



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 70 OF 2014

BETWEEN

MOHAMMED IQBAL.....1ST APPELLANT

NIDA ENTERPRISES.....2ND APPELLANT

CMC HOLDINGS LIMITED3RD APPELLANT

AND

AGNES MBAYAKI SHIKAMIRESPONDENT

(Being an appeal from the Judgment and decree of the Senior Principal Magistrate's Court at Butere dated the 10.07.2014 in Civil Case No. 49 of 2012 by Hon. E.S. Olwande, Ag SPM)

J U D G M E N T

Introduction

1. The appeal herein arises from the judgment and decree of the Senior Principal Magistrate's court at Butere in Civil Case Number 49 of 2012. The trial court after considering the evidence before it found that the driver of the tractor reg. No. KBL 058W was 80% liable for the accident. She awarded the plaintiff Kshs.996,800/= as General Damages and Kshs.23,605/- as special damages

The Appeal

2. The appellant was aggrieved by the said decision on quantum and liability and filed this appeal based on the following grounds:-

1. The trial Magistrate erred in arriving at a finding on liability against the 1st Defendant.
2. The trial Magistrate relied on factors that did not form part of the evidence on record in arriving at a finding on liability against the 1st Defendant
3. The trial Magistrate erred in analyzing the evidence on record on a balance of probabilities and thereafter arriving at a finding on liability
4. The trial Magistrate relied totally on the submissions by the plaintiff and disregarded the defence submissions with regard to the evidence on record with regard to liability
5. The trial Magistrate erred in not taking into consideration section 58 of the Succession Act.
6. The Trial Magistrate erred in entering judgment against all the defendants after establishing that the 1st defendant was the owner of the tractor registration Number. KBL 058W.
7. There was misdirection on the part of the Trial Magistrate in awarding damages which were

excessive.

3. The appellants want the appeal allowed and judgment in the subordinate court set aside and the suit dismissed with costs. In the alternative they want the evidence on record to be evaluated a fresh and a finding be made on liability and quantum under the Law Reform and Fatal Accident Acts. They are also seeking for an order in respect of costs of appeal.

4. This being a first appeal this court is under a duty to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind the fact that it neither saw nor heard the witnesses testify see **Selle & Another -vrs – Associated Motor Boat Co.Ltd & others (1968)E.A 123. In Kiruga – vs- Kiruga and Another (1988)KLR 348** the Court of Appeal observed that. “An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

5. In order to proceed with this task it is necessary to give a summary of the evidence placed before the trial court.

The Plaintiff's Case

6. The plaintiff filed her plaint after being issued with a limited grant ad litem under Section 54 on 12.03.2012. The plaint dated 12.04.2012 and filed on 07.05.2012 sets out the cause of action at paragraph 6. It is to the effect that on or about the 18.10.2012 the deceased was lawfully riding, a motor cycle registration No. KMCB 335S along Bungoma Mumias Road at Mayoni area when the 1st Defendant drove motor vehicle registration No. KBL 058W New Holland tractor so negligently and or recklessly that he rammed into motorcycle registration No. KMCB 335S as a result of which the deceased suffered fatal injuries.

7. At paragraph 7 the plaintiff avers that “the said accident was caused by the nature of the poor and unsafe mechanical condition in which the motor vehicle registration No. KBL 058W New Holland tractor was and the negligence and or reckless manner in which the motor vehicle was being driven.” The accident is attributed to the negligence of the 1st defendant particularized in the same paragraph and the 2nd and 3rd defendants also particularized in the same paragraph. By reason of the accident the deceased, an adult enjoying robust health suffered fatal injuries thereby losing his normal expectation of life and the deceased's dependants and/or estate suffered great loss and damage. Particulars under the Fatal Accidents Act and special damages have been set out at paragraph 10 and the respondent prayed for damages under the Fatal Accidents Act Cap 32 laws of Kenya and under the Law Reform Act cap 26 Laws of Kenya.

8. The respondent called two witnesses. She told the Court that her husband Benard Orembo Shiala (deceased) was involved in a road traffic accident on 18.10.2011 where he suffered fatal injuries and died on 20.10.2011(see PEX1 the death certificate). She did not witness the accident. She explained that her husband was a carpenter and also used to operate a motor cycle. She got the information about the accident on 18.10.2011 at around 8-9.00Pm from a nurse who called her from St Mary's Mission Hospital Mumias. She arrived at the said hospital an hour after receiving the call and found her husband was in theatre. Her husband was later transferred to Kakamega provincial Hospital because St. Mary's mission hospital lacked some equipment. She produced the grant of letters of administration ad litem, PEXh4, receipt PEX5 and after doing a search which showed that the motor vehicle KBL 058W was owned by NIDA ENTERPRISES she produced the copy of records PEX6 and the receipt PEX7.

