REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 57 OF 2019

PATRICK MURIITHI MUMBI

EDWIN LEIMANYAN MINCHIL.....APPELLANTS

VERSUS

MOSES KAHINDI KARISA

(Suing as administrator and legal

representative of the Estate of KANZE JEFWA JABU).....RESPONDENT

(Being an Appeal from the Judgment delivered by the Senior Resident

Magistrate Honorable L. M. Juma in the Senior Principle Magistrate's

Court at Kilifi in Civil Suit No. 330 of 2016 delivered on 16.7.2019)

Coram: Hon. Justice R. Nyakundi

Kinyua Muyaa Advocates for the appellants

Kanyi J. Advocates for the respondent

JUDGMENT

This is an appeal by the defendants (appellants) against the decision of the **Senior Resident Magistrate L. M. Juma** in the traffic accident claim proceedings between them and legal representative to the estate of the deceased **Kanze Jefwa Jabu** (the respondent).

Background

In the plaint dated 9.9.2016, it was averred that on or about 26.9.2015, the deceased was lawfully crossing at Komba Mwiko when the 2nd defendant herein the 2nd respondent **Edwin Leimayan Minchil** so negligently and carelessly drove the 1st defendant/1st respondent motor vehicle registration number KBV 559T permitted the vehicle overspeed, hit and knock her down as a direct result whereof she was fatally injured. On behalf of the estate the respondent sought damages under the Law Reform and Fatal Accidents Act following the loss and damage occasioned by the negligence and breach of the duty of care based on the doctrine of vicarious mobility. The decision made by the Learned trial Magistrate on 16.7.2019 apportioned liability at 40% for the respondent and 60% jointly and severally against the appellants on damages the respondent was awarded for **Pain and suffering Kshs. 100,000/=**

Loss of expectation of life Kshs. 80,000/=

Loss of dependency Kshs.1,000,000/=

Special damages Kshs. 17,750/=

Plus interest and costs.

The appellants appeal is against the above orders of the trial Court and ancillary matters. Issues on appeal:

> ***1. The Learned trial Magistrate failed to consider and/or misapprehend the Law on tort of negligence and on evidence laid before her placing blame entirely on the part of the deceased, thereby arriving at an erroneous finding on liability holding the appellants 60% to blame jointly and severally with the respondent being only 40% liable while at the same time erroneously observing that a consent had been entered into between parties on liability.***
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> ***2. The Learned trial Magistrate failed to properly analyse evidence as laid before her and/or to acknowledge and scrutinize documentary evidence produced before her especially by the police officer thereby making an unreasoned finding on liability apportioning blame on the part of your innocent appellants.***
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> ***3. The Learned trial Magistrate disregarded the applicable traffic Laws and failed to take to account written submissions made on behalf of the appellants and instead holding in one place that she had reviewed case law cited by parties but observing in another that the appellants had failed to file submissions when in fact submissions had long been filed, served upon the respondent's advocates therein and handed into the Court's Assistant were on record as at the time.***
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> ***4. That the Learned trial Magistrate erred in making awards, excessive ones, in damages under the Law Return Act and the Fatal Accidents Act to persons not dependent upon the deceased, in the absence of evidence in proof of dependency thereby unjustly enriching the respondent and occasioning loss and prejudice upon the appellants condemned to bear 60% of those awards jointly and severally.***
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> ***5. The Learned trial Magistrate misapprehended the Law and settled precedence on the assessment of damages for loss of dependency under the Fatal Accidents Act thereby erroneously making a conventional and excessive lumpsum assessment of such damages in the sum of Kshs.1,000,000.00/= occasioning injustice upon the appellants.***
>
> ***6. The Learned trial Magistrate erred further in fact when she condemned the appellants to bear the respondent's costs and on awarding the respondent interest on the erroneous and excessive awards made.***

The Appellants Submissions

On behalf of the appellants, Learned counsel **Mr. Muyaa** submitted that an adverse inference drawn against the appellant on liability failed to meet the threshold on proof of particulars of contributory negligence. To what matters the Court should have regard in deciding whether the appellants were liable submitted counsel depended upon direct or circumstantial evidence which was not the case at the trial of the respondent claim. Further, counsel argued and contended that at the substantive hearing the key witnesses in support of the claim was the legal representative **(PW1) Moses Kahindi Karisa** and a police officer **PC Ismael Adam** both of whom were neither eye witnesses to the accident or circumstantially contributed to the relevant material on causation and proximate cause of the accident.

In view of those matters, Learned counsel argued and submitted that the discretion exercised by the Learned trial Magistrate to apportion contributory negligence was arrived at notwithstanding the absence of evidence.

