REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 49 OF 2017

ROSE WANJIRU NJIGA ***[Suing as the legal representative & administrator of the***

estate of the late Edwin Gachoki Njiga [deceased]**..............................APPELLANT**

VERSUS

PACKSON GITHONGO NJAU...1ST RESPONDENT

JOHN MUTYAUHORO MUGO..2ND RESPONDENT

(Being an appeal from the judgment & decree of Hon Kiama dated 31st October 2017

delivered in Wanguru CMCC No. 176 of 2016).

JUDGMENT

1. The appellant, *Rose Wanjiru Njiga*, instituted a suit in the lower court against the 1st respondent who was the 1st defendant and a *Mr. Fredrick Munyi* who was sued as the 2nd defendant but who for undisclosed reasons was not made a party to this appeal. *John Mutyauhoro Mugo* who is named as the 2nd respondent in this appeal was not a party to the suit filed in the lower court. His joinder as a party to the appeal is therefore irregular and unprocedural.

2. In her suit, the appellant sought both general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* in her capacity as the legal representative and administratix of the estate of her late son *Edwin Gachoki Njiga* who died as a result of injuries sustained in a road traffic accident which occurred on or about 17th May 2016 along the Mwea-Embu road at Gachoge town.

3. It was the appellant's case that on the material date, the deceased was riding motorcycle registration number KMDV 205Q when the 1st respondent (1st defendant) who was the 2nd defendant's authorized driver drove motor vehicle registration number KBR 387N recklessly and negligently and caused it to collide with the aforesaid motorcycle thereby occasioning the deceased fatal injuries.

4. The defendants in their joint statement of defence dated 26th April 2019 denied liability and averred that the accident was caused substantially or solely by the negligence of the deceased.

5. After a full trial, the learned trial magistrate accepted the 1st defendant's claim that the deceased was to blame for the accident as he had failed to keep distance and was attempting to overtake at high speed when the accident occurred. He also held that the deceased had not been a licensed rider. He apportioned liability at 80% against the deceased and 20% against the defendants jointly and severally. He also awarded the plaintiff special damages in the sum of KShs.17,130 and general damages in the total sum of KShs.917,130.

6. The appellant was dissatisfied with the trial court's finding on liability. She proffered this appeal in which she complained that the trial court's finding on liability was against the weight of the evidence and that in making that finding, the learned trial magistrate failed to exercise his discretion judiciously.

7. This is a first appeal to the High Court. I am aware that as a first appellate court, I have a duty to revisit, re-evaluate and reconsider all the evidence presented to the trial court and arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses testify and give due allowance to that disadvantage. The mandate of a first appellate court was succinctly summarized by the Court of Appeal in the case of ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** where the court stated as follows:

*“**This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***

8. In ***Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123***, the same court elaborated on the powers of a first appellate court and expressed itself as follows:

"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 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 on the case generally.”

9. That said, it is important to point out that though an appellate court has wide powers to interfere or reverse findings made by the lower court, this power is not unlimited. It is an established principle of law that an appellate court should be slow to interfere with findings of fact made by the trial court and should only interfere with them if it was satisfied that the court acted on no evidence or misapplied the law when arriving at its decision. In ***Makube V Nyamoro, [1983] KLR 403***, the Court of Appeal restated this principle and held as follows:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong legal principles in reaching the findings he did. …”

See also:** **Sumaria & Another V Allied Industrial Limited (2007) 2 KLR 1**; **Jabane V Olenja, [1986] KLR 661.

10. Having the above principles in mind, I have carefully considered the grounds of appeal, the evidence on record and the appellant’s written submissions. I find that the only question for my determination in this appeal is whether or not the learned trial magistrate erred in his determination on the issue of liability. Put differently, the issue for my determination is whether or not the trial court’s finding on liability was sound in law given the evidence on record.

11. It is trite law that he who alleges must prove. This is a cardinal principle of the law of evidence which is codified in *Section 107 (1)* of the *Evidence Act* which states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

12. In this case, the appellant averred in her plaint that the accident in which her son died was caused by the negligence of the 1st defendant. The particulars of the alleged negligence were pleaded in paragraph 4 of the plaint as follows:

1) Driving with no regard to other users of the road especially the deceased.

2) Driving on the wrong side of the road.

3) Failure to stop or swerve in order to avoid causing the accident.

4) Disregard of the traffic highway code.

5) Losing control of the motor vehicle and ramming motorcycle registration number KMDV 205Q from the rear.

