REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 23 OF 2019

JOSEPH KAMAU NDUNGU .....APPELLANT

VERSUS

1. NATHANIEL MWABONJE KUTO (Suing as the administrator

of the estate of KUTO MWAMBONJE (Deceased)

2. NATIONAL INDUSTRIAL CREDIT BANK LTD.....RESPONDENTS

(Being an appeal from the Judgment of the Senior Resident Magistrate Court at Kilifi (Hon. L. N. Juma) dated and signed and delivered on the 23.4.2019 in Kilifi CMCC No. 153 of 2018)

CORAM: Hon. Justice R. Nyakundi

Okello Kinyanjui Advocates for the appellant

M. S. Shariff Advocates for the 1st respondent

Muriu Mungai Advocates for the 2nd respondent

JUDGMENT

Joseph Kamau Ndungu, the appellant challenges the exercise of judicial discretion by the Senior Resident Magistrate **(Hon. L. N. Juma)** in **SRMCC NO. 153 OF 2018** in the Judgment delivered on 23.4.2019 in which she made the following orders:

(a). Liability at 100% in favour of the respondent as against the appellant.

(b). Damages for loss of dependency Kshs.500,000/=.

(c). Pain and suffering Kshs.200,000/=

(d). Loss of expectation of life Kshs.100,000/=

(e). Specials Kshs.195,340/= plus costs and interest as prayed in the plaint.

On the above orders the appellant came up with thirteen (13) grounds of appeal dated 3.5.2019:

(1). The Learned Magistrate erred in law and in fact in not properly appreciating the evidence that was before her;

(2). The Learned Magistrate erred in law and in fact in making a finding that the accident is, ipso facto, blamed on the appellant.

(3). The Learned Magistrate erred in law and in fact making a finding in favour of 1st respondent's testimony without any valid reason.

(4). The Learned Magistrate erred in law and in fact by relying on the 1st respondent's hearsay evidence.

(5). The Learned Magistrate erred in law and in fact in finding the appellant liable for the accident when no evidence was produced by the 1st respondent to prove any of the particulars of negligence pleaded in the plaint.

(6). The Learned Magistrate erred in law and in fact in ignoring and/or failing to follow the principle propounded by the High Court of Kenya in Daniel Kimani Njoroge v James Kihara and another {2011} eKLR, where the High Court of Kenya stated that the particulars of negligence must be proved and it was the duty of the 1st respondent to present evidence that established, primafacie, that the accident was caused by some act or omission of the appellant.

(7). The court erred in law and in fact in making a finding of negligence on the part of the appellant when there was no evidence of the same.

(8). The Learned Magistrate erred in law and in fact in failing to realize and/or find that the burden of proving damages for negligence rests primarily on the 1st respondent who to maintain an action against the appellant must show that the respondent was injured by an act of omission which the appellant is in law responsible.

(9). The Learned Magistrate erred in Law and in fact in completely ignoring the decision of the Court of Appeal in Nandwa vs Kenya Nazi Ltd {1988} eKLR which decision laid the principle that the 1st respondent had the burden of proving that the accident was caused by the negligence on the part of the appellant and that the formal burden of proof does not shift.

(10). The Learned Magistrate erred in law and in fact in not following and/or ignoring the first principles of the doctrine of stare decisis.

(11). The Learned Magistrate erred in law and in fact in making a finding on damages that was too high in the circumstances.

(12). The Learned Magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matters in making his award for damages.

(13). The Learned Magistrate erred in law and in fact in generally making erroneous findings in the suit.

Procedural history

On 26.4.2018, the respondent **Nathaniel Mwabonje Kuto** suing as the administrator to the estate of **Kuto Mwambonje** filed suit against the appellant alleging that on or about 18.6.2016, the deceased was walking along Bundacho heading to Kitsoeni, within Kilifi – Kaloleni Road, when the appellant's motor vehicle being carelessly controlled, and driven permitted the said motor vehicle to cause an accident. That by the driver, agent, servant, being in control of motor vehicle registration number KBY 094A it veered off the road and violently knocked the deceased who at the time sustained fatal injuries in which he died on 21.6.2016 while undergoing treatment.

The particulars of negligence are as pleaded in paragraph 5 of the plaint. The joint statement of defence filed in court on 31.5.2018 denied ownership of the subject motor vehicle, occurrence of an accident, involving the deceased and particulars of negligence as pleaded under paragraph 5 of the plaint.

