REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 21 OF 2018

ANDREW OCHIENG & ANOTHER (Suing as the Legal Representatives

of the Estate of GEORGE OTIENO OCHIENG

(Deceased).....APPELLANT

VERSUS

RONGAI WORKSHOP & TRANSPORT.....1ST RESPONDENT

DANIEL MWATI.....2ND RESPONDENT

(Being an appeal against the judgment of the Chief Magistrate's Court at Nakuru (Hon. V. Wakhumile) delivered on 15/02/2018 in Nakuru CMCC No. 968 of 2010)

JUDGMENT

1. *Vide* an Amended Plaint dated 05/05/2017, the Appellants herein suing as the legal representatives to the estate of George Otieno Chieng (Deceased) sued the Respondents claiming compensation for fatal injuries they say the Deceased sustained on 25/03/2010 when he was a cyclist riding his bicycle along the Geoffrey Kamau/Kenyatta Avenue roundabout in Nakuru. They claim that the 2nd Respondent drove motor vehicle registration number KJN 687/ZB 4583 so negligently that it hit the Deceased thereby causing him fatal injuries.

2. The Respondents filed their Amended Defence denying any liability for the accident. In particular, the Respondents averred that the accident was caused solely and/or substantially contributed to by the negligence of the Deceased himself.

3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate concluded that the allegations were not made out and dismissed the claim.

4. The Appellants are aggrieved. They have filed this appeal listing five grounds of appeal as followed:

> *1) That the Learned Trial Magistrate erred in law and fact in evaluating the evidence adduced hence arrived at a wrong conclusion that the Appellant did not prove his case as required by law.*
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> *2) That the Learned Trial Magistrate erred in law and fact by misapprehending the evidence given hence dismissed the*
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> *Appellant's case.*
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> *3) That the Learned Trial Magistrate failed to appreciate the degree of proof of liability in civil matters and treated the Appellants' case as if proof was beyond reasonable doubt.*
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> *4) That the Learned Trial Magistrate took into account matters that he ought not to have taken into account leading to a wrong conclusion.*
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> 5) *That the Learned Trial Magistrate erred in law and fact in not assessing or assessing adequately the amount of quantum that would have appropriately compensated the Appellant on succeeding to prove his case*.

5. The appeal is opposed. The court directed the parties to canvass the appeal by way of written submissions and neither party found it necessary to orally highlight.

6. I have read and considered the respective arguments in those submissions.

7. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

8. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt – vs-Thomas (1), [1947] A.C. 484.*
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> "*My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

9. The appropriate standard of review established in these cases can be stated in three complementary principles:

a) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

10. With the above principles in mind, I will now proceed to deal with the present appeal.

11. The Appellants' case was founded on the alleged negligence of the Respondents. As such, they were by law required to establish on a balance of probabilities that:

1) The Respondents owed the deceased a duty of care;

2) The Respondents breached that duty;

3) That the Deceased suffered fatal injury as a result of that breach; and

4) The Deceased's estate suffered economic loss as a result of the death of the Deceased.

12. After a consent which had been filed in Court settling the matter was set aside on account of the fact that the lawyer for the Respondents who so settled did not have authority to do so, the matter proceeded for hearing. The Appellants called three witnesses.

13. Andrew Ochieng Oloo testified as PW1. He is the father of the Deceased. He testified that the Deceased was a boda boda operator in Nakuru; that he received news on 25/03/2010 that the Deceased had been knocked down by a motor vehicle; that he immediately travelled to Nakuru but found that the Deceased had already died.

14. Mr. Oloo testified about the burial and other expenses he had to pay for following the demise of his son and produced receipts for those expenses. He testified that the Deceased had a wife but that they had separated and that he was now living with the children of the Deceased. He did not say how many children these were. On cross-examination, he said he did not know the name of the estranged wife.

15. The second witness was Lawrence Oduor Owino. He testified that he was a *boda boda* operator and that on 25/03/2010 he was waiting for passengers near Barclays Bank in Nakuru when he saw the Deceased riding from the show ground general direction towards the round-about at KFA. He testified that after the Deceased joined the road, he was hit by a vehicle which was trailing him. They then rushed him to PGH, Nakuru. Regarding what he saw, the witness said simply:

> *I saw the Deceased riding from the show ground general direction towards the round-about. After joining the roundabout, he was hit by a vehicle which was trailing him. This was about 7:50am. He was struck by motor vehicle registration no. KJN 687, a lorry ought to have given the Deceased the right of way (sic). The Deceased bicycle was hit as a result of the lorry driver's carelessness.*

16. On cross-examination, the witness insisted that the lorry was trailing the motor bike and it hit it at the centre. He further stated that the lorry driver ought to have slowed down.

17. The third witness for the Plaintiff was PC Samson Okello of Nakuru Police Station. He produced the Police Abstract issued respecting the accident. He, however, said that he was unable to tell the Court the findings of Police investigations into the case because the original file was forwarded to the DCIO's office in Nakuru. He also produced a sketch map of the accident and stated that the accident was investigated by Corporal Caroline. In cross-examination, the witness referred to the sketch map he had produced and told the Court that the rider was on the left side of the road and that Investigating Officer blamed the pedal cyclist for the accident and recommended closure of the file. He also stated that the vehicle was inspected and found to be in good order.

