REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 11 OF 2020

SHIVJI PREMJI VARSAMI.....1ST APPELLANT

NARAYAN BUILDERS LIMITED.....2ND APPELLANT

VERSUS

NEEMA KAZUNGU.....RESPONDENT

(Being an appeal against the Judgment of Hon. S. D. Sitati – Resident Magistrate in Malindi PMCC No. 212 of 2018 delivered on 3/2/2020)

Coram: Justice Reuben Nyakundi

Kariuki Gathuthi & Co. Advocates

Wambua Kilonzo & Co. Advocates

JUDGMENT

The appellant has taken one point in this appeal:

· **That the trial court ought to have dismissed the claim summarily for non-proof of negligence on the part of the Respondent.**

The substantial issue then is whether the learned trial magistrate was right in apportioning liability at 95%: 5% for the Appellants as against the Respondent.

The grounds of appeal filed by the Appellants are that the learned trial magistrate erred in law, in holding that the appellants were liable to a higher portion of 95% on contributory negligence as compared with the respondent at 5%. Arguing the grounds cumulatively Appellants' counsel Mr. Wambua, contended that the decision on contributory negligence was against the evidence presented to the court.

On the velacity and cogency of the witnesses' evidence learned counsel attacked the testimony of (PW1) and (PW2) on the proximate cause of the

accident. Learned counsel stated in reference to the police evidence of (PW2), the real cause of the accident can be formed in reference to the following statement:

> **"I cannot recall the vehicle registration number of the vehicle, it started overtaking the other vehicle. Fearing head on our driver slowed down and finally pulled out of the road. After the lorry was gone, our driver tried to swerve back to the road and it is at this point when the vehicle hit by another motor-vehicle pick up."**

According to learned counsel if only the driver of the tuk tuk had checked clearance of the road first, the accident couldn't have occurred. Learned counsel for the Appellants relying on the principles in **Simpson vs Peat (1952) 1 ALL ER, Peris Onduso Omondi vs Tectura International Ltd & Anor [2012] eKLR, Kiema Muthuku vs Kenya Cargo Handling Services Ltd [1991] 2 KAR 258, Sammy Ngugi Mugo vs Mombasa Salt Lakes Ltd [2014] eKLR.**

So far as the key principles in the cited cases are concerned, it may be said that in law there is no liability without fault and the plaintiff must prove negligence against the defendant. It followed, in the opinion of the learned counsel liability was not proved on a balance of probabilities. He therefore prayed for the upsetting of the findings of the court below.

In this case, the Respondent apparently opposed to the appeal in its entirety on the findings on liability.

Having considered the submissions by both counsels and the submissions of the appeal its now my singular duty to appraise the evidence in determining the appeal.

Determination

I take it as a guide for the exercise of this court jurisdiction factoring the extracts from the decision by their Lordships in the case of **Peters vs Sunday Post Ltd [1958] EA 429 and Shah vs Aguto [1970] EA 265**

> **"So far as these cases illustrate the appellate court has jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence by the trial magistrate should be held to stand…..But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion. In Karisa vs Solanki [1969] EA 320 the court observed that "where a trial judge finds that one of the parties to an accident has not been guilty of any negligence, the court, even if it is doubtful that it would have arrived at the same decision, should not interfere with that finding unless, it is satisfied that the trial judge was wrong."**

The matters which the court should consider on this appeal, is whether negligence was proved against the Appellants on a balance of probabilities.

The law on proof of negligence is well settled as expressly opined by the Learned Authors in **Clerk & Lindsell on Torts 18th Edition** as being the correct statement on the ingredients to take into account thus:

> **1. The existence in law of a duty of care situation i.e. one in which the law attaches, liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in a suit, on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.**
>
> **2. Breach of the duty of care by the defendant i.e. that it failed to measure upto the standard set by law.**
>
> **3. A causal connection between the defendant's careless conduct and the damage.**
>
> **4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.**

When these four requirements are satisfied, the defendant is liable in negligence. The standard normally set is that of a reasonable and prudent man. In the often cited words of **Baron Alderson, "*Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man guided upon these considerations, which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.*"**

The key notion of reasonableness provides the law with a flexible test, capable of being adapted to the circumstances of each case. That bringing me to the burden of proof in an action for negligence which is vested upon the claimant – plaintiff who has the cause of action on occurrence of the accident against the defendant. This test is amplified under **Section 107, 108 and 109 of the Evidence Act**:

> **"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **108. The burden of proof in a suit of proceedings lies on that person who would fail if no evidence at all were given on either side.**
>
> **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 that fact shall lie on any particular person."**

