown on the road. He confirmed that the respondent had been charged with causing death by dangerous driving. In cross-examination, he stated he was about 15 meters away from the scene. He further stated that the vehicle was speeding and that there were no speed bumps on that part of the road.
7. PC James Mwaura (PW 3) confirmed that an accident took place on the material date and he produced the police abstract. He told the court that he visited the scene after the accident and that according to the investigation, the child crossed the road from right to left as one heads to Modogashe and was knocked down while crossing the road. He told the court that PW 2 was one of the proposed witnesses in the traffic case against the respondent and that in his statement, he stated that he heard a person shouting and on looking he saw a child lying on the road. In cross-examination, he stated that while the vehicle did not have any pre-accident defect, the front bonnet was dented and windscreen smashed after the accident. He also referred to the sketch plan which indicated that there were skid marks on the left lane of the tarmac but they did not leave the road and that the deceased was hit on the path of the skid marks. In re-examination he stated that the sketch map was drawn after the child's body had been removed from the scene and that skid marks came before the probable impact.

8. The respondent (DW 1) told the court that on the material day, he was driving at a speed of about 30-50kph when he saw five boys, who appeared to be playing, on the left side of the road. As he got close to the boys, one of them jumped onto the road. He slammed the brakes while blowing the horn. The child landed onto the windscreen, rolled and landed on the tarmac. He stopped the vehicle and took the boy to the hospital. Although he was charged, DW 1 testified that the case did not take off. He also testified that there was a speed bump not more than 110 metres from the scene of the accident. DW 1 blamed the child for jumping onto the road.

9. After reviewing the evidence, the trial magistrate held that since the child was 15 years old, he knew how to take care of himself and ought not to have rushed to the road. He concluded that from the totality of the evidence, the child dashed onto the road when the vehicle was very near and that he could not attribute any negligence on the part of the respondent in the circumstances.

10. I have reviewed the evidence as required of the first appellate court and the issue is whether the appellant proved her case on the balance of probabilities. The appellant's case set out in the pleadings is that the child was walking off the road when he was hit by the respondent's motor vehicle which veered off the road was supported by PW 2. I would mention that although PW 3 stated in his evidence that PW 2's statement to the police was that he never witnessed the incident, the statements were not put to PW 2 or produced in evidence. However, this evidence was led and admitted into evidence by counsel for the appellant and there was no reason for PW 3 to lie.

11. In my view, the resolution of this matter lies in the testimony of PW 3 who was an independent witness and who visited the scene 15 minutes after the accident. He recalled that there were skid marks on the tarmac road which stopped at the point of probable impact with the child. This evidence, coupled with the fact that PW 2 stated to the police that he only heard the child scream and then saw the child on the road, makes it more probable that the child was crossing the road when he was hit by the respondent. It is trite law that parties are bound by their pleadings. In the plaint, the appellant set out to prove that the vehicle veered off the road and hit the child, she failed to do so. Having so found, I must affirm the finding of the trial magistrate dismissing the appellant's case.

12. In the memorandum of appeal, the appellant stated that the trial magistrate erred in failing to assess and award damages in favour of the appellant. It is clear from the judgment that the trial magistrate nevertheless assessed damages after dismissing the appellant's case. This ground of appeal is misplaced and is accordingly dismissed.

13. For the reasons I have set out, this appeal be and is hereby dismissed with costs to the respondent assessed at Kshs. 30,000/-.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A. MABEYA

JUDGE