REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 129 OF 2019

LEONARD GITOBU MURITHI.................................APPELLANT

VERSUS

RHODA WANJA M'NKANATA (Suing as a legal representative of

the estate of DAVID KINOTI M'RINGERA.............RESPONDENT

(An appeal from the judgment and decree of the Hon. S. Abuya, SPM made on 23/9/2019 in Meru /CMCC No. 110 of 2017)

J U D G M E N T

1. The appellant was the defendant in the lower court. By a plaint dated 27/5/2017, she sued the appellant in respect of a road traffic accident that occurred on 3/3/2017. She alleged that on the material day, the appellant was the owner of motor vehicle registration no. KBL 759F ("the subject vehicle") which he drove negligently as a result of which it knocked down DAVID KINOTI M'RINGERA ("the deceased") whereby he died. She blamed the appellant for the accident and set out various particulars of negligence.

2. By a defence dated 28/11/2018, the appellant denied the respondent's claim and put her to strict proof. He pleaded in the alternative that if the accident occurred, the same was sorely caused or substantially contributed to by the deceased. He also set out various particulars of negligence against the deceased.

3. The trial Court held the appellant to be 100% negligent and awarded the respondent damages of Kshs.3,054,728/-. It is against the said decision that the appellant has appealed to this Court setting out 5 grounds of appeal which can be summarized into two as follows: -

a. That the trial Court erred in apportioning the appellant liability at 100%.

b. That the damages awarded of Kshs.3,054,728/- was inordinately high.

4. This being a first appeal, this Court is enjoined to re-assess and re-evaluate the evidence afresh with a view to arriving at its own independent conclusions and findings. In so doing, the Court must bear in mind that the trial Court had the advantage of seeing the witnesses testify. **(See Selle v. Associated Motor Boat Company [1968] EA 123).**

5. The respondent's case was that on the material day, **Nicholas Kirinya Kithinji (Pw2)** was walking along Nanyuki – Meru road. It was at night but he could see well as there was electricity and light from vehicles. He was on the left side of the road while facing Meru and he saw the subject pass him, veer off the tarmac and hit the deceased who was also walking ahead of him. The deceased died on impact. PW2 called the police and reported the incident.

6. On the same day at about 11pm, the respondent who testified as **Pw1** was informed about the accident. The following day she learnt that her husband had been knocked down by the subject vehicle at Ntugi market. Her husband was an Administration Police Officer aged 50 years at the time. They had been married for over 20 years and had 3 children together. The deceased used to take care of her and their children.

7. No.66495 PC David Chacha (Pw3) appeared and produced the Police Abstract. According to the police records, the appellant lost control of the subject vehicle and hit the deceased who was on the pedestrian walkway. The appellant was to blame for the accident even though he had not been charged with any traffic offence.

8. The appellant closed his case without calling any evidence. It is on the foregoing evidence that the trial Court found in favour of the respondent as aforesaid.

9. The parties filed their respective submissions which the Court has considered.

10. The first ground was that the trial Court erred in holding the appellant 100% liable. It was submitted that **Pw3** had admitted that the appellant had not been charged with any traffic offence two years after the accident had occurred. That **Pw3** had not visited the scene and was not the investigations officer. That he had only relied on the information in the OB to hold that the appellant was to blame for the accident.

11. It was further submitted that although **Pw2** was an eye witness, he was unaware of any traffic offence the appellant had been charged with. That the appellant had pleaded in his defence that the deceased was negligent and had set out various particulars of negligence. The case of **Catholic Diocese of Kisii v. Peter O. Isaboke & Another [2019] eKLR** was relied on in support of the submission that liability should have been apportioned at 50 – 50.

12. On behalf of the respondent, it was submitted that the appellant had not proved any of the particulars of negligence that he had raised in his defence. That under ***sections 107, 109 and 112 of the Evidence Act, Cap 80*** those particulars remained mere accusations that were not proved. The cases of **Francis Mutito Mwangi v. M. M [2016] Eklr** and **Susan Kanini Mwangangi & Another v. Patrick Mbithi Kavita [2019] Eklr** were cited in support of the submission that the trial Court was right in apportioning liability at 100%.

13. In civil cases, the burden of proof is always on the one who asserts the existence of a set of facts. The standard of proof is on a balance of probability. Before the trial Court, the respondent called 3 witnesses in support of her case. **Pw2** was an eye witness. He told the Court how he saw the subject vehicle pass him, veer off the tarmac and knock down the deceased who was also walking ahead of him. The deceased was at the time walking on the left side of the road as one faces Meru.

14. Pw3 told the Court that according to the information held by the Police, the appellant had lost control when he hit the deceased. The deceased was on his right side of the road and was on the pedestrian walkway. The evidence of these two witnesses remained firm even in cross examination and was not displaced.

15. The appellant did not testify to give his side of the story. The evidence of the respondent was therefore not rebutted. Having failed to call any evidence in rebuttal, the appellant cannot complain that he was held to be 100% liable. Any allegations in the defence remained just that, mere allegations. They were not proved.

