



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 168 OF 2019

VERONICA NDUTA MAINA, FRANCIS MWANGI MUNGAI

(Suing as the personal representatives of the estate of

PAUL MAINA MUNGAI (deceased).....APPELLANT

VERSUS

HOBRA MANUFACTURING CO. LTD.....RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court, at Limuru,

S. Agot SRM, SPMCC No. 130 of 2016 dated 18th October, 2019)

JUDGMENT

1. I am called upon to determine this appeal which is against the trial court's finding on liability and quantum.

2. On 24th July, 2009, Paul Maina Mungai, deceased was riding his bicycle along Limuru-Banana Road. He was riding behind a lorry. The appellants' case is that the lorry in front of the deceased turned right to join Kabuku road and the pickup vehicle registration No KXC xxx, driven by the employee of the respondent, in this appeal, swerved to avoid hitting the lorry and consequently, drove onto the opposite lane and thereby hit the deceased. The respondent's case is that the lorry stopped at the turning to allow the pickup pass and the deceased overtook the stationary lorry and in so doing rode into the pickup and was consequently injured and later died.

3. The trial court after receiving the evidence found on liability at 90% to 10% in favour of the Respondent. The trial magistrate found that the witnesses who testified did not blame the respondent for the accident.

4. On quantum, the trial court awarded the appellants the following amounts:-

(a) Law Reform Act

Loss of expectation of life Kshs.100,000

Pain and suffering Kshs.50,000

(b) Fatal Accident Act

Loss of dependency Kshs.732,840

(c) Special damages Kshs.146,180

Total Kshs.1020,020

5. This is the first appellate court and the duty of this Court was discussed in the case of **GITOBU IMANYARA & 2 OTHERS VS. ATTORNEY GENERAL (2016) eKLR** as follows:-

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an 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. See SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LIMITED AND OTHERS [1968] EA 123 AND WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in PETERS –VS- SUNDAY POST LTD [1958] EA 424. In its own words: -

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

6. The Appellants have presented a total of six grounds of appeal which collectively relates to the trial court’s finding on liability and quantum.

LIABILITY

7. The appellants faulted the trial court’s finding on liability where the deceased was blamed for the accident at 90%. The appellant submitted that although the trial court, in the judgment, stated that the appellants’ eye witnesses’ evidence would be relied upon in determining liability that it however failed to note that the said eye witness saw the pick-up swerve to avoid colliding with the lorry and as it did so the said pick-up collided with the deceased.

8. Appellant faulted trial court’s reliance on the police officer’s evidence. The police officer produced copy of the occurrence book (OB) record which lay the blame for the accident on the deceased. In the appellant’s view, the OB is recorded from the information given by the person reporting, in this case the respondent, and the information thereof cannot be relied upon because it contains one-sided information of how the accident occurred.

9. The appellant submitted that the respondent’s witness evidence contradicted that of the appellant’s witness yet the appellant’s witness was an eye witness of the accident.

10. On liability, appellants stated that they had met the burden of civil proof by adducing evidence of an eye witness who testified that the respondent’s driver was driving at a high speed and on seeing the lorry turning in front of him swerved which caused the accident.

11. The respondent’s submission were to the effect that the “*deceased was the sole author of his misfortune,*” that he should have stopped behind the lorry so as to give way to the oncoming pick-up. According to the respondent, the finding of the trial court cannot be faulted.

ANALYSIS ON LIABILITY

12. It is not disputed that a collision occurred between the respondent’s vehicle and the deceased as he rode his bicycle. The divergence comes in on the determination of who was at fault. In other words, whose acts of negligence caused the accident to happen? For the court to interrogate this issue it will need to determine who bore the burden of proof. Section 107 of the Evidence Act Cap. 80 provides:-

“ (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.

13. The court in the case THREADSETTERS TYRES VS. JOHN WEKESA WEPUKHULU (2010) eKLR considered the issue of burden of proof and stated:-

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

14. The appellants called one witness who adopted his written witness statement. That witness, *Reuben Karegi Njenga* stated that on the material date he had just alighted from a public service vehicle (*matatu*). He was at the junction that joins the Limuru-Banana Road. He further stated:-

“I saw a lorry coming from the direction of Limuru town. It was indicating to turn right at the junction and enter the road that heads to Kabuku. At the same time, I saw another vehicle coming from Tigoni directions. It was a pick-up coming downhill and very fast.”

