REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 70 of 2009

ESTHER J. SHISIA ……..…….. APPELLANT

V E R S U S

BENARD AMWAYI ……..…… RESPONDENT

J U D G M E N T

The appellant, ESTHER J. SHISIA, filed Civil Suit No. 785 of 2006 before the Mumias Senior Resident Magistrate's Court seeking special and general damages as a result of the death of her son **CHARLES KHAMALA SHISIA** who died in a road traffic accident on the 11.12.2004. The trial court dismissed her suit resulting to this appeal. The grounds of appeal are that the trial court failed to make a finding on contributory negligence and thereafter apportion liability, the trial did not assess quantum of damages. The appellant's suit was dismissed yet the evidence on record showed that there was recommendation to charge the driver of that motor vehicle, the trial magistrate did not analyse the evidence on record and only relied on the defence evidence leading to the dismissal of the suit and that the trial court misapprehended the facts and evidence before the court and applied wrong principles of the law.

Parties agreed to proceed by way of written submissions. Counsel for the appellant submitted that the evidence on record proved the appellant's case. The evidence showed that the driver of the accident vehicle was at fault and the vehicle overturned after the accident. Although the driver of the vehicle testified that he was driving at a speed of 85 km per hour the fact that the vehicle overturned after the accident proved that he was over speeding. PW2 testified that the deceased was riding his bicycle on the opposite side of the road and the vehicle left its side and went to hit the deceased. Counsel further submitted that PW3, a police officer testified that the cause of the accident was over speeding. The trial court did not assess any quantum of damages and the judgment is hanging. On his part counsel for the respondent submitted that PW2, the alleged eye witness was discredited by the court and found to be untruthful. He gave a wrong incredible account of the manner in which the accident occurred and the same could not have been accepted by the court. The appeal ought to be dismissed as it was filed by the appellant herself yet she had a counsel on record. The appeal is against the judgment of C. N. Ndengwa, SRM yet the record of appeal indicates that it is against the judgment of Hon. E. K. Makori, PM. The deceased was the author of his own misfortune and the trial court came to the correct decision.

The record of the trial court shows that three witnesses testified for the appellant and one for the respondent. The appellant testified as PW1 and her evidence was that the deceased was her son. On the 11.12.2004 she was informed about the accident and the deceased died on the spot. She was issued with a death certificate and obtained a grant of letters of administration in succession cause no. 47 of 2005 before filing the suit. The deceased was a driver by profession as well as a farmer. She spent about KShs.12,000/= for the funeral and also used maize and beans during the funeral. The deceased was 38 years and he had a wife by the name **JANE KHAMALA. PW2, ANTONY MZEE**, testified that on the

11.12.2004 he was with the deceased cycling from Kakamega Town heading home along the Kakamega – Mumias road. Each of them had his own bicycle. The deceased was ahead of him and they were cycling on the left side of the road heading towards Mumias. A motor vehicle coming from Mumias side registration number KZC 222 Toyota Corolla left its side and went to the right hand side of the road and hit the deceased. The vehicle went for about 30 m and moved back to the right side of the road. The driver lost control and entered into somebody's farm. According to him the driver caused the accident as he was over-speeding. The motor vehicle was coming on the opposite direction. The market center was about half kilometer behind the scene of accident. After the accident he saw the deceased down and his bicycle was on top of the vehicle. There was no any other person at the scene.

PW3, SEGEARNT MICHAEL WANJOHI, testified that an accident occurred on 11.12.2004 and it was booked at Kakamega police station involving motor vehicle number KZC 222 Toyota Corolla. He did not investigate the case. The accident occurred at Muhogo area along the Kakamega – Mumias road. According to his evidence the driver as per his statement indicated that he was driving at 85 kmp. The driver lost control and the motor vehicle veered of the road and went to hit the pedal cyclist. The driver was to be charged with causing death by dangerous driving. His further evidence was that the police file did not have a statement of independent eye witness but only had statements from the people who identified the body for post mortem. The investigating officer was Sergeant Joel Hoyo. The driver of the accident vehicle lost control and rolled once and then lost consciousness. From the police file the driver stated that the deceased joined the road from a feeder road about 5 meters away and he could not avoid the accident.

