REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT CIVIL APPEAL NO. 28 OF 2016

JENEBY MAWIRA……APPELLANT

VERSUS

ANNWHILLER MWENDE RUGENDO AND

NJOKA BARUTHI (suing as legal representatives of

ALFRED MUTWIRI NJOKA deceased) ……RESPONDENTS

JUDGEMENT

1. The appellant in this appeal (**JENEBY MAWIRA**) has preferred this appeal from the judgment of **Hon. A. G. Kibiru Chief Magistrate's** Court Civil **Suit NO. 58 of 2014**. Briefly in that case the respondents herein, **Annwhiller Mwende Rugendo and Njoka Baruthi** suing as legal representatives of the estate of **the late Alfred Mutwiri Njoka** (hereinafter to be referred to as the deceased) had brought civil action against the appellant herein for a tort of negligence due to traffic road accident involving appellant's motor vehicle registration **No. KBT 782X** pick up and a motorcycle registration No. **KMCJ 6212** where the deceased was riding as a pillion passenger. Both the rider of the motor cycle and the deceased perished in the accident which occurred on **14th October, 2013** at around 20.15 hours along Embu-Meru road near a place called Gwa-Kanyoni stage.

2. The respondents in the said suit had listed several particulars of negligence in their plaint but the same were denied by the appellant and attributed the negligence to both the motorcycle rider and the deceased. The learned trial magistrate after trial found that the appellant was 100% liable blaming him for not taking out 3rd party proceedings and further that the deceased could not be blamed as he was just a passenger. The trial court then went ahead and quantified and awarded damages to the respondents as follows:

i) Pain and suffering 15,000/=

ii) Loss of expectation of life 90,000/=

iii) Loss of dependency using a multiplier of 25 years and minimum age of Kshs. 9,780,095

9024.50 x 25 x 12 x 2/3 1,804,830/=

iv) Special damages 21,100/=

v) Burial expenses 50,000/=

Total	1,980,93/=
Less double entitlement	90,000/=
Total awarded	1,890,930/=

The trial court also awarded costs and interests against the appellant.

3. The appellant felt aggrieved against the entire judgment and preferred this appeal listing the following 4 grounds in his memorandum of appeal namely;

> ***i) That the learned magistrate erred in fact and law in holding the appellant 100% liable, a finding not supported by the pleadings and evidence adduced in his view.***
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> ***ii) That the trial magistrate erred in law in failing to take into consideration the issues raised by the defence in challenging the plaintiff's case and in eventually finding the appellant 100% to blame.***
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> ***iii) That the trial magistrate exercised his discretion wrongly in computing the amount awardable for loss of dependency based on a multiplicand which was not supported by any probative evidence in proof of the deceased earning before death thus arriving at an inordinately high and excessive award on damages.***
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> ***iv) That the trial magistrate erred in law and fact by failing to take into account the appellant's submissions and binding authorities cited in regard to the applicable multiplier thus arriving at an excessively high amount leading to an erroneous award.***

4. The appellant in both written and oral submission made through learned counsel **M/S Muthoga Gaturu & Co. Advocates** crystallized the above grounds into two main grounds which are basically on:

i) Liability and

ii) Quantum

i) <u>Liability</u>

On liability, the appellant contends that the respondents did not prove liability against him at the trial and that the respondent simply gave evidence on the assessment of damages and in his view the police officer who was called to testify exonerated him and that there was absence of direct evidence linking him with any blame on the occurrence of the accident. **Mr. Rukioyah learned** counsel for the appellant further pointed out that the evidence tendered at the trial showed that both the said motor vehicle and motor cycle involved in the accident were both headed the same direction and that the motor cycle was in the process of overtaking when an oncoming vehicle forced it to swerve left and in the process hit the appellant's motor vehicle on the front right causing the fatal accident.

5. The appellant further contends that particulars of negligence attributed to him were not proved pointing that the law placed the burden of proof on the respondents. On this score he cited the decision on **MICHAEL K. KIMARU –VS- MARGARET WAITHERA MAINA [2015] eKLR** where the court observed that as a general principle negligence must be proved and there should be no liability without fault. The appellant contends that the trial court was not guided by the evidence adduced at trial in order to arrive at the correct decision. Pointing out at the pleadings at the lower court the appellant specifically faulted the respondent for pleading that the accident was caused "***due to the negligence of the driver of motor vehicle registration NO. KBT 782X"*** but failed to adduce any evidence to prove the fact pleaded. The appellant submits that the absence of an eye witness at the scene of the accident led to failure by the respondents to ascertain the events leading to the accident and hence liability and cited the decision in **EVANS MUTHAITA NDIVA –VS- FATHER RINO MENEGHELLO & ANOTHER [2004] eKLR**

to support the contention. He has further cited the provisions of section 107 (1) & 108 of the Evidence Act (Cap 80) and contended that the respondents did not discharge their burden of proof. It is the appellant's contention that the respondents failed to adduce any evidence during trial apportioning blame him.

