Misati (Suing as legal and personal representative of the Estate of Priscal Kwamboka Onkoba) v Kamunge (Civil Appeal 51 of 2016) [2023] KEHC 17754 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 51 OF 2016

TA ODERA, J

MAY 5, 2023

BETWEEN

HEZRON MISATI (SUING AS LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF PRISCAL KWAMBOKA ONKOBA) ..... APPELLANT

SUING AS LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF PRISCAL KWAMBOKA ONKOBA

AND

SAMUEL KAMUNGE ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. J. NTHUKU (R.M) IN NAKURU CMCC 535 OF 2013 dated 16.10.13)

JUDGMENT

1. By a plaint dated 14/6/2013, the Appellant filed a suit seeking general damages, special damages, costs of the suit, interest and any other relief against the respondent. The appellant commenced the suit as the legal and personal representative of the estate of the Priscal Kwamboka OnkobA (the deceased herein). The respondent pleaded that on or about 17/06/2008, the deceased was lawfully riding a motor cycle as a pillion passenger along Kenyatta avenue Nakuru road when the respondent, his servant, agent and/or driver drove, negligently managed and/or controlled motor vehicle KAR 302 C (suit motor vehicle) causing it to knock and subsequently caused the death of the deceased on 20.6.2008.

2. The respondent particularized the negligence on the part of the appellant, his servant, agent or driver, the particulars pursuant to *Fatal Accident Act* and the particulars of special damages.

3. The respondent entered appearance and filed a defence dated 22/7/2013. The appellant denied the occurrence of the said accident, liability and particularized the negligence of the deceased and the rider. The appellant asked the trial court to dismiss the suit with costs.

4. The suit proceeded for hearing when appellant called 4 witness while respondent called 2 witnesses.

5. The trial Magistrate in his judgement dated 16.10.13 dismissed the suit.

6. The appellant being dissatisfied with the judgement preferred the instant appeal on the following six (4) grounds:-

    a. That the learned Magistrate erred in law and in fact in dismissing the Appellant's suit and finding that the Appellant had not proved his case on a balance of probabilities notwithstanding overwhelming evidence to the contrary.

    b. That the learned Magistrate erred in law and in fact in disregarding and /or ignoring the evidence adduced by the Appellants , his witnesses and submissions .

    c. That the learned Magistrate erred in law and in fact by going out of her way and relying on information that was not on record in determining liability.

    d. That the learned Magistrate erred in law and in fact by assessing damages that were inordinately low in the circumstances.

7. The appellant prayed:-

    a. That this appeal be allowed and the Judgment in Nakuru CMCC No. 533 of 2013 be set aside and be substituted with a Judgment in favour of the Appellant against respondent.

    b. The costs of the appeal and lower court suit be borne by the respondent.

8. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 12.7.19. The respondent did not file any submissions. I have duly considered the submissions by the appellant.

9. This being the first appeal, the court has a duty to re-evaluate and analyze all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.

10. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR.

11. Guided by the above principles, I have considered the appeal, the proceedings in the trial court and the submissions by both parties. The main issue for consideration is:-

    a. Whether the trial Magistrate apportioned liability correctly.

    b. Whether the trial court applied the correct principles in assessment of damages.

12. The Court of Appeal in *Alfarus Muli v Lucy M Lavuta & Another* Civil (1997) eKLR held that:-

> " The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

13. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1987) eKLR, Kneller J.A. stated: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango v Manyoka* [1967] E.A. 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited v Kalovoto* [1970] E.A. 414, 418, 419. This court follows the same principles."

14. The question of liability in road traffic cases was discussed by the Court of Appeal in the case of *Michael Hubert Kloss & Another v David Seroney & 5 Others* (2009) eKLR as follows;

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) A.C. 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...

15. The appellant testified as PW1. He stated that he never witnessed the accident and his mother died 3 days after the occurrence of the accident.

16. PW2 Christopher Ondieki testified that he was walking along Kenyatta Avenue when he saw a cyclist carrying a pillion passenger indicate that he was about to join post bank junction and motor vehicle registration no. KAR 302 C red in colour hit the bicycle from behind. On cross -examination he said the bicycle was hit from behind and later changed the story and said it was hit from the front. He said he recorded his statement with police a week later after attending the funeral of deceased.

17. Pw3 PC Christopher Kiari said PC Sarara visited the scene and that it is the cyclist who hit the motor vehicle from behind and that it is the cyclist who did not give way. On cross -examination he said he could not tell the point of impact and so he could not tell who was to give way.

18. Pw4 John Abuso said he saw a white vehicle which was speeding from KFA general direction along Kenyatta Avenue hitting the bicycle carrying a lady pillion passenger.

19. Dw1 Samuel Kamunge testified that on 17/6/18 he was driving motor vehicle registration no. KAR 302 C along Kenyatta road at 20kmph and on reaching polo centre junction he heard a bang behind the co-driver's door and he stopped and got out and found the cyclist who had hit his vehicle picking his bicycle and his pillion passenger was lying on the ground . He said the cyclist was charged but he was not charged. Dw2 Mary Wambui is a wife to Dw1 and she supported the evidence of Dw1 in all material aspects.