15. He stated that the lorry turned into the junction into the path/lane of the oncoming pick-up. He said:-

“By the time the pick-up was very close. I saw the pick-up swerve to avoid colliding into the lorry and moved in the lane of vehicles coming from Limuru town. As the pick-up swerved it came face to face with a cyclist who was cycling on his right side of the road...”

16. The witness narrated how the pick-up collided with the deceased and on being hit the deceased fell across the road.

17. On being cross examined this witness stated that the lorry failed to stop to give way to the pick-up at the junction as it turned into Kabuku road. He said of the lorry:-

“... it just turned, and pick-up was near.

...the driver of pick-up was at speed and he hit the deceased. The pick-up swerved to avoid hitting the lorry and ended up hitting the bicyclist ...

According to me, the lorry was at fault, it should have slowed down to allow pick-up pass (sic).”

18. The respondent called a police officer from Tigoni Traffic base as a witness. This officer was not based at Tigoni Police station when the accident occurred. His testimony was restricted to what was contained in the O.B. The O.B. recorded that the pick-up was from Banana going towards Limuru Town. At a junction the lorry had stopped to give way to an oncoming motor vehicle. The cyclist overtook the stationary lorry and “knocked by (sic) on coming pick up”. The witness stated that there was no intention to charge the driver for the pick-up. The officer stated that the two police officers who attended the scene blamed the cyclist for the accident because he failed to stop when he found the lorry stationary, instead he overtook the lorry and he was hit by the oncoming pick-up.

19. Respondent also called *Joseph Mwaniki Njoya* as the second witness. This witness was a passenger in the pick-up. This witness stated that he was seated in front of that pick-up, he was the co-driver and he therefore witnesses the accident. He too stated that the cyclist overtook stationary lorry. He said:-

“As we approached the lorry which had come to a halt on its lane, a man riding a bicycle and carrying a sack of vegetables suddenly emerged from the rear of the lorry while overtaking the same.”

20. The witness said that the driver of the pick-up tried in vain to avoid a collision with cyclist. He further said that when the traffic police officers from Tigoni police station arrived at the scene they found the lorry there, it had not been affected by the accident and that the cycle was in the middle.

21. Although appellants faulted the trial court for failing to heed to their second witness statement, which lay the blame on the pick-up, the trial court cannot be faulted for making a finding that all the witnesses who testified did not blame the driver of the pick-up. That is a correct finding on the facts. This is because the appellants’ witness on being cross examined was categorical that the lorry was to blame for the accident.

22. It will be recalled that the trial court received the evidence of two eyewitnesses. One was appellants’ witness and the other was respondent’s witness who was seated at the front with the pick-up driver. My assessment of those two witnesses is that the respondent’s witness was more credible than the appellants’ witness. The respondent’s witness evidence was supported by the O.B. report of the two officers who attended the scene of the accident. I need to state here that I do not accept the submissions on behalf of the appellants that the O.B. cannot be relied upon because it contained the description of how the accident occurred as narrated by the respondent’s driver. Such submission could perhaps be considered if the police officer was cross-examined, when he testified, on what was the source of the O.B. record. In the absence of such cross examination this Court can only accept that the O.B. contains the record of the investigation made by the two police officers who attended the scene of the accident.

23. I also do not accept as correct, the testimony of the appellants’ witness that the lorry was to blame for the accident. The lorry or its registration was not reflected in the police abstract at all. That to me speaks of the evidence of the respondent being the more likely correct statement what occurred on the fateful day. That is, that the lorry stopped at the junction before turning to give way to the pick-up to pass. The cyclist which was behind the lorry overtook the stationary lorry and thereby met with the oncoming pick-up and the collision occurred. The cyclist overtook the stationary lorry without sufficient warning.

24. The trial court cannot be faulted for laying the blame on the cyclist at 90%. For that reason, the appeal on liability fails.

QUANTUM

25. I have considered the submissions on quantum and I find no reason to interfere with the award made by the trial court. The awards are not inordinately low for this Court to disturb. This is correct in respect to the awards for pain and suffering for loss of expectation of life and loss of dependency.

26. I do find that the appellants’ mis-understood the trial court’s judgment on dependency. The trial court in making that award was aware that the deceased was 41 years old. The trial court also in the absence of proof of earnings rightly considered the minimum wage regulations. The appeal on quantum is disproved and is rejected.

27. Since the appeal did not touch on the special damages, the same will remain undisturbed.

DISPOSITION

28. For the reasons set out above and because I find no error in the trial court's determination on liability and quantum, this appeal is dismissed with costs.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 23RD DAY OF SEPTEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Ndege

For the Appellant: Ms. Luchemo

For the Respondent: Mr. Nyamu

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE