REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 42 OF 2015

MBUGU DAVID…….……..……...1ST APPELLANT

DAVID KIARIE MBURU…….....…….2ND APPELLANT

-Versus-

JOYCE GATTHONI WATHENA AND ELIZABETH NJERI

(Suing as personal representatives of the

Estate of SIMON KIARIE MBURU)……...……..RESPONDENTS

(Being an appeal from the judgement and decree of Hon. Mr. Mbicha (RM) delivered on 9/5/2014)

JUDGEMENT

This appeal arises out of the judgement and decree of the lower court presided over by Hon. E. Mbicha (RM) by which **DAVID MBUGU** and **DAVID KIARIE MBURU** herein referred as the appellants are impugning the award of damages under the Fatal Accidents and Law Reform Act for Ksh.1,486,900/=and liability apportioned at 65%:35% in favour of **JOYCE GATHONI WATHENA** and **ELIZABETH NJERI** as legal representatives of the estate of SIMON KIARIE MBURU herein referred as the deceased.

Background:

What then are circumstances leading to the filing of the appeal by the appellants? According to the pleadings and the record of the trial court, the appellants' motor vehicle registration KBP 493V – ZD 6746 a semi trailer was on 15/5/2012 being driven by their authorized agent, servant, driven along Emali – Loitokitok road towards Loitokitok at about 7.00 pm. In the course of the journey an accident occurred involving a motor cyclist among motor cycle registration No. KMCT 872B. In the said collision one SIMON KIARIE MBURU a rider sustained fatal injuries.

At the hearing in the trial court the evidence given by the representatives as PW1 and PW2 being the mother and wife of the deceased was in respect of how they learnt of the accident. Further in their testimony they alluded to the fact that the deceased before his death was a businessman with an income of Ksh.40,000/=. That through the income he used to support his wife and two children. In assessing damages, the trial court weighed on this aspect of income but opted to apply the minimum wage as a multiplicand.

It is not disputed that the respondents did not witness the occurrence of the accident. Their visit to the

scene according to e evidence was after the incident. According to the testimony of PW3 PC Maina, on receipt of the report he commenced investigations by visiting the scene and evidence on the accident. PW3 stated in court that on observations and circumstances alluded to the collision, the motorcyclist (deceased) was to blame. In this respect he recommended that the matter be disposed off by way of inquest.

The driver of the subject motor vehicle one ZACHARIA GITHINJI testified on behalf of the appellants at the trial. In his testimony he denied any negligence on his part as to the occurrence of the accident. In his explanation on the material day of 15/5/2012 he saw two motorcyclists on the side of road. He further stated that one motorcyclist managed to cross the road but the second one collided with his motor vehicle in the middle of the road.

According to his version the motor cyclist herein the deceased was the author of his own death for not observing the traffic rules. The learned trial magistrate armed with that evidence and material arrived at a conclusion on liability and quantum against the appellants which became a subject of this appeal.

Being dissatisfied with the outcome and judgement of the lower court, they filed the present appeal based on the following grounds:

(1) The learned trial magistrate erred in the way he weighed the evidence tendered before the court.

(2) The learned trial magistrate erred in law by giving a judgement on liability that went against the weight of evidence.

(3) The learned trial magistrate erred in law and fact by failing to find the deceased's responsibility for the accident that led to the case that was filed in court.

(4) The learned trial magistrate erred in law by making high and inordinate award on quantum.

As noted earlier based on the above evidence the learned trial magistrate came to the conclusion that the respondents discharged the burden of proof on a balance of probabilities against the appellants. He then proceeded to make a finding and decision as follows:

(a) Liability apportioned at 65%:35% in favour of the respondents.

(b0 On quantum, pain and suffering Ksh.10,000/=.

(c) Loss of expectation of life Ksh.100,000/=.

(d) Loss of dependency Ksh.,356,900/=.

(e) Funeral expenses Ksh.20,000/=.

(f) Total gross Ksh.1,486,900/= less 65% contribution. Net award Ksh.520,415/=.