In the judgement of the court in **Nandwa vs Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi vs Eldoret Express Co. Ltd [2008] eKLR,** the court held inter alia 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 as 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 the decided in the plaintiff's favour unless, the defendant provides some answer to displace that inference."**

In this case, the respondent evidence (PW1) Neema Kazungu was to the effect that on 20/4/2018 she was travelling on board a tuktuk when the Appellants' motor vehicle being driven from Kilifi left its lane to collide with their tuktuk. As a result of the collision, she suffered injuries to the head, tongue and knee. According to the respondent all these injuries were further diagnized at Kilifi Hospital as supported by the treatment notes and the P3 form. On cross-examination by the Appellants' counsel it is clear from the record that the respondent confirmed that the accident occurred at 9.30 am. Further the accident occurred for reason of the collision caused by the vehicle from Kilifi

which left its lane. It's also on record from the evidence by (PW1) that the tuktuk took evasive steps but nevertheless it was too late as the offending vehicle pushed its way to the other lane to hit the tuktuk.

The other material evidence came from (PW2) who apparently did not investigate the accident but relied on the information from the extracts context by one PC Charles Lewa. PW2 adduced evidence on the proximity cause of the accident and an inference drawn from the sketch plan and legend on the documented scene of the accident.

The position adopted by the Appellants came from the evidence of (DW1) Salim Ndunji Mwero, the driver by then of the subject motor vehicle registration KBM 329V. His version on the accident was on the acts of negligence committed by the driver of tuktuk which approached the road suddenly without ensuring it was safe to do so. That is how he escaped from being charged with the offence of careless driving. Upon this evidence the learned trial magistrate apportioned liability at 95%: 5% in favour of the respondent.

Taking all the foregoing considerations into account the picture that emerges is that the direct eye witness evidence of (PW1) as circumstantially, corroborated by PW2 places the defendant squarely at the scene of the accident. The evidence discloses that the vehicles were being driven on opposite directions.

It certainly would not be possible to allege that the tuktuk emerged from the side of the road to collide with the motor vehicle. It is significant too, that the failure by the police not to charge the Appellant's witness with a traffic offence is not defence to controvert the burden of proof of the facts which rests with the respondent. That decision not to charge the Appellant's driver to me would not be taken as ground to rebut proof of prima facie case to hold him vicariously liable for the accident.

The issue in the instant case is simply whether, the Appellant's driver was so liable for the negligence in respect of the operation and control of the motor vehicle in question? As indicated in the judgement of the trial court quite apart from any issue on vicarious liability there is also the primary issue on contributory negligence apportioned mainly to the Appellant's driver. This is a positive finding given the oral evidence of (PW1) and circumstantial evidence of (PW2).

My understanding of the duty of an appellate court is that it cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the trial magistrate can be said to be plainly wrong. See **Peters vs Sunday Post (Supra).**

I hasten to observe that in so far as the principles to guide an appellate court are concerned, when it comes to impugn the decision of the trial magistrate care should be taken that he or she has enjoyed the advantage of seeing witnesses, evaluate their demeanor and velacity of their testimonies in court, an advantage not available to the appeals court.

I am persuaded in my approach taken on the issue, the weight given to the evidence, bearing of the circumstances admitted or proved, or otherwise nothing has been canvassed by the Appellant to demonstrate that the learned trial magistrate went plainly wrong on the decision as to contributory negligence.

In the case of **Calvin Grant vs David Pardedon at (Civil Appeal No. 91 of 1987 EWCA,** the court held:

> **"Where there is evidence from both sides to a civil claim for negligence involving a collision on the roadway and this evidence, as is nearly always, usually the case, seeks to put blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag-marks if any to relation of damages to the respective vehicles or parties, any permanent structures at the accident sites, broken glass, which may be left, on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."**

In my view a motor vehicle driving from its lane and colliding with another being driven on its rightful lane does create a prima facie case of negligence. In the case of **Jones vs Linox Quarries Ltd [1952] 2 QB 608** the court held that:

> **"A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he ought to be hurt himself, and in his reckonings he must take into account the possibility of others being careless."**

I am glad on this score to find that the learned trial magistrate view of this matter coincides with mine.

Accordingly, I think no valid grounds exist for interfering with the decision of the court below. My conclusion is that this appeal fails and should be dismissed with costs on both liability and quantum with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021.

.....

R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (wambuakilonzoadvocates@gmail.com kariukigathuthi@gmail.com)