REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 81 OF 2019

SHIVLING ENTERPRISES LIMITED..... APPELLANT

VERSUS

JEMIMAH MWAKE KALA and CHRISPIN NGONGE MWANGALA (suing as the administrators of the estate of EVANSON MWAMBOLE (Deceased) ..... RESPONDENTS

(Being an appeal against the judgement of Honourable L.N. Juma Resident Magistrate on 22nd August, 2019 in PMCC No. 265 of 2017 Kilifi)

Coram: Hon. Justice R. Nyakundi

Mr. Wambua Kilonzo for the appellant

Mr. C.K. Areba for the respondent

JUDGMENT

Introduction

The respondents **Jemimah Mwake Kala** and **Chrispin Mwangala** filed suit seeking damages in tort on behalf of the estate of **Evanson Mwangala** (hereinafter referred as the deceased) against the appellants to this appeal.

Brief particulars, basis of the claim at the trial court. In the magistrate court, it was alleged that on the 14th November, 2016 the deceased was lawfully travelling as a passenger in motor vehicle registration No. KYD 229D at Kikambala along Mombasa-Kilifi Road when the appellant motor vehicle registration KBV 184A was carelessly and negligently driven that it violently hit motor vehicle registration KYD 229 while the deceased was on board. As a result of the collusion the deceased suffered fatal injuries. The respondent particularized the acts of negligence on the part of the appellant agent, servant, employee or servant under paragraph 4 of the plaint on the respondent claim for on account of survivorship and dependency. They averred that prior to the death of the deceased he was the bread winner and adequately provided for:

1) Elistinah Wanjala – daughter, aged 13 years

2) Jelida Wakesho – daughter, aged 8 years

3) Mary Majina – daughter, aged 11 years

4) Justin Mwalima – son, aged 2 years

5) Jemima Mwake Kala – wife, adult

The damages claimed by the respondents were as provided under the Law Reform Miscellaneous Act and the Fatal Accidents Act.

On the appellant side statement of defence ownership of the subject motor vehicle KBV 184A, occurrence of an accident, particulars of negligence and the deceased sustained injuries as a result of the alleged accident were all denied.

In the alternative the appellant pleaded that if such an accident occurred it was substantially or wholly contributed to by the motor vehicle registration number KYD 229 as specified in paragraph 8 of the defence.

When the matter came up for hearing, **Jemimah Mwake Kala** gave evidence on behalf of the estate with regard to liability and assessment of damages. In her evidence on oath she told the court as to the existence of facts prior, during and after the accident. She told the court that during the deceased lifetime both of them were married and blessed with four children including a minor aged 2 years at the time of his death. It was further the respondents evidence that the deceased was on board motor vehicle KYG 224Y which collided with KBV 184A. On dependency the respondent stated in court that the deceased income was Kshs.1,000 per day totaling to a monthly income of Kshs.30,000. The court also heard that the deceased died at the age of 48 years.

It would be observed that at the close of the respondents case, simultaneously the appellant also opted not to call any evidence thereto and the judgement date was given by the learned trial magistrate.

The upshot of all this was the judgement by the trial court on liability and quantum in the following terms:

1) Liability apportioned at 20% 80% as against the appellant

2) Pain and suffering awarded at Kshs.50,000

3) Less of expectation of life Kshs.50,000

4) Less of dependency Kshs.1,000,000

5) The respondent was also awarded costs and interest.

The appellant being aggrieved with both orders on liability and quantum filed this appeal based on the following grounds:

1) The Learned Trial Magistrate erred in Law by failing to evaluate the entire evidence on record and make a finding that the respondent did not prove her case on a balance of probabilities against the appellant and thereby arrived on wrong findings on issues before the court.

2) The Learned Magistrate erred in Law and in fact by failing to find that the respondent did not prove negligence on the appellant.

3) The Learned Magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on the same.

4) The Learned Trail Magistrate erred in fact and in law by failing to consider the Appellant's submissions and judicial authorities both on liability and quantum of the damages with the resultant miscarriage of justice to the appellant.

5) The Learned Trial Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsuitable in law.

6) The Learned Trial Magistrate erred in awarding a sum in respect of loss of dependence which was so inordinately high in the circumstances that it represented an entirely erroneous estimate.