6. The appellants further contends that the learned trial magistrate ignored the evidence he adduced arguing that he was the only person at the scene who witnessed the accident first hand and that his testimony was corroborated by the evidence of the investigating officer (PW2). The appellant contends that the trial magistrate erred by apportioning 100% liability against the appellant yet the evidence tendered absorbed him from any blame.

7.The appellant further faults the learned trial magistrate for apportioning liability for his failure to take out 3rd party proceedings. The appellant contends that he did not have to take out 3rd party proceedings to show or prove that he was not liable for the accident and cited the decision in **MICHAEL K. KIMARU –VS- MARGARET WAITHERA MAINA [2015] eKLR** to solidify the contention.

8. The respondent has opposed this appeal. He has pointed out that this being the 1st appeal, the court has powers to either review or uphold the judgment as provided under the provisions of section 78 of the Civil Procedure Act and cited the decision in **KIRUGA –VS- KIRUGA & ANOR [1998] KLR** where they argue that the court held that an appellate court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support its finding or unless the trial can be said to be plainly wrong.

9. The respondents further contend that being a pillion passenger, the deceased could not possibly be blamed for the accident. They further contend that the rider of the ill fated motor cycle cannot be blamed because he was not made a party to the proceedings as per the provisions of order 1 rule 15 Civil Procedure Rules and on this score the following decisions have been cited.

> **a) Zakaria Mwangi Kagai –vs- Barnabas A. Mwisuji & Anor (Nairobi HCCC NO.1053 OF 1998)** where the court held that failure to join a party to proceedings deemed necessary by the defendant is fatal to his claim for contribution or indemnity.
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> **b) Ntulele Estate Transporters Ltd & Anor –vs- Patrick Omutanyi Mukholwe [2014] eKLR;**
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> **c) Stella Muthoni –vs- Saphet Mutegi (Chuka HCCA NO. 5 of 2016)** where the court observed that it was wrong for the trial court to make a relief against a person who was not a party to the proceedings.

The respondents argues that in the light of the above authorities, they discharged their duty in proving negligence against the appellant.

10. **<u>Determination on liability</u>**

This court has considered the submissions of both counsels in this appeal and all the authorities cited. It is clear from this appeal that this ground on liability is significant to the direction this appeal takes. This court shall first examine the pleadings filed at the trial court before re-evaluating the evidence tendered in so far as the issue of liability is concerned. The basis for this is that the main thrust of any civil proceedings is the pleadings filed.

11.In the suit dated **2nd April, 2014** the respondents herein attributed the occurrence of the accident that occurred on **14th October, 2013** along Embu-Meru highway where the deceased suffered fatal injuries to the appellant herein and listed 14 particulars of negligence which he attributed to the appellant as follows namely:

> ***(a) Driving too fast in the circumstances***

(b) Failing to keep any proper look-out or to have any sufficient regard for the deceased.

(c) Failing to control the defendant's motor vehicle in time sufficient enough to keep the same from the collusion or at all.

(d) Failing to heed the presence of motorcycle the deceased was on or otherwise in sufficient time to avoid the collision.

(e) Failing to give any or adequate warning of his approach

(f) Failing to control the defendant's motor vehicle in time sufficient enough to keep the same from the collision.

(g) Failing to heed the presence of motorcycle registration No.KAMCJ 6212 on the said road.

(h) Failing to exercise any proper effective control of the defendant's motor vehicle.

(i) Causing or permitting the said motor vehicle to collide with the said motorcycle.

(j) Failing to take adequate measures to prevent the said motor vehicle from colliding with the said motorcycle.

(k) Driving without due care and attention.

(l) Failing to take heed to the condition of the road

(m) Driving a defective motor vehicle

(n) Failing to stop, slow down, to swerve, and/or in any other manage an/or control the said motor vehicle as to keep the same form colliding with motor cycle registration mark KMCJ 621 Z.

The respondents further pleaded that they would be relying where necessary to the doctrine of res ipsa loqitum, the highway code and the provisions of the Traffic Act (Cap 403 Laws of Kenya.). The respondents by specifically pleading the particulars of negligence duly complied with the provisions of the law **(Order 2 Rule 4 Civil Procedure Rule)**

12.In his defence, the appellant denied the accusations and pleaded as follows:

"save that an accident happened involving motor vehicle Registration Number.KBT 782X and motorcycle registration No.KMCJ 6212, the defendant denies that the same happened in the manner pleaded under paragraph 4 of the plaint, or at all and further deny that motor vehicle KBT 782 X was negligently driven, managed and/or controlled accordingly the entire contents and all the particulars of negligence set out under paragraph 4 (a) to (n) are denied "in toto" and the plaintiffs are put to strict proof of entire allegations."

