



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 206 OF 2018

CATHERINE WAMBUI NJOGU.....APPELLANT

VERSUS

JACOB MASH SHAKE

DOMITILAH W.CHAO (suing as legal administrator of estate of

DAVIS MWANGEMA MASHA.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. F. Kyambia on 14th September 2018 in Mombasa Civil Suit No. 2226 of 2014)

JUDGMENT

1. The appellant herein, who was the defendant in the suit before the lower court, filed this appeal on 9th October 2018 challenging the decision made by the trial court on 14th September 2018 allowing the respondent's claim for general and special damages arising out of a road traffic accident.
2. The respondent's/plaintiff's case before the lower court was that on or about 9th April 2012, the deceased was a lawful pedestrian walking along Mombasa Malindi Road when at Engen Petrol station, the defendant's driver/agent drove the defendant's motor vehicle registration No. KAY 069 so recklessly and negligently thereby knocking down the deceased who sustained fatal injuries.
3. The appellant filed her statement of defence before the lower court after which the matter proceeded to trial.
4. The trial court determined the case in favour of the respondent who was awarded a total amount of Kshs 1,478,892/= for loss of dependency, loss of expectation of life, pain and suffering and special damages. The respondent was also awarded the costs of the case and interest thereon thereby triggering the filing of this appeal in which the appellant listed the following grounds of appeal in the Memorandum of Appeal:-

1. That the trial court erred in law and fact in holding that the appellant was liable for the accident yet there was no proof of liability.

2. That the trial court erred in law and fact in holding that the appellant was liable for the accident which allegedly occurred on 9th April, 2012 yet no eye witness was called to testify.

3. That the trial court erred both in law and fact in awarding general damages yet there was no proof of earnings as by law required.

4. That the trial court erred both in law and fact in awarding special damages when the same were not specifically pleaded and strictly proved as by law required.

5. That the trial court erred in law and fact in failing to appreciate the fact of the case and misapplying the law in so far as award of damages in fatal accident claims is concerned.

6. That the trial court erred in law and fact in failing to take into account the appellant's submissions filed in court and the authorities cited thereof.

7. That the trial court failed to take into account the relevant provisions of the law when delivering its judgment.

5. Parties filed written submissions to the appeal which they highlighted at the hearing of the appeal.

6. **Mr. Ondabu**, learned counsel for the appellant, submitted that the respondent's case was not proved to the required standards as there was failure by the respondent to enjoin the driver of the suit motor vehicle to the suit coupled with the failure to prove liability on the part of the appellant. Counsel argued that in the circumstances of the case, the appellant could not be held vicariously liable for the accident.

7. Counsel faulted the trial court finding that the appellant was liable merely because she did not attend court or call witnesses and argued that it was the duty of the respondent to prove his case against the appellant. He maintained that the failure to call an eye witness to the accident was fatal to the respondent's case as the trial court was not informed of the circumstances under which the accident took place so as to enable it arrive at a proper finding on the issue of liability. It was also submitted that loss of dependency was not proved.

8. On his part, **Mr. Otwere**, learned counsel for the respondent, submitted that the defendant/appellant did not deny that the suit motor vehicle belonged to her so as to support her assertion that she is not vicariously liable for the accident in question. It was submitted that the respondent's case was proved to the required standards thereby justifying to the court's decision in his favour. Counsel argued that the evidence of PW1 was not challenged and that the particulars of negligence were clearly spelt out in the plaint.

9. In respect to the cross appeal, counsel submitted that the 1/3 dependency ratio adopted by the trial court was erroneous in view of the fact that the respondent proved that the deceased was a family man with a wife and child. It was the respondent's case that a dependency ratio of 2/3 ought to have been adopted by the trial court.

10. As a first appellate Court, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that the court 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 v 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."

11. I have carefully considered the Record of Appeal, the parties written submissions and the authorities that they cited. I find that the main issue for determination is whether the respondent proved his case against the appellant in respect to liability and loss of dependency to the required standards.

12. The appellant contended that the trial court erred in making a finding that she is liable for the accident in the absence of proof of liability. The appellant's case was that there was no eye witness to the accident to prove that any of the particulars of negligence listed in the plaint and neither was the investigating officer called to shed light on the results of the investigations.

13. In the instant case, it was not in dispute that the respondent did not call any eye witness to the accident. At the hearing before the trial court, the respondent's case was presented through the testimony of a single witness, the deceased's father and administrator of his estate one **Jacob Masha Shake** who was not an eye witness to the accident and who, apart from stating that the deceased died in an accident, also testified about the burial expenses and other costs attendant to the deceased's funeral.

14. In making a determination on the issue of liability, the trial court held as follows:-

"The defendant did not offer any evidence as she did not call any witness. I have considered the pleadings herein, the evidence tendered by the plaintiff both viva voce evidence and the documentary evidence produced in court. I have also considered the submissions by both counsels(sic).