In the alternatively seriatim to the averments, the defendants pleaded particulars of the deceased negligence or contributory negligence as itemized in paragraph 7 of the statement of defence. The defendant prayed that an opportune time they could be seeking dismissal of the claim.

The Learned trial Magistrate upon hearing both parties on 23.4.2018 gave Judgment for the respondent in terms specified above. At the trial of the claim both liability and quantum were in contention from the defendants. The mode of disposal of the case was through viva voce evidence and summed up by way of written submissions.

From the record, **Mr. Nathaniel Mwambonje Kuto** gave evidence on the occurrence of the accident although it emerged that he did not witness the aforesaid accident which occurred on 18.6.2016. He got to know of the accident after the event. The deceased apparently had been hospitalized at Jocham Hospital, Kilifi. **Mr. Mwambonje** adduced further evidence that the deceased was transferred to Coast General Hospital where he passed away on 21.6.2016 while undergoing treatment. There was also additional evidence with regard to documentary evidence on funeral expenses, the petition and subsequent issuance of special grant of Letters Adlitem produced as exhibit 7. As to the manner of occurrence of the accident, **Mr. Mwambonje** placed reliance on the police abstract admitted as exhibit 3.

On the other hand, the appellant as the defendant in the suit elected not to call any evidence on the matter.

The Appeal in respect of liability

Mr. Okello has argued before me as he did before the trial court liability on causation of the accident was not proved on a balance of probabilities. He expounded at length the grounds of appeal as outlined elsewhere in this Judgment. In **Mr. Okello's** contention that burden of proof lies on the respondent to take the pleadings to the next level by adducing evidence that the accident occurred due to the negligence of the appellants. **Mr. Okello** further stated that the appellant did not bother to call evidence against the respondent because there was nothing to answer in rebuttal.

Mr. Okello alert to the principles on the burden of proof vested with the plaintiff relied on the legal principles and dictum to support his perspective. He referred to the cases of **Daniel Kimani Njoroge v James Kihara {2011} eKLR, Nandwa v Kenya Nazi Ltd {1988}**

eKLR, Samalla Hassan Abdallah v Dajmar Service Line {1958}.

Mr. Okello then referred this court to the case of **Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others {2015} eKLR:** on the failure by the Learned trial Magistrate not to follow the principles of stare decisis. In the same way on matters to do with assessment of damages **Mr. Okello** submitted that the global sum approach was erroneous resulting in an excessive quantum of Kshs.500,000/=. On a without prejudice Learned counsel rooted for a sum of Kshs.40,000/= under the Fatal Accidents Act, pain and suffering Kshs.50,000/=, loss of expectation of life Kshs.50,000/= plus costs and interest. However purely, Learned counsel main stay in this appeal is to have it allowed and the entire Judgment set aside with costs.

I have combed through the record unfortunately, I do not seem to see the rejoinder in the form of submissions by the respondent. I take it that if they were filed, the manner of handling our records might have occasioned a misfiling. Indeed, respectively, the respondent seldom would always defend the impugned Judgment.

Basically, whatever misdirection or errors that may be within it, litigation was settled in his favour. The issues raised before me on appeal for the respondent are matters of an appellant only desirous of depriving him the fruits of his Judgment.

In my view even with the material on record, this court has a connecting factor with the subject matter of the appeal to consider both counsels submissions, the trial record and the impugned Judgment. My position is embolden by the jurisdiction of the first appellate as declared in **Pandya v R {1957} EA and Rawala v r {1957} 570:**

> ***"1. It is the duty of the first appellate court to remember that parties are entitled to demand of the Court of first appeal a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions, bearing in mind always that it has neither seen nor heard the witness and make due allowance for this."***

Analysis and Determination

The heart of this appeal notwithstanding any other issues in the Memorandum of the appeal is whether the burden of proof of the appellant's negligence as pleaded in paragraph 5 of the plaint by the respondent was established by the trial court on a balance of probabilities. In answer to the question from counsel for the appellant submissions when adjudicating the issue on liability and the burden of proof the general Law of tort in respect of the civil claim ought to take center stage throughout the trial. A pleading, is simpliciter is the initial complaint or accusation against the defendant to satisfy the threats or actual violation of a right stated to domicile with the pleader or plaintiff, or claimant and petitioner in civil cases. As to who shoulders the burden of proof its clearly provided for in Section 107 (1) of the Evidence Act that:

