



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL APPEAL NO.57 OF 2018**

**ELDORET EXPRESS LTD.....APPELLANT**

**VERSUS**

**KENNEDY WAFULA MAKOKHA & JACKLYNE**

**MALIATSO WEKESA (suing as legal representative of the estate**

**ROBERT WEKESA SIMIYU(Deceased).....RESPONDENT**

(Being appeal from judgement/Decree delivered by Honourable J.Kingori,

CM-Bungoma Delivered on the 12<sup>th</sup> June,2018)

**JUDGMENT.**

By plaint dated 31/10/2013, the respondent in this appeal Kennedy Wafula Makokha & Jacklyne Maliatso Wekesa suing as legal representative of the estate of the late Nobert Simiyu (Deceased) sued the Appellant, Eldoret Express Co. Ltd seeking general damages, special damages and cost of the suit for pain and suffering from injuries sustained in a road accident involving motor vehicle registration number KAQ 731 B Isuzu Bus owed by the appellant along the Bungoma -Webuye road on 18<sup>th</sup> June, 2013.

The deceased was a lawful passenger aboard motor vehicle registration number KAQ 731 B when at Bukembe area Bus stage the bus stopped and when the deceased was alighting, defendant, his driver, servant and/or authorized agent so negligently managed to drive and/or controlled motor vehicle that is so carelessly caused and/or permitted to so instantly and violently to take off and thereby causing the deceased to be thrown out and knocking him down thereby sustaining him fatal injuries and as a result deceased's estate consequently suffered loss and damage. The particulars of negligence on the part of the appellant were pleaded and tabulated in paragraph 4 of the plaint. The Appellant in his defence denied any negligence or liability in respect of the accident and averred that the accident was caused solely or substantially contributed to by the deceased. Particulars of the negligence on the part of the deceased were stated.

The appellant in his statement of defence averred that the deceased caused or substantially contributed to the accident due to the deceased negligence in failing to take adequate precaution of his own safety and failing to heed to the appellant's instructions on safety precautions when travelling. Appellants also denied particulars of injuries and special damages as set out in the plaint.

Briefly the evidence on record, the Respondent who testified as PW1. He testified that he is a brother to the deceased and lives in Bukembe.

That on 18/6/2013 he found his brother lying down following an accident and he died while being taken to hospital. He took him to the mortuary and reported the matter to the police who issued him with a police abstract. He later buried the deceased and adduced the burial permit as P Exhibit No. 2 and death certificate as P Exhibit No. 3. He testified that deceased had 6 children and produced baptism cards to that effect and stated that deceased was agent for defendant and adduced a staff identification card as Exhibit 7.

Pw2 No. PC Evaline Cheronu of Bungoma Traffic Base testified that the deceased died in a road accident at Bukembe involving motor vehicle registration number KAQ 731 B Isuzu Bus and produced a Police Abstract as P Exhibit 1. On cross examination he testified that the deceased was not a fare paying passenger but a tout of Eldoret Express. She also denied that the deceased's jacket was held by a knob while jumping out of the bus and that according to the Investigating Officer, the driver was not to be blamed for the accident and deceased was author of his own death.

Dw1 PC Geoffrey Kahiga of Bungoma Police Station traffic department testified that Patrick Sundwa was driving motor vehicle registration number KAQ 731 B Isuzu Bus from Webuye towards Bungoma direction and while at Bukembe shopping Centre, he stopped to allow some

passengers to alight and others to board.

That the conductor signaled driver to proceed and there were two touts at the stage one being the deceased decided to alight from the moving vehicle and one of them successfully managed to alight as the 2<sup>nd</sup> being the deceased jacket got trapped by a knob and he fell down and ran over by the vehicle and died while being taken to the hospital.

Under cross examination he stated that he was not the investigation officer in the case but inspector John Bosco Mutai was in charge of the case.

