Awale Transporters Ltd & another v Kariuki (Suing as the administrator of the Estate of Joshua Kiptanui (Dcd) (Civil Appeal 28 of 2021) [2023] KEHC 3402 (KLR) (19 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3402 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 28 OF 2021

RN NYAKUNDI, J

APRIL 19, 2023

BETWEEN

AWALE TRANSPORTERS LTD ..... 1ST APPELLANT

SHELTON OTEDO ..... 2ND APPELLANT

AND

GEORGE KEGO KARIUKI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSHUA KIPTANUI (DCD) ..... RESPONDENT

(Being an appeal from the judgement and decree of Honourable D. Milimu, RM in Eldoret CMCC Number 387 of 2019 delivered on 12th March, 2021)

JUDGMENT

1 The appeal before this court arises from the judgement and decree of Honourable D. Milimu, RM in Eldoret CMCC Number 387 of 2019 delivered on 12th March, 2021. The cause of action arose from an accident that occurred on 3rd November 2017 when the deceased was a motorcycle rider along Eldoret-Nakuru road near Eldoret Hospital junction when the defendant's drivers/agents negligently drove motor vehicle registration numbers KCC 721 Z/ZD 4110 and KBW 117C causing them to lose control and knock the deceased causing him to sustain fatal injuries.

2 Upon considering the testimonies of the witnesses and the evidence tabled before the court the trial magistrate entered judgement in favour of the respondents on 12th March 2021 apportioning liability at 50% and awarding general and damages at a total of Kshs. 1,630,700/-. The appellants, being dissatisfied with the decision of the trial magistrate instituted the present appeal vide a memorandum of appeal dated 29th March 2021 premised on the following grounds;

3 The parties prosecuted the appeal vide written submissions.

Appellant's Case

4 Learned counsel for the appellants submitted that the plaintiff failed to prove his case to the required standard. He urged that both PW1, the police officer and PW3, the eye witness, confirmed that the deceased was knocked by motor vehicle registration number KBW 117C as a result of which he fell into the rear wheels of motor vehicle registration number KCC 721Z/ZD4110 which was in motion and was ran over. Further, that despite PW1, the police officer and PW3, the eye witness, confirming that the accident occurred suddenly and it was therefore difficult for the driver of motor vehicle registration number KCC 721Z/ZD 4110, to notice the accident on time and to brake, slow down or swerve so as to avoid running over the deceased, the Learned magistrate went ahead to find the appellants 50% liable for the accident on the reasoning that there was no indication that either of the motor vehicles tried to slow down, brake or swerve to try and avoid the accident. He urged that their evidence exonerated the 2nd appellant from liability and imputes liability on the driver of motor vehicle registration number KBW 117C. Counsel submitted that the court ought to have found the 1st defendant liable 100%.

5 Learned counsel urged that the deceased's monthly earnings were unascertainable, and he urged this Honourable court to set aside the trial court's judgment in this regard as the same was purely speculation and instead adopt a multiplicand of Kshs.5, 000 which is within the Government's Minimum Wage Guideline for unskilled laborers. He relied on the case of *Philip Wanjera & Another -vs- Ahmed Libah & Another*, HCCA No. 343 of 2014 and the case of *Paul Ouma v Sarah Akinyi and Monica Achieng Were (suing as the legal representative in the Estate of Paul Otieno Were (Deceased)* [2018] eKLR in support of this submission.

6 Counsel urged that the trial court did not take into account the vicissitudes of life in determining the multiplier. He cited the case of *James Gakinya Karienye & Another (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) vs Perminus Kariuki Githinji* [2015] eKLR and urged the court to adopt a multiplier of 18 years. He also urged the court to adopt a sum of Kshs. 20,000/- for loss of expectation of life as the deceased died on the spot and considering the uncertainties and vagaries of life.

Respondent's Case

7 Learned counsel for the respondent filed submissions dated 23rd February 2023. Counsel urged that there were three witnesses called to prove the plaintiff's case in the trial court and when the defendants were put on their defence they failed to call any witnesses and did not file any witness statements or any evidence in support of their case. He submitted that having failed to call any witness the appeal should fail as pleadings in court cannot automatically serve as evidence in court.