6) Driving recklessly and veering off the road and ramming motorcycle registration number KMDV 205Q from the rear.

7) Causing the accident.

8) Veering off the road and ramming motorcycle registration number KMDV 205Q on its lane.

13. From the evidence on record, it was not disputed that a collision occurred between the motorcycle the deceased was riding and the vehicle the 1st defendant was driving at the material time. What was contested was the claim that the 1st defendant caused the accident by his negligent driving. Having alleged negligence against the defendants, the burden of proof lay on the appellant to prove to the trial court on a balance of probabilities that the 1st defendant was negligent in the manner in which he drove or controlled the aforesaid vehicle and was to blame for the occurrence of the accident.

14. In her evidence before the trial court, the appellant who testified as PW1 stated that she only got to learn about the accident from her daughter. She did not witness the accident and could not therefore tell how it happened. Her only other witness (PW2) PC *Pauline Kibati* did not also witness the accident. Her role was limited to producing a police abstract which only confirmed the occurrence of the accident. The police abstract was produced as Pexbt 6. She testified that she was not the investigating officer and she did not visit the scene of the accident nor did she conduct any investigations into the cause of the accident.

15. The 1st defendant testified as DW1. He admitted having been the driver of motor vehicle registration number KBR 387N but denied that he had negligently caused the accident. He testified that the motorcycle the deceased was riding was proceeding towards Embu while he was driving in the opposite direction towards Nairobi. According to him, the accident was caused by the deceased who was overtaking another motorcycle ahead of him and in the process, he rammed into the right side of his vehicle.

16. In his judgment, the learned trial magistrate did not address his mind to the law on burden of proof and did not evaluate the evidence that was adduced by the appellant to establish whether it was sufficient to discharge her burden of proving the allegations of negligence that had been pleaded against the 1st respondent to the required legal standard. He based his finding on liability on the evidence tendered by the 1st respondent.

17. Upon my independent evaluation of the evidence on record, I find that the appellant failed to adduce any evidence to prove negligence on the part of the 1st defendant either as alleged in the plaint or at all. She admitted that she did not witness the accident and she did not call any independent witness to support her claim that the accident was caused by the 1st defendant's negligent driving. PW2's evidence did not assist her case in any way since she did not visit the scene and had no clue how the accident happened. The police abstract she produced in evidence gave no indication about who among the deceased and the 1st defendant was to blame for the accident. It only indicated that the matter was pending investigations.

18. The only evidence on record which pointed to how the accident occurred was the testimony of DW1 which demonstrated that it was the deceased who caused the accident by overtaking another motorcycle in a manner that made him lose control and caused him to collide with motor vehicle registration number KBR 387N.

19. Given the foregoing, I am satisfied that the trial court's finding on liability was not supported by the evidence on record. The evidence presented before the trial court did not prove that the 1st defendant was guilty of any act or omission which was negligent and which was the direct cause of the accident. The evidence adduced by the defendant, which as stated earlier was the only evidence on record which gave an account of how the accident occurred shows that if there was anybody who was to blame for the accident, it was the deceased.

20. The learned trial magistrate failed to properly analyse the evidence on record and arrived at the erroneous conclusion that both the deceased and the 1st defendant were to blame for the accident hence his apportionment of liability. This was clearly an error on the learned trial magistrate's part because there was no basis in law for apportioning any liability on the defendants given that no iota of evidence was adduced by the appellant from which an inference of negligence could be drawn against the 1st defendant.

21. The law is that there is no liability without fault. In the absence of evidence to prove that the 1st defendant negligently caused the accident, it is my finding that the appellant totally failed to discharge her burden of proof and instead of apportioning liability, the trial court ought to have dismissed her case. It is thus my finding that the trial court's decision on liability was a finding of fact which was based on no evidence and was also based on an error of law.

22. For the foregoing reasons, I do not find any merit in this appeal and it is hereby dismissed. The trial court's finding on liability is hereby set aside and is substituted by an order of this court dismissing the appellant's suit with costs to the 1st respondent as the 2nd respondent though joined in this appeal was not a party to the suit in the lower court.

23. Each party shall bear its own costs of the appeal.

It is so ordered.

DATED and SIGNED at NAIROBI this 8th day of October 2019.

C. W. GITHUA

JUDGE

DATED and DELIVERED at KERUGOYA this 11th day of October 2019.

L. W. GITARI

JUDGE