The appeal was disposed of by way of written submissions from both the appellant and responded counsels. In the arguments before this court **Mr. Wambua** for the appellant drew my attention on the nature of the evidence of (PW1) which in the circumstances of the issues pleaded failed to proof the case on preponderance of evidence, to the required standard of proof on a balance of probabilities. Learned counsel relied on the authority of **Philomena Mutheu Nzyoka** (being as a legal representative of the estate of the late **TKM v Transports Kenya Ltd (2016) eKLR,** where it was observed interalia that it is the duty of the plaintiff to plead, particularize negligence and breach of duty of care acts on the part of the defendant, indeed argues **Mr. Wambua** the respondent bears the burden of proof that the acts of negligence complained of were committed by the appellant to give rise to loss and damage. Those concerns by Mr. Wambua formed the epitome of the appeal.

Analysis and determination

It is important at the outset to define clearly what the duty of the first appellate court means in this context **(See Okeno v R {1972} EA 32)** the court reiterates that:

"A first appellate court is obliged to analyze and re-evaluate the evidence adduced before the trial court, independently, draw its own conclusions of course without overlooking or disregarding the findings of the trial court, and bear in mind that, unlike the trial court it did not have opportunity of hearing and seeing witnesses testify."

This appeal would mainly turn on **Mr. Wambua's** concentrated ground on the standard of proof and establishment of liability in negligence cases involving motor vehicle collision, normally set on a balance of probabilities.

However, that is not enough, the plaintiff has an evidential and legal burden to discharge on a balance of probabilities under Section 107(1) of the Evidence Act to obtain Judgment having satisfied the legal elements of the dispute. It is often associated with the ***Latin maxim Semper necessitas proband incumbit ei qui agit,*** a translation of which in this context is ***"The necessity of proof always lies with the person who lays charges.".*** In **Halsburys Laws of England 4th Edition Vol 17 at para 13 D. 14** It was observed:

"The legal burden is the burden of proof which remains constant throughout a trial. It is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard he will lose. The legal burden of proof rests upon the party desiring the court to take action. Thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party to whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

Cross on evidence 6th Edition {2000} 198 stated:

"The obligation to show if called upon to do so, that there is sufficient evidence to raise an

issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligations."

When it comes to matters of legal burden of proof, the plaintiff has the duty to proof the existence or non-existence of the issues in the cause of action. It is the decisive factor in respect of the issues being determined by the court and not pure logic.

Briginshaw v Briginshaw {1938} (HCA) 60 CLR 336 the court stated:

"The truth is that, when the Law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ….."

Any inquiry involving collision of motor vehicle has to start with the backdrop statutory provisions of Section 47 and 49 on reckless and careless driving under the Traffic Act Cap 403 of the Laws of Kenya. The moving provisions provides that if any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic, which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable.

Therefore in personal injury claims it is correct on the totality of the evidence to accept and draw an inference in terms of Section 119 of the Evidence Act. Even supposing the court could act on its own motion under Section 1A and 3A of the Civil Procedure Act on overriding objective and inherent jurisdiction all done to promote a fair, effective, just and proportionate administration of justice, a gap in the chain can be filled, on the cause or act. The next step is to ask the question whether both drivers are alive and able to testify of the maneuvering they did to each other prior to the accident to avoid the accident. I understand this to be the proper direction for reason that negligence is but a breach of the duty of care under common law and statutory law.

To avoid the risk of a trial court arriving at a subjective decision the general rule on negligence has to be interrogated and an inference ought to be drawn on only the evidence itself.

The rationale for this can be found in the statement by **Lord Wright** in **Lochgelly Iron Coat Co. Ltd v McMullan (1934) AC 1** in which the court stated thus:

"In strict legal analysis 'negligence' means more than heedless or careless conduct whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

The second factual issue arising out of the pleadings is on vicarious liability. The plaint sought to make the appellant vicariously liable for the negligence in which the deceased suffered fatal injuries.

The trial court in determining what caused the accident unless there are admitted facts must answer the question on liability and how the owner was vicariously liable at the material time of the accident. On the basis of the plaint and statement of defence the duty and task delegated by the owner of the motor vehicle is a feature which stood out at that trial.

In **Selle and another v Associated Motor Boar Co. Ltd 1968 EA 123** and **Sir Clement de Lestang v P at Page 128** held:

"Where, however, a person delegates a task or duty to another, not a servant, or employs 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."

In **Mr. Wambua's** contention, the respondent star witness was not on board the motor vehicle registration KYD 229 and yet she stood in the witness box and gave such evidence to an accident therefore she did not witness it and the court went ahead to accept such evidence to manifest liability in negligence on the part of the appellant. The complaint by **Mr. Wambua** for the appellants was also supported by the record of the trial court.