8 The respondent submitted that the Appellant(s) does not deny the occurrence of the accident nor do they deny that it is its motor vehicle that caused the fatal injuries to the Respondent/Plaintiff. In the judgement of the Chief Magistrate's Court liability was apportioned at 50% to 50% since neither of the parties called evidences. Since the court did not hear either of the Defendants, apportioning of liability at 50% to 50% among the Defendants was the best approach the trial magistrate could take.

9 Counsel urged that the quantum awarded for pain and suffering was reasonable and the court ought not to disturb the same. Further, that the award of loss of life was reasonable and he relied on the case of *Mercy Muriuki & Another (Suing as the legal Administrator of the Estate of Robert Mwangi*(2019) eKLR in support of this submission. On loss of expectation of life, counsel intimated that the award of Kshs. 150,000/- was reasonable and cited the case of HCCA 532 Of 2001 *John Jembe Mumba -vs- Seif Mbaruka & Another* where a similar amount was awarded.

10 Learned counsel submitted that the deceased was aged 21 years and was a business man as indicated on the death certificate. The plaintiff testified that the deceased earned Kshs. 20,000/- per moth selling milk with a boda boda motorcycle. He was barely 21 years and he would have worked to the age of 70years. Although there was no pay slip to evidence this, the court has on several occasions rejected the contention that only documented evidence can prove income (see *Jacob Ayiga Maruja & Another -vs- Simeon Obayo* (2005) eKLR. The respondent urged that a Dependency ration of 2/3 would have been applied under this head.

11 He concluded by submitting that the special damages were pleaded and proved and the appellant did not contest the same as such they should not be dismissed. Counsel urged that the appeal be dismissed with costs to the respondent.

Analysis & Determination

12 This being an appeal, it is imperative to set out that as an Appellate court will not normally interfere with a trial court's judgement on a finding of fact unless the same is founded on the wrong principles of fact or law as was set down by the court of appeal in *Selle & Another -vs- Associated Motor Boat Co. Ltd & Another* (1968) EA 123 where the court stated as follows:-

> " A court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on misapprehension of the evidence, or the judge is shown demonstrable to have acted on wrong principles on reaching his conclusions".

13 Upon considering the memorandum of appeal and the submissions of both parties, the following issues arise for determination;

1. Whether the trial court erred in its finding on liability
2. Whether the trial court erred on its finding on damages

Whether the trial court erred in its finding on liability

14 I have considered the evidence of the witnesses in the trial court and from the evidence of PW3, an eye witness, it is evident that the accident occurred. Further, it is clear that the two motor vehicles were involved in the said accident. However, I take issue with the finding of the trial court that the evidence of the eye witness was corroborated by the evidence of the police officer as the police officer was not the investigating officer in the matter and further, he did not produce sketch maps. It therefore begs the question as to how the trial court found the evidence of the police officer corroborative.

15 From the evidence of PW3 who was behind KBW 117C, the deceased was knocked by the said vehicle and fell into the rear tyres of the appellant's vehicle. It is clear that without the actions of the driver of KBW 117C, the deceased would not have fallen into the path of the appellants' vehicle.

16 It is trite law that he who alleges must prove. The burden of proof of the negligence of the appellant rested solely on the respondent. Negligence as defined by Perly Chartersworth on Negligence 5th Edition Chapter 1 is the omission to do something which a reasonable man, guided upon those considerations ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and a reasonable man would not do. To determine whether an act was negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage."

17 In *Regina Wangeci v Eldoret Express Co. Ltd* [2008] eKLR held that:

> In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts, which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."

18 It follows that the concept of a duty of care has a correlation with the concept on proximate cause as explained in *Anns vs Merton London Browngh Council* [1977] AC in which the court observed that;

> Proximity simply means that the parties must be sufficiently close, so that it is reasonably foreseeable that one party's negligence would cause loss or damage to the other. Fairness means that it is fair, just and reasonable for one party to owe the duty to another."

19 In *Donoghue v Stevenson* [1932] AC, the House of Lords held that "a person should be able to sue another who causes them loss or damage. That is what the court referred to as the duty of care to their neighbours."

20 Therefore, the claimant or plaintiff is under a duty to prove on a balance of probabilities the following elements:

(a) That the defendant owed a duty of care.

(b) That the defendant breached that duty of care.

(c) That the claimant/plaintiff suffered loss or damage as a direct consequence of the breach.

21 It is not disputed that the appellant, being a driver, owed a duty of care to other road users. However, from my assessment of the evidence, the appellants did not breach that duty of care as the deceased was knocked by the 1st defendant, a consequence of which he fell under the lorry and was crushed by the rear wheels.

22 In *London Transport Board v Upson* (1949) AC 155 at 175 where the learned law Lord said that: " If the possibility of danger emerging is reasonably apparent then to take no precaution is negligence but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man. That there is no negligence in not having taken extraordinary precaution." It seems to be this was a case where there was appreciable risk but the likelihood of that happening at the precise moment at which this accident occurred throwing the victim at the wheels of the Appellants vehicle was so slight. That it is not a matter which the Appellant ought to have considered to require its driver to slow down as the evidence did indicate on the record. The learned trial magistrate admitted the evidence but on appraising it to exercise discretion failed to take into account those circumstances did not amount to negligence on the part of the Appellants driver of Agent. On a careful examination of the typed record there is nothing to lead this court to any other conclusion that there existence sufficient evidence leading learned trial magistrate to the conclusion she reached in the matter. In fact, even the principle of res ipsa loquitur is not applicable to the events resulting in the death of the deceased. The court in *Scott v London and St Katherin Docks Co.* (1861-73) ALL E.R Rep. 246 had this to say: " There must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant, or his servant, and the accident is such, as in the ordinary course of things, does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In the same vein the court in *Barkway v. South Wales Transport Co. Ltd* (1950) 1 ALL ER390, Lord Porter

in referring to Earle, C.J's statement of the principles, said at page 394 " "The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the 7 question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

23 Looking at the four corners of the impugned judgement the natural inference that arises from that accident which took place as a result of the initial collision as a result the deceased was thrown and subsequently failed at the near side of the Appellants vehicle the res does not speak for itself. It is for this reason one can safely conclude that negligence on the part of the Appellants driver was not proved on a balance of probabilities. Having so found, it was the duty of the said learned trial magistrate to go further and examine the evidence in order to ascertain if there was any evidence revealing that the Appellants Motor Vehicle in the ordinary course of things contributed to the accident. In my view even contributory negligence is purely speculative.

24 In the case of *Lochgelly Iron Coat Co. Ltd vs Mc Mullan* (1034) A.C at pg 25 it states that: " In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing"

25 The respondent version on the cause of the accident leaves no doubt that the Appellant breach of duty was so remote and nowhere can it be said that the driver did not take reasonable steps to avoid the accident. I

26 In that instance, the appellants were in no position to prevent the accident and further, did not cause the deceased to fall under the lorry. The House of horses in *My Land Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd* 1918 AC, 350 it was held interalia as follows:

> Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain but a net. At each point influences, forces, events, precedents and simultaneous, meet and the radiation from each point extends infinitely. At the point where these various influences meet it is for the Judgement as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause."

28 Upon consideration of the record of appeal, the submissions of the parties and the circumstances of the case, I find that the trial magistrate erred in her finding on liability. The appellant's influence on the unfortunate demise of the deceased was too remote for any liability to be imputed.

29 In the premises, the appeal succeeds and I hereby set aside the finding of the trial court on liability against the appellants herein with costs payable by the Respondent/Plaintiff in CMCC 387 of 2019.

DELIVERED AND DATED AT ELDORET ON THIS 19TH DAY OF APRIL 2023

In the Presence of:

Nondis for Kitiwa & Co. Advocates

Wanyonyi Advocate for the Respondent

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R.NYAKUNDI

JUDGE