



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
HIGH COURT CIVIL APPEAL NO. 29 OF 2017

SALMIN MBARAK AWADHIAPPELLANT

-VERSUS-

EMMA NTHOKI MUTWOTARESPONDENT

JUDGEMENT

1. The Respondent lodged **Makindu CC No. 166/08** claiming special and general damages arising from the Road Traffic Accident which arose on **19/11/2006**. He claimed to have been a pedestrian along **Mombasa-Nairobi** road when the driver of motor vehicle **KAV 673W/ 2C 44735** so negligently driven that it knocked him occasioning him serious injuries.

2. The matter had been heard at the formal prove stage but upon setting aside *ex parte* judgement at the appellant instant, the matter was reheard. However before the respondent husband could testify, he passed on and thus his wife was substituted to continue with the suit.

3. The matter was heard by the trial magistrate and she held the Defendant/Appellant equally to blame and awarded Respondent **Kshs.256,000/=** in general and special damages.

4. Being aggrieved by the above decision, the Appellant lodged instant appeal and set out the following grounds:-

1) That the Learned Trial Magistrate erred in finding that the plaintiff had proved her case against the 3rd Defendant when the evidence on record could not support such a finding.

2) That the Learned Trial Magistrate erred in finding that the 3rd defendant owed a duty of care to the deceased when the evidence on record was clear that the deceased jumped onto the road in an attempt to rob the 3rd defendant and was therefore the author of his own misfortune.

3) That the Learned Trial Magistrate erred in failing to find that the plaintiff had not established that the deceased was involved in the accident involving the 3rd Defendant's motor vehicle and/or that the alleged deceased died as a result of injuries sustained in the alleged accident.

4) That the Learned Trial Magistrate erred in failing to find that the plaintiff's case was riddled with material contradictions that could not sustain a finding that the deceased was involved in the said accident.

5) That the Learned Trial Magistrate erred in failing to find that the plaintiff/respondent's evidence was of no probative value and could not establish a case as required in law.

6) That the Learned Trial Magistrate erred in failing to find that the failure by the plaintiff to produce the original traffic investigation file was fatal to the plaintiff's claim.

7) That the Learned Trial Magistrate erred in failing fully consider the defence case and evidence.

8) That the Learned Trial Magistrate erred in law in awarding the plaintiff/respondent excessive damages.

5. During directions the parties agreed to canvass the appeal via written submissions which they filed and exchanged.

6. The duty of this court will be to re-evaluate, re-assess and re-evaluate, and re-analyze the evidence on record and determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way.

7. See the case of **SELLE –VS- ASSOCIATED MOTOR BOARD COMPANY LTD (1968) E.A. 123, 126** where the court considered the principle upon which it acts in a first appeal noting as follows:

“Briefly put they (the principles) are that, this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge’s finding of fact

if it appears either that he has clearly failed on some point, to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

8. The plaintiff's case is that on the material date they were going home walking along **Nairobi-Mombasa** road in company of her husband. They were on the left side of the road facing Nairobi. While so walking with her husband ahead of her the driver of motor vehicle **KAV 673W** headed to Mombasa at high speed started to overtake a lorry ahead of it.

9. In the process it came face to face with another lorry coming from Nairobi side. The lorry **KAV 673W** managed to overtake but overshot the tarmac to avoid collision with oncoming lorry and in the process knocked her husband and threw him into the ground off the road.

10. The motor vehicle **KAV 673W** did not stop but ran away but was arrested and impounded at **Makindu Road Block** after other motorists notified the police and was handed over to **Mtito Police Station** the next day.

11. PW1 was a doctor who examined the PW2 husband and produced report on his injuries. PW3 was police officer who delivered and produced police report in court.

12. The defence called 2 witnesses DW1 and DW2. DW1 admitted knocking down a pedestrian on the material date by his motor vehicle **KAV 673W 2C 4735**. He confirmed on the material date his above motor vehicle knocked down a person in **Mtito Andei** area.

13. He narrated that the person who was crushed had jumped to his motor vehicle and tried to gain entry but was knocked down.

14. DW1 was with DW2 in the motor vehicle **KAV 673W** at 11.30 p.m., a person jumped to the window of his door and then moved to the other side's door (driver's side). The motor vehicle was moving slowly as there was another motor vehicle ahead.

15. There was a sharp bend. The motor vehicle knocked down the person and he fell on the road. Later, they reported to police station. The motor vehicle never stopped at the scene as they feared for their lives.

16. It is on that evidence the Trial Magistrate held that the DW 1 had a duty of care to ensure that he did not knock the pedestrian down and also the deceased owed the duty of care to the the motor vehicle which crushed him. Thus both were equally to blame.

17. The Appellant submits that the Respondent did not prove case beyond reasonable doubt and relied on **KIRUGI & ANOTHER –VS- KABIYA & 3 OTHERS (1987) KCR 347** which held that,

“The burden is always on the plaintiff to proof his case on balance of probabilities even if the case was heard on formal proof.”

18. The court is urged under the aegis of **SELLE –VS- ASSONATED MOTORS BOAT CO AND OTHERS (1968) EA 123** to re-evaluate evidence and make a dependent findings and conclusion.

19. The Appellant submit that the Appellant driver did not owe a duty of care to the PW2 husband and same was not proved.

20. The pedestrian was committing a crime thus he was to blame for the accident. Thus the apportionment of liability on 50% 50% was erroneous.

21. The Applicant also raises the issue of the identity of the victim PW1 examined one **Fredrick Waita Mutuku** and produced medical report. The **P3** form talked of **Mutuku Mwangangi**. The police abstract talked of **Mutuku Mwangangi Sati**. The death certificate had the name of **Fredrick Waita Mwangangi**.

22. Initial treatment notes showed **Mutuku Sati**. The ages in those documents ranged from 31 years, 44 and 57. Thus there was doubt as whether they referred to the victim knocked that material day.

23. The Respondent submitted that the trial court rejected evidence that the pedestrian was a robber who attempted to rob the driver of **KAV 673W**. The driver did not stop after knocking passenger and did not report robber crime at **Mtito Andei Police Station**.

24. The Respondent that said the driver of lorry admitted knocking the pedestrian thus should have been held **100%** to blame. The accident was on **19/11/2006** and the pedestrian survived up to **27/07/2009** and even was issued P3 form and police abstract and was never arrested on allegations of robbery or attempt thereof.

25. PW2 testified she witnessed the knocking down of her husband. There was no robbery evidence either reported or investigated by the police. Thus the lorry driver DW1ought to have been blamed 100%. The fact that driver of the lorry was charged was not a reason to exonerate him in liability herein.

26. On age and name, the death certificate of the pedestrian was produced and it gave correct name and age. Though Respondent never appealed, he seeks driver to be held 100% blameworthy.

27. The court has perused the pleadings, evidence on record and submissions, I find the issue emerging as follows:

- ***Who was to blame for the accident?***

- ***Was the person involved in the accident the Respondent’s husband?***

- ***What is the order as to costs?***

28. The PW2 testifies that she saw the lorry overshoot the tarmac while overtaking. Thus it moved out of the road and knocked her husband. DW1 and DW2 on their part they testified that the pedestrian was knocked while he was jumping into the lorry trying to gain entry. They term the attempt to be a robbery bid which failed.

29. Whereas the DW2 says the deceased fell outside the road after being knocked. DW1 and DW2 state that he fell on the road.

30. PW3 police officer says that the lorry driver reported that he was attacked by robbers vide OB of **19/11/2006**. The trial court seem not to believe either side via observation of the demeanor of the witness and evidence tendered as who was to blame and thus apportioned liability equally.

31. The PW2 narration as to how accident occurred seem to be on exaggeration as for trailer to travel at high speed, overshoot tarmac and overtake an oncoming motor vehicle and does not overtake looks incredible. The picture does not emerge clearly as to why her husband who was walking along the road with her was knocked and she was missed.

32. On the other hand the driver of the lorry says the person tried to gain entry to the lorry and failed thus he knocked him. Then he ran away and reported of a robbery attack. His story also looks incredible. The victim was alive for several months after the accident, he was furnished by the police with an abstract but the police never recorded any statement on alleged robbery attempt nor investigate the same allegation.

33. The evidence by plaintiff and the defence was conflicting on the correct fashion of the happening of the accident. The fact remains that the victim was knocked by the appellant motor vehicle as admitted but court was not convinced on each sides stories on the actual happening of the accident and thus found same not credible leaving the court with no option but to blame both sides equally.

34. There are plethora of authorities which are to the effect that where the court had no concrete evidence to distinguish the blame between the two sides in accident incident, the court ought to apportion liability equally. See **BERCKEY STEWARD LTD AND OTHERS –VS- LEWIS KIMANI WAYAKI (1982-88) KAR 1118** and also **BAKER –VS- MARKET HARK BROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD (1953) IWLK**.

35. The trial court called it mutual duty of care owed between driver and the pedestrian and thus breach by both driver and pedestrian of that duty of care thus giving birth to equal blame. The trial court was correct in apportioning blame equally and thus the ground on liability is rejected.

36. There was no appeal on quantum. Thus same remains as awarded by the trial court.

37. As regards the identity of the victim, the PW2 was eye witness of the accident and the victim was her husband. There are no material discrepancies in names in the exhibited documents (P3, abstract and medical report) which would warrant court to overturn the instant verdict by the trial court.

38. The court has perused the documents exhibited to arrive into that conclusion.

39. The court therefore finds that the appeal has no merit and same is dismissed.

40. The parties to bear their own costs. This is because the Respondent was also seeking judgement on liability to be overturned unsuccessfully.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 26TH DAY OF APRIL, 2017.

C. KARIUKI

JUDGE

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