ON APPEAL

Mr. Njuguna counsel for the appellants in is written submissions contested the findings on liability for reason that it was not supported by any credible evidence at the trial. Counsel further stated that PW1 and PW2 did not witness the accident. Their probative value relates only that the deceased was a son to PW1 and married to PW2 whom they were blessed with two children. In learned counsel's view the learned trial magistrate ought to have factored in the evidence of the investigating officer who blamed the

deceased for the accident.

Learned counsel further faulted the learned trial magistrate on the fact that the appellants' driver was the one who had the right of way. He further faulted the learned trial magistrate that the deceased did not wear a reflector given the circumstances that the accident happened at night. Counsel contended that in weighing the respondents' evidence as against the appellants answer to the allegations of negligence the burden of proof was not discharged. It was further counsel's submissions that the learned trial magistrate gave no reasons to support apportionment of negligence at a ratio of 65%:35% in favour of the respondents as against the appellants.

The appellants' counsel relying on the decisions in the cases of ***Florence Rebecca Kakume v Coastline Bus Safaris & Another [1996] eKLR*** ***and Kiema Muthungu v Kenya Cargo Handling Services Ltd KAR [1991] (2) 258***. On the proposition that there can be no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence. Counsel therefore argued that in absence of proof there was an error in fact and law which this court should interfere and set aside.

According to counsel for the appellants as the issue on liability was not proved the award of damages to be assessed by the trial court. This according to counsel would only be applicable where the first threshold on liability was met by the claimant. In his determination to discredit the evidence relied upon in assessment of damages, counsel urged the court to note that there were no documents to support income by the deceased. In counsel's view it was an error for the learned trial magistrate to rely on regulations of minimum wages to determine the multiplicand and award damages in favour of the respondent.

In the alternative counsel submitted that in absence of cogent evidence an income of 5000/= and multiplicand of 18 years could have been appropriate. In support of his contention counsel relied on the case of ***Felister Nduta Muthoni & Another v The Attorney General [2004] eKLR***. It was on that basis counsel submitted that the judgment of the trial court should be set aside and the appeal allowed.

Respondent's Submissions:

Mr. Mutuku for the respondents submitted and opposed the appeal on both liability and quantum. Mr. Mutuku submitted that according to the evidence prior to the accident, appellant's driver had noticed two motorcyclists. He also contended that the first motorcyclist managed to cross the road but the second one being the deceased was hit by appellant's vehicle. In his contention counsel stated that the driver of the subject motor vehicle did not apply brakes nor swerve or slow to avoid the accident.

Mr. Mutuku further impugned the evidence of the investigating officer as to the findings and recommendation blaming the deceased. According to Mr. Mutuku the apportionment on liability by the trial court was based on record in its totality. The same cannot be faulted as the circumstances are clear this was a case of contributory negligence. In support of the submissions on liability and jurisdiction of the appellate court on appeal counsel relied on the case of ***Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini v A.M. Lubia and Olive [1982 – 88] 1 Kar 727 and Jackson Murerwa v Jalambe Enterprises [2011] eKLR*.**

As to the award on quantum Mr. Mutuku for the appellants submitted that the finding by the trial court was fair and reasonable. He urged the court to affirm the decision by the lower court. He placed reliance in the following authorities: ***Board of Governors of Kangubiri Girls High School and Another v Jane Wanjiku & Another Nyeri*** ***Civil Appeal No. 35 of 2014 eKLR, P. Sarojevo Gen. Eng. Co. ltd v Esther W. Njeri & 2 Others [2014] eKLR, Benedata Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR***. The proposition running through the authorities cited by the learned counsel for the respondents is to the extent and exercise of judicial discretion in computing award of damages under the Fatal Accidents Act and Law Reform Act.

In a nutshell counsel contended that no reasons have been provided by the appellants to show that the

learned trial magistrate erred or misdirected himself in assessing damages and apportionment on liability. Mr. Mutuku urged this court to affirm judgement of the lower court.