Consequently, argued Learned counsel the error had a significant practical prejudice and injustice occasioned to the appellants.

Submissions on behalf of the Respondent

Based on the above submissions the door was opened for the respondent's counsel to render his perspective on the matter. It must first be noted that Learned counsel for the respondent having reviewed the evidence by both parties submitted that there was no error or misdirection in the manner contributory negligence was apportioned by the Learned trial Magistrate. Learned counsel argument was to ask the Court to bear in mind those statements made on oath by the appellant witness who also doubled up as the driver of motor vehicle registration KBV 559T.

In respect of the cogency of the evidence by the **police officer (DW2)** who produced the police abstract Learned counsel admitted that his evidence was of no probative value as to the occurrence, cause and blameworthiness of the respondents or the appellants. In a nutshell Learned counsel submitted and emphasized that the discretion exercised by the Learned trial Magistrate has not been demonstrated to be in error either in fact or Law to warrant an intervener from the appellate Court as suggested by the appellants counsel. He prayed that the impugned Judgment be left undisturbed.

Analysis and Determination

In the instant appeal, in this context of the impugned Judgment what stands out to be reviewed on the evidence given by both parties is the issue of proof of liability in negligence or the creation of the fully considered contribution of either of the deceased or the appellants' driver. The Court is being invited to exercise that appellate jurisdiction as set out in the cases of **Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates {2013} eKLR, Selle v Associated Motor Boat Company Ltd {1968} EA 123, Peters v Sunday Post Limited {1985} EA 424** The relevant principle manifested in these precedent setting authorities is that:

> ***"On a first appeal the Court should reconsider the evidence, evaluate it 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 attendance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. Notably on all these matters the Court is entitled to exhibit the evidence, to re-hear the case, reconsider the material before it and reach its own decision thereon without disregarding the Judgment of the Learned trial Magistrate but***

carefully weigh it and not to differ from the findings on a question of fact of the Magistrate who had the advantage of seeing and hearing the witnesses."

I have considered the substratum of the appeal and both arguments as submitted through their respective legal counsels. In considering this question on whether the Learned Magistrate erred in findings on liability there are clear settled principles to draw inspiration from in deciding whether the Court is justified to disturb the decision as such to support the submissions. In either way it is incumbent to bear in mind that in these cases it is the civil standard of a balance of probabilities that should guide the Court. Reference was made to this legal principle in **Re-Dellows Will Trusts {1964} 1 ALL ER 771 where Thomas J.** said:

"It seems to me that in civil cases, it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue but as Morris C.J. says in Hornal v Neuberger Products Ltd {1956} 3 ALL ER at page 973 that the gravity of the issue becomes part of the circumstances which the Court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome. The unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distruction and the practical result is stated by Denning C. J Hornal (supra), the more serious the allegation the higher the degree of probability that is required; but it need not in a civil case, reach the very high standard required by the Criminal Law."

Its legislated under Section 107 (1) of the Evidence Act that:

"Whoever deserts any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist. Therefore ordinarily unless on admission of facts it is for the plaintiff or claimant to a suit in his or her own case to present evidence to make out a case against the defendant (See Barka Saidi Salumu v Mohemaedi Saidi Civil Appeal No. 181 of 1969 HCT).

In **Kenya Power and Lighting Company Ltd & Another v Hermina Abakalwa Lusimba CA No. 126 of 1993 the Court of Appeal** observed interalia:

"To simply allege that the motor vehicle which killed the deceased resembled the defendants motor vehicle is not enough to discharge the burden of proof in an action for damages for negligence which rests primarily on the plaintiff, who to maintain an action must show that he was injured by an act or omission for which the defendant is in Law responsible. It is not enough for the plaintiff to simply establish facts which tend to show that the case of her husband's is in doubt and may be attributed to some cause other than the second appellant negligence."

More importantly given the need for the Court to apply a standard of proof in which the plaintiff ought to prove the cause of the deceased death; is necessary indicative of the defendant breach of duty. In addition the evidence presented including testimonies of the police officer (PW2) and documentary reports weighed in all should point towards some form of negligent act or omission to hold the defendant liable.

On a cumulative view of the evidence in that case the principle established in the comparative dictum in **United States v Halfield 591 F 3d, 945, 947 (7th Cir 2010)** has a bearing on the clarity in the case Law about what type of causation was required. The Court stated:

"Causation is an important issue in many cases in a variety of fields of Law and has been so for centuries. Yet it continues to confuse lawyers, in part because of a proliferation of unhelpful terminology for which we Judges must accept a good deal of the blame. One finds the following causal terms: proximate cause, actual cause, direct cause, but – for causation, significant causal connection, contributory causation, sole cause, meaningful role, possible cause, remote cause and cause in fact, a factor that resulted in, primary cause and played a part."

