



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 116 OF 2013

BIRIR

1. LILIAN

2. RODGERS KIPKOSGEI (Suing a legal representative
of

the estate of **LINAH KERENG KOECH (DECEASED)** **APPELLANTS**

VERSUS

AMBROSE LEAMON **DEFENDANT**

(Being an appeal from the judgment/decree of Hon. S. Mungai Chief Magistrate Delivered on 3rd July 2013 in Nakuru CMCC SPMCC NO. 262 of 2008)

JUDGMENT

1. The appeal hereof arises from the judgment of the lower court that dismissed the appellants' case with costs. The appellants are the administrators of the estate of **Linah Kereng Koech** who suffered fatal injuries on 15th July 2005 in a road traffic accident along the Mogotio-Eldama Ravine road where she was knocked down by a motor vehicle Registration Number KAT 329 being driver by the Respondent. After a full trial, the court made a finding that the Respondents did not prove their case on a balance of probability. This finding prompted the appellants to lodge the appeal.

2. The grounds of appeal are three fold:

On liability of quantum of damages the issues framed by both the appellants and the Respondents are:

1. whether the appellant proved their case on a balance of probability.
2. whether a court can find a driver of a motor vehicle liable in negligence based on fact of a traffic offence conviction without any further evidence of culpability.
3. Quantum of damages.

3. The Appellants case before the trial court was presented by one of the appellants, Rodgers Kipkoge Koech, being one of the administrators who testified that the deceased's mother was 63 years old and was informed of the demise by his brother. That he went to the scene and found the body of the deceased on the windscreen of the accident motor vehicle registration Number KAT 329D. That later, the police visited the scene with the Respondent. He later obtained a police abstract that recommended that the driver of the said vehicle be charged, and indeed he was charged with the offence of causing death by dangerous driving and convicted. He did not produce the traffic court proceedings. It was his testimony that based on the traffic court proceedings. It was his testimony that based on the traffic court verdict, the Respondent was to blame. He stated that he did not witness the accident.

He further – testified that his mother was assisting him and his other siblings with her income of Kshs.25,000/= from sale of milk from her cows and cereals from her *shamba*. He did not produce any evidence earnings.

4. P2, a Police Officer Douglas Muthinja attended court and produced the police abstract. He was not the investigating officer. He stated that the respondent was charged with a traffic offence of causing death but the case was not finalised. He stated that he did not know how the accident occurred.

5. The respondent's case was that as he was driving along Mogotio-Eldama Ravine, there was an oncoming *matatu* with lights on, that it swerved and he saw a person at the middle of the road, that he tried to swerve to the left but the edge of the drivers side of this car hit the pedestrian. It was his evidence that the point of impact was on the left side and that upon swerving, the vehicle did not go off the road. He confirmed that he was charged and convicted for the offence of causing death by dangerous driving but on appeal the conviction was set aside. He however did not produce the traffic court proceedings nor the judgment of the High Court that set aside the conviction and sentence.

6. By its judgment dated the 3rd July 2013, the trial court, upon analysis of the evidence made a finding that the Appellants did not prove their case to the required standard. It was its finding that the deceased was crossing the road at night in the face of on coming traffic and was to blame and the evidence on how the accident occurred came from the Respondent. The court found that the Appellants did not tender any evidence on how the accident occurred nor the judgment of the traffic case.

7. The trial court went ahead to state that the appellants failed to call any eye witness who could have established that the Respondent was the author of the accident. It further found that the Respondents evidence was unchallenged, and proceeded to dismiss the suit.

8. In the matter of quantum of damages, the trial court assessed damages as was expected. The age of the deceased was undisputed, 63 years. No proof of earnings was tendered and therefore a sum of Kshs.3,000/= per month, a multiplier of 3 years and a multiplicand of 1/3 were adopted in calculating loss of dependency of Kshs.36,000/=. He however came to the conclusion that there were no Dependents as all her children were self dependent by their own testimony. He also stated that he would have awarded a sum of Kshs.120,000/= under the **Law Reform Act** had the appellants proved their case on a balance of probability.

9. This court as the first appellant court is minded to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions. See **Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (EA) 123**. As stated above, three issues arise for the court's determination:

(a) whether the plaintiff/appellants proved their case on a balance of probability. The appellants case that they did not know how the accident occurred. The police officer who testified was of no assistance other than producing the police abstract, and stating that the Respondent was to blame. The respondent had been charged in a traffic court and the case had not been determined. That brings me to the second issue; a framed by the appellant.

(b) whether a court can find a driver of a motor vehicle liable in negligence based a conviction in a traffic offence without any other evidence of culpability. The issue captures the

facts of this matters.

10. There having been no eye witness to the accident and the police investigations report not furnished to the court, the only submission by the appellant was that the trial court should have found in favour of the appellant in the face of the conviction and sentence of the Respondent in the traffic offence which they did not prove by way of proceedings or judgment of the traffic court.

Section **107, 108 and 109 of the Evidence Act** places the burden of proof of a particular fact on the person who wishes the court to believe in its existence unless it is proved by law that the proof of the fact shall lie on any particular person.