The respondent testified that on the 11.12.2004 he was driving motor vehicle number KZC 222 Toyota Saloon from Mumias heading to Kakamega at about 7.00 p.m. He was on the left side of the road as you head towards Kakamega and after passing Shibuli market a bicycle cyclist entered the road from the left side as one faces Kakamega. The cyclist suddenly joined the road from a feeder road. He tried to avoid hitting him and swerved to the right and he hit him at the middle of the road. The vehicle lost control and he landed on the right side of the road facing towards Kakamega. He was driving between 80-85 kph. The vehicle overturned and he was taken to St. Mary's hospital as he was also injured. His further evidence was that the deceased was too close and he could not hoot as he entered the road suddenly. His further evidence is that the point of impact was at the middle of the road.

The main issue for determination is whether the trial court made the correct conclusion by dismissing the appellant's suit. The record of the trial court shows that the three witnesses testified before S. N. Abuya, Ag. SRM. The respondent testified on the 19.12.2008 before the said magistrate and parties agreed to file written submissions. The matter was listed for mention on 23.1.2009 and was again listed for mention on the 25.2.2009 for purposes of taking directions. On 25.2.2009 parties appeared before Mr. E. K. Makori Ag. P.M. and the court directed the proceedings were to be typed. The matter was listed for mention on 27.3.2009. The judgment was delivered by Mr. E. K. Makori on 26.6.2009. The record of the trial court does not indicate whether the previous magistrate had been transferred. Since the judgment was written by Mr. E. K. Makori the contentions by the respondent that the appeal should be dismissed for citing the wrong magistrate cannot be sustained. C. N. Ndegwa, SRM seemed to have mentioned the matter on the 25.2.2009 but the record of the trial court shows that E. K. Makori also mentioned the matter that date. The record of the trial court does not indicate whether Mr. Makori wrote the judgment on behalf of C.N. Ndegwa or S.N. Abuya, but the judgment was delivered by Mr. E. K. Makori. I do find that there is no prejudice on the respondent with regard to the title of the appeal. I will categorize the respondent's objection on the title of the appeal as a technical issue which is taken care of by Article 159 of the Constitution.

The trial court in dismissing the suit held that the deceased was the author ofhis own misfortune and could not blame the defendant. The trial court relied on the evidence of the respondent and held that the deceased entered the highway abruptly from the left side of the road as one faces Kakamega direction on to the path of the accident motor vehicle. The evidence of PW2 was dismissed as PW3 indicated that the investigating officer did not have the statement of an eye witness and that the respondent's evidence disproved the evidence of PW2. The evidence on record does show that the deceased herein died as a result of a road traffic accident involving motor vehicle number KZC 222. Whereas the appellant's

evidence was that the deceased was cycling on his proper lane on the left side of the road, the respondent testified that the deceased joined the road from a feeder road abruptly within five meters from the accident vehicle. assuming the court go by the appellant's evidence, more specifically the evidence of PW2, it will be concluded that the respondent left his lane on the right hand side of the road and moved to the left hand side and in the process knocked the deceased. Going by the evidence of the respondent it will appear that the respondent only saw the deceased entering the road just within 5 meters away and in an attempt to avoid hitting him, swerved to the right but met the deceased at the middle of the road. Going by the respondent's evidence it is clear that the respondent did not exercise due care and skill to avoid the accident. If the deceased entered the road within a short distance from him it would appear that the deceased was cycling very fast compared to the accident motor vehicle. Within 5 meters the cyclist crossed the path of the respondent and was hit at the middle of the road. If that were to be the case then the respondent could have swerved to the left of the road and continued driving without causing the accident. The respondent's sequence of events would mean that the deceased crossed very fast and he swerved to the right and the two met at the middle of the road. It appears that the accident vehicle ran over the deceased and it overturned on the right hand side of the road as one faces Kakamega side.

The trial court only picked sections of the evidence of PW3 and concluded that there was no eye witness. It appears that the judgment was written by Mr. E. K. Makori who did not have the advantage of seeing the witnesses and make conclusion on their credibility. There was no good reason as to why the evidence of PW2 was discredited. His evidence was challenged through cross-examination. From the evidence of PW3, it is clear that the respondent was to be charged with the offence of causing death by dangerous driving. The witness merely reported that according to the investigating officer there was no statement from an eye witness. That did not mean that there was no eye witness. It is the evidence on record that the respondent was injured and he was unconscious. He could therefore not have seen any eye witness at the scene. There is a possibility that PW2 was with the deceased. Since the police did not charge the respondent and there was no inquest it is clear that PW2 was not called to go and give his statement. It is also the evidence of PW3 that the driver of the accident vehicle lost control and veered off the road and went to hit the pedal cyclist. This was his evidence during examination in chief. During cross-examination PW3 testified that the statement of the driver indicated that the cyclist emerged from a feeder road into the main road and the driver noticed the cyclist when he was 5 meters away. He tried to avoid hitting him but met him in the middle of the road. The trial court took that part of the evidence to be the evidence of PW3 and dismissed the evidence of PW2. PW3 also informed the court that the investigating officer that the deceased emerged from a feeder road and a collision occurred at the middle of the road. The body was lying on the right side of the road facing Kakamega direction on the tarmac. The investigating officer was not an eye witness and did not take the statement of PW2. He was merely stating what the respondent told him. According to PW3 the police had enough evidence to charge the respondent with causing death by dangerous driving.

Going back to the explanation by the respondent on how the accident occurred, it is clear that the respondent lost control of the vehicle. The vehicle overturned and landed on the right side of the road as one faces Kakamega direction. That was the opposite side of the road as the respondent was coming from Mumias. If the deceased abruptly emerged from a feeder road and the respondent was doing at 85 kph then the accident ought to have occurred just on the left hand side of the road. There is no evidence that the road at the scene is covered with grasses or trees and one cannot see from a distance if somebody tried to cross the road.If the explanation by the respondent is to be followed I do find that it would have been impossible for the collision to have occurred at the middle of the road given the speed at which the respondent was driving. It appears that the respondent did not see the deceased. I do find that the respondent was to blame for the occurrence of the accident. The deceased was on the right hand side of the road and it is the respondent who left the road and knocked the deceased. I further find that PW2 was with the deceased and his evidence was wrongly discredited. Even if the deceased abruptly joined the road form a feeder road the respondent ought to have been attentive while driving along the road and if that were to be the case he ought to have seen the deceased and swerve to the left as according to him the deceased was 5 meters away and crossed his path. If he had swerved to the left he could not have hit him. I do therefore find that the respondent was 100% to blame.

With regard to quantum counsel for the appellant urged the court to grant KShs.100,000/= for loss

of expectation of life, KShs.10,000/= for pain and suffering, KShs.15,150/= for funeral expenses and KShs.480,000/= for loss of dependency using a multiplier of 15 years and a monthly net salary of KShs.4,000/=. The deceased died on the spot. However, there is no painless death. I do find that an award of KShs.10,000/= for pain and suffering is reasonable. The appellant obtained letters of administration before instituting the suit. The general trend has been to award an amount between KShs.100,000/= and KShs.150,000/= for lost years. Counsel for the respondent in his submission before the trial court stated that the grant issued to the appellant could not have made her to be the personal representative of the deceased. He was of the view that KShs.70,000/= would have been sufficient. It is the appellant's evidence that she filed succession cause number 47 of 2005 and obtained a grant to enable her seek compensation. The grant was produced as evidence. I do find that the appellant is entitled to damages for the deceased's estate under the heading of loss of expectation of loss of life I do award a sum of KShs.100,000/=. The deceased was taken to Kakamega Hospital where the post mortem was conducted as per the evidence of PW3. The appellant must have incurred expenses to transport the body and to bury it. The plaintiff sought a sum of KShs.15,150/= as funeral expenses and the cost of police abstract and death certificate. I do find that amount to be reasonable and do award the same. Even if no receipts were produced for the funeral expenses it is clear that the deceased was buried and expenses were incurred.

The appellant testified that the deceased was married. Paragraph 4 of the plaint indicates that the deceased left three sons and one daughter and the names are given. The deceased was aged 38 years and was a driver but did not have any driving employment at the time of the accident. I do find that a multiplier of 12 years is reasonable. A monthly salary of KShs.4,000/= as per the appellant's submissions before the lower court is also fair. In the end the respondent is held 100% liable for the occurrence of the accident. The appellant is awarded the following amount in form of damages:-

(a) Pain and suffering - KShs. 10,000/=

(b) Special damages - KShs. 15,150/=

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

(d) Loss of dependency (4,00 x 12 x12 x1/3 - KShs.192,000/=

Total - **KShs.317,150/=**

I will not deduct the sum of KShs.100,000/= from the award as has been the case in some decisions. The above amount forms part of the deceased's estate and that is not double compensation. The appellant shall have costs of the suit before the trial court. Each party shall meet his/her own costs of the appeal.

Delivered, dated at signed at Kakamega this 20th day of March 2013

SAID J. CHITEMBWE
J U D G E