REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
APPELLATE SIDE
CIVIL APPEAL NO. 40 OF 2003
BETWEEN

AGNES AKINYI OKEYO ..... APPELLANT

AND

MARIE STOPES - KENYA ..... RESPONDENT

[An Appeal from the decision and ruling of Senior Principal Magistrate's Court, Kisumu delivered on 15th October 2003 by B.A.O. ASUNAH (Mrs.) - S.R.M.

IN

CMCC No. 168 OF 2002]

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JUDGMENT OF THE COURT

This is the appeal of the plaintiff in Senior Principal Magistrate's Court Case No. 168/02 Kisumu. It is an appeal from the judgement of B.A.O. Asunah, wherein she dismissed the case of the plaintiff. The plaintiff is the wife of the late George Okeyo Ogola who was involved in accident with motor vehicle registration number KAK 407F on 3.3.01 at Mamboleo along Kisumu-Kakamega road. There was no eye witness, apart from Moses Odhiambo Otieno, who heard a bang behind and when he turned he saw a motor vehicle had hit somebody. The accident was a fatal accident and the appellant herein did not call the police to give some light on how the accident occurred. The Police Abstract was produced by consent of the parties, though I must confess the information contained therein was immaterial to proof liability.

As rightly pointed by the trial Court the accident was between the deceased cyclist and the respondent's motor vehicle. Secondly the cyclist died as a result of the injuries caused by the accident, However the dispute is who was to blame for the accident. I am in total agreement with the trial Court that he who alleges must prove, However I must immediately state that the proof is on a balance of probabilities.

As stated above the accident was not disputed to have been motor vehicle registration No. KAK 407F driven by Charles Omondi Osumba and the deceased

cyclist. The driver stated in his evidence that he saw a cyclist ahead in the same direction he was going. The cyclist was on the same line and cycling on the left side of the road. The driver stated that at the time, he was driving between 40 - 50 k.p.h. As to how the accident happened, he stated that the cyclist suddenly branched to the right side of the road as if to cross the road. He claims that the cyclist turned abruptly without warning and despite him swerving it was too late to avoid the accident. He further stated that after hitting the cyclist, he landed on the left side of the road.

I have on my part appraised the evidence of the driver and the first question that came to my mind was the speed of the motor vehicle and whether it was possible under the circumstances to avoid the accident. The moment the driver was called to give evidence, it was incumbent upon him to explain and demonstrate that the accident was not due to his fault. He was bound to explain what he has done to avoid the accident and to me it is not enough to say that he swerved but must indicate to which direction he swerved. If the cyclist who was on the same left line branched to the right, then what was the reason of swerving for the driver would have continued on his line, which there was no hindrance, suffice to say that the respondent's driver was not obliged to prove how and why the accident happened but show that he was not to blame for the accident by giving suspicious and contradictory evidence. I am saying suspicious because if a driver is on line driving at 40 k.p.h. and then the object infront of him branches and/or switches line to the right, then the prudent and the most sensible thing would be first to brake, even though the object branched abruptly to the right in the present matter, the driver does not indicate whether he applied brakes and why he had to swerve from his line.

The moment he admitted that the deceased landed on the left, which his usual line as cyclist then the evidence of the driver would. Be suspicious to believe. As a result of his inconsistent evidence and his failure to give and/or provide a plausible explanation, makes his testimony suspicious and he could not by any imagination escape from liability that follow from his negligence. Further the driver does not indicate whether he warned the cyclist, even though according to his version of the accident such warning was not even necessary. I am satisfied that the trial court acted on wrong principles and misapprehended the facts and as ad result made a wholly erroneous conclusion on liability.

The trial court did not weigh the scales of justice properly hence erred on dismissing the appellant's case. The trial court failed to take into consideration the particulars and circumstances of the accident as narrated by the respondent's driver and placed too much burden on the shoulders of the appellant. She failed to appreciate the evidence of the driver who to me was driving the motor vehicle in a negligent manner, thereby caused the accident, which resulted in the death of the cyclist. The fact that the driver admitted to be driving at between 40 - 50 k.p.h. and failed to avoid the accident was a clear manifestation that he took no steps to avoid the cyclist.

It has also been admitted that cyclist died on the spot, definitely form the impact of the accident. This is a clearly prima facie that the driver was at a speed which was excessive, thereby driving in a manner dangerous to other road users and failing to steer the motor vehicle properly. The scales of justice cannot weigh in favour of a driver who was driving between 40 - 50 k.p.h. and was not impeded but failed to control and/or manage the motor vehicle so as to avoid the unfortunate death of the cyclist. Equally the balance of probabilities cannot favour a driver who failed to brake and swerve inorder to avoid the accident. All the circumstances surrounding the accident points to one thing that the driver of the respondent did

not exercise prudent and reasonable care, hence his evidence clearly creates the impression that he did nothing to save the life of the cyclist.

It is my judgement that after considering the cause of accident from all direction and angles, it was solely caused by the driver of the respondent hence they cannot escape from the consequence that follow form such reckless negligence. In my assessment the trial court failed to appreciate and balance the evidence which was presented to her and I totally disagree with Mr. Onyango Advocate, that she did what was possible under the circumstances by dismissing the suit of the plaintiff. Therefore I hold the respondents 100% liable for the accident which occurred on 3.3.2001 and the appeal on the issue of liability succeeds.

The upshot is that the order dismissing the appellant's suit is set aside and judgement is entered for the appellant against the respondent in the sum of KShs.110,150/= with costs.

The appellant shall not have the costs of this appeal as her Advocate did not contribute the success of the appeal either by way analyzing the evidence and/or availing of authorities to support the appellant's claim. Each party shall bear his/her own costs.

Dated and Delivered and signed at Kisumu.

This 26th Day of April 2004.

MOHAMED A. WARSAME

AG. JUDGE

Ruling delivered in the presence of:

Mr. Onyango for the Appellant.

Mdr. Okungu for the respondent.

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