16. In **Ambrusina Makena v. Kenya Power & Lighting Company [2020] Eklr,** the Court held as follows:-

> **"The defence relied on its statement of defence. However, that cannot constitute evidence capable of displacing the plaintiff's evidence. Where a party fails to call evidence in support of its pleading (be it a plaint or defence), the evidence of the opposing party is to be believed as having not been rebutted, unless effectively and displaced in cross-examination. In this case, the evidence was not displaced in cross-examination. Accordingly, the evidence of the plaintiff was uncontroverted. See Edward Mariga v. Nathaniel David Schulter & Another [1997] Eklr".**

18. In this regard, the case of the **Catholic Diocese of Kisii v. Peter O. Isaboke & Another (supra) relied on the appellant** is not applicable in that, in that case, the driver of the vehicle that caused the accident testified and told the Court how the victim had run unto his vehicle thereby causing the accident. In the present case, the Court did not have the advantage of hearing the appellant's story. Accordingly, the first ground fails.

19. The second ground is that the trial Court erred in awarding damages that were excessive.

20. As an appellate court, this Court will not interfere with an award of damages unless the award is so inordinately high or low as to represent an erroneous estimate of damages. Or, if the trial court took into consideration an irrelevant material or failed to consider a relevant matter. See **Butt v Khan [1982-88] KAR 5.**

21. It was the appellant's submission that the respondent did not produce any document in support of her claim. That what was produced was the defendant's file and police abstract only. That the trial Court erroneously held that there was a payslip produced. In a nutshell, the appellant submitted that the respondent failed to prove the deceased's earnings with certainty.

22. I have compared the typed proceedings at page 128 of the record and the handwritten record of the trial Court. The typed proceedings indicate as follows: -

> **"Miss Gitonga: I produce the defendant's file of P. Exh. 2 and 3 respectively as police abstract marked as P. MF1-1"**

23. On the other hand, in the handwritten record of the trial Court, the proceedings are recorded as follows: -

> **"Miss Gitonga: I produce plaintiff documents filed as P. Exh. 2 to 9, respectively in the plaintiff's list of documents and police abstract marked as P. MFI-1".**

24. From the foregoing, it is clear that the typed proceedings are not in tandem with the original record. In such circumstances, the Court is to be guided by the original record which in this case clearly indicate that the respondent produced her documents that she had filed with her list of documents. Those documents included, amongst others, receipts in support of special damages, birth certificates of the children and the deceased's payslip for January, 2017.

25. In view of the foregoing, the criticism of the trial Court by the appellant is misplaced. The trial Court was clearly guided by the evidence before it when it held that there was a payslip belonging to the deceased.

26. On the multiplicand, the appellant relied on the decision of **Tobias Odoyo Oburu v. Jane Kerubo Miruka & Another [2018] Eklr,** and urged that the Court should have adopted the minimum wage of Kshs.5,844/20. On the other hand, he respondent submitted that the deceased was an Administration Police Officer who had known definite income.

27. Where there is evidence of definite income, the Court will not adopt the minimum wage under the ***Regulation of Wages (Amendment) Order.*** In the present case, there was clear evidence that the deceased was an Administration Police Officer. He was working within Meru County as such and his income was disclosed in his payslip for the month of January, 2017. He was earning a gross of Kshs.44,880/- per month and a nett of Kshs.36,216.60 after the statutory deductions.

28. Accordingly, the trial Court was correct in declining to adopt the minimum wage and instead apply Kshs.36,616.60 per month as the multiplicand.

29. On the multiplier, the trial Court used 10 years. The appellant submitted for 5 years. The case of **Jane Wairimu Maina v Peter Githinji Kahindi & Another [2006]** was cited in support of those submissions. On her part, the respondent supported the trial Court's multiplier of 10 years and relied on the case of **Irene W. Kagondu & Another v. W. K. Tilley (Muthaiga) Ltd & Another [2008] Eklr.**

30. I have considered the two cases relied on by the parties. The case of **Irene W. Kagondu (supra)** cannot apply as the deceased was a private practitioner and the Court was of the view that he could have worked up to 70 years. As regards the case of **Jane Wairimu Maina (supra)**, the court was right in adopting a multiplier of 5 years as the deceased was 50 years at the time of his demise and the retirement age at the time in public service was 55 years.

31. In **Floice Adema Onami v. Kezia Muthoni Ngure & 2 Others Msa HCCC No. 301 of 2002 (UR)**, a multiplier of 15 years was adopted for a deceased aged 50 years working in a bank. In **Josiah Sangara Birundu v. Ruth Chemutai Chelule & Another [2001] Eklr,** a multiplier of 11 years was adopted for a deceased who died at 49 years.

32. In the present case, the deceased was 50 years at the time of his demise. He was a public servant with the Administration Police. The retirement age is well known to be 60 years. In my view the multiplier of 10 years adopted by the trial Court was acceptable notwithstanding the vargaries, vicissitudes and uncertainties of life.

33. On the dependency ratio, the trial Court applied 2/3. The appellant submitted that the respondent did not produce a marriage certificate or birth certificates to show that the deceased had any dependants. He proposed a dependency ratio of 1/3.

34. The respondent told the Court that she was married to the deceased for 21 years and that they had 3 children together. She admitted that she had not produced the original birth certificates as they were required in school. Her testimony was not challenged. It was not suggested that her evidence was made up. She produced copies of birth certificates which clearly showed that the three named children belonged to the deceased and the respondent. There was clearly evidence of dependency and the trial Court was right in adopting 2/3 dependency.

35. In view of the foregoing, the claim that the damages of Kshs. 3,054,728/= was excessive has no basis. The damages were arrived at correctly.

36. Accordingly, the second ground is likewise without any basis. In the circumstances, the entire appeal lacks merit and is hereby dismissed with costs.

It is so decreed.

DATED and **DELIVERED electronically Meru this 5th day of May, 2020**.

A. MABEYA

JUDGE