Discussions And Resolutions:

In this appeal I have considered the evidence at the trial, submissions by both counsels and judgement of the lower court. This appeal is primarily and substantially anchored on two key issues put succinctly:

> **(a) Whether the respondents/plaintiffs discharged the burden of proof on a balance of probabilities on liability to occasion apportionment at 65%:35% by the trial magistrate?**
>
> **(b) Whether the award of damages under the Fatal Accidents Act and Law Reform Act was correct in the circumstances of the case?**

The most contentious issue in this appeal concerns liability; who is to blame for this accident between motor vehicle reg. KBP 493V/ZD 6470 and motor cyclist KMCT 872B. From the evidence it is not in dispute that the vehicle and motor cyclist colluded at about 7.00 pm on 15/5/2012. As the time the motor cyclist was on the left side of the road intimating to join the main road where the motor vehicle reg. KBP 493V/ZD 6740 was being driven.

It is also on record from the evidence of the lorry's driver that prior to the accident he noticed two motor cyclists on the side of the road. It is also clear from his evidence that the first motor cyclist managed to cross the road from the left side to the right side of the road. It is also not in dispute that the second motor cyclist made attempts to cross but was not so lucky as his colleague. The lorry's driver testified that he tried to swerve but unfortunately a collision occurred with the motor cyclist whom he learnt that had had suffered fatal injuries.

The mother and wife who testified as PW1 and PW2 did not witness the accident. They appeared at the scene after the fact. The investigating officer PW3 also visited the scene pursuant to a report in the police station. In his testimony the lorry was not at the scene save for the deceased and the motor cycle.

The trial magistrate armed with this evidence apportioned liability at 65% to be borne by the deceased and the driver to shoulder 35%. With this background in mind what is the applicable law?

The law is very clear on where the burden of proof lies. Section 107 of the Evidence Act provides:

> **"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

Section 108 provides for incidence of burden and proof particular facts.

> **"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."**

See also Section 109 of the Evidence Act.

This position of the law was clearly captured on the following authorities: ***Eastern Produce [K] Ltd v Christopher Atiado Osiro HCCA 43 of 2001***. The court held thus:

> **"It is trite that the onus of proof is on he who alleges"**

And in matters where negligence is alleged the position was well laid down in the case of ***Kiema Mutuku v Kenya Cargo Handling Services Ltd [1991] 1kar 258*** where the court also held interalia on this issue:

"There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove negligence against the defendant where the claim is based on negligence."

In the case of ***Patrick Nguthira Gichuki v David Denny [2013] eKLR***, ***Abuodha J*** had this to say:

"It is a settled rule of evidence that a person who seeks from any court or tribunal a determination in his or her favour must provide that court with sufficient evidence to persuade such court or tribunal that whatever is being claimed more probably took place than not. It does not have to be proof beyond reasonable doubt as in criminal cases but it ought to be such proof that any reasonable person listening to the testimony or reviewing the evidence will be more included to reach the conclusion that the event being alleged indeed took place."

In view of the legal principles in the above decisions and the provisions under the Evidence Act the respondents herein had an obligation to prove their case on a balance of probability against the appellants.

In regards to blame worthiness and causation, the testimony of PW1 and PW2 has no probative value. The police officer PW3 who visited the scene and investigated the accident did not seem to have found negligence on the part of the appellant's driver. In his opinion though not supported with very clear cogent and credible evidence blamed the deceased. One can easily notice a gap in the conclusion by the investigator.

In view that the offending motor vehicle was not at the scene, in absence of skied marks the availability of the lorry at the scene would properly have assisted PW3 to arrive at a different conclusion. There is glaring discrepancy and scanty information from the investigating officer and the recommendations to absolve the driver of the lorry. The respondent's case on how the accident occurred is missing.

In appraising evidence at the trial court, many questions confer. In this accident did the driver of the lorry and motor cyclist see each other in time prior to the collision? What was the impairment or obstruction between them? What was the width of the road? Did the collision occur? What was the nature of the light at that particular time when the accident occurred? The driver of the first motor cycle was at the scene prior to the collision? Did the police officer who investigated the accident record his statement since he managed to cross the road earlier than the deceased?

As an appellate court, can I find an anchor to hang on in absence of being availed evidence to evaluate and scrutinize? In my view the case of ***Karanja v Refugee*** on how to proceed. The evidence by the investigating officer did not answer in any way these questions in the affirmative. In the case of ***Karanja v Matete [1983] KLR 147*** the Court of Appeal held thus:

"There are two elements to be considered when assessing the issue of liability namely causation and blame worthiness; there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence in not seeing it before hand; and lastly in assessing blame worthiness the distinction is that the driver had a lethal machine/car on her control apportionment of blame represents exercise of discretion."