20. Dw3 Micah Mimka the officer incharge traffic registry Nakuru law Courts produced traffic case file no. 1425/2008 in which Shadrack Maingi Mutisya was charged with causing death by careless driving and the case was withdrawn under section 87 A CPC.

Analysis and determination

21. On liability I have evaluated the evidence of PW1, PW2, PW3 and PW4 vis a vis that of Dw1, Dw2 and Dw3. PW1 said the vehicle hit the bicycle from behind and then changed the position and said it was from the front. This is not logically possible. He also said he recorded his statement with police 7 days later after attending the funeral of deceased. The delay was not explained. It is clear that PW2 was not at the scene.

22. Pw4 said he witnessed a white vehicle hit the motor cycle while Pw2, and PW3 said it was a red vehicle .It is strange that he saw white vehicle while PW2 saw a red one. I agree with the trial magistrate that PW2 was not at the scene and is not a credible witness. PW3 the police officer gave very scanty evidence of the accident and blamed the pedal cyclist for the accident. He did not produce any sketch plans and legend of the scene. He was also not the investigating officer and he could not tell the probable point of impact. His evidence was purely hearsay and does not assist this court to arrive at a just determination of the issues herein. Dw1 and Dw2 said that it is the bicycle which rammed into their vehicle which was being driven at 20 kmph. The inspection report (Dexh 1) produced by Dw1 indicates that the near side right bottom door was slightly scratched and the vehicle had no pre-accident defects. Appellant faulted the magistrate for finding. In this case both the cyclist and the driver were incharge of their respective vehicles. The doctrine of Res ipsa loqitor thus does not apply. It is trite law that he who alleges must prove. The appellant did not discharge the said burden under section 107 and 108 of the Law of *Evidence Act*. It is not clear how the accident occurred. The respondent was therefore not to blame for the accident as was rightly found by the learned trial magistrate.

23. On quantum for damages, it is trite law that the appellate court will not interfere with exercise of discretion by a trial magistrate in awarding of damages unless the court took into account an irrelevant factor or left out a relevant factor or the award is inordinately low or high that it must be wholly erroneous estimate of damages. See the case of *Kanga v Manyoka* [1961] EA 705, 709, 713 & *Lukenya Ranching and Farming Coop Society Ltd v Kavoloto* [1979] EA as cited in the case of *Paul Kipsang & Anor v Titus Osule Osore* [2013]eKLR. Also *Mombasa Maize Millers & Another v Elius Kinyua Gicori* [2021]eKLR, *Gitobu Imanyara & 2 Others v Attorney General* [2016]eKLR and *Kemfro Africa Ltd t/a Meru Expresses & Anor v A.M Lubia & Anor* KLR 30.

24. This court therefore will therefor deal with the said issues under the following distinct and separate heads.

Pain And Suffering

25. The Appellants submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and assessing damages for pain and suffering at Kshs.40,000/= .Appellant submitted that an award of Kshs.120,000/= would suffice under this head as deceased died 3 days from the date of the accident and cited the case of Jemmimah Wambui Njoroge Civil Suit no. 242 of 2009 where an award of Ksh 120,000/= was made under this head and also Rispa Ogema Elijah v Ali Salim Transporters and another HCCC No. 6 of 1995 where deceased died on the spot and was awarded Kshs.100,000/= for pain and suffering I have considered the said cited case , the fact that deceased died 3 days after the accident and must have suffered a lot of pain and the comparable awards. I find that the assessment of Kshs.40,000/= was too low in the circumstances and I would substitute the same with Kshs.120,000/= .

26. On the loss of dependency, it was submitted that deceased was aged 69 years old at the material time and was a farmer earning Kshs.30,000/= per month and the used minimum wage for the year 2012 of Kshs.15,000/=. The proposed calculation of loss of dependency as hereunder 15,000x 2/3 x 10x

12 = Kshs.1,200,000/=. I find that multiplier of 10 years is high considering the age of deceased and vicissitudes of life and I would apply 5 years. 2/3 dependency is also on the higher side since all the dependants are adults and considering the advanced age of deceased I would put the dependency at 1/3 which is reasonable in the circumstances. I would calculate the loss of dependency as follows;

15000x 1/3 x 5x 12 = 300,000/=.

27. On loss of expectation of life, the trial Magistrate assessed the same at Kshs.100,000/= which is reasonable and I uphold the same.

28. In the upshot had the appellant proved their case on a balance of probability I would have awarded;

Damages for pain and suffering Kshs.120, 000/=

Loss of expectation of life Kshs.100, 000/=

Loss of dependency Kshs.300, 000/=

Special damages Kshs.50, 000/=

Total Kshs.570, 000/=

29. From the foregone, the upshot is that this court finds that the appeal is devoid of merit. The judgement and decree of the Hon. J. Nthuku (R. M) dated and delivered on 18.9.15 is hereby upheld. The costs of this appeal is awarded to the respondent.

T. A. ODERA - JUDGE

5.5.2023

JUDGEMENT DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Miss Oganga for the Appellant.

No appearance for the Respondent.

Court Assistant; YEGO.

T. A. ODERA - JUDGE

5.5.2023