All that may be so; but it is also not in dispute that in holding the respondent on vicarious liability the safe and clear principle was articulated by **Sir Charles Newbold P in Muwonge v Attorney General of Uganda 1967 EA 17** as follows:

> ***"An act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently or criminally, or for his own benefit, nevertheless if what he did is mainly a manner of carrying out what he was employed to carry out then his master is liable."***

In this sense the learned trial magistrate finding did not factor the issue on vicarious liability. I agree with **Mr. Wambua's** position that the trial court record does not depict that the respondent had on her side prima facie evidence established on the pleadings and evidence that the appellants driver, agent or servant was within/or without the scope or in the course of his employment when the collision occurred.

From a broad purposive view, in the instant case only the courts guidance on the critical questions which the respondent sought to answer when claiming various reliefs of compensation would satisfy any sound and prudent Judgment. The object and efficacy of the decision could have reflected the dictum by the privy council in **Nance v British Columbia Electric Railway Co. Ltd (1951) 2 ALL ER 448** where **Viscount J**. stated:

> ***"Generally speaking when two-parties are so moving in relation to one another so as to involve risk of collision each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."***

In the present case and at that trial, the learned trial magistrate initial filtering role of adjudication did not fall within the design and context of establishing causation and proximate cause of the accident. Further that both drivers in using the road they were also statute bound to take all reasonable steps to avoid the accident.

Whether applying the overriding objective, in Section 1A, Article 50(1) of the Constitution and further Section 3 and 3A of Civil Procedure Act it follows from all corners in my view the matter does not end there, the principle in **Ojiambo v Standard Ltd & 2 others (2004) KLR 496** is very useful. Thus:

> ***"Courts should be alive to happenings in society because law does not operate in a vacuum and a court closed to the ongoing in society cannot possibly understand the impetus behind a pleading. However those ongoing should not be the one to influence the outcome of a case, as what should influence the outcome of a case is the law and facts as applied."***

Courts must lift the veil of the pleadings in circumstances to do justice to the parties. In my view it's not always reasonably possible for courts to take refugee on the fact that parties are bound by their pleadings. Judges too have a role to deal with disputes justly and in accordance with the overriding objective. It means to deal differentially with each case on account of substantive and procedural justice.

That brings me to the third issue to this appeal which is the most difficult, whether the conclusion reached by the trial magistrate factored in contributory negligence in view of the incident that at the material time there were two motor vehicles involved in the collision. The statement of law in **Brandon v Osbourne Garner and Co. 1924 1 KB 548** Swift J held as follows:

"In my opinion this case is carried by the statement of the law in Jones v Boyce. Lord Ellen Borough, where in substance directed the jury that if a person is placed by the negligence of the defendant in a position in which he acts, under a reasonable apprehension of a danger and in consequence of so acting is injured, he is entitled to recover damages, unless, his conduct in all circumstances of the case amounts to contributory negligence. If a person is not to be held guilty of contributory negligence because he acting instructionally for his own preservation, does that with a reasonable man under those conditions would do."

In **Bringhams and Berrymans Motor Claims Cases 10th Edition** the learned authors stated:

"Regard must be had not only to the causative potency of the acts or omissions of each of the parties but to their relative blame worthiness."

It is not clear from the judgement of the trial court as to whether facts disclosed and proved by the respondent distinguished and identified the test on the alleged liability on two fronts thus **(i) was the appellant wholly to blame for the accident when the collision involved two motor vehicles (ii) whether or not in any event contributory negligence was a factor in the facts of the case.**

Considering the foregoing position the learned trial magistrate erred in fact for not stating any reasons for her decision on liability. The statement on record that the respondents evidence was never challenged by the appellant cannot be true because the burden of proof on a balance of probabilities substantially remained in the realm of the unknown. **See Section 107(1) of the Evidence Act which states "in any proceedings whenever desires any court to give judgement as to any legal right or liability dependence on the existence of facts which he asserts must prove that those facts exist."**

In this case the respondent tendered a copy of the grant of letters of administration Exhibit 1, letter from the quo locational chief as exhibit 2 and nothing else said to proof liability. I have also taken into consideration from the scrutiny of the record, there is no iota of evidence at which stage all other documentary exhibits i.e., police abstract death certificate, statutory notice, certificate of examination and test of motor vehicle KYD 229 were ever admitted in evidence without calling the maker. It would appear that in this particular case, seemingly compliance with Order 11 of the Civil Procedure Rules was a routine case management protocol for the trial court. It is almost evident that there is no order to show that the respondents documentary exhibits have been admitted without calling respective makers. It is trite that authenticity of a document may be proved by presenting or tendering oral evidence (see Section 64, 65 and 66 of the Evidence Act) or by consent of the parties to the form of a document. The courts have regard in any action under the Civil Procedure Rules pretrial conference under the direction and discretion of the court is geared at achieving the following:

1) The simplification of the issues

2) The necessity or desirability of amendment to the pleadings

3) The possibility of obtaining admissions of fact and of documentary exhibits to avoid unnecessary delays

4) The limitation of the number of expert witnesses

5) The advisability of availability of witnesses out of the jurisdiction of the court

6) Such orders as to facilitate the overriding objective under section 1A of the Act

Although a trial court is entitled to proceed with the care without a pretrial conference but before hearing commences full disclosure of evidence and information to be used against the defendant has to be availed in advance.

Generally, speaking as appreciated in the case of **Nicholas v Sanborn Co. 24F, 908**:

*"**The pretrial conference came into existence as the result of an effort to dissipate a growing dissatisfaction with the courts on account of the inordinate delay and unnecessary and burden borne expense so after connected with the trial of a law suit, and the uncertainty of litigation arising out of the liability of the parties to evaluate the trial worth of the claim or defence or to foresee the ultimate outcome of the action. It was designed to narrow the issues, to avoid trials in cases where trial would not be necessary and expedite the disposition of pending litigation."***

Applying the above principles in the instant case there was no evidence on agreed issues set out on the claims and defenses to be tried by the stipulation, of the parties and whether expert witnesses will testify in person or their reports admitted by consent. Further how the agreed issues were to be proved by the parties in a formal trial to avoid wastage of time was not captured in the proceedings.

Regrettably, for this case the first opportunity to resolve the problems of screening whether the investigating officer and other crucial material was necessary and certain issues of relevance got lost in the circumstances and the trial court found itself with only evidence of PW1.

The propensity of the evidence adduced by the respondent did not settle the issue of the burden of proof in a case of this magnitude on a claim based on an award of over 1 million plus costs.

I am of a strong view that the learned trial magistrate erred in law and facts and she as did not consider fully the case upon her not only to do justice but ensure that it has been done in balancing competing interest of the parties. This appeal court is plainly concerned that an order to interfere with the decision is justified. See **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & another CA No. 345 of 2000**.

The upshot of the above is that the appeal succeeds on the central ground of burden of proof in civil cases settled on a balance of probabilities, with specific reference to this trial.

The underlying facts of the instant case gives rise to invoking the provisions under Section 78(1) of the Civil Procedure Act. In addition with, considering the decision by the Supreme Court of Kenya in **Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed & 3 others (2018) eKLR.** The threshold to be applied in situations like this is based on the facts is to order for a retrial of the claim to manifest justice between the parties. The court held and stated as follows:

"[79] Taking into account the practice of various jurisdictions 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 d 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) Were 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 curse of trial is an essential consideration to ensure fairness and due process;

(h) Where 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 pints 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."

It follows from these principles and the issues raised on appeal, the real question in controversy between the parties was never resolved fairly and justly. It is recognized as detailed by the supreme court in Mohamed Case (supra) that where an appeal court considers it as of necessity it can re-open the trial and order for a rehearing. That is the view I hold in this matter that in determining the appeal without a retrial there is a likelihood of injustice being due to the respondent.

This equity safeguard is a standard of proof, must be met and within Section 78(1) of the Civil Procedure Act, the redress invoked is for purposes of the interest of justice and the obligations on the part of the court to do the balancing act of rights between disputants who look up to the court for the much elusive fundamental substantive justice. In all these observations made by this court there is a salutary reminder to trial courts that reasons must be given for the decision on liability and assessment of damages that places the appeal court in a much better position from which to pronounce the correctness or otherwise the findings being challenged on appeal.

For the reasons stated in this context an order for a retrial be and is hereby ordered to proceed before another trial magistrate besides L.N. Juma (SRM).

In determining the decisions the trial magistrate need to engage the parties in a pretrial conference under Order (11) of the CPR and Active Case Management Guidelines in a conclusive manner on (a) issue of negligence as pleaded by the respondent in her plaint (b) In addition to the evidentiary foundation of the case whether the motor vehicle in which the deceased was travelling as a passenger did contribute to the accident and a consideration of third party directions link.

The scheme created by the parliament under Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Article 159 2(D) of the Constitution permits judges and magistrates to exercise wide discretion to consider a variety of factors in which to guarantee the right to a fair trial and substantive justice. The costs of this appeal be taxed and be paid by the respondent.

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

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mulwa holding brief for Wambua Kilonzo for the appellant

2. Mr. Ogeto holding brief for C. K. Areba for the respondent