> ***"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."***

In the sense of this case, the plaintiff was required to lead evidence to show and point out the negligent conduct of the defendant as envisaged in the plaint. Whether that legitimate expectation exists is, self-evidently, a question of fact. **Cross and Tapper on Evidence 9th Edition at 106** and **Emson on Evidence {2004} 2nd Edition at 78 421** wrote:

> ***"If the party bearing an evidential burden on an issue manages to discharge it, this is said to place on his opponent a tactical or provisional burden to adduce evidence in rebuttal. The tribunal of Law's ruling means that sufficient evidence has been adduced on the issue for the tribunal of fact to find, at the end of that trial, that it has been proved. If the opponent fails to adduce evidence to show the contrary, it is quite possible that the issue will be proved against him."***

Generally, facts in issue in the instant are those disputed on occurrence of the accident, breach of duty of care and actual negligence. As the Law postulates the connecting factor of negligence and the accident ought to be established by the plaintiff.

The commentary by **Dennis I, H {2002} the Law of Evidence 2nd Edition (Repointed) at 37**, summed up the required intensity of proof and the distinction between evidential burden and legal burden as follows:

> ***"When a Judge is deciding whether an evidential burden has been discharged he looks only at the evidence favouring the party who bears the evidential burden. The question for decision is whether the favourable evidence is sufficient by itself to raise for the court to consider, the fact that there may be substantial other evidence contradicting the favourable evidence is immaterial at this stage. When a fact finder (Judge, Jury or bench or Magistrates) is deciding whether a legal burden has been discharged, the fact finder looks at all the evidence adduced in the case. Thus the fact finder will take into account the evidence which first served to discharge the evidential burden plus any other evidence which tends to confirm or rebut it. The discharge of an evidential burden does not involve a decision that any fact has been proved. All it signifies is that a question has been validly raised about the possible existence of a material fact, the decision is only that enough evidence has been adduced to justify a possible finding in favour of the party bearing the burden. The discharge of the legal burden occurs at a later stage in the trial, when the fact-finder is required to decide on the existence or non-existence of facts whose possible existence is in issue."*** *(emphasis added).*

In the offending litigation confusion began to reign the erroneous decision by the Learned trial Magistrate which purported to contextualize evidence by the plaintiff/respondent as primafacie evidence on liability against the appellant to shift the burden of proof in rebuttal. What is missing from the Judgment of the Learned trial Magistrate is the distinction and findings on the duty of care imposed upon the appellant/defendant and the common sense principles on causation. That the accident was caused by the defendant by driving the subject

motor vehicle in a manner which was negligent.

As the Law on negligence has developed overtime a verdict on negligence is only harmonious with the facts and evidence when the following elements are capable of being discharged on a balance of probabilities: ***(a). duty, (b). breach of duty, (c). cause in fact (d). proximate cause and finally loss and damage.***

The position taken by **Lord Atkin** in **Donoghue v Stevenson {1932} AL 562 at page 580** provides an illuminating principle in the tort of negligence where he had to say that:

> ***"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is my neighbor? Persons who are so closely and directly affected by my act that I ought reasonably to have then in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."***

In the instant case, there is the benefit of the finding by the trial Magistrate that motor vehicle registration number KBY 094A was involved in a road traffic accident with the deceased along Kilifi – Kaloleni Road on or about 18.6.2016. She gave Judgment against the appellant on the vital issue of vicarious liability, apparently on the presumption that the driver, agent, servant or employee in control of the vehicle at the time of the accident drove it so negligently resulting in the collision. The circumstances under which the driver of a motor vehicle is usually held liable in negligence was on account of the principle in **Selle & another v Associated Boat Co. Ltd {1968} EA 123 where Sir Clement De Lestung V.P** held:

> ***"Where however, a person delegates a task or duty to another, not a servant or employer another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person, be called agent, or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be."***

This principle was further strengthened in **Morgans v Launchbury {1972} 2 ALL ER 606** where the **House of Lords** in that case held that:

> ***"To fix liability on the owner of a car for the negligence of the driver, not being a servant, it must be shown that the driver, at the material time, was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request, express or implied or on instructions, and was doing so in performance of a task, or duty delegated to him by the owner."***

The test on whether the appellants were to be held liable ought to have been exhibited within the binders of the issues framed during the pretrial conference under Order 11 of the Civil Procedure Rules. On appeal I see no evidence that the issue on vicarious liability to have been made as a definitive finding by the Learned trial Magistrate.

In relations to claims for negligently caused personal injury and death involving a pedestrian the assessment of liability, on contributory negligence is a predominant factor. The court had a discretion to basically make a finding on causation and blame worthiness **(See Baker v Will Oughby {1970} AC 467)** within the degree of culpability of the defendant with that of the deceased.

In the context of this appeal, there are no reasons arising from the Judgment of the trial court on the position taken in this crucial issue of contributory negligence. The negligence Calculus provides a framework in which a trial court has to conscientiously apply its mind to the facts and evidence to entitle him or her to take the view which inspires confidence in the administration of justice. It is evident from the evidence as recorded and having observed the single witness (who happened to be the respondent. The appreciation of 100% liability was based on that testimony, of the respondents evidence who was not an eye witness nor competent to give circumstantial evidence to fit the test in **R v Mwarage {1994} KLR 618**.

The Learned Magistrate as a trier of fact has to determine the dispute on negligence and answer both the Common law and Statutory questions on the cause of the accident and attributes of negligence. (See the following elements of liability on a balance of probabilities not dealt with by the trial court:

(1). Did the defendant owe a duty of care to the pedestrian.

(2). Did the defendants conduct jointly and severally constitute that breach of duty.

(3). Was the defendants conduct the proximate or actual cause of the accident and the deceased fatal injuries.

(4). Plausibly, did the deceased in any way contribute to the breach of care owed by the defendant.

The Learned trial Magistrate stated in her Judgment that she found force in the evidence put forth by the respondent to establish liability at 100% as against the defendants. The background to this case and the ensuring evidence leading up to the Judgment up to this appeal behoves on me to find that the Learned trial Magistrate erred in Law and in fact in his interpretation of the legal duty of care in negligence, was wrong in principle.

If at all a question of liability was to be appropriately assessed, I think the solution should have been vide persuasion of the dictum in the case of **Estiverner v Vertus N. J. 2013** in determining whether to recognize the existence of duty of care:

"Whether, a person owes a duty of reasonable care toward another turns on whether, the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors, the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. The analysis is both very fact specific and principled: it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct."

In the present case, the subject matter of litigation is compensation for damages arising out of fatal injuries suffered in accordance between the defendants/appellants motor vehicle and the deceased. It cannot be denied by either side to this litigation that it was known and appreciated by both parties that an accident occurred and the deceased death is traceable to the injuries suffered after being knocked down by the offending motor vehicle. This gives rise to the question as to whether all deaths which will be caused negligently but for absence of an eye witness, the victim should not be remedied by the tortfeasor? That would be the absurdity of the Law in my opinion and totally unrealistic and would be nothing but a convenient fiction to say that a court cannot go in for circumstantial evidence to establish causation and blameworthiness.

As much as I tend to agree with the appellant counsel that proof of liability is a path of the Law vested with the plaintiff. Its inexplicable exercise of discretion when something is fifty percent obvious, a fair and reasonable opportunity given to the defendant to meet the demands of primafacie case is considered an uphill task.

In this process our constitution in Article 159 (2) (D) comes out very strongly on the rights and entitlement of litigants so prescribed that the trial courts to do so in conformity as to achieve substantive justice. It is also important to point out that in the resolution of disputes the Law must take into account generally applicable rules to govern societal behaviors not just an outcome that decides only the particular circumstances and parties before the court. **(See Estiverne v Vertus supra).** The Honourable **Beverley McLachlin, The Chief Justice of Canada** in his address:

("The future of courts in changing world 2008 Judges Conference)" "observed that judging is premised on the insight that truly impartial decision making arises out of a genuine appreciation for social contexts of parties, witnesses and the matter before court, Judges are called upon to be interpreters of difference."

