



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 19 OF 2018

JENIPHER AWINO OCHOLA(suing as legal representative of the estate of

Kevin Odhiambo Nyapara.....**APPELLANT**

VERSUS

LILIAN ACHIENG NYAMENA.....**RESPONDENT**

(Being an Appeal from the Judgment and Decree in Winam SRMCC No. 156 of 2016 delivered by Hon. B. Kasavuli (SRM) on 16th March, 2018)

JUDGMENT

1. **JENIPHER AWINO OCHOLA** (*hereinafter referred to as appellant*) sued **LILIAN ACHIENG NYAMENA**(*hereinafter referred to as respondent*) in the lower court claiming damages for fatal injuries suffered by her son, **Kevin Odhiambo Nyapara**, when motor cycle KMDG 107H (*hereinafter referred to as the motorcycle*) that he was riding collided with respondent's motor vehicle KCD 847M(*hereinafter referred to as the lorry*) on 17th May, 2015 allegedly as a result of the negligence of the respondents driver, servant and or employee.

2. The defendant/respondent filed a statement of Defence and denied the claim.

3. In a judgment delivered on **17th March, 2018**, the trial court found that the appellant did not prove her claim and dismissed it with costs to the respondent.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 29.3.18 filed the Memorandum of Appeal dated 12.3.18 which sets out 9 grounds of appeal that may be summarized into the following 1 ground that:-

The Learned trial Magistrate failed to consider that the plaintiff's case was merited

APPELLANT'S CASE

5. PW1, the appellant herein and PW2 PC Mwakwekwe Nyoka were not at the scene of the accident and did not know how it occurred. PW2 however produced a police abstract PEXH. 3 which shows that the accident was pending under investigations. PW3 Maurice Ouma stated that the lorry turned onto the lawful lane of the motorcycle causing the accident in which the cyclist denied on the spot.

RESPONDENT'S CASE

6. DW1 Philip Ochieng Aganja, the driver of the lorry stated that he did not know how the accident occurred and was only alerted about it after it happened. DW2 Daniel Ochieng Otieno was not of much help since he did not witness the occurrence of the accident.

SUBMISSIONS BY THE PARTIES

7. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

APPELLANT'S SUBMISSIONS

8. From the appellant's submission, the appeal is only on liability. Appellant holds the view that the evidence by PW3 clearly demonstrated

that the lorry driver was to blame for the accident and the same ought not to have been dismissed without any proper grounds.

9. Appellant placed reliance on the following authorities.

1. Fraciah Njeri Gracevs Isaiah Ngararika Muindi & Another [2012] eKLR which cited the old case of **HEAVEN VS. PENDER (1883), II Q.B.D.**, where BRETT M.R. said at p. 507 -

"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his own part, has suffered injury."

2. Mary Njeri Murigi v Peter Macharia & another [2016] eKLR where the court relied on the evidence on an eye witness

3. James Gikonyo Mwangi v D M (Minor Suing through his Mother and next Friend, I M O) [2016] eKLR which quoted **Embu Public Road Services Ltd. vs Riimi (1968) EA 22** where it was stated:

".....Where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence....."

RESPONDENT'S SUBMISSIONS

10. It was submitted for the respondent that the cyclist was not licenced to ride a motor cycle and that the evidence of PW3 was unreliable because he did not record any statement with the police. Respondent submitted that deceased was to blame for hitting the rear tyre of the lorry. On quantum, the respondent proposed Kshs. 10,000/- for pain and suffering; Kshs. 100,000/- for loss of expectation of life; a dependency ratio of 1/3, Kshs. 1,346,681.56 for loss of dependency and Kshs. 43,300/- for special damages.

11. Respondent placed reliance on the following authorities.

1. Kiema Mutuku -Vs- Kenya Cargo Handling Services Ltd (1991) 2 KAR 258 where the Court of Appeal held that our law has not reached the age of liability without fault

2. Adan Hussein Ali & Another V Geoffrey Ndiku Mutisya & Another [2015] eKLR where court awarded Kshs. 10,000/- for pain and suffering

f. F M M & another v Joseph Njuguna Kuria & another [2016] eKLR where court awarded Kshs. 100,000/- for a 26 year old and adopted a multiplier of 23 years

Analysis and Determination

12. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another -Vs- Allied Industrial Ltd (2007) 2 KLR** and **Selle & Another -Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

13. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

14. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of liability.

15. DW1 blames the deceased for the accident. His evidence is however unreliable because he could not tell how the accident occurred and only learnt about the collision after he heard shouts from boda boda riders. His initial report to the police that the cyclist knocked the rear bumper of the lorry is therefore not factual. The evidence by PW3, the eye witness blaming the lorry driver for turning onto the lawful lane of the motorcycle is denied by the lorry driver. PW2 who was expected to assist the court resolve the stalemate regarding the point of impact merely produced the police abstract whose evidence only confirmed the collision but was of no assistance to court concerning the issue of liability. In the result, I find both the cyclist and the lorry driver equally liable. In so finding, I find fortification in the Court of Appeal decision in **Hussein Omar Farah v Lento Agencies [2006] eKLR** where the court faced with a similar situation as the one subsisting in this case held as follows:

"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

DISPOSITION

16. Consequently, I find that this was not a case of dismissal of the plaintiff's suit in its entirety. Accordingly, the appeal succeeds and the trial court's order dismissing the plaintiff's case is set aside and substituted with an order on liability at 50:50% as between the appellant and the respondent. The amount of general damages assessed by the trial court remains undisturbed. Each party shall bear its own costs of this appeal. .

DATED AND DELIVERED AT KISUMUTHIS 4th DAY OF *October*, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellant -

For the Respondent -