



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 70 OF 2015

1. JOHN OCHIENG ORWA

2. RAJAB ALLI.....APPELLANTS

-VERSUS-

1. MICHAEL KARIUKI MUTUGI

2. LUCY MONICA WANJIRU (Suing as the Legal representatives

of SAMUEL MUGERA MUTUGI (DECEASED).....RESPONDENTS

J U D G M E N T

1. This appeal arises from the judgment of Hon. S. Gicheru Mombasa Civil suit No. 19 of 2012. The Respondents successfully sued the appellants for fatal injuries sustained in a road traffic accident from which the Appellants estate was put to loss and damage. They were awarded damages all-inclusive in the sum of Kshs. 1,590,020/=plus costs of the suit.

2. The appellants were aggrieved by the judgment and lodged this appeal via an amended Memorandum of Appeal amended on the 14.7.16 relying on several grounds regarding the finding of full liability against them and for quantum of damages. The grounds of appeal precisely are as follows:-

a) That the trial magistrate erred in law in holding that the Plaintiff had proved its case on negligence on a balance of probabilities when no evidence was adduced to prove the particulars of negligence pleaded.

b) That the trial magistrate erred in law and in fact in apportioning liability between the parties without considering whether the plaintiff had discharged the burden of proving negligence.

c) That the trial magistrate in apportioning liability acted without de regard to the evidence on record and in essence presumed negligence from the mere fact that an accident was said to have occurred which Act was wrong in principle and in law.

d) That the trial Court assessment of damages was too arbitrary and did not even consider precedents.

e) That the assessment of damages for loss of dependency is inordinately high as to represent an entirely erroneous estimate.

f) That the learned trial magistrate in assessing damages under the Law reform Act Viz Loss of dependency failed to apply the correct principle by adopting an income that was not proved and that contradicted the documentary evidence hence arrived at an assessment of damages that was high as to be erroneous.

g) That the learned trial magistrate misapprehended the evidence and misapplied .misunderstood and/or overlooked the correct legal principles and judicial precedent and submissions by parties that he made an award under the law reform Act and the fatal accident Act that was inordinately high hence an erroneous estimate of damages which the deceased estate suffered.

3. By consent of the parties, this appeal was argued by way of written submissions.

4. The appellants ventilated several issues in their submissions. Firstly, it was argued that Respondents failed to adduce any evidence to prove the pleaded facts as both PW1 and PW2 did not witness the accident or even attempt to explain how the accident occurred. Also,

Counsel for the appellants submitted that the trial magistrate shifted the burden of proof to the Appellant before being satisfied that the Respondents had proved their case and considered extraneous issue which did not appear anywhere in evidence. In this regard counsel relied on the case of **DT Dobie & Co. (k) Ltd vs. Wanyonyi Wafula Chebukati HCCA No. 88 of 2009**.

5. Secondly, on assessment of damages, it was contended that the multiplicand used by the trial magistrate was not supported in evidence as there was no evidence to show that the deceased was employed at the time of the accident or he supported his nuclear family. Consequently, damages for loss of dependency should have been dismissed. Further, it was submitted that the multiplier of 18 years for a person aged 41 years was plucked from the clouds without considering precedent and the nature of the deceased work and lifestyle. In this regard, counsel relied on the case of **Alice Awuor Omollo vs. Balal Abdul Chandry & Another HCCC No. 296 of 2003**.

6. On the part of The Respondents, Counsel argued that the Appellant already admitted liability to the extent of 50% and therefore the appellants cannot be heard to wax hot and cold.

7. On quantum, the respondents' Counsel submitted that the trial courts discretion should only be interfered with only where it has been shown that the trial Court acted on wrong principle or awarded excessive damages.

8. On loss of dependency counsel submitted that the trial Court finding was based on authorities before it and no evidence was adduced by the Appellant of the vicissitudes of life or imponderables which would have shortened the deceased working life. In this regard counsel relied on the case of **Benedicta Wanjiku Kimani v. Changwon Cheboi & Anor, (2013) eKLR**.

9. The duty of the first appellate court was explained in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES [1976] & ANOTHER VS LUBIA & ANOTHER (No.2) [1985] eKLR**. The court observed:-

“...The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

10. The issues for determination in this case are as follows:-

- a) Whether the Plaintiff had proved its case on negligence on a balance of probabilities***
- b) Whether the magistrate misdirected himself in awarding damages for loss of earnings.***
- c) Whether the quantum of damages was inordinately high.***

11. From the evidence adduced, it is a fact that an accident occurred whereby the Deceased was knocked by the Appellant Car driven by the 1st Appellant and succumbed to his injuries while receiving treatment.

12. In civil cases like the one before me, the standard of proving who was to blame for the accident is that of on a balance of probabilities and the burden of proving that standard is upon the party who alleges as espoused in Section 107 of the Evidence Act Cap 80 Laws of Kenya that:-

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

13. In the case **Nadwa -vs- Kenya Kazi Ltd (1988) eKLR**, the Court of Appeal observed:

“In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference.”

14. I have looked at the police abstract at page 18 of the Record of Appeal, I note that it states that the case is pending under investigations. It is PW1's testimony that he saw the Appellant's motor vehicle KAV 279W at the police station and was informed it was the one that caused the accident. PW2 a police officer produced the abstract and on cross-examination stated that it was the 1st appellant who reported the said accident at the police station. The Respondent did not call the police officer who investigated the accident but another officer who merely produced a police abstract which merely indicated that the accident was still under investigation.

15. In **TREADSETTERS TYRES LTD -VS- JOHN WEKESA WEPUKHULU [2010] eKLR** where Ibrahim J. allowed an Appeal quoted Charles worth & Percy On Negligence, 9th edition at P. 387 on the question of proof, and burden thereof where it is stated:-

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

16. Similarly in the Court of Appeal case of **Lakhamshi v Attorney General [1971] E A 118, 120** it was held as follows;

***“It is settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame... I accept that a judge is under a duty when confronted by conflicting evidence to reach a decision on it. I accept that in relation to most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. I accept that in many cases, as for example, where vehicles collide near the middle of a wide, straight, road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. I think that it is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but I accept that where it is not possible, it is proper to divide the blame equally between them.*”**

Where, however, there is a lack of evidence, as opposed to a conflict of evidence, I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

17. From the above, I find that Respondent herein failed to discharge its burden of proof on a balance of probabilities and this Court is in agreement with the Appellant’s argument that the particulars of negligence pleaded by the Respondent were not proved. As this Court was not informed how the accident occurred. The Appellant driver was the only person who witnessed the accident but was not called by the Defence. Consequently, it is my view that the evidence by the Respondent was enough to prove its case on a balance of probabilities. The burden of proof rested with the appellant who failed to discharge it.

18. It is my view, that had the Respondents pleaded the doctrine of *res ipsa loquitur*, then they would have succeeded in their present claim reason being that it was only the Appellant that witnessed accident as to explained how it occurred see **Embu Public Road Services Ltd. -vs- Riimi (1968) EA 22** where it was held as follows:-

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control”.

19. Having allowed the appeal on liability, I do not consider it necessary to make a determination on the quantum of damages which I really consider to have been modest and a matter for the discretion of the trial court.

20. For reasons set out above, I find that the appeal is merited and I hereby set aside the Judgment on liability by the trial Court. I award the costs to the appellant.

Dated and delivered at Mombasa this 6th day of December 2019.

P.J.O. OTIENO

JUDGE