REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 34 OF 2020

JUDITH MEDZA DOFU ***(Suing as the wife and personal***

representative of the estate of

ISAAC GALOWE KULOLA (DECEASED).....APPELLANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION KENYA.....RESPONDENT

(Being an appeal from the whole Judgment and decree of the Principal Magistrate's Court at Mariakani by Hon. S.K.Ngii – SRM delivered on the 24th day of June, 2020 in Mariakani PMCC No. 25 of 2018)

Coram: Hon. Justice R. Nyakundi

Mjeni Mwatsama & Company Advocates for the Appellant

Waithera Ngigi & Co. Advocates for the Respondent

J U D G E M E N T

This is an appeal against the dismissal order of the inferior court decreed in the judgement of Hon Ngii (P.M) of Mariakani on 24.6.2019. Aggrieved with the decision the appellants has preferred an appeal to this Court based on the following grounds in the Memorandum of Appeal;-

1. The learned magistrate erred in law and fact in his failure to appreciate the Plaintiff's evidence and not taking the same into consideration.

2. The learned magistrate erred in law and fact in finding that the Plaintiff failed to discharge the burden of proof because she did not witness the accident.

3. The learned magistrate erred in law and in fact by disregarding the evidence of Plaintiff witness number 2 in arriving at the decision.

4. The learned magistrate erred in law and fact in finding the Plaintiff did not prove the motor vehicle KCD 260J was the one which caused the accident.

5. The learned magistrate erred in law and fact in disregarding the Plaintiff's evidence yet the Defendant did not offer any evidence to the contrary.

6. The learned magistrate did not apply the doctrine of *Res Ipsa Liquitor* ***as pleaded in the plaint.***

7. The learned magistrate erred and misdirected herself in awarding low general damage of Kshs.720,000/= for the fatal accident the Plaintiff suffered which amount is excessively low in the circumstances and which amount is an erroneous estimate of the loss/damage suffered by the Respondent.

Background

On or about 5.6.2016 the deceased ***Isaac Gatwe Kuhola*** stated to be a pedestrian was allegedly involved in a road traffic accident along ***Mazeras /Rabai Road*** with motor vehicle registration ***KCD 260J*** registered in the name of the Respondent. The appellant who applied for grant of letters of administration intestate instituted a suit against the Respondents for negligence and other reliefs for damages under the Law Reform Misc. Act and Fatal Accidents Act. The particulars of negligence are as outlined in the Plaint filed in Court on 2.2.2018 pleaded as follows;-

a) Driving without due care and attention.

b) Driving at a speed that was excessive in the circumstances.

c) Driving on the wrong side of the road.

d) Leaving his lawful lane and thereby driving into the path of the deceased hence causing the accident.

e) Creating circumstances that precipitated and caused the accident.

f) Failing to keep and or maintain any proper look out.

g) Failing to have due regard to the safety and wellbeing of other road users and in particular the deceased.

h) Failing to exercise the care and skill reasonably expected of a driver of a motor vehicle in the circumstances.

i) Overtaking what it was inappropriate to do so.

j) Failing to brake in time or at all.

k) Failing to stop, to slow down, to swerve or in any other way so to manage and/or control the said motor vehicle to avoid the accident.

l) Causing the death of the deceased.

Further the Plaintiff shall at the hearing rely on the doctrine of *Res Ipsa Liquitor* as far as the same is applicable.

The Respondent in its defence pleaded that the deceased was wholly to blame for the accident or was contributorily negligent on 10.7.2019, the matter came up for trial before Hon Ngii (SRM) as he then was). The issue to be determined by the learned trial magistrate was whether it was the deceased who was negligent or the respondent driver, agent, servant or employee to find the appellant on vicarious liability.