After the close of the respective parties' cases their advocates filed written submissions both on liability and on quantum. The trial court found the appellant 100% liable and awarded general damages of Kshs.835,000/=, Loss of Expectation of life Kshs.100,000/=, Pain and suffering Kshs.10,000/=, special damages Kshs.3,780/=. The entire award was thus Kshs.948,980/=.

The appellant then filed this appeal faulting the judgment and decision on the following grounds:

**i. That the learned trial magistrate erred in fact and in fact by apportioning 100% liability to the defendants without considering the circumstances of the case;**

**ii. That the learned trial magistrate erred in fact and law by apportioning 100% liability to the defendant whereas the police abstract produced indicated the matter was still pending for trial.**

**iii. That the Trial Magistrate erred in fact and law by apportioning 100% liability to the Defendant whereas PW2 gave evidence that the deceased jumped from the motor vehicle while it was in motion.**

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Okwoyo for the appellants submitted that there is evidence that the deceased was author of his own death because Pw2 testified that the deceased jumped out of the bus while on motion and he fell down and run over by the bus.

He submitted that the trial court entirely blamed the driver for driving off the bus before the deceased alighted safely which is a presumptuous finding and the finding of the trial magistrate is a grave error and urged this court to set aside the judgment.

The Respondent filed written submission through M/s. Chunge, she submitted on liability that the trial court had advantage of hearing the witnesses and reached its decision and it is upon the appellant to satisfy the appellant court the evidence adduced that this court ought to interfere with finding of trial court.

She submitted that the particulars of negligence were attributed to the appellant's driver who drove off the motor vehicle too fast in the circumstance and failed to keep proper look out and submitted that the driver should have anticipated any wicked action by the passengers who were alighting. She submitted that the appellant did not proof allegations that the deceased himself volunteered death when he jumped from the suit motor vehicle. She submitted that the trial magistrate was right in assessing liability at 100%.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

**“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.**

**However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif Vs Ali Mohammed Solan [1955] 22 EACA 270).**

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellants and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is where trial magistrate properly assessed the liability at 100%?

On issue of who was liable for the accident It is imperative at this juncture to determine how the accident occurred and who was responsible for the same. I have considered evidence on record and it is my finding that Pw2 testified that deceased died in a road traffic accident on 18/6/2013 at Bukembe while he was a tout aboard suit motor vehicle. On cross examination he testified that the deceased jumped out of the bus while on motion while he was touting for the suit motor vehicle.

Dw2 also testified that on the material date there were two touts at the stage one being the deceased and the touts decided to alight from moving vehicle and one of them successfully managed but the deceased jacket got trapped by a knob and he fell down and was ran over by the vehicle. It is clear from the forgoing that it is not in dispute that the deceased was a tout in the suit motor vehicle and he jumped off while the motor vehicle was on motion and he fell down and motor vehicle ran over him.

I have analyzed trial court judgement where the trial court found the Defendant/Appellant 100% liable for the said accident. I have also carefully considered the circumstance under which the accident occurred it is clear that the deceased was a tout to the suit motor vehicle and

he jumped off while the suit motor vehicle was in motion and he fell down and motor vehicle ran over him.

It is also clear from evidence on record that he was in the company of another tout who managed to successful managed to jump off the suit motor vehicle. From the above I find the deceased contributed to his own death by jumping off a moving vehicle which he knew was dangerous act to his life and I hereby attribute a 30% liability on the deceased for contributing to the accident that resulted to his death.

In quantum, I find no reason to disturb the same, save then to make provision for contribution by the deceased. I hereby apportion and award the quantum on damages as follows;

- a. General Damages Kshs.835,200/= less 30% contributory negligence which is = Kshs.**584,640/=**.
- b. Loss of expectation of life Kshs.100,000/= less 30% contributory negligence which is = Kshs.**70,000/=**.
- c. Pain and suffering Kshs.10,000/= less 30% contributory negligence which is = **Kshs.7,000/=**.

No order as to costs.

I so order.

**Dated and Delivered at BUNGOMA this 5<sup>th</sup> day of November, 2019.**

**S.N. RIECHI**

**JUDGE.**