9. She also produced the demand letter (PEX7), transport receipt PMFI – 10 coffin Receipt PEX11. She also produced copies of Birth Certificates for their children PEX 12 (a) (b) (c)

10. PW2 Saidi Chongo Opiyo a boda boda operator, told the trial court that on the 18.10.2011 around 7.00 – 8.00pm he was along Mayoni Mumias Road when at the junction of a road heading to Mumias

Sugar factory, he saw a tractor enter the road and knock down a motorbike rider. The tractor's registration number was KBL 058W. He blamed the driver of the tractor who entered the Highway without giving way.

11. On cross examination, he explained that he was behind the deceased when the tractor entered the road. He estimated the distance between him and the deceased to be 30 meters. He further explained that the area where the accident occurred was well lit with electric lights. He added that the tractor did not have a harrow and the deceased's motorbike did not knock the harrow.

12. PW3 No. 53012 PC Jackson Wanyama produced the police Abstract PEX2. On cross examination he explained that he performed traffic duties at Mumias from 2006 – 2012 and that he worked with the investigating officer in this matter while at Mumias.

13. On the 29.7.2013 treatment notes and receipts were produced by consent and they were marked as PEX9.

The Defence Case

14. The defendant Mohammed Iqbal filed his defence on the 9.8.2012. In the defence he challenged the plaintiff on the averments stated in her plaint. He denied the facts in the plaint and put the respondent herein to strict proof thereof. The 1st Defendant also denied the particulars of negligence alleged by the respondent. He also challenged vicarious liability and averred that if an accident occurred then same was as a result of contributory negligence of the deceased as set out at paragraph 12 of the defence.

15. In support of their case, the defendants called two (2) witnesses. Briefly, DW1 No.73900 CP Moses Mureithi a police officer based at Butere Police Station produced the traffic file on behalf of PC Mbevi who was on transfer to Athi-River police station.

16. He explained to the trial court the contents in the said file. What emerges there from is that the rider of the motorcycle who is deceased miscalculated the distance as he tried to overtake the tractor and that is when he knocked the harrow. DW1 also stated that the rider was not a competent rider because he had no licence to ride hence he contributed to his own death. He produced the entire file as Exhibit 1.

17. On cross examination he explained that the tractor driver did not stop after the accident. The inspection reports showed that both the motor cycle and the tractor had no pre-accident defects.

18. DW2 Mohammed Iqbal Dawood Antule a businessman who was engaged in transport and land preparation business told the trial court that he had a contract with Mumias Sugar Company. That he received a report on 18.10.2011 that tractor KBL 058W had been involved in an accident. He asked the driver of the said tractor if he was aware of any accident involving that tractor and his answer was in the negative. He proceeded to the scene where he found police officers who confirmed to him that there was an accident that involved his tractor. He reported the accident and the tractor was taken for inspection. On cross examination he informed the trial court that the driver of the tractor left work in December, 2013.

Submissions

19. The appeal was canvassed orally. Miss Pandit clarified that she was representing the 1st appellant. In her submissions she challenged the judgment of the trial court, claiming that the trial court did not evaluate evidence on ownership, negligence and vicarious liability.

20. On the issue of ownership she submits that the documents produced by plaintiff – copy of records – showed that 2nd and 3rd defendants were owners of the tractor, while the abstract showed that it is the 1st defendant who was the owner of the tractor, and further that the evidence did not show who the owner of the tractor was. That the trial Magistrate's judgment only stated in general terms that the 3 defendants

were all owners. She adds that the plaintiff did not plead that the tractor was owned by the 1st defendant.

21. In her further submissions, Miss Pandit discredited PW2's evidence as an eye witness because according to her an eye witness is one who saw how the accident occurred and probably reports the accident and records a statement. She also raised issue of the exact place the accident occurred and submitted that there was no basis for the trial court to make a finding on vicarious liability. According to Miss Pandit liability against the respondent should have been higher because the motorcycle had no licence and should not have been on the road.

22. On quantum she submitted that the deceased's occupation was not pleaded, that multiplier of 18 years should have been used and that the trial Court should have used a lower ratio of 2/5 instead of 2/3. Mr. Mukisu on his part urged this court to uphold the findings of the lower court on the issue of ownership. He submitted that the Respondent established ownership on a balance of probability by producing a police abstract and certificate of official search.

23. Counsel also submitted that the accident did occur that and the police placed the tractor at the scene of accident and so did DW2. He also placed PW2 at the scene of the accident and contented that he (PW2) was the one who reported the accident at the police station. He blamed the investigating officer for not recording PW2's statement. Mr. Mukisu opined that the police file was prepared in such a way as to defeat the respondent's case by suppressing evidence. Mr. Mukisu submits further that the issue of pleadings should not defeat the substance of the suit as the issue is clearly technical and curable by the evidence adduced on record. On quantum he submits that the ratio of 2/3 was reasonable and regarding the deceased's earnings, he submitted that the trial court relied on the minimum wage of kshs.7,000/= and further that the multiplier of 21 years was fair having taken into account the retirement age of 60 years.

