



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 44 OF 2018

BETWEEN

MARY NGUHI WANJERI.....1ST APPELLANT

GEORGE MBURU WAMBUI.....2ND APPELLANT

(Suing as the legal representatives of the estate of PETER GITAU WAMBUI (DECEASED))

AND

JOHN NGURU GICHEHA RESPONDENT

(Being an appeal from the judgment of the Hon Principal Magistrate, Mr. J. Kituku delivered on 28th February 2018 in Kiambu CMCC no. 271 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellants herein were the plaintiffs in the lower court. Their action against the respondent was anchored in paragraph 4 of the plaint dated 1st October 2015 and filed in court on the same day. It was alleged that on 25th August 2013, the respondent and/or his authorized driver, servant or agent drove, managed and/or controlled motor vehicle registration number KBP 253N so carelessly and negligently that it lost control and knocked down the deceased and as a consequence thereof the deceased sustained fatal injuries from which he died. The appellants sought to be compensated in both general and special damages for the death of the deceased which they alleged was caused solely by the negligence of the respondent. The appellants alleged that as a result of the death of the deceased they had suffered loss and damage. They brought the suit both under the *Law Reform Act* and the *Fatal Accidents Act*.

2. The appellants set out particulars of negligence on the part of the respondent and/or his authorized driver servant and/or agent in paragraph 4 of the plaint.

3. The respondent filed a defence. Though the respondent conceded that an accident occurred involving his motor vehicle, he denied any responsibility for it and instead alleged that it was the deceased who caused the accident by abruptly and negligently crossing the road when it was not safe for him to do so. The respondent also alleged that the doctrine of *Res Ipsa Loquitur* did not apply to the circumstances of the case.

4. After a full hearing of the case, the learned trial magistrate reached the conclusion that the appellants had failed to prove their case against the respondent on liability and dismissed the appellants' claim. There was no order as to costs.

The Appeal

5. Being dissatisfied with the entire judgment, the appellants filed the Memorandum of Appeal on 26th March, 2018 on the following grounds: -

1. THAT the learned trial magistrate erred in law and fact in holding that the appellants did not prove negligence on the part of the respondent.

2. THAT the learned trial magistrate erred in law and fact in failing to take into account principles of the doctrine of *res ipsa loquitor* as pleaded by the appellants in their plaint.

3. THAT the learned magistrate erred in law and fact in failing to appreciate that the respondent admitted in paragraph 4 of his statement of defence that his vehicle was involved in the accident of 25th August 2013.

4. THAT the learned magistrate erred in law and fact in failing to give due consideration to the contents of the appellant's submissions.

6. As this is a first appeal, this court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to coming to its own conclusions in the matter, save to remember that it has no opportunity of seeing and hearing the witnesses and to make an allowance for the same. See *Peters versus Sunday Post & another [1957] EA 424*.

The Appellant's Case

7. The appellants called two witnesses. PW1 was George Mburu Wambui, a brother to the deceased. He is the one who obtained the Limited Grant of Letters of Administration. He conceded that he did not witness the accident, though he got a report of the same on the day it happened. PW1 also conceded that though he indicated in his statement that the deceased was earning Kshs.30,000/- per month as a barber, he had no evidence to prove the same.

8. PW2 was no. 66763 PC Isaiah Muthiani of Gilgil Traffic Police Base. He testified of the occurrence of an accident from which the deceased allegedly met his death. He also testified that the left side mirror of the subject motor vehicle registration number KPB 253N was found at the scene.

9. In cross examination, PW2 stated that he was not the investigating officer. He could also not confirm if any report of the accident was made to the police station. PW2 could also not say on which side of the road the body of the deceased and the mirror from the respondent's motor vehicle were found.

The Respondent's Case

10. The respondent called one witness, John Ngure Gicheha, DW1. In his defence, he alleged that he was attacked as he drove his motor vehicle registration number KBP 253N. That the attackers came from both sides of the road and that after the accident, he reported the incident to Kasarani Police Station who issued him with a police abstract dated 26th August 2013. The same was produced as Dexh.1. He explained that the side mirror fell down after it was hit by a stone thrown at it by his attackers.

Submissions and Issues for Determination

11. This appeal proceeded by way of written submissions. I have read through the rival submissions together with the attached authorities.

12. From the submissions, the evidence on record, and the grounds of appeal, the issue that arises for determination is whether the learned trial magistrate was right in concluding that the appellants did not prove their case on liability against the respondent.

Analysis and Determination

13. After carefully reconsidering and evaluating the evidence afresh, and in light of the law, the evidence on record and the submissions, I am satisfied that the findings of the learned trial magistrate were sound. In their plaint dated 1st October 2015, the appellants alleged at paragraph 4 thereof that the respondent and/or his authorized driver, servant or agent, drove, managed and/or controlled the subject motor vehicle in such a careless and negligent manner that it lost control and knocked down the deceased who died as a result of the fatal injuries. The appellants set out detailed particulars of alleged negligence. However, in the statements by both PW1 and PW2, there was no iota of evidence to show the manner in which the respondent's car was being driven just prior to the alleged accident. Both PW1 and PW2 admitted that they did not witness the accident, and could therefore not say how the subject motor vehicle was being driven just prior to the alleged accident. PW2, who was a police officer, could not say on which side of the road the accident may have occurred.

14. *Section 107 of the Evidence Act* provides that he who avers has a duty to prove his averments. In a civil suit like the present one, he must do so on a balance of probabilities. It has also been held that pleadings are not evidence and that every allegation of fact must be proved by cogent evidence. The appellants have argued that since the respondent admitted that he was involved in an accident, then it must be presumed that it is his car which knocked down the deceased and killed him. Far from it. In *Stratpack Industries versus James Mbithi Munyao – Nairobi HCCA No. 152 of 2013*, the Court held, and I entirely agree, that: -

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff and he must prove the causal link between someone's negligence and his injuries; he must adduce evidence from which on a balance of probabilities a connection between the two can be drawn as not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.”

15. I am also in agreement with the respondent's submissions that the doctrine of *res ipsa loquitor* as is known in law does not apply in this case. In the first place, there is not even the slightest evidence on how the accident occurred and there are therefore no surrounding circumstances from which it may be inferred or presumed that there was negligence on the part of the respondent herein. The respondent was therefore under no duty to say more than he did.

Conclusion

16. For the foregoing reasons, I find and hold that this appeal has no merit. The same is hereby dismissed in its entirety.

17. As to costs, I direct that each party meets its own costs both in the lower court and on this appeal

18. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 11TH day of June, 2020

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CHRISTINE W.MEOLI

JUDGE

In the Presence of

.....Mr.Ndolo holding brief for Mr. Mwangombe..... for Appellant

.....Mr.Njeru holding brief for Mr.Wanjala..... for Respondent

.....Court Assistant