18. In re-examination, PC Okello reversed himself and said that according to the covering report, the pedal cyclist was to blame for the accident. He had said during his examination-in-chief that he did not know the findings of the investigations.

19. On the other hand, the Defence called a single witness, the driver of the motor vehicle KJN 687. His name is Josephat Kibet Rono. He testified that he was driving the motor vehicle on 25/03/2010 from Rongai. He said that there was heavy traffic near the KFA roundabout. When the traffic opened up, he eased the motor vehicle slowly only to be alerted by his assistant that there was an accident. He came out of the vehicle and saw a man lying on the left side of the vehicle next to the wheel.

20. In cross-examination, the witness insisted that he only saw the pedal cyclist when he came out of the truck and had not seen him before. He also said that another vehicle zoomed past them suspiciously rapidly and it might have been the cause of the accident.

21. Based on this evidence, the Learned Trial Magistrate analyzed the evidence thus:

> *I have considered the submissions by both counsels carefully. It is rather unfortunate that the Deceased lost his life at a young age. However, the evidence on record in the absence of the conclusive findings resulting from an inquest, suggest that he was solely to blame for the accident. I hasten to state so because of the following reasons.*
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> > *a) According to exhibit 14, he was overtaking the trailer from the left side which is contrary to section 73 of the Traffic Act as submitted by the Defendant.*
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> > *b) The traffic Police Officer who visited the scene blamed the Deceased for the accident. In fact, the covering report suggests that he was likely to be charged had he survived the accident.*
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> *I also found the testimony of PW2 to be wanting in credibility because he never recorded any statemtn yet he "witnessed" the accident and rushed the Deceased to the hospital. There is no reason to explain why he never took his concern for the Deceased to the next level (recording a statement), yet he was able to track DW1.*

22. Primarily, the Appellants fault these findings by the Learned Trial Magistrate because they believe that he wrongly analyzed the facts and misapprehended the standard of proof in civil cases.

They argue that the standard of proof is "on a balance of probabilities" and not "beyond reasonable doubts". They insist that had the Learned Trial Magistrate utilized the correct standard of proof, he would have concluded that the Appellants had established their case on a balance of probabilities.

23. I am not as sanguine as the Appellants are about the evidence they adduced before the Trial Court on how the accident occurred. They presented two witnesses: PW2 claimed to have witnessed the accident. He testified that the motor vehicle hit the "motor bike" at the centre. He also claimed that he saw the Deceased "joining" the road. At a different time in his same testimony of less than two paragraphs he said that the motor vehicle was "trailing" the Deceased.

24. On the other hand, PW3 completely contradicted PW2: He produced Exhibit 14 which showed that the Deceased was on the left side of the motor vehicle. PW3 also produced a covering report which showed that the Investigating Officer in the case had concluded that the

Deceased was illegally overtaking on the left side.

25. Based solely on the utterly contradictory and self-defeating evidence produced by PW2 and PW3, the Learned Trial Magistrate was justified to reach the conclusion that evidence by the Plaintiffs in the case did not reach anywhere near the degree required to prove the claims in civil cases. On the one hand the Appellant's evidence was contradictory. On the other, the evidence was in support of the Respondents' case. This last fact is accentuated more by the fact that it is not just subjective evidence which was in support of the Respondent's case and in consonance with the evidence of DW1, the evidence was official Police Reports in the form of a sketch drawn by the Investigating Officer and a Cover Report.

26. If this was not enough to torpedo the Appellant's case, the incredulous nature of the Appellants' "star" witness, PW2 irrevocably does so. As the Learned Trial Magistrate pointed out, it was suspicious that the witness claimed to have witnessed the accident yet he did not record a statement with the Police. What is more is that his own testimony is internally contradictory. At one point he claims he saw the Deceased "joining" the road; at another he saw the motor vehicle trailing the Deceased. He also referred to the Deceased as riding a "motor bike"; a Freudian slip which tends to confirm the Learned Trial Magistrate's suspicions that the witness was probably never at the scene. Thirdly, the extreme brevity in which he describes what happened is a tell-tale sign that his evidence was likely manufactured. Finally, his evidence flies in the face of established facts about the case: he claimed that the motor vehicle hit the Deceased in the "centre"; yet by all objective facts, the Deceased was found lying by the left side of the truck. It would not have been possible for the Deceased to have moved across the width of the truck to the left side without being crushed completely.

27. All in all, there is absolutely no basis for overturning the findings of the Learned Trial Magistrate. There was simply no evidence on record to make a finding in favour of the Appellants.

28. **Consequently, the appeal herein is without merit and it is dismissed with costs**.

29. Orders accordingly.

Dated and delivered at Nairobi this 4th day of June, 2020.

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JOEL NGUGI

JUDGE

NOTE: This ruling was delivered by both Zoom video-conference facility and email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by email in cases where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Appellants, Mboga GG & Co. Advocates and Counsel for the Respondents, Mukite Musangi & Co. Advocates, consented to the delivery of the ruling by both email and video-conference facility.