13. The pleadings cited above by both parties required or necessitated trial where the competing facts pleaded would be interrogated, tried and determined. It is trite law that whoever alleges has the burden of prove as spelt under section 107 of the Evidence Act (Cap 80 Laws of Kenya). The respondents were therefore under an obligation to establish and prove any or all the allegations or particulars of negligence they attributed to the appellant. This court has considered the evidence tendered by the plaintiff who called 2 witnesses to discharge the burden placed on them by the law. The evidence tendered by the 1st respondent (**Annwhiller Mwende Rugendo)** in so far as the particulars of negligence (liability) attributed to the appellant are concerned was scanty at best. She merely testified that she received a phone call that her son had been hit by a ***"miraa motor vehicle"*** and did not witness the accident. This is what she told the trial court, "I did not witness the accident. I do not know anyone who witnessed the accident."The

respondents also called a police officer who carried out the investigation concerning the occurrence of the accident and the witness was **PW2 (PC Koskei Kibos)**. His evidence was that upon visiting the scene of the accident he found evidence that "the motorcycle joined the road without due care and attention and was knocked down by the motor vehicle." He further testified that the accident occurred on a straight road and at night and that he established that the rider entered the road abruptly that is why he did not find any evidence to prefer charges against the appellant herein who was driving the motor vehicle. That is all the evidence the respondents adduced in proving all the particulars of negligence specifically pleaded and itemized above.

14. Now supposing we pose there and assume that the appellant chose to remain silent or adduce no evidence in defence. This court finds that the provisions of section 107 as cited by the appellant will apply. The provision states:

> **"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". (**Emphasis added**).** The respondents claim / suit against the appellant was based on tort of negligence. They had the duty and obligation to adduce or place evidence before the trial court evidence proving to the required standard that the appellant was negligent as asserted in the pleadings. This court finds that the evidence placed before the trial court by the respondent fell short of this cardinal principle and requirement of law. It is trite law that without fault liability cannot lie. It is also important to note that negligence is a question of fact which must be proved if liability is to lie. In this regard, this court concurs with the following decisions cited by the appellant:
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> **1. Michael K. Kimaru –vs- Margaret Waithera Maina [2015] eKLR** where the court reiterated the same principle applied in the case of **Nzoia Sugar Company Ltd –vs- David Naiyanya** where the following observation was made
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> "As a general principle negligence must be proved and there should be no liability without fault."

15. The appellant did testify at the trial and denied being negligent. He testified as per the statement filed that on the material date and time he was driving motor vehicle registration KBT 782X to Nairobi to deliver a consignment of ***"miraa".*** According to him he was driving at a relatively low speed when with a motorcycle emerged carrying a passenger and attempted to overtake and immediately upon overtaking cut in into the appellant's path and hit his vehicle. He further testified that despite efforts to avoid the accident, the motorcycle ended up hitting his motor vehicle. He further testified that he reported the matter at Chuka Police Station and that his motor vehicle was later inspected and no defect was found. He further confirmed that no traffic offence was preferred against him by the police on account of the accident. He testified that the motorcycle rider who died in the process was reckless and careless in the manner he rode the motor cycle. I have noted from the evidence tendered by the defendant that his evidence is inconsistent with the chain of events as testified by the investigating officer (PW2). However this court is minded by the clear provisions of the law under section 108 of the evidence Act and on the question of burden of proof. The law provides as follows:

> **"The burden of proof in a suit lies on the person who would fail if no evidence at all were given on either side."**

I have re-evaluated the evidence tendered by both the respondents and the appellants at the trial and it is clear that evidence touching on any particulars of negligence attributed to the appellant was missing. That omission was fatal to the respondent's case.

16. The respondents have submitted that this court should take judicial notice of the fact that vehicles carrying miraa are notorious for over speeding and that on that basis hinted at the provisions of **section 59** of the **Evidence Act.** It is true that courts of law can be called upon to take judicial notice of certain facts that have attained some notoriety does not need to be proved. However evidence must be tendered to prove that the fact has gained sufficient notoriety for the court to take judicial notice of the same. Furthermore where negligence is contested as it was at the trial in this instance, it cannot be assumed. I

also find that the respondents contention on this point is moot because it can also be safely argued that judicial notice of the fact that most motorcycles in Kenya roads are carelessly ridden and mostly rode by person who ether have no regards to traffic rules and regulations or ignorant of the same. It is therefore not safe in my view to make assumptions in circumstances such as obtains in this case.

17. The learned trial magistrate in his judgment placed premium on the question of liability on the fact that the appellant failed to take out 3rd party proceedings against the motorcycle rider whom he blamed for the accident. He cited the decision in the case of **Zakaria Mwangi Kagai –vs- Barnabas Mwisuji & Anor (Nairobi HCCC No. 1053 of 1998).** The respondents in opposing this appeal has supported the finding by the learned trial magistrate. The provisions of order 1 rule 15 Civil Procedure Rule cited by the respondents in their submissions provides that where a defendant claims as against any person not named in a suit he should apply for 3rd party proceedings against that person. I have gone through the above cited decision in Zakaria's case and though I agree that no order can be made against a party who is not a party in the proceedings with due respect disagree that where a court cannot clