Juma v Rabote (Suing as the legal representative of the Estate of Leonard Taabu Rabote (Deceased) (Civil Appeal E044 of 2022) [2023] KEHC 2909 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E044 OF 2022

RE ABURILI, J

MARCH 22, 2023

BETWEEN

STEPHEN OMONDI JUMA ..... APPELLANT

AND

AWUOR RABOTE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LEONARD TAABU RABOTE (DECEASED) ..... RESPONDENT

(An appeal arising out of the Judgement and Decree of the Honourable S.W. Mathenge (SRM) in the Principal Magistrate's Court at Bondo delivered on the 31st August 2022 in Bondo PMCC 62 of 2019)

JUDGMENT

Introduction

1. The respondent herein sued the appellant before the trial court for causing the deceased's death following a fatal road accident wherein on the December 28, 2018, the appellant's motor vehicle registration number KCM 275X, was carelessly, negligently and recklessly driven causing it to veer off the road thereby knocking down the deceased who was a lawful pedestrian walking along the pedestrian lane as a result of which the deceased sustained fatal injuries.

2. The appellant filed a defence denying that he was the owner of the aforementioned motor vehicle and further denied all details of the accident and instead put the respondent to strict proof thereof.

3. After hearing the witnesses' testimonies including an eye-witness, the trial magistrate found in favour of the respondent on liability and proceeded to hold the appellant 100% liable for the accident before awarding the respondent damages all totalling Kshs 762,203.60 against the appellant.

4. Aggrieved by the said judgment and decree, the appellant filed his Memorandum of appeal dated September 3, 2022 2022 in which he raised 3 grounds of appeal namely:

    i. That the learned trial magistrate erred in fact and in law by failing to dismiss suit and apportioning 100% liability to the appellant (defendant) without considering the circumstances of the case.

    ii. That the learned trial magistrate erred in law and in fact in finding favour of the respondent (plaintiff) against the appellant (defendant) when there was totally no credible evidence or proof of negligence on the part of the appellant.

    iii. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on liability by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on liability.

5. The appeal herein which was only against liability was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that the testimony of PW3 who claimed to be an eye witness ought to be disregarded as she was an unreliable and untruthful witness as she did not witness the accident or record her statement with the police and further that she was 50 metres away from where the accident took place.

7. It was further submitted that PW1, Inspector Maloba from Bondo Police Station was not the investigating officer and further that the police abstract produced did not blame anyone for the accident and also that PW1 failed to produce the police file in court that contained sketch maps and/or any other information that would have been integral in establishing the appellant's liability. Reliance was placed on the case of *Evans Mogire Omwansa v Benard Otieno Omolo & Another* [2016] eKLR where the court held *interalia* that failure by the police to produce sketch plans of drawings of the possible point of impact that could have assisted the court to piece up the evidence was fatal to the appellant's case in proving negligence against the respondent.

8. The appellant further relied on the case of *Osman Ahmed Kahia v Joseph G Njoroge* [2012] eKLR where the court held interalia that the respondent did not prove his claim especially on liability as against the appellant to warrant the orders to be made in his favour in a case where there was no sketch map to aid the court in determining the point of impact.

9. The appellant's submitted that the deceased was the author of his own misfortune and was to blame for suddenly dashing into the road without due care as being an adult, he ought to have been careful.

10. It was further submitted that the respondent did not discharge the burden of proof to the required standard. The appellant further submitted that it was not enough for the respondent to allege negligence but that she had to offer evidence in support as mere assertions should and cannot stand in court and ought to be corroborated by tangible evidence.

11. The appellant further submitted that the court failed to consider the evidence tendered by the appellant on how the accident happened and thus came to an erroneous conclusion on liability based on non-existent evidence and speculation.

12. The respondent did not file submissions.

Analysis and Determination

13. Having considered the pleadings in the lower court and the grounds of appeal, I must as a first appellate court adhere to the requirements under section 78 of the *Civil Procedure Act* and review, reassess and reevaluate the evidence adduced in the trial court before arriving at my own independent decision bearing in mind the fact that I neither saw nor heard the witnesses as they testified. hence giving an allowance for that. The section was interpreted in the often cited case of *Selle v Associated Motor Boat Co* [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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."

14. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

15. Revisiting the evidence adduced in the lower court, PW1, Inspector Maloba of Bondo Police Station testified that he was not the investigating officer. He produced the police abstract for the material accident of 8/9/2018 along the Kisumu- Bondo road involving motor vehicle registration number KCM 275X. In cross-examination, he testified that the police abstract did not blame anyone for the accident and further that the police did not know if the deceased was drunk when he was knocked down.

16. PW3 testified that she witnessed the accident. It was her testimony that she left Bondo heading for home when she saw a tractor heading towards Kisumu and a Nissan heading towards Bondo. She testified that the Nissan was being driven at a high speed and that it left the road and hit somebody who was outside the road. PW3 testified that she reached the accident scene and recognized the deceased then called his mother. In cross-examination, PW3 testified that she was 50 metres away from the scene when the accident occurred ahead of her.

17. DW1, who was driving the accident motor vehicle testified that as he was driving the motor vehicle on the road from Kisumu to Usenge, at Opoda, he saw a lorry on the opposite side of the road with some tree branches on the road. He testified that a man emerged from the bushes and abruptly crossed the road and that DW1 was unable to stop despite applying the brakes. He testified that he hit the person who fell on the road. In cross-examination, DW1 testified that the road was a busy stretch and that the deceased crossed the road from left to right and was hit by the left side of the vehicle.

18. The Court of Appeal in *Ephantus Mwangi & Another v Duncan Mwangi*, Civil Appeal No 77 of 1982 [1982-1988] 1KAR 278 stated as follows regarding the finding of liability by the trial court:

> " A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of

particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. In this appeal, it is clear that the determination of the appeal revolves around the question of liability. That the burden of proof was on the respondent to prove her case on a balance of probability is not in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

20. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same *Act* as follows:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

21. The two provisions were interpreted in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*."

22. In this case, it is not in dispute that the appellant's driver hit the deceased. PW3 the eye-witness confirmed as much and her testimony remained uncontroverted by the appellant even in cross examination and now the appellant claims that the eye witness' account is unreliable as she was 50 meters away from the scene of accident. There is no scientific evidence that a distance of 50 meters away is too far for a person to see what is happening at that range. In his testimony, DW1, the appellant's driver testified that the deceased appeared out of the bushes abruptly and jumped onto the road. DW1 also testified that the stretch of the road was busy and that there were tree branches on the opposite side where a lorry was.

23. The Court of Appeal in *Micheal Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR stated that:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs Gypsum Mines Ltd* (2) (1953) AC 663 at p 681 as follows:
>
> 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history

several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...'"

24. In this case, from the appellant's driver's own testimony, the stretch where the accident occurred was a busy stretch and further from his testimony, it seems there was a stalled lorry on the opposite side of the road as was evidenced by the tree branches on the road warning the other road users to be careful when approaching the scene.

25. Further, the appellant's driver testified that he tried to apply the brakes but was unable to stop. In my view this is evidence that despite the fact that the stretch of the road was busy, the appellant's driver was speeding and failed to bring the car to a stop.

26. The testimony of PW3 remained uncontroverted and she testified that the appellant's vehicle was speeding and that the deceased was a pedestrian walking on the side of the road who met his death after being hit by the motor vehicle after it went out of the road.

27. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

> "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

28. Further, In the case of *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR, this court expressed itself thus:

> "A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof."

29. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

30. That seems to have been the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No 50 of 1981 [1983] KLR 142 and *Mahendra M Malde vs George M Angira* Civil Appeal No 12 of 1981, and *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

31. The appellant failed to adduce any evidence before the trial court to show that the deceased ought to shoulder some blame for the accident. Additionally, this court has not been shown that the trial magistrate wrongly exercised her discretion when apportioning liability or based her finding on liability on no evidence or the wrong principle.

32. The appellant in this case did not adduce evidence to demonstrate that the deceased ought to shoulder some blame, in view of the controverted evidence of the plaintiff's eye witness on how the accident occurred. In the circumstances, I find that the plaintiff in the lower court proved her case on a balance of probabilities. A balance of probabilities was defined in the case of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 as follows:

> "In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

33. Applying the foregoing principle to the facts of this case, I find that there was sufficient evidence that the appellant failed in his expectation as a reasonable driver and could not have been absolved from liability in the causation of the accident and fatal injury to the deceased.

34. To this end I find that this appeal lacks merit. I uphold the finding and holding by the lower court on liability and dismiss this appeal with costs of Kshs 30,000 to the respondent.

35. I so hold.

Dated, Delivered and Signed at Siaya this 22nd Day of March, 2023

R.E. ABURILI

JUDGE