Having heard the evidence of Pw1 (Judith Medza), the grant holder and administrator to the Estate of the deceased) with that of the police officer (Pw2) and thereafter written submissions by both counsels, the learned trial magistrate found in favour of the Respondent. It's this finding of dismissal of the entire claim on the strength of non-proof of negligence that triggered the present appeal. In that evidence of Pw1 and Pw2, it came out clearly that the deceased was knocked down while crossing the road from the left side to the right. The accident was later to be reported to Mariakani Police Station and as expected a police officer by the name Nyamwee visited the scene and documented all the chain of events of the accident. Having considered all that was stated in collision it was difficulty for the learned trial magistrate on a balance of probabilities rule on liability in favor of the appellant as against the respondent.

Appellants Submissions

Counsel for the appellant argued the appeal by way of written submissions filed and made global attack on the impugned judgement. Counsel submitted that for purposes of this appeal, the sole issue was whether the learned trial magistrate was right in dismissing the suit on grounds that the appellant failed to proof negligence.

Flowing from this issue was the contention by counsel that the finding was inconsistent with the evidence entered by the same court. The second issue raised by counsel was in respect of absence of any evidence from the respondent to controvert existence of a prima facie case established by the appellant. Counsel was highly critical of the learned trial magistrate disregarding the evidence of the police officer who confirmed occurrence of the accident and blameworthy on the part of the respondent's driver, agent or servant. In counsel's view the learned trial magistrate never gave weight to section 107,108, 109 and 112 of the Evidence Act to draw a forgone conclusion that negligence had been proved to call upon the respondent to give evidence in rebuttal. That the case for the appellant having been established, rendered the respondent to testify on matters within its knowledge. It was further submitted by counsel that the learned trial magistrate failed to consider all of the evidence and the skewed analysis occasioned prejudice and injustice to the appellant. In support of this appeal, counsel cited and relied on the following authorities; ***-Felister Nduta Muthoni V The A.G.C Hccc No. 1210 of 2003, Mugunga General Stores V Pepco Distributors Ltd [1987] KLR 150, Ann Wambui Nderitu suing as Administrator for the Estate of George Nderitu V Joseph Kiprono Ropkoi CA No. 345 of 2000.*** Counsel indicated that the learned trial magistrate failed to take into account the enunciated principles to find that at the material time the respondent driver operated the motor vehicle subsequently.

From the record, it is not clear whether the respondent filed the rejoinder submissions as earlier on directed by the court. That as it may be no mistrial would be occasioned by that omission alone, in the fullness of time in the matter.

Determination

In line with the submissions the relevant principles to guide the court are as instructive herein below; -

> ***"It's trite that the first appellant court has a duty to examine, scrutinize and re-evaluate the entire record of the inferior court so as to draw its own conclusions and inferences on the matter. Any virtual of this jurisdiction the court is however barred from making any findings as to the demeanour, truthfulness convincingness and credibility of witnesses who testified at the trial court for the sole reasons of not accorded that advantage. (See the cases of Peters V Sunday Post Ltd [1958] E.A 424.***

From this, it is also grave move for an appeals court to interfere with the decision of the trial court unless it's clear that the learned trial magistrate failed to apply correct principles or appraise the evidence and its relevance to the facts in issue and at stake between the parties. ***(See Mwangi & another V Wambugu [1982] LLR 76 CCAK Marube V Nyamuro[1983].***

In the present appeal the substantial factual and legal issues arise wholly on the courts discretion to dismiss the suit for lack of proof of the elements on liability. In the case of ***Ezekiel Wanjohi V Leba Inyangala and others CA No. 44 of 2002[2002] LLR CAK.***

> ***"It is the duty and burden of the appellant to prove her case against the respondent on a balance of probabilities. A party with the burden of proof as envisaged under section 107 (1) of the Evidence Act will win only when clearly entitled to win and secure judgement in his or her favor as to the existence or nonexistence of facts n issue to the claim. If that party loses, the standard of proof and not the judge or magistrate, is to blame."***

In evaluating evidence to construct the narratives of the case, judges and magistrates should not tilt the scale at the standard of proof to over value the evidence inconsistent with the attention required to give effect to the standard proof. In ordinary negligence action cases, the plaintiff must establish essential elements by a preponderance of the evidence. In the case of ***Wright Root Beer Co. V Fowler Products Co. 196 so 2d 61 51, 618 LA 1st Circuit [1967]*** the following proof requirement is necessary thus;-

> ***"The jurisprudence is well settled that one is entitled to recovery must make and establish his claim to a legal certainty. It does not suffice for the plaintiff to make out a case that is merely probable, he must establish his claims to a legal certainty by a reasonable preponderance of the evidence, proof by a preponderance of the evidence requires that the evidence as a whole show that the fact sought to be proved is more probable than not"***

What this passage means is the duty of the plaintiff/defendant to adduce evidence which goes beyond a mere allegation in the written statement of claim or for that matter the defence. It matters not whether the recourse to the claim is on the plea of *res ipsa liquitor*. In the case of ***Mary Ayo Wanyama and others V Nairobi City Council CA No. 252 of 1998*** the court held;-

> ***"That for the court to adopt the principle of*** *res ipsa liquitor* ***there must be some evidence of what actually happened and how the accident occurred."***

Moreover, a case based on negligence each of the proof of the particulars of negligence in the plaint is an answer to the jurisprudence question to give greater weight to proof the facts in issue. As a starting point in terms of this appeal, one must frankly ask whether the elements of the tort was proved on a balance of probabilities against the respondent. In the case of ***Berrill V Road Haulage Executive [1952] 2 Lloyds Report 490,*** where the court held;

> ***"In running down accidents when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and that is trite whether on foot, or whether one is on foot and the other controlling a moving vehicle"***

In the same vein the court in ***Equator Bottlers Company Ltd V Sozi Todayo Musumba CA No. 36 of 2005*** stated that***;-"in negligence suits the plaintiff has the burden of coming forward with particulars of negligence that must be strictly proved by credible and fairly specific version of evidence of what the defendant did and of circumstances surrounding his conduct."***

In proving negligence the plaintiff is required to provide evidence in support of the particulars pleaded in the plaint. This proof is usually by an act of calling an eye witnesses who will testify as to what they saw, the defendant did to be held liable for the loss and damage. In our law conduct that is not dangerous or breach of the duty of care cannot be equated with negligence.

As also demonstrated by the ***Court of Appeal in Mwangi & another V R[2004]eKLR*** a fact may also be proved by circumstantial evidence that evidence like direct evidence is dependant on each link in the chain which must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion discerned. That the chain of evidence as proved is incapable of any explanation or any other reasonable hypothesis that **as a matter of substantive law the conduct that resulted in the injury was reasonably of a negligent character.**

In the realm of fact-finding proof needed to establish the circumstances of the cause, breach of duty of care and blame-worthiness are commonly deductible from the investigating office who visited the scene. There are certain generic traits of evidence respecting the testimony which affect the probative value on this class of circumstantial evidence such as experience and skill of the police officer who visited the scene on receipt of the accident report, the truth that scene was visited, whether it had been interfered with to negative any positive inference to be drawn as to the dents, point of impact, brake marks, proximate cause and the near side of the parties to the accident. The quest of the standard of proof on a disputed fact is by a preponderance of the evidence and not that of beyond reasonable doubt. (***See Miller V Minister of Pensions [1947]2 ALL 372 at 373.***

In the instant appeal to be entitled to a claim in damages, it was incumbent upon the appellant to bring herself within the quest of the

principles in ***Kenya Power & Lighting Co. Ltd V Mathew Karage Wanyiri [2016] eKLR*** where it was held; -

> ***"Negligence is the omissions to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or during sometime which a preponderance and reasonable man would not do".***

In addition the case of ***Susan Njoki (Suing as the administrator of the Estate of Francis Mwaure Theuri V Joseph Kiiru & Another [2017] eKLR*** observed *inter alia*; -

> ***"That a mere occurrence of an accident which fails in any way to prove acts of negligence contributable to the preponderance in this appeal will not grant any relief in personal injury claim unless the respondents negligence is either admitted or preserved and there is no evidence to controvert it".***

It is instructive from these authorities that the burden of proving this causal link was upon the appellant at that trial court. This court has to take cognizance of the fact that the fact of causation is not susceptible of proof to a mathematical certainty or analogous to military precision. All what the law required of the appellant, was to call evidence to show that reasonably with high probability the harm against the deceased was caused by the tortious conduct of the respondents. The most acceptable meaning the learned trial magistrate gave the expressions and impressions to the evidence on oath of the two witnesses was that the contested existence of fact of negligence was not probable. The more probable hypothesis was that of non-existence of liability against the respondent's driver, employee, servant or agent to infer vicarious liability on its part.

In the case of ***Tabitha Nduhi Kinyua V Francis Mutua Mburi & Another CA 180 of 2009[2014] eKLR*** where the Court stated that; -

> ***"The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employer was acting within the course and scope of employment at the time the delict was committed. The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision on Joseph Cosmas Khayigila V Gigi & Company Ltd & another – CA 119/86 as follows; - In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in the performance of the task of duty thereby delegated to him by the owner"***

Questions presented to judicial interpretation by the appellant are inherently controversial in view of the principles on causation, breach of duty of care and furthermore on proximate cause of the accident. Sometimes it is rarely possible to resolve them with absolute certainty. A feature which emerges in evaluating the testimony of the two witnesses as corroborated with the documentary exhibits their probative value simply does not satisfy with certainty the degree of prove on a balance of probabilities. Thus, as seen from the evidence of (Pw1) its reliability and admissibility fail to connect the respondent's driver or agent drove the said motor vehicle without due care and attention.

Quite clearly also Pw2 evidence seems to be more of hearsay in several specifics to classify his evidence against the respondent's driver as negligent to produce liability for loss and damage to accrue to the appellant. This means that the investigating officer had the traditional duty of proving the point of impact and the manner of driving at the time of the accident in relation to the deceased body. The yield by the driver and the interpretation of the debris or broken glasses at the scene is of significance. The definitive inferences to be drawn from the sketch map and the basis of who to blame for the accident can circumstantially be inferred.

There were various narratives that arise from the record to cast a reasonable doubt as to the negligence of the respondent's driver. First, whether it can be conclusively stated the deceased decision to cross the road was the sole contributor to the accident. Second, whether the driver anticipated the risk and failed to take evasive steps to avoid the accident. Third, the respondent driver knocked the deceased on the left or right side of the road to cause inflict fatal injuries.

As I understand the legal position the appellant was under a duty to formulate to the trial court that; -

> ***a) The respondent's driver was under duty to avoid hitting the deceased as he did.***
>
> ***b) The respondent's driver conduct was negligent towards the deceased***
>
> ***c) That the respondents wrong driving was the proximate cause of the deceased's death.***

In a sense from the evidence as examined and scrutinized by this court I find no traces of preponderance of evidence demonstrating that the respondent's driver was mainly to blame for the accident.

Quite judiciously, the court below discussed the material on record at length and ultimately granted the relief albeit unpleasant to the appellant. He also assigned reasons for that decision. The letter underlying exercise of discretion by an appeal's Court is admittedly well stated in the case of ***Mkube V Nyamuro[1983]LLR,403-415 at 403*** thus.

> ***"A Court on appeal will not normally interfere with the finding of fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles of fact or law in reaching his conclusion."***

That being the legal position liability attaches only in cases where from the evidence adduced at the trial all facts and circumstances of the accident taken together vicariously connect the respondent with the negligent acts and breach of duty of care of his driver, servant or employee. That was not the case proved on a balance of probabilities to render the judgement impeachable.

There is nothing to persuade this Court to take a different view. As a consequence, the appeal is devoid of merit and is good for dismissal with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 7TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the 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.