The first step central to the trial between the appellant and the respondent was the framing of the issues pursuant to Order 11 of the Civil Procedure Rules. It would have readily come out that there was either an eye-witness or not? The complete analysis as stated under Order (11) of the Civil Procedure Rule could have referenced the parties case to be wholly dependent on circumstantial evidence of the investigating officer to the accident. What I am left with in the case before me, is a positing by the appellant that there was no proof of negligence and therefore let my people go scot-free and the respondent walk away empty handed.

I echo the principle by **Prosser on Torts 2nd Edition Section 36:**

"That duty is largely guided in the natural responsibilities of social living and human relations such as have recognition of reasonable over, and fulfilment is had by a correlative standard of conduct, for negligence is essentially a matter of risk, that is to say of recognizable danger of injury."

In the context of what I have said above about the burden of proof and negligence the course taken by the Learned trial Magistrate failed the essential duty in evaluating the evidence that amounted to the plaintiff discharging the burden on a balance of probabilities on liability against the appellant which was not existent.

There was no evidence led prior to and during to the collision of the accident. It is noteworthy that the court of truth literally means over sighting the trial as a trier of facts that the issues of fairness and due process are not violated. Thus the primary interest of justice could have been served under Order 1A of the CPA by the summoning of the investigating officer, who visited the scene, drew any sketch map and came up with any positive findings as to the cause of the accident.

It transpires therefore that the failure not to summon the investigating officer through the intervention of the court pursuant to Section 3A of the Civil Procedure Act either party was prejudiced and the truth of the accident remained obscure. Unfortunately, that at the earliest opportunity was lost at the pretrial conference stage.

In my view the court erred in not calling and admitting evidence of the investigating officer. Therefore, without appearing that this court is on a mission of an affirmative action to assist the victim of the accident, I am guided by the provisions of Section 78 (1) of the Civil Procedure Act which provides as follows:

"Subject to such conditions and limitation as may be prescribed an appellate court shall have power:

(a). To determine a case finally.

(b). To remand a case.

(c). To frame issue and refer them true.

(d). To take additional evidence or to require the evidence to be taken.

(e). To order a new trial."

Going by these provisions it's a clear indicator that courts are courts of justice not Law and or procedure. A balancing of the above considerations on a case to cases basis is a discretionary power which must be exercised in only strong case and for the interest of justice. There is no doubt in this case the chronology and sequence of events at the trial shows that the Learned trial Magistrate had in her view evidence of the investigating officer that would have been of a decisive character and of sufficient weight to the trial. She however chose not to provide leadership in giving directions for the admission of such a crucial evidence that might have determined the trial fairly and justly to the parties.

The writ of error by the Learned trial Magistrate can be corrected by allowing it to receive additional evidence stipulated during the pretrial conference.

In **Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamud & 3 others {2018} eKLR,** the question whether fresh evidence is admitted or not and the guiding principles alluded to such exercise of discretion was put to rest as follows:

"[79] Taking into account the practice of various jurisdiction outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the Law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a). the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

(b). It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(c). It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d). Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e). The evidence must be credible in the sense that it is capable of belief;

(f). The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g). Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h). Whether the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i). The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filing gaps in evidence. The Court must find the further evidence needful.

(j). A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k). The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

[80] We must stress here that this Court even with the application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

In the instant case though the trial court ruled in favour of the respondent there was a deficiency on the evidence adduced with regard to causation and breach of duty of care as between the deceased and the appellants.

I would therefore resolve this appeal and the issues raised by allowing the appeal with the following conditional orders:

(1). That the impugned Judgment of the trial court dated 23.4.2019 be and is hereby set aside.

(2). The claim be remanded back to Kilifi Senior Principal Magistrate for a retrial before another Magistrates besides Hon. L. N. Juma (SRM); on a priority basis and to be concluded within sixty days (90) from the date of pretrial directions, but cumulatively not later than ninety (120) days with effect from post Judgment date of this court.

(3). That the trial court consider it suitable admission of evidence by the investigating officer at Kilifi Traffic Base Commander, and conduct an examination of the witnesses and find facts based on all relevant evidence.

(4). Based on the pretrial conference under Order 11 of the Civil Procedure Rules, the question of contributory negligence be ascertained in any event.

(5). The costs of this appeal to abide the outcome of the primary suit and shall lie in favour of the appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Ogeto holding brief for Okello Kinyanjui for the appellant

2. Mr. Atiang holding brief for Shariff for the 1st respondent and Mr. Kongele for the 2nd respondent