On liability, the defendant did not offer any evidence. The consequences of a party failing to call witnesses was extensively dealt with by G.V. Odunga J in the case of LINUS NG'ANG'A KIONGO & 3 OTHERS -VS- TOWN COUNCIL OF KIKUYU. The judge citing the decisions in the case of MOTEX KNITWEAR LTD -VS- GOPITEX KNITWEAR MILLS LTD HCC No. 834 OF 2002 emphasized that failure by the defendant in that case to call witness meant that not only does the evidence tendered by the plaintiff's case stand unchallenged but also that the claims made by the defendant in the defence remain unsubstantiated."

15. From the above extract of the trial court's judgment, it is apparent that the trial magistrate found that because the appellant did not tender any evidence, the defence remained unsubstantiated. My understanding of the decision by Odunga J. is that it is only applicable where the plaintiff has tendered evidence to support his case does the burden of proof shift to the defendant. It would then appear that contrary to the well known principle in civil cases that **"he who alleges must prove"**, the trial magistrate shifted the burden of proof on the appellant when the respondent had not proved liability/negligence against her.

16. With all the due respect to the trial court, I find that this was a misapprehension of the law regarding the burden of proof in civil cases. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1)(2) of the Evidence**

Act which provides as follows:

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. Section 112 of the Evidence Act provides thus:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

18. Courts have taken the position that even where no appearance or no defence is filed leading to the entry of interlocutory judgment, the plaintiff is still under an obligation to prove his case on a balance of probabilities. This is the position that was taken by the Court of Appeal in the case of *Karugi & others v Kabiya & 3 Others* [1983] eKLR wherein it was held:-

“The burden on a plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended. The burden of proof is no way lessened because this is heard by way of formal proof.”

19. Similarly, in the case of *ZOS & COA (suing as the legal representatives of the Estate of SAO (deceased) v Omollo Stephen* [2019] eKLR, Aburili J observed that:-

“42. I have cited the Court of Appeal decision in which is clear that even if the case proceeds by way of formal proof, the plaintiff is under legal duty to prove negligence and liability of the defendant as particularized in the plaint. Liability is not like special damages. In the latter case, judgment would be final where there is no defence as opposed to the former and hence the requirement for formal proof to prove negligence or liability of the defendant and the general damages suffered as a result of the alleged acts of negligence.”

20. In the case of *Douglas Odhiambo & Another v Telkom Kenya Ltd CA 115/2006*, the Court of Appeal was presented with a similar case and noted that there was no evidence that the 1st defendant was even faulted by the police for the occurrence of the accident as the police abstract produced did not show that anyone was charged with a traffic offence. It thus follows that even where there is no rebuttal, in a matter that requires proof, Section 107 of the Evidence applies, that whoever desires the 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.

21. In the present case, I have perused the police abstract that formed part of the plaintiff's list of documents before the trial court and I note that it does not show that the appellant was blamed for the accident or that anyone was charged with a traffic offence. It is therefore my finding that there was no material placed before the court to prove negligence and that the trial court therefore misdirected itself in finding that the appellant was wholly to blame for the accident in the absence of proof simply because she did not tender any evidence in support of the averments made in the defence. I reiterate that the burden was on the respondent to establish, not only that an accident occurred that led to the deceased's death, but that the defendant was solely to blame for the accident.

22. This court notes that in this case, even though it is most unfortunate that life was lost in an accident in which the family of the deceased was entitled to seek redress through compensation in damages, the rules governing proof of negligence are well settled. Courts have held that the mere fact that particulars of negligence are listed in the plaint does not amount to proof of negligence as evidence must be led to support such pleadings. I am guided by the decision of Madan JA in *CMC Aviation Ltd Cruise Air Ltd (1)* [1978] KLR 103 wherein he observed:

“Pleadings contain the averments of the facts concerned and until they are proved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”

23. My finding on the issue of liability would have been sufficient to determine this appeal but I am still minded to consider the issue of dependency ratio adopted by the trial court that was contested by the respondent in the cross appeal.

24. The respondent faulted the trial for adopting the dependency ratio of ? instead of ? while arguing that the plaint contained the full particulars of the deceased's dependants in which case, a ration of ? ought to have been applied. My finding, however, is that dependency is an issue that is subject to evidentiary proof. In this regard, the respondent needed to have presented evidence to show that the deceased was married with a child. PW1 testified as follows on the issue of dependants:

“He was married with one child. The deceased's wife went to Middle East .I stay with the child. I take care of the child.”

25. I note that apart from the claim that the deceased had a wife and a child, no material was placed before the trial court to establish this. My take is that the respondent needed to tender proof through a birth certificate or notification or any other document that would prove the existence of a child. I am therefore satisfied that the finding of ? dependency ratio was well founded.

26. Having regard to the findings that I have made in this judgment, I find that the appeal is merited and I allow it with the result that the judgment delivered on 14th September 2018 and all consequential orders are hereby set aside and in its place, judgment is hereby entered

dismissing the respondent's case. I make no orders as to costs.

Dated, signed at Nairobi this 29th day of October 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 14th day of November 2019

ERIC OGOLA

JUDGE

In the presence of:

Mr. Omondi holding brief Ondabu for appellant

Mr. Naeke holding brief Otieno for respondent

Mr. Kaunda – Court Assistant