



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 174 OF 2019

DAVID MBIYU NG'ANG'A.....APPELLANT

VS.

PETER NGURE NJOROGE.....1ST RESPONDENT

ESTHER NYAMBURA.....2ND RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrates Court at Limuru K.M. Njalale, SRM dated 18th January, 2019)

JUDGMENT

1. **DAVID MBIYU NG'ANG'A** (the appellant) has filed this appeal against the judgment of the Principal magistrate's court (the trial court) at Limuru.

2. **PETER NGURE NJOROGE** and **ESTHER NYAMBURA** (the respondents) sued the appellant before the trial as the administrators of the estate of their son Simon Murigi Ngure deceased. In that action, they alleged that the appellant negligently drove his motor vehicle, registration No. KBS 836A on Nairobi-Naivasha highway, thereby causing an accident with the deceased who was a motor cycle rider. The deceased died at the scene.

3. The respondents' claim was denied by the appellant who pleaded that the accident was caused solely or substantially contributed by the deceased's negligence.

4. After trial, the trial court apportioned liability on 40%-60% in favour of the respondents. The appellant was aggrieved by that judgment and has filed this appeal. The appellant filed eleven grounds of appeal. Those grounds raised the following issues:-

- (a) Who was liable for the- accident?
- (b) Did the trial court err in its award on damages?

ANALYSIS AND DETERMINATION

5. This is the first appellate court and as such, it is expected to reconsider the trial court's evidence and evaluate that evidence itself and draw its own conclusion. This is what the court stated in the case **JACKSON KAIJO KIVUVA VS. PENINA WANJIRU MUCHENE (2019) eKLR** thus:-

“14. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal stated that:-

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect”

6. Only one respondent, **PETER NGURE NJOROGE** testified at the trial. He stated that the deceased was his son. He was unable to state how the accident occurred, because he was not present at the scene of the accident. He said that the son had a wife called ELISHABAH but he had not officially been introduced to her. The witness was unable to prove to the court that the motor cycle his deceased son was riding,

when the accident occurred, belong to the deceased. He however did state that the deceased used to earn Ksh.30,000/= per month but again he had no proof of sum earned by the deceased.

7. The respondents also called a police officer in charge of traffic in Lari. That officer confirmed that the accident was recorded in his office. This is what the police officer further stated:-

“An accident happened involving a motorcyclist No. KMDK 895C was heading towards Naivasha from Nyambari motor vehicle ahead of him registration KBS 836A Toyota Lexus turned to the left to join in the junction. It is then that the rider rammed into the rear of the Lexus. Due to the impact he was thrown, landed with the head on the tarmac road and the injuries caused fatal injuries ... officers visited scene took necessary action removed it to the morgue ... the rider was blamed for the accident.”

8. The appellant also testified and stated:-

“I was going to uplands funeral home driving KBS 836A. when I reached Gatarama area, I indicated to enter uplands funeral home.

I heard a knock on the rear to my right. It was a motorbike registration KMDK 895C.

I saw the bike fly up then a person after it and it hit him.

I indicated to the left other motor vehicles had slowed down. Those behind me. I was on the left. I had signalled. I was moving off the road but not completely. I blame the owner of the bike. His calculation was not right. He was overtaking me but did not calculate well...

He had no helmet. The mistake was his. I was not even charged with a traffic offence.”

9. With a view of the above evidence, the trial court had this to say on liability:-

“LIABILITY

I have looked at the evidence as adduced. No one from the plaintiff side testified on how the accident allegedly occurred. I only have the defendant's version and that is what I will base my opinion on. The IO testified besides the defendant who was at the scene. He did not give details of the point of impact. No sketch plans were produced and/or elaborated and the PAR indicates that the accident was pending under investigation. No was (sic) charged with a traffic offence. He said that the deceased was blamed for the accident. However, this is not the case on the PAR he produced and wished to rely on. He did not investigate the accident as the one who did was apparently on transfer. There was no version of the occurrence of the accident. I must state that it is not clear on how investigation was carried out and who (if any) was to blame for the accident. The plaintiff seems unaware of how exactly the accident may have occurred. From the evidence adduced though I do find that an apportionment of liability in the tune of 40%:60 in favour of the plaintiff should suffice and I apportion as such.”

10. Who bore the onus to prove the appellant was negligent and that his negligence cause the death of the deceased and to prove the claim for loss of earning and damages? It is trite law that he who alleges must prove. This is what section 107 of the Evidence Act provides. That section provides thus:-

“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.

11. The respondents lay the blame of the accident on the appellant. The one respondent who testified the father of the deceased, confirmed that he had no evidence to offer on how the accident occurred. The respondents called a police officer as their second witness and that police officer stated that the deceased was wholly to blame for the accident. The officer also stated that the deceased hit the appellant's vehicle on its rear. That impact threw the deceased up and he landed on his head which hit the tarmacked road.

12. The police officer's evidence corroborated the appellant's evidence that the deceased hit appellant's vehicle, on the rear, as appellant was in the motion of turning to the left. That evidence is further corroborated by the certificate of examination and tests of vehicles dated 10th September, 2015. That certificate confirmed the damage on the deceased's motor cycle was on:-

“Front rider's mudguard, front windshield, damages view mirror, ripped off.”

13. The damage on the motor cycle being on the frontal part of that motor cycle confirms the appellant's and the police officer's evidence that the deceased rammed into the back of the appellant's vehicle.

14. It follows that since the law does not require the defendant (herein the appellant) to prove he was not negligence but rather requires the one who alleges (the respondents) to prove negligence and it will be observed from the reproduced evidence that the respondents failed to prove negligence on the part of the appellant, it therefore follows that the trial court's findings on liability was made in the absence of cogent evidence either oral or documentary. There was no basis for the trial court to apportion the appellant 60% liability for the accident. It was not based on evidence adduced. The respondents failed to meet the burden of proof.

15. This Court therefore finds and holds that the accident was wholly attributed to the negligence of the deceased. He was the author of his own misfortune. The deceased endangered his life by not heeding the presence of the appellant's car and which had slowed down in the process of turning off the main highway.

16. The second issue is whether the trial court erred in its award of damages.

17. The respondents did not prove the deceased owned the motor cycle. They did not prove he was running a business as *boda-boda* operator and the trial court was therefore misplaced to have used in calculating damages the amount stated by the respondent as deceased's earning because there was no proof. There was no proof the deceased was earning at all and as correctly submitted by the appellant, the trial court in assessing the damages due should have adopted the government minimum wage rate.

Further, the respondent did not prove the age of deceased. It was not enough to simply state the deceased was 25 years old. There was need for his age to be proved.

18. I do therefore find the trial court erred in assessing damages.

DISPOSITON

19. The appeal, having regard to the discussion above, is merited and is allowed. This Court therefore grants the following orders:-

(a) This appeal is allowed and the trial court's judgment in the case SPMCC Limuru No. 177 of 2016 dated 18th January, 2019 is set aside and the respondent's said suit is hereby dismissed with costs.

(b) The appellant is awarded costs of this appeal.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 1ST DAY OF JULY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Appellant : Ms. Kimasha

For Respondents: Ms. Mwangi holding brief for Mr. Mutori

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE