REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 56 OF 2017

MWAKA MGAZA TSANJE & NDARO CHARIKE BENDAGO (Both suing on behalf

of the estate of **CHARIKE BENDAGO MUZUNGU).......... PLAINTIFF/APPELLANT**

VERSUS

BADAR HARDWARE LTD ....DEFENDANT/RESPONDENT

(Being an appeal from the Judgment delivered on 2nd August 2017 by Hon. Wasige, Senior Resident Magistrate in SRMCC NO. 410 OF 2016 – Kaloleni)

CORAM: Hon. Justice R. Nyakundi

Njoroge Mwangi for the Appellant

Machuka for the Respondent

JUDGMENT

This is an appeal from the decision of Hon. L. W. Wasige (SRM) in which the Learned Magistrate entered Judgment against the respondent on liability at a ratio of 40%:60% for negligence and quantum of Kshs.1,807,612/= less 40% apportionment on liability.

Being aggrieved with the Judgment, the appellant filed an appeal based on the following grounds:

1. **The Learned Magistrate erred in law and in fact when she imported negligence to the deceased based on the reflective jacket, an issue that was not pleaded in the Defence and not raised in the defendant's Submissions.**

2. **The Learned Magistrate erred in law and in fact when she descended into the arena of conflict and based her decision on an issue not pleaded by either parties and thus arrived at an unjust and unfair conclusion on liability.**

3. **The Learned Magistrate erred in law and in fact in when she apportioned 40% liability to the deceased yet the Defendant's case was based on pure hearsay and or the plaintiff's case was not controverted.**

4. **The Learned Magistrate erred in law and in fact when she apportioned 40% liability to the deceased based on speculation and or circumstantial evidence.**

Background

Prior to the suit it was alleged that on or about 12.10.2016 the deceased was lawfully, riding a motor cycle along Kinango – Lunga – Lunga Road at Guranze shopping centre when he was knocked down by motor vehicle registration number KCH 351 2 F 4858 registered in the name of the defendant. The plaintiff alleged that the defendant's agent, servant or employee drove the subject motor vehicle in a negligence manner that the same violently and fatally knocked down the deceased.

The defendant response to the averments to the particulars on negligence in their statement of defence was that the accident never occurred in the manner described in the Plaint. Further the defendant denied particulars of negligence on the part of the driver or servant who drove the aforesaid vehicle on the material day. In the alternative and without prejudice, the defendant averred that the accident which is being alleged was wholly or contributed to by the deceased.

It is plain from the pleadings and averments by both the plaintiff and the defendant at the onset the contest between the legal representative who filed the suit on behalf of the deceased and the defendant at the trial court was the issue on causation and responsibility for the accident. In this respect the trial court had the duty to consider the facts and evidence before attributing any acts of negligence that could be reasonably be inferred on any of the parties.

The case for the appellant in the court below was that on 12.10.2016 on or about 6.30 pm while the deceased was riding his motor cycle KMCU 357G, a collision occurred with motor vehicle KCH 351 J ZF4858. According to PW 1 Corporal Juma of Taru Police Station he stated that following the report an investigations revealed both the defendant/respondent driver and the deceased were driving to the same direction. However, the respondent's driver hit the deceased from behind, thereafter a police abstract contained brief particulars on the accident was admitted in evidence as **exhibit 1.** On cross-examination PW 1 denied ever visiting of the scene but relied on the report made by IP Mwiti who was never called as a witness. PW 2 Yusuf Dimba testified as an eye witness to the occurrence of the accident. In his testimony at the time of the accident, while walking home, he stopped to exchange greetings with the deceased who happened to be riding his motor cycle on the said road. Further PW 2 told the trial court that as soon as they parted ways he saw two trailers drive along the same road, where one overtook the other. According to PW 2 it was in that process of overtaking that the respondent's motor vehicle collided with the deceased.

In his observations, the respondent's motor vehicle was to blame because the driver drove at high speed and took an action to overtake on a narrow road, knocking the deceased. At the scene PW 2 stated that the deceased was yet to join the road. PW 3 Mwaka Ngaza testified as widow and administrator to the deceased estate. Following the accident, she applied and obtained the death certificate produced as **exhibit 2**, grant of Letters of administration **exhibit 3**, the payslip **exhibit 5** as proof of salary earnings of the deceased as a Teacher with Teachers Service Commission. The witness further stated that the deceased also carried out farming activities and owned a shop which earned them Kshs. 60,000/= per month. PW 3 also pointed out that the deceased died at the age of 54 years leaving behind 13 children. The letter from the chief of the Location confirmed survivorship of the deceased dependants.

The respondents case in trial court was supported by the testimony of DW 1 – Abdalla Chogo Bwaru who testified as private investigation for the insurance company which insured the offending motor vehicle. subsequent to his investigations, DW 1 concluded that the deceased was the one to blame for not keeping a proper look out.

On cross-examination, DW 1 told the court that the motor cycle was off the road when the accident occurred. He also confirmed that he went to the accident scene after a week from the date of occurrence.

Confronted by the case for the appellant and that of the respondent, the Learned trial Magistrate had this to say on liability:

> ***"I find that the deceased contributed to the said accident. I say so because, the accident occurred in the evening yet the deceased was not wearing a reflective jacket.*** **PW 1 told the court that the accident occurred at 6.30 p.m. At that hour, nightfall is setting in or on days where nights are longer, darkness has already set in. Thus it was only prudent for the deceased who was riding a motor bike in the evening to have worn a reflective jacket. Perhaps if he had worn one, the driver of the trailer would have seen him in good time and the accident would have been avoided. The wearing of reflective jackets cannot be over emphasized by this court especially where motorcyclists are riding their motorbikes in the evening or at night. The upshot of all the above is that it is my finding that the accident was caused by the negligence of both the driver of the trailer in question and the deceased. I hereby apportion liability at 40% against the deceased and 60% against the defendant."**

Pursuant to this holding on liability, the Learned trial Magistrate proceeded to award quantum on the various heads which totaled to 180, 612/= less 40% contributory negligence.

At the hearing of this appeal, counsel for the appellant Mr. Njoroge argued grounds 1, 2 and 3 together. These grounds essentially concerned the case pleaded in the trial court on liability. According to Mr. Njoroge, the negligence pleaded in the trial court and evidence led was at variance with the Judgment reached by the Learned trial Magistrate. Indeed, counsel argued and submitted that there was no mention of a reflective jacket by any of the witnesses save for the allegation made by PW 1 during cross-examination. However, PW 1 never attributed the cause of the accident to the said reflective jacket.

As regards contributory negligence, counsel submitted that it was never an issue nor did any one of them submit another issue to warrant it to be determined. As set out in Section 107 (1) of the evidence Act counsel submitted that the one's of proving existence of a fact in order to obtain judgment the burden lies to who asserts as to existence of that fact. In essence, counsel contended the allegation on the part of the deceased not wearing a reflective jacket was never pleaded by either the plaintiff or the defendant. To buttress his arguments and submissions learned counsel cited the following authorities **Bundi Makube –vs- Joseph Onkoba Nyamuro, CA NO. 8 OF 1983 – KISUMU, Simon Taveta –vs- Mercy Mutitu Njeru, CA NO. 26 OF 2013 – NYERI, Independent Electoral ABD Boundaries Commission & Ano –vs- Stephen Mutinda Mule & Others, CA NO. 219 OF 2013 – NAIROBI, Abok James Odera T/A A. J. Odera & Associates –vs- John Patrick Machira T/A Machira & Company Advocates (2013) eKLR, Linus Nganga Kiongo & 3 Others –vs- Town Council of Kikuyu, Nairobi HCCC NO. 70 of 2001, Mary Njeri Murigu –vs- Peter Macharia & Anor, Nairobi HCCC NO. 318 OF 2012**

On the hand, counsel for the respondent, Mr. Machuka submitted and was of the view that the decision by the trial court should be upheld. According to Mr. Machuka the Learned trial Magistrate applied her mind to the facts and evidence as led by the claimants. In support of the respondents case, counsel reiterated the evidence in the court below and an evaluation undertaken by the Learned trial Magistrate on the subject matter of the present appeal. So learned counsel relying on the following authorities: **Jamnadad V vs Gorhandaj Hemraj CA No. 57 of 1952, Christopher Kiprotich vs Daniel Gathua & 5 Others, Chemwolo –vs- Kubende, Kamani vs KACC** which had in complete citations urged this court to dismiss the appeal.

Analysis and determination

I have considered the appeal and procedural history of the claim as presented before the trial court. On appeal both counsels ably argued their respective positions by way of written submissions. On the scope and duty of an appellate court, I am guided by the principles in **Selle v Associated, Motor Boat Co. 1968 EA 123.** As regards the standard of proof in cases of this nature, it is trite that the claimant must proof the case on a balance of probabilities required of civil cases which she filed before the trial court. That threshold issue will mirror through the determination of this appeal.

So, in the instant appeal while applying the principles in Selle case, I must ask myself whether the record bears sufficient evidence to sustain the findings in the Judgment of the Learned trial Magistrate. At the heart of the submissions of appellant counsel lies the issue on liability in negligence that resulted in the accident. The subject matter of this appeal.

This court at the end of it all must answer the question

> **(1). Whether the trial Magistrate erred in law and fact in apportioning liability at 40%: 60% in favor of the appellant as against the defendant.**
>
> **(2). Whether there was any misdirections on quantum.**

Issue No. 1

The efficacy of what would constitute contributory negligence was discussed by **Winfield and Jolowicz** the 19th Edition. **Sweet and Maxwell 2014** at page 703 in the following passage:

> ***"The lack of care that will constitute contributory negligence varies with the circumstances of each case, the greater the risk of suffering damage, the more likely it will be, all other things being equal, that the reasonable person in the claimants position would have taken precautions in respect of that risk. The reasonable person will be careless and so the claimant who does not anticipate that the defendant might be negligent may be guilty of contributory negligence; however, the law does not require the claimant to proceed with a timorous fugitive constantly working over his shoulder for the acts from others."***

In addition, the principle of negligence was meritoriously stated in the English case **Lochgelly Iron Coal Co. Ltd v Mc Millan 1934 AC 1** where the court held as follows:

> ***"In strict 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."***

In **Neil Lewis v Astley Baker 2014** the Supreme Court of Jamaica determined the crucial question on contributory negligence as expressed herein under:

> ***"Where the defendant's negligence has created a dilemma for the claimant, the defendant cannot escape full liability, if the claimant in the agony of the moment tries to save himself by choosing a course of conduct which proves to be the wrong one, provided the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it, was a reasonable one provided that those two conditions are satisfied, these being that the claimant acted in a reasonable apprehension of danger and the method by which he tried to avoid the danger with which he was confronted at the material time was a reasonable one, then the claimant would not be contributory negligence as regards his loss/or injury suffered."***

In ascertaining who between the plaintiff and the defendant is liable for the acts of negligence and proximate cause of the accident. The **House of horses in My Land Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd 1918 AC, 350** it was held interalia as follows:

> ***"Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, 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, precedents and simultaneous, meet and the radiation from each point extends infinitely. At the point where these various influences meet it is for the Judgement as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause."***

Applying the above principles to this appeal it is not disputed that the deceased and the defendant's driver were on the same road. A perusal of the evidence shows that prior to the accident they were driving facing the same direction. It is clear from PW 2 a fellow teacher also walking home came into contact with the deceased who was riding his motor cycle. The deceased according to PW 2 proceeded to stop so that they engage in a short conversation. The collision occurred soon thereafter they parted ways but before PW 2 would completely leave the scene of the accident.

It follows therefore if the deceased had not joined the road at what point did he contribute to the occurrence of the accident (collision with the respondent's motor vehicle). It is also deduced from the record that the offending motor vehicle hit the deceased from the rear as it was overtaking another motor vehicle.

In the English authority of **Commissioners for Executing Office of Lord High Admiral of United Kingdom v Owners of S. S. Volute (2) 1922 KAC 144** Lord Viscount stated:

> ***" I think that the question of contributory negligence must be dealt with somewhat broadly upon commonsense principles as a jury noted probably deal with it. And while no doubt where a clear line can be drawn. The subsequent negligence is the only one to look to, there are cases in which the two acts come closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly, negligence, while not held free from become under the Bywell Castle rule, might on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."***

The respondent's claim for contribution would be by virtue of Section 3 of the Law Reform Act and the relevant considerations here was not capable to come within the meaning of the words where it may recover contribution from the deceased as a tortfeasor. Our law in Kenya is similar to the principles dealt with the persuasive authorities I have referred to in this discussion. The right of contribution amongst joint tortfeasors is both a statutory right given by Section 3 of the Law Reform Act and a fact to be proven by evidential material as provided for under Section 107 (1) of the Evidence Act.

From the above case Law, it is clear that the question whether the deceased contributed to the accident ought to have been proved on a balance of probabilities. At the outset of the trial, the plaintiff sued the defendant under vicarious liability for reason of the negligence which their driver of the trailer was involved and fatally injured the deceased. The hearing of the claim proceeded with three witnesses testifying in support of the plaintiff's case. The court had at its disposal evidence of an eye witness (PW 2). The Administrator (widow) to the deceased PW 3 and a police officer (PW 1. PW 1 who produced the police abstract did not investigate the accident nor was he the one who drew the sketch plan.

It was not established whether he had any knowledge or experience on traffic accident investigations. It is clear from the record that PW 1 alluded to the fact that the deceased was not wearing a reflective jacket. The source of this information given that he did not investigate the accident was never interrogated by the trial court. As noted by the appellant counsel and confirmed by this court, the Learned trial Magistrate in making a determination on apportionment of contributory negligence she relied heavily on (PW 1) evidence in respect to the absence of wearing a reflective jacket by the deceased. That specific piece of evidence cannot be identifiable in the entire pleadings. As to whether PW 1 satisfied the minimum criteria for his evidence to pass the test of probative value and materiality, the court in the case of **Francis Mburu Njoroge v R CA 1131/1986** held as follows:

> ***"Opinion evidence given by police officer relating to the of impact should never be accepted unless he can show that he has many years experience. In inspecting the scenes of traffic accidents. He should give evidence only of what he saw at the scene on his arrival including every mark on or near the road and every piece of debris leaving it to the court to determine the point of impact."***

The reason for this principle is for the court to analyze such circumstantial evidence to prove negligence on the part of the defendants. It is also meant to avoid reliance on hearsay evidence not well grounded on the witness who lacks knowledge and experience on scenes of traffic accidents and to give opinion on proximate cause.

As the defence counsel submitted that the respondent is free from blame worthy because no criminal proceedings were preferred by the police against the driver of the trailer. It is my view that the failure to charge the driver of the offending motor vehicle with a traffic offence did not render the civil proceedings void tending to establish liability in negligence which is the question in this appeal.

The evidence on record is such that if I do away with the testimony of (PW 1) who without Justification introduced a new angle to the case on reflective jacket, the sanctity of the claim is purely on the basis of PW 2 testimony. PW 2 described the traffic flow and the position of the deceased when he was knocked by the respondent's trailer which was overtaking another lorry. PW 2 explained on what he saw happen when the deceased was knocked while still off the road. Under cross-examination by the defendant counsel his testimony seems to have remained steadfast and consistent. He recalled seeing the defendant's vehicle negotiate the narrow road making a path into the other side before colliding with the deceased. The fact of the defendant/ respondent's vehicle hitting the deceased from the rear remains uncontroverted. As regards the time PW 2 stated it was 5.30 pm. However, the Learned Magistrate without designing adequate reasons rejected that piece of evidence and preferred that of (PW 1) who alleged that it happened at 6.30 p.m. This witness testimony can best be described as hearsay evidence as he neither investigated the accident nor visited the scene. It is not plausible even if one was take the position that the accident occurred at 6.30 p.m. and not 5.30 p.m. as the trial Magistrate did to reach a finding that it was getting dark to impair visibility. I understand this to mean that the defendant's driver while on the road could only see the surrounding by way of a reflective jacket worn by the deceased. It ought to be the other way round that the defendant/respondent motor vehicle was fitted with functional Headlamps as a source of light.

I am of the view that such findings exhibited in light of the prevailing circumstances repugnant to the letter and spirit of Part VIII of the provisions of Traffic Act and Regulations. The duty of care was owed to the deceased by the defendant, agent, servant or driver save for introducing the passage on reflective jacket by the trial Magistrate. There was a breach of that duty by the defendant, agent or servant which resulted in the accident. In my view the court had cogent and credible evidence to determine the cause of the accident but decided to go on a frolic to heavily rely on a collateral material of non-wearing of a jacket by the deceased to affix to contributory negligence.

