



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 6 OF 2016**

**BETWEEN**

**SAMUEL STEPHEN WERE suing as the representative**

**of JARED OCHIENG ODUOGO (DECEASED) ..... APPELLANT**

**AND**

**SUKARI INDUSTRIES LIMITED ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. B.R. Kipyegon, RM at the Senior Resident Magistrates Court at Ndhiwa in Civil Case No. 3 of 2014 dated 30<sup>th</sup> September 2014)***

**JUDGMENT**

1. In the subordinate court, the appellant filed suit on behalf of the estate and beneficiaries of Jared Ochieng Oduogo (“the deceased”) claiming damages as a result of an accident which resulted in the death of the deceased. According to the plaint, the deceased was riding a motorbike along the Uiri-Ndhiwa Road when the respondent’s driver negligently drove a Holland tractor and trailed registered as KAQ 576P/ZB 2972 and collided with the motorbike resulting in his death. In its defence, the respondent averred that the accident was caused substantially or entirely by the negligence of the deceased.
2. According to the learned magistrate, the appellant failed to prove negligence against the tractor driver on the balance of probabilities and as a result dismissed the claim. He however proceeded to assess damages under the *Law Reform Act (Chapter 26 of the Laws of Kenya)* and *Fatal Accidents Act (Chapter 32 of the Laws of Kenya)* and awarded Kshs. 1,030,000/-. The appellant appeals against the finding on liability only. The respondent did not file a cross-appeal against the award of damages.
3. As this is the first appeal, I am alive to the responsibility of the court. This court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123* and *Kiruga v Kiruga & Another [1988] KLR 348*). This mandate was succinctly summarised in *Peters v Sunday Post Ltd [1958] EA 424* as follows;

*Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide...*

4. The appellant called two witnesses. Samuel Stephen Owere (PW 1) recalled that on 16<sup>th</sup> August 2013 at about 4.00pm, he was informed that the deceased had been knocked down by a tractor. He immediately rushed to the scene where he found the deceased's body lying on the left side of the road with his motorcycle. The tractor was ahead of the body. On cross-examination he stated that the tractor was about 50 metres ahead.
5. Nyagol Isaiah Ouma (PW 2) testified that on the material day at about 7.00pm, he alighted from a motorbike and was walking along the Amoyo-Riat road when a motorcyclist passed him carrying two passengers followed by a tractor. He further testified that the tractor was moving at a high speed and that it appeared to have lost control. He stated that the tractor knocked the motorbike with the passengers ahead of it and stopped at a distance of about 60 metres. In cross-examination, he stated that the accident occurred at about 7.30pm but it was not dark. He insisted that the motorcycle and the tractor went ahead of him and that the accident occurred on the left side of the main road.
6. The tractor driver, Paul Sipitali Lutome (DW 1) testified that the accident took place at about 4.30pm. He testified that as he was driving at a speed of 15kph, carrying a load of stones, he met another tractor and a motorbike carrying two pillion passengers. As the motorbike tried to pass in between the two tractors, he swerved left to avoid a head on collision. Unfortunately the motorbike hit the trailer. Since he feared for his life, he took off to inform his employer. He admitted he was later charged with careless driving. In cross-examination he stated that the motorcycle was going in the opposite direction and was on the right side of the road.
7. It is well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable. This is consistent with the provisions of **section 107(1)** of the **Evidence Act (Chapter 80 Laws of Kenya)** which provides;

*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

8. In this case, the burden on the appellant before the trial court was to prove on the balance of probabilities that the respondent was negligent and therefore liable for causing the accident. There is no doubt that there was a collision between the motorbike and the tractor. The question is whether the appellant proved negligence. This is a case where there was conflicting evidence on both sides and in this respect I recall the words of Spry, VP in **Lakhamshi v Attorney General [1971] E A 118, 120** that;

*It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.*

9. PW 2 stated that he saw the respondent's tractor following the deceased's motorbike. Both PW 1 and PW 2, who saw the deceased's body after the collision, confirm that the deceased was lying

on the left side of the road with tractor some distance ahead. On the other hand DW 1's version of events is that the accident was the result of him trying to avoid a head on collision. If DW 2's version is correct that the rider hit the back of his trailer, it is more likely that the deceased's body would have been found in the middle of the road as there was another tractor coming from the opposite direction. There is no reason to disbelieve the appellant's witnesses and I do not think the fact they their testimony as to the time the incident took place, though inconsistent, is material to the determination of liability. What is true is that the incident took place in the evening before it was dark.

10. The appellant's case has more weight since the respondent's driver admitted that he was charged with careless driving. PW 2's testimony that he saw two people on the motorbike is corroborated by the police abstract which shows that two people died as a result of the accident. On the other hand, DW 1 stated that he saw three people on the motorbike yet it is unlikely that in such a serious accident, a third person would have escaped unhurt. I find and hold that the evidence, taken as a whole, points to the fact that the tractor was being driven behind the motorbike at a high speed when it lost control and hit the motorbike ahead of it. Since the motorbike was hit from behind, it would have been very difficult, if not impossible, for the deceased to avoid the accident.

11. I also disagree with the learned magistrates conclusion that, "*the deceased died of a complete crush of the head ... out of some unexpected mischief during the ride rammed his head on the tractor's metal trailer.*" This conclusion is inconsistent with the evidence and does not explain why the second pillion died unless the tractor hit the motorbike from behind ran over the rider and his pillion passenger. I therefore find the respondent fully liable.

12. I allow the appeal. The judgment of the subordinate court dismissing the appellant's claim is set aside and substituted with judgment for the appellant for the sum of Kshs. 1,030,000/=. The respondent shall bear the full costs of the trial and this appeal.

**DATED and DELIVERED at HOMA BAY this 31<sup>st</sup> day of May 2016.**

**D.S. MAJANJA**

**JUDGE**

Ms Kuke instructed by Everlyne Kuke and Company Advocates for the appellant.

Mr Wangonda instructed by L. G. Menezes and Company Advocates for the respondent.