My own appraisal of the evidence which was before the learned trial magistrate is that the deceased and another were motor riders on the left side of the road. One motor rider managed to drive across the road from the left side to the right side. The deceased followed soon thereafter but unfortunately had collision with the appellant's motor vehicle. The evidence as regards the part of impact remained largely unchallenged, though the absence of the lorry no doubt occasioned certain gaps on the suggestive part of impact. There is no dispute that the deceased from the left side joined a major road without ensuring that it was safe to do so.

The relevant applicable Highway Code parts have the following provisions:

"(6) Before you cross the road, stop at the kerb look right, look left and right again. Do not

cross until the road is clear, then cross at right angles, keeping a careful look out at all the times. If there is a refugee, stop on it and look again on one way traffic road, stop and look towards oncoming traffic before you cross.

(7) Do not cross unless you have a clear both ways. Take extra care near stationing vehicles or other obstructions and whenever your view is limited."

The deceased was on left side of the road where the appellant's driver was driving. These provisions are applicable to the deceased to observe before making a move to cross from left to right side of the road. The fact that there was a first motor cyclist who crossed safely was not a safety net for the deceased to drive a cross the road when it was not safe to do so. There is no evidence on record what occasioned the deceased not to give way to the oncoming traffic.

When the totality of the evidence of PW1, PW2, PW3 and DW1 is scrutinized one wonders on how the learned trial magistrate arrived at apportionment of negligence as between parties. It appears to me that the events of 15th May 2012 on occurrence of the accident and in the manner it occurred is fairly articulated by appellants' defence witness. It is apparent that the deceased failed to take extra precautions to cross the road in front of the said lorry in contravention of the highway code.

I note that there was no sufficient evidence from either the appellants or respondents to have persuaded the trial magistrate to exercise discretion and apportion liability. I also agonized on appeal whether the appellants' and respondents' case would be considered under the principles in the case of ***Lakhamishi v Attorney General [1971] EA 118*** where the court held that:

"As there was no means of distinguishing between the two drivers as to who should be blamed, the court should apportion the blame equally."

The Court of Appeal in the case of ***Abbay Abubakar and Fatuma Ali v Marair Freight Agencies CA No. 67 of 1983*** held as follows on the principle of apportionment of negligence equally:

"The trial judge rightly applied to the facts before him the relevant law enunciated by *Spry v P* in *Lakhamishi v Ag [1971] EA 118, 120* for such cases which 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 part, 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 idle of a wide straight road in conditions of good visibility with no courses there is in the absence of any explanation, an irresoluble inference of negligence on the part of both drivers because if one was negligence in among over the centre of the road, the other must have been negligence in failing to take evasive action. Although it is usually possible, but nevertheless after extremely difficulties, to apportion the degree of blame between the two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. When however there is 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 negligence and if negligence on his part cannot properly be inferred from the circumstances of the accident."

Applying the principles in the above case leads me to the following conclusion. The evidence on record by the respondents proved none of the elements of negligence. Secondly the efficiency of the provisions of the Highway Code was not adhered to by the deceased.

The burden of proof on a balance of probabilities was not discharged by the respondent on liability. Sympathetic as the court may be to her plight, the circumstances presented and the evidence on the accident leads me to the conclusion that appellants' driver was not responsible.

In this regard the holding by the learned trial magistrate apportioning liability at 65%:35% was in error. Accordingly the said finding is set aside.

DECISION

On account of this, I allow this appeal; set aside the judgement of the lower court as follows:

1. **Apportionment on liability at 65%:35% is allowed.**

2. **The award on quantum is hereby set aside.**

3. **Liability order in this appeal do abide in Civil Appeal No. 41 of 2015. Accordingly the award on general damages in Civil appeal No. 41 of 2015 is set aside.**

4. **The appellant shall have costs of these two appeals and of the suit at the lower court.**

It is so ordered.

Dated, signed and delivered this 28th day of September 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Kamau holding brief for Mutuku for Respondent present

Mr. Mbigi Njuguna for Appellant Absent – to be notified

Mr. Mateli Court Assistant