When one assesses the evidence, there is no mention on the manner of driving by the driver of the defendant's vehicle, the nature of the speed, the surrounding circumstances, like traffic on the road at the time, the narrow road and the act of overtaking which was not safe to do so at that moment. Whilst the respondent did not see it fit to call the driver, it is clear to me that the rebuttal given by DW 1 failed to controvert PW 2 testimony. On causation and liability. The fact that there was no answer to prima facie evidence tendered by the plaintiff witnesses completely left nothing reasonable to infer contributory negligence.

At the very least the respondent placed reliance on the testimony of (DW 1) apparently whose mission was to look for material to exonerate the defendant from blame.

Section 48 of the Evidence Act provides for the opinion of experts. By reason of the provisions the expert is expected to be skilled in areas

of foreign Law, Science, or Art, or in questions as to the identity or genuiness of handwriting or finger prints or other impressions. The exercise of discretion to admit expert evidence has to be considered pursuant to Section 48 in consonance with the principles in the cases of **Mutonyi v R 1982 KLR 210** I have considered the evidence of (DW 1) adduced herein before the trial court to discredit the manner in which the occurrence of the accident took place. Contrary to Section 48 of the Evidence Act. (DW 1) testimony did not fall within the provision that he was a person skilled and experienced in traffic accidents investigation.

The inferential force or weight to be given to such evidence touching on the accident is of low relevance and probative value. It is not unusual to find witnesses of DW 1 category giving evidence in court not to advance the course of justice but to support the principal who hires and pays them for the services. If there was any weight given to DW 1 testimony by the trial court obviously she misapprehended the import of Section 48 of the Evidence Act. It therefore seems plain that the respondent had no evidence to show that there was contributory negligence on the part of the deceased.

This court therefore guided by the principles in **Bundi Makube v Joseph Onkoba Nyamoro Civil Appeal No. 8 of 1983** holds that the Learned trial Magistrate erred in Law and fact to apportion vicarious liability in the present case between the deceased and the defendant's driver. The principle composite negligence was not applicable in this case but was there material evidence to apportion liability at 40%: 60% for the plaintiff.

In the result, sorry though for the respondent that he would be compelled to shoulder the entire burden to the extent of responsibility on negligence and breach of duty of care. Accordingly, on this grounds the appeal succeeds.

Issue No. 2

As regards quantum, the legal principles to guide an appellate court to interfere or affirm the Judgment of the trial court are as stated in the case of **Henry Hidaya Ilanga –vs- Manyema Manyoka (1961) 1EA 705** where it was held that:

> ***"In considering this question, I apply the rule laid down by the Privy Council in** Nance vs British Columbia Electric Railway Co. Ltd (4) (1951) A. C. 601 at P. 613* ***when discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a judge; -***
>
> ***"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellant court is not justified in substituting a figure of its own for that awarded below simply because it would be awarded a different figure if it had tried the case in the first instance. Even if the tribunal of first instance was a judge, sitting alone before the appellate court can properly intervene it must be satisfied either that the judge in assessing damages, applied a wrong principle of law (as by taking into account some irrelevant factors of leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint Vs Lovell, (1935) 1KB 354 approved by House of Lords in Davis Vs Powell Duffryn Associated COLLIERES Ltd (1942) AC 601)."***

I have reviewed the evidence and entire Judgment by the Learned trial Magistrate. The observations I make is that the circumstances surrounding the award of damages under the various heads was well thought by the trial court. Based on the evidence, income earned as a teacher prior to his death and level of dependency, the award was within acceptable limits. There was also no appeal or cross appeal against the findings by the Learned Magistrate on my part, I find no grounds to interfere with the deceased on quantum and do accept it as conclusive, in reference to this issue on damages, it is accordingly affirmed.

In the result the appeal on liability succeeds as specified hereinabove and the ratio of 40% apportionment on contributory negligence is hereby quashed and set aside. The respondent is found to have been wholly vicariously liable in negligence against the deceased.

The appellant will have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20th DAY OF SEPTEMBER 2019.

....

R. NYAKUNDI

JUDGE