



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 310 OF 2017

MWAKA CHIJE BARISA.....APPELLANT

VERSUS

ABDUL HAKIM ABDALA.....1ST RESPONDENT

SILVER STAR PARCEL SERVICE LTD...2ND RESPONDENT

(Being an Appeal from the Judgment and/ or Orders of the Chief Magistrates Court, Milimani Commercial Court, Nairobi (hon. Ms. Gichobi given on the 19th day of May, 2017)

JUDGMENT

The appellant is the widow of the late Moses Chije Barisa who died as a result of a road traffic accident that took place on 23rd June, 2006 along Mombasa- Nairobi road. The deceased was the driver of motor vehicle registration No. KAR 713 B when it collided with motor vehicle registration No. KAR 728 D.

The appellant sued the 1st and 2nd respondents blaming them for the negligence which led to the death of her husband. The 1st respondent was the driver of motor vehicle registration No. KAR 728 D while the 2nd respondent was the owner thereof. The respondents denied the appellant's claim in the lower court.

The case was heard in the lower court whereby the appellant testified as P.W. 1 and called P.W. 2 who was the finance officer of Kenya Evangelical Lutheran Church, the employer of the deceased. She produced the death certificate, the grant ad litem and the police accident abstract to establish her capacity to prosecute the case against the respondents. In addition she produced several receipts related to special damages claimed to assist the court in assessment of damages. P.W. 2 on the other hand produced the payslip of the deceased showing his monthly salary.

The respondents did not offer any evidence in the trial. Following that hearing, the lower court delivered its judgment on 19th May, 2017 dismissing the appellant's suit with costs to the respondents in the following words,

“The plaintiffs claim as against the defendants is dismissed with costs to the defendants for want of proof of negligence and/ or capability on the part of the defendants.”

The dismissal notwithstanding, the court proceeded to assess damages at the total sum of Kshs. 612,900/=, had the appellant succeeded. Aggrieved by the said judgment, the appellant lodged this appeal. Only the appellant's counsel filed submissions to the appeal. The counsel for the respondents did not appear for the hearing of the appeal notwithstanding service upon his firm of all notices of either hearing or mention.

I have, as required of me, evaluated the evidence adduced before the trial court with a view to arriving at independent conclusions. P.W. 1 and P.W. 2 did not witness the accident. No eye witness was called and the only evidence relating to the accident was the police accident abstract produced as exhibit 4 in the trial.

In addressing the police accident abstract and the issue of liability, the trial court said as follows,

“Police Abstract tabled in evidence shows that Abdul Akim Abdala, the 1st defendant herein who was the driver of motor vehicle KAR 728 D belonging to the 2nd defendant was charged with causing death by dangerous driving but the abstract further reads case pending before court. Outcome is not given and neither was it given at trial. Indeed P.W. 1 in cross-examination stated that no one was charged with the death of her later husband.

For the record, this court has no way of assessing liability since there is no material before it detailing how the accident occurred. There is nothing to show that the defendants were to blame for the accident and not the other way round.

Consequently, but sadly, it's my finding that the plaintiff did not proof (sic) culpability on the part of the defendants even on a balance of probability and the plaintiff's case herein is dismissed."

The respondents were represented by counsel in the lower court. The police accident abstract exhibit 4 was produced by the appellant in her evidence in chief. This was done without any objection from the defence. The appellant was also cross-examined by counsel for the respondents and again, no question was raised about the police accident abstract. That accident abstract if anything, confirms the accident took place as alleged by the appellant. It also shows that Abdul Akim Abdala was charged with the offence of causing death by dangerous driving vide Traffic Case File No. 13 of 2003. These details appear at paragraphs 3, 4 and 5 of the accident abstract aforesaid.

Paragraph 7 is supposed to capture the result of investigations or prosecution if known. The entry that appears in that paragraph is that the case was pending before court. That information in itself points to the fact that there was prima facie evidence that the 1st respondent was culpable and that is why he was charged with the offence of causing death by dangerous driving. It matters not that the case had not been determined before the trial court.

It is not the conviction or acquittal in a traffic case, or indeed any criminal case, that impacts on liability on the offending party. This is because proof in any civil proceedings is on a balance of probability. It was therefore in my view, misdirection for the trial court to conclude that the court had no way of assessing liability because the police accident abstract was sufficient evidence in this case to establish liability on the part of the 1st respondent. That finding was therefore against the evidence tendered by the appellant.

Even in the absence of the police accident abstract, the 1st respondent was in control and management of the motor vehicle registration No. KAR 728 D which collided with the motor vehicle which was being driven by the deceased. The principle of *res ipsa loquitur* is applicable in the circumstances of this case. Under this principle, the fact that the accident occurred is in itself an inference of negligence on the part of the 1st respondent.

The inference of negligence cannot be discounted in the absence of any explanation from the 1st respondent. It will be recalled the respondents did not offer any evidence during the trial in the lower court.

The counsel for the appellant has cited several authorities to assist the court in reaching a just determination in this appeal. These include Joseph Kihinda Maina vs Evans Kamau Mwaura and 2 Others (2014) e KLR, Esther Nduta Mwangi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007, Margaret Waithera Maina vs. Michael Kimaru (2017) e KLR.

I find that on the facts, the evidence and decided cases the appellant had established liability on the part of the 1st respondent. It was not denied that he was driving the motor vehicle with the authority or as driver of the 2nd respondent. Vicarious liability therefore attaches upon the 2nd respondent in the circumstances of the case.

The trial court proceeded to assess damages payable to the appellant. I have carefully considered the approach used by the trial court, and believe the correct principles and assessment were correct. The awards made thereunder are reasonable and therefore uphold the same. In the end, this appeal succeeds both on liability and quantum.

Accordingly, the lower court judgment on liability is set aside and in place thereof, there shall be judgment for the appellant against the respondent jointly and severally. The appellant is hereby awarded a total of Kshs. 612,900/= plus costs of the suit both in the lower court and in this appeal.

Dated, signed and delivered at Nairobi this 29th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE