



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 128 OF 2012

ELIZABETH WANJIRA GICHOHI.....APPELLANT

VERSUS

DANIEL MWIRIGI NGEERA.....RESPONDENT

(Being an appeal against the judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 122 of 2011 (Hon. E.K. Makori) delivered on 25th November, 2012)

BETWEEN

ELIZABETH WANJIRA GICHOHI (*Suing as the mother and the administratrix of the estate of Githinji Gichohi (deceased)*).....PLAINTIFF

AND

DANIEL MWIRIGI NGEERA.....DEFENDANT

JUDGMENT

The appellant's suit in the magistrates' court was dismissed for what I understand to be lack of evidence; in that suit, the appellant had sued for damages under the **Law Reform Act (Cap 26)** and the **Fatal Accidents Act, (Cap 32)**, costs of the suit and interest thereof.

The basis of the appellant's claim was a road traffic accident which occurred on 30th May, 2008 along Naromoru-Nanyuki Road; it involved motor vehicle registration number KBA 329B (herein "the motor Vehicle") and a cyclist, one Githinji Gichohi who perished in the accident.

The appellant sued in her capacity as the deceased's mother and the administratrix of his estate; in the plaint filed in court on 25th May, 2011, she attributed the accident to the negligence of the driver of the motor vehicle.

After hearing the appellant, her witness and the respondent, the learned magistrate came to the conclusion that she had not proved her case on a balance of probability and accordingly dismissed the suit. It is against this decision that the appellant has now appealed to this court on the grounds that the learned magistrate erred in law in holding that negligence had not been proved against the respondent; that he also erred in law in dismissing the suit instead of apportioning liability; that he erred in law in holding that the respondent had been exonerated in the traffic proceedings yet there was no evidence of such exoneration. The learned magistrate's decision was also faulted because he is alleged to have erred in law when he

failed to consider the evidence adduced in totality hence arriving at the wrong decision; that he erred in law in not finding that the doctrine of *res ipsa loquitur* was applicable in the matter; and, that he also erred in law in delivering a judgment that was wrong.

Parties agreed to have the appeal disposed of by way of written submissions which I have had occasion to consider in the light of the evidence proffered at the trial; it is this evidence that I, as the first appellate court, have to reconsider and evaluate afresh and come to my own conclusions since I am not bound by the subordinate court's factual findings. All I have to bear in mind is that the trial court had the benefit of seeing and hearing the witnesses. The legal basis for this course is found in **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court of Appeal for East Africa (per Sir Clement Lestang, V.P) said:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

Apart from the driver of the motor vehicle, there was no other person who witnessed the accident. The traffic police officer who investigated the accident did not himself testify but he handed over the case to his colleague one Joseph Ngeera who testified that according to the police records driver of the motor vehicle together with the deceased were travelling towards the same direction. It was his evidence that the deceased was hit when he attempted to make a U-turn to enter a feeder road to the right; he produced a sketch plan to illustrate how the accident happened more particularly, the point of impact, the position the deceased’s body landed after the accident and on which lane the motor vehicle was being driven. The plan also showed the location of the feeder road that the deceased intended to join and where the vehicle stopped from the point of impact. In cross-examination the officer read a statement from the investigation diary which to the effect that:

“Suddenly, the pedal cyclist entered the right side without checking the other road users and observing the motor vehicle behind him hence he was hit and brown (sic) off his bike. The pedal cyclist is to blame for the accident for failure to observe road rules and observing other road users.”

I have read the investigation diary which was admitted in evidence this is not exactly what the investigations wrote. The pertinent part of his statement read as follows:-

“...circumstances of the accident are that at about 1.30 pm driver Daniel Ngeera was driving his m/vehicle Reg. No. KBA 329A from Nanyuki heading towards Naromoru direction and on reaching the location of the accident the pedal cyclist made a right turn and on (sic) the process was knocked down and died on the spot. The driver escaped with no injuries. His motor vehicle was damaged on the bonnet and front windscreen smashed.”

There is nowhere in the whole of that statement where it is suggested, as purportedly quoted, that “*the pedal cyclist is to blame for the accident for failure to observe road rules and observing other road users.*” It would, in my humble view, be a misdirection on evidence to hold the deceased accountable for the accident on the basis of what is in effect a foreign statement introduced in the investigation officer’s report.

The deceased’s mother had nothing to say about how the accident occurred as all she knew was what she

was told that her son had been hit by a motor vehicle. The rest of her testimony revolved around her relationship with the deceased, his work as a farmer and a carpenter and how he used part of his income to support her; on this last aspect of her evidence, she testified that the deceased used to give her Kshs 4,000/= per month. She also produced receipts showing that she had incurred funeral expenses of up to Kshs 25,000/= for the deceased's funeral.

The only other person who related the events leading to the accident was the driver of the motor vehicle and his version was as follows:

“I never reached safely near the airstrip. I did get a cyclist who was on a yellow line on the road. We were moving the same direction towards Nyeri. He was on the left side of the road. He was off the road. When I was to overtake he suddenly made a 90 degree turn. He hit my vehicle on the left side. The accident did happen. It was left side of the vehicle. I was about 10-5metres away from him. I was driving about 40 kph. The deceased landed on the right hand side of the road as you face Nyeri. The point of impact was left side of the road middle of the road. My vehicle did stop.”

What I make of the respondent's testimony is that the deceased was on three different spots - he was off the road; he was on the left side of the road; and, he was on the middle of the road riding on the yellow line. It is impossible to imagine how the deceased could possibly have been at these places at the same time; however, if the respondent was to be given the benefit of doubt and I assume, as he has suggested, that the deceased was riding on the yellow in the middle of the road, there are at least three factual possibilities that may have obtained; first, the most probable positioning of the deceased in relation to the motor vehicle would be at vehicle's right hand side since both the vehicle and the cyclist were heading the same direction; second, if the deceased had to turn right in those circumstances, there would ordinarily be no obstruction, at least not from the respondent's vehicle, in that direction; third if he turned to the right and hit the respondent's vehicle on its front left, it simply means that the respondent was driving on the right lane and this appears to have been the case since the respondent himself testified that he was overtaking when the accident happened. The sketch plan also shows that the respondent was driving on the right hand side of the road and in fact after the accident, the vehicle stopped on the right lane more than 40 metres from the point of impact.

If the deceased was riding on a yellow in the middle of the road, the picture of the scene that comes to my mind was that the road ahead of the respondent's motor vehicle was clear; it also means that if the respondent was to drive by the deceased's side, there would be enough space between them as to avoid any accident because according to the sketch plan, each of the two lanes was 3.3 metres. It is possible that in such conditions the respondent would certainly have driven on and overtaken the deceased without any danger of an accident without necessarily veering to the right lane. The reason why he would have driven on and overtaken on left hand side of the deceased was because there was a feeder road to the right and since the deceased was cycling on the yellow line his likelihood of turning right to join the feeder, as it turned out to be the case, was in my view a foreseeable possibility. The cyclist would of course have done well if he indicated that he was about to turn right but there was no reason the respondent would have insisted on overtaking on right lane when there was sufficient space on the left lane and when there was every possibility that any motorist, cyclist or other road user including the deceased could turn right at that particular section of the road to join the feeder road.

The investigations officer also noted that it was the vehicle's bonnet and the windscreen that were damaged and not any of the side; this to me suggests that it is more probable that the deceased was hit by the front part of the vehicle than the possibility that he hit the vehicle on its left side.

I cannot also fail to observe that the motor vehicle stopped more than 40 metres away from the point of impact; the respondent himself testified that he did not brake and that he would have only braked if the deceased had indicated that he was turning right. According to him, the visibility was clear, the road was straight and he was clearly able to see the deceased before the accident. Moreso the scene of the accident was close to a shopping centre. In my view the respondent could, with the exercise of some caution that a reasonable motorist would ordinarily take in such circumstances, have avoided the accident.

My assessment of the evidence of the police officer and that the respondent is that, at the very least, both the deceased and the respondent were equally to blame for the accident; over and above the reasons I have given, the respondent has to bear responsibility for not being cautious that he was at a T-junction and the deceased, as any other road user, would probably have turned at the junction considering that he was riding on the yellow line at that juncture; on the other hand, the deceased had to bear a portion of the blame for not indicating that he was turning right. I would, in the circumstances apportion liability in the ratio of 50:50.

On quantum, I note that neither of the parties submitted substantively on this issue except for the appellant's plea to this court to allow the appeal and uphold the award by the subordinate court; it is apparent that both parties were preoccupied more with the question of negligence than with the issue of quantum. I would take it that they were both satisfied with the award proposed by the trial court had the appellant's suit succeeded at that stage. The learned magistrate assessed award under distinct heads as follows:-

a. Pain and suffering	Kshs	20,000.00
b. Loss of expectation of life	Kshs	100,000.00
c. Loss of dependency	Kshs	270,000.00
d. Special damages	<u>Kshs</u>	<u>25,500.00</u>

Total Kshs 415,000.00

Having found that the deceased contributed to the accident in equal measure this award would be subject to contribution by 50%; the net award would therefore be as follows:-

Kshs (415,000.00 – (415,000 x 50/100) = 207,500.00

I will therefore allow the appeal and award the appellant the sum of Kshs 207,500.00 plus costs and interest from the date of judgment in the lower court. The appellant shall also have the costs of the appeal.

Signed, dated and delivered in open court this 17th June, 2016

Ngaah Jairus

JUDGE