Determination

24. The appeal herein raises the twin issues of liability and quantum. Before making my findings, this court is aware of the principle that proof in civil cases is on a balance of probabilities and that parties are always bound by their pleadings. See the case of **Karugi & Another – vs- Kabiya & 3 others (1987) KLR 347** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

25. The Court of Appeal has recently considered two cases in determining whether a party can rely on unpleaded issues.

26. In the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER – VS- STEPHEN MUTINDA MULE & 3 OTHERS (2014) Eklr**, the court stated thus;-

“the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd- vrs – Nyasulu [1998] MWS C 3*, in which the learned judge quoted with approval from an article by Sir Jack Jacob entitled “The present importance of Pleadings” which was published in [1960] *Current Legal Problems* at Pg 174 whereof the author stated’ As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings----- for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called any other business, “in the sense that points other than those specified may not be raised without notice.”

27. In this appeal it is not in dispute that an accident occurred on the 18.10.2011 involving the tractor KBL 058W and the Motorcycle KMCB335S in which the motorcyclist died. Ownership of the tractor has been contested by the appellant. From the evidence on record DW1 has admitted that he is the owner of the said tractor. This court therefore finds that nothing much turns on the issue of ownership of the tractor as the 2nd and 3rd appellants were in the matter for purposes of credit to the 1st appellant.

28. The main issue now for determination is that of liability. PW2 was the only eye witness in this case. The driver of the tractor did not testify. From the police file the investigating officer found that the deceased was the one who rammmed onto the harrow. PW2 who was at the scene testified that he saw a tractor just entering the main road from a feeder road and knocking down a motorcycle.

29. The tractor contributed to the accident. According to the trial court's judgment which I quote "from the contents of the police file, it would appear that the investigating officer relied only on the statement of the driver to make his findings because the only statement of those present at the scene is that of the driver. He deduced that the deceased hit the harrow from the statement of the driver of the tractor and he even stated that the claim that the deceased hit the harrow was supported by the impact on the harrow. It would appear that he lied because from the inspection report in the file, it is stated clearly that the plough was not damaged in the accident."

30. I agree with the trial court on her finding that the investigating officer was not candid to tell the court the truth. As stated above the tractor driver was to blame for the accident. His conduct after the accident betrayed him. The driver of the tractor even lied to DW2 when asked about the accident. He ought to have parked/stopped the tractor at the scene instead of parking it at the yard after the accident and saying nothing about the accident until he was asked. I will not therefore interfere with the issue on liability as found by the trial court.

31. On the issue of quantum the general principle is that in the assessment of damages a trial court exercises its discretion and the appellate court will not normally interfere with such exercise of discretion unless the trial court either acted on wrong principles or awarded so excessive or so inordinately low damages or the court considered irrelevant matters or failed to take into consideration relevant matters and as a result arrived at the wrong decision. See **Butler –vs – Butler (1984) KLR 225 and Kemfro Africa Ltd t/a Meru express & Another – vs – A.M. Lubia and another (1982 – 88) IKAR727**. The claim herein is based on the Law Reform Act and the Fatal Accidents Act. In assessing damages under the Fatal Accidents Act Ringera Judge as he then was, in the case of **Beatrice Wangui Thairu – vrs – Hon. Ezekiel Bargerung & another Nairobi HCCC No. 1638 of 1988 (UR)** stated as follows:-

"The principles applicable to an assessment of damages under the Fatal Accidents Act are too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

32. In the instant case, the learned trial Magistrate relied on the minimum wage to determine the multiplicand. I am satisfied that the trial Courts computation was fair in the circumstances. A multiplier of 21 years was used by the trial Court, the issue of multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with reason. I find that the undisputed fact the multiplier of 21 years was reasonable taking into account that the deceased was 33 years old and would have worked to about 60 years.

33. The evidence on record is also clear that the deceased was a family man with young children hence he must have used a significant amount of his income to support his family. The dependency ratio of 2/3

was therefore reasonable in the circumstances.

Conclusion

34. The upshot of all the above is that the finding on liability and quantum by the learned Magistrate is upheld. The appeal is accordingly dismissed with costs to the respondent.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this19thday ofSeptember2016

RUTH N. SITATI

JUDGE

In the present of;-

.....Mr. Nyikuli for Miss Pandit (present).....for Appellant

.....Mr. Mukisu (absent).....for Respondent

.....Mr. Lagat.....Court Assistant