By comparison and application of these principles to that primary trial the Learned trial Magistrate was to consider matters such as cause, proximate cause, contribution and other circumstances in order to determine whether it would be reasonable and just to apportion contributory negligence. To proof the claim before Court it required of the plaintiff to proof on a balance of probabilities. The import of it may be by direct or vide circumstantial evidence that the deceased death was due to the negligence acts in which the defendants driver was responsible. That legal and evidential burden never shifts to the defendant until and unless a primafacie case on particulars of negligence has been discharged in the first instance by the plaintiff.

In this matter from the record, as deduced and permitted by the Learned trial Magistrate, the principle on contributory negligence was at play and became the decisive factor on apportionment of liability.

The overview of the current legal regime on negligence and contribution. As was discussed in **Berrill v Road Haillage Executive {1952} 2 Lloyds Rep 490 as well as the words in the text Bingham and Berryman's Mmor claims cases 10th Ed**

"A driver is not bound to foresee every extremity of folly which occurs on the road".

It is also an established rule taken from **Blyth v Birmingham Water Works Co {1856} 11 EX CL 781:**

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man would not do."

In order to construe contributory negligence it is necessary to consider the principles in **Froom v Butcher {1975} 3 ALL ER 520:**

"Negligence depends on a breach of duty whereas contributory negligence does not negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man he might hurt himself."

The purport and tenor of this appeal is suggestive of the principles in **Qamil v Holt by the English Court of Appeal {2009} EWCA 1625** the issue in this appeal is analogous to the conceptualization of the facts and the matter of impugning the discretion of the trial Court thus:

"That was a case of a kind which arises, as is the case before us today where a collusion, occurs between a driver and a pedestrian in circumstances where the pedestrian gave the driver very little time to stop or to avoid an accident. Those are always very troublesome cases and Courts are required to look very carefully at the facts of those individual cases, to see whether there was some breach of duty. On the part of the driver, such as travelling at an excessive speed for the circumstances, and of course, depending on the busyness of a man thorough fare, particularly with school children, above and such things possibly elderly pedestrians, that may be a speed which is well within the speed limit, even that may be an excessive speed in the circumstances. Or the Court is asked to consider whether the driver is in those cases was accepting a proper look out especially if the driver should have known from the people on the streets or his familiarity with the locality, that children (possibly elderly pedestrians) would be about, and other such considerations such as elderly pedestrians."

For the defendant to held liable to negligence the Court in ***Birch v Paulson {2012} EWCA 487 Davis C. J took this approach***

"The legal test is not a question of the counsel of perfection using hindsight. Of course it is not, and drivers are not required to give absolute guarantees of safety towards pedestrians. The yardstick is by reference to reasonable care. I accept that some cautious drivers might well have eased their foot off the accelerator as they came closer to the claimant, but I do not consider that it would have been negligent not to do so. If I am wrong about that I do not consider, for reasons I shall explain that this would have made any difference to the outcome. I am quite satisfied that a reasonably careful driver would not have considered it necessary either to brake or to steer towards the center of the road, still less to do both of those things. I consider that for me to hold that a reasonably careful driver would consciously have decided to slow down and to steer to the offside as safety precaution would be a decision based on hindsight given what happened, rather than on the information available to a reasonably careful person in such a position at the time. Accordingly, whilst I have every sympathy for the claimant given the appallingly serious consequences of this collision. I am unable to find that the defendant was negligent as alleged."

The comparative case Law position is fortified locally by the statements in **Mohammed Farrah v Kenya Ports Authority {1988-92} 2 KAR 283 where as per Hailox CJ** had this to say:

"A man is not bound to wait until disaster be falls him and then attempt to extricate himself from it. He is entitled, and indeed bound, if he is not to be guilty of any contributory negligence to take reasonable precautions to avoid injury to himself. Therefore, the issue for consideration is whether the plaintiffs act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If a man is placed in such a situation that he must adopt a perilous alternative the man who places him in such situation is responsible for the consequences."

See also **Zarina Shariff v Sethina {1963} EA 239, Land v London Transport Executive {1959} 3 ALL ER.** This exposition of the Law affirms that contributory negligence must be pleaded or inferred from the facts and circumstances of the case on the equal evaluation of the evidence by both parties **Yunis O. Gani v Vitalis Onyango CA No. 45 of 1989, Maina Kamaru & Another v Josphat Muruiki Wangondu CA No. 14 of 1989.** The foundation of the appellants' case before this Court was that the Learned trial Magistrate misled herself on the evidence in arriving at a conclusion on contributory negligence which was erroneous. In the case at the primary Court the respondent version of how the collision took place was neither based on direct or cogent circumstantial evidence. The tortious act apparent took place in absence of **(PW1)** being at the scene. His reflection and recapitulation of the accident can best be described what he gathered from third parties. In strict sense negligence means more than needless, or reckless conduct on the part of the defendant it will be recalled that the **2nd appellant (DW1)** who testified with regard to the collision denied any wrongful act but to a greater degree blamed the deceased. Another unfortunate aspect of the Judgment delivered by the Learned trial Magistrate was to make a finding correlating the evidence of a **police officer (PW2)** who neither investigated the accident, visited the scene to draw a sketch plan or being in possession of first hand information he could draw such absurd inferences. The trial Court accepted both **(PW1)** and **(PW2)** evidence which was not clear and compelling to properly find existence of contributory negligence or to infer from the circumstances of the accident.

In my view there was insufficient evidence from which that Court will arrive at the conclusion on contributory negligence. For completeness the police abstract produced in evidence as an exhibit is correct to its contents and the available version by (DW1) undoubtedly the deceased was the author of his own misfortune.

This Court accepts the principle in **Lakhamshi v Attorney General {1971} EA 118, 120.** This decision is somewhat in sync in relation to the facts of this appeal. The Court held:

"The position must however be different where there is no evidence to establish that any party was negligent. That would be the case where the evidence adduced points one way and there is no conflicting evidence in which case it can move right to apportion blame, there being no evidence on which apportionment could be based. It is difficulty to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent."

Having made specific finding on contributory negligence, the Learned trial Magistrate failed to give reasons and further explanation on the bound factors which influenced her discretion. If death in fact did result from the injuries suffered in the accident it remained relevant to specifically deal with causation issues as earlier acceded to elsewhere in this evaluation of the evidence. It bear emphasis in the present case to adopt the view taken by the Court in **Legland Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd {1918} AC 350 at pg**

369: where Lord Shaw went on to say that:

> ***"Causes are spoken of as if they were as distinct from one another as beads in a row or links in action, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet and the radiation from each point, extends infinitely."***

At the point where these various influences and tensions meet it is for the Learned trial Magistrate Judgment upon a matter of fact to declare which of the causes thus found at the point of impact was the proximate cause and which was the remote cause.

The old adage maxim that parties are bound by their pleadings is also applicable to this appeal. The respondent claim was based on negligence as pleaded in paragraph 5 of the plaint. It was the duty of the respondent to proof each element singularly or cumulatively that the appellants were liable for the death of the deceased. There is no iota of evidence that the respondent discharged that burden of proof on a balance of probabilities. That safeguard is to be read alongside on the substance of the suit as given meaning in the words of the Courts in **Khambi & Another v Mahithi & Another v Nashir Sethna & Others {1963} EA 239** where the Law is trite that:

> ***"An appeal Court will not interfere with an apportionment of liability assessed by a trial Judge, except where it can be shown that there is some error in principle, or that apportionment is manifestly erroneous."***

In the present case, I therefore have difficulty accepting the testimony of (PW1) and (PW2) on the collision that took place. I am of the view none of their narrative could be construed as attaching liability to either the appellants or the respondent victim **(Kanze Jefwa).** Further, the failure of the trial Court to summon a witness on the accident report to include the fact of investigations speaks to lack of probative value on the evidence of the police officer. Notwithstanding, this omission, the Court went ahead to accept his evidence which he had no clue on the accident.

In those circumstances, the Learned Magistrate was wrong to conclude that this was a claim anchored on contributory negligence.

Having reviewed the evidence and the applicable case Law, the result in the Judgment of the Learned trial Magistrate is at variance with the evidence tendered by both parties.

Accordingly, I agree with the submissions by the appellant's counsel on the orders of the Court being appealed against that they be set aside and replaced by the following orders:

> ***(a). That the Learned trial Magistrate improperly exercised her discretion on the facts and circumstances of the particular case to rule on apportionment of contributory negligence on non-existent material or under the provisions of Section 119 of the Evidence Act.***
>
> ***(b). Accordingly, I allow the appeal set aside the Judgment and decree on both liability and quantum with costs to the appellants.***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER, 2020

.....

R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. Wamboi holding brief for Kinyua Muyaa Advocates for the appellants

2. Mr. Adoyo for the respondent