The appellants have urged in their written submissions that by virtue of the traffic offence conviction, the respondent was to blame for the accident. It was relied on the provisions of Section 44 of the Evidence Act that a conviction by the traffic court is conclusive evidence of negligence and faulted the trial court for dismissing the case, and relied on the case **Karanja -vs- Malele (1983) KLR 143**. As stated earlier, no copy of the traffic court judgment was availed to the court.

11. On the same issue, the Respondent in his written submissions also relied on **Section 107 of the Evidence Act** and state that it was the duty of the appellants to discharge the burden of proof and cannot shift the said burden to the respondent, that they did not prove who was to blame. All their witnesses were not eye witnesses. It is submitted that the respondents evidence on the manner of the occurrence of the accident therefore remains uncontroverted and unchallenged. It is further stated that the appellants in their testimony did not blame the respondent for the accident.

12. I have considered the evidence by the appellants. They did not blame the respondent for negligence. They did not call any evidence of how the accident occurred. They in effect did not discharge the burden of proof of the allegations they stated in their pleadings. They relied only on the respondents conviction in the traffic offence and for which they produced no evidence other than a statement appearing on the police abstract.

I have considered **Section 47A of the Evidence Act** that reads:

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall ---- be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

In **David Kinyanjui & 2 Others -vs- Meshack Omar Monyoro – civil Appeal No.125 of 1993** the Court of Appeal held that a conviction does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant – in a civil trial.

However, in **Francis Mwangi -vs- Omar Al-Kurby C.A No. 87 of 1992**, the same court was of the view that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence and therefore where both appellant and Respondent did not give evidence, but there is evidence of conviction, there is nothing on record to show in what way, if at all, the respondent contributed to the incident.

In the present case, in his own admission, the respondent was charged and convicted, but also stated that the said conviction and sentence was set aside on appeal.

It is my considered view, and I agree with the Judges of Appeal in the above cases, that a conviction in a traffic court does not bar the respondent from raising a defence on contributory negligence in a civil suit.

13. It is not clear from the scanty and one sided evidence as to who between the two parties was to blame. The issue of contributory negligence plays itself clearly as pleaded in the respondents defence in the trial court. But again, the appellants tendered no evidence at all. How then would the court be able to apportion liability on uncontroverted and unchallenged evidence by the opposing party?

See **Francis Mwangi** (supra).

It is also my view considered that despite the conviction of the Respondent, the deceased may have also been guilty of carelessness as was testified by the Respondent and which testimony was not challenged.

See also **CA No. 85 of 2012 Kithini Titus -vs- Almidad Panel Services and Another**.

14. The standard of proof in criminal cases is slightly higher than of civil cases, and in particular in traffic cases. The acquittal or conviction in a traffic case, in my considered view, cannot be a bar to a prosecution in a civil case on a claim for damages and the court is not bound to follow the investigating officers opinion in reaching its decision in a civil claim.

Justice Visram (as he then was) in **Statpack Industries -vs- James Mbithi Munyao C.A No. 152 of 2003** stated that a plaintiff must adduce evidence from which, on a balance of probability, connection between the two may be drawn. He further went on to state that not every injury is necessarily a result of someone's negligence, that an injury *per se* is not sufficient to hold someone liable for the same.

Just like the trial court, this court is unable to hold that the appellants proved their case to the required standard.

15. I have stated that in my view which has been the view of other courts, that a conviction in a traffic offence alone is not sufficient without further evidence to hold the respondent liable or culpable. There must be evidence by the appellant to show why and how the respondent is culpable. Mere statements are not enough.

In this case, there is absolutely nothing on record to show in what way, if at all, the Respondent was to blame or contributed to the accident.

Having stated as above their court finds that the appellant failed to prove their case on a balance of probability.

The appeal therefore fails on grounds 1 and 2.

16. the 3rd ground of appeal was on quantum of damages, said to amount to an erroneous estimate of reasonable compensation to the deceased's estate.

A court on appeal will be very slow to interfere with the trial court's discretion in the assessment of damages unless it is shown that in arriving at the said quantum, the trial court took into account irrelevant factors of left out relevant ones or that the award is so low or wholly erroneous estimate of the damages. See **Kemfro Africa t/a Meru Express Services & Another -vs- Lubia & Another (No. 2) (1981-88) L KAR 727**. I am satisfied that the trial court addressed its mind to all the factors that it ought to in assessing the damages. The deceased's earnings were not proved. Dependency too was not adequately proved under the **Fatal Accidents Act**. The court would have awarded a sum of Kshs.30,000/= towards funeral expenses and Kshs.120,000/= under the **Law Reform** had the claim been proved as stated. The appellant has not shown in what way the trial court erred in the award of damages.

This ground in my view is without merit. It is also dismissed.

17. In its totality, and for the reasons stated above, the appeal is dismissed with costs.

Dated, signed and delivered in open court this 28th day of January 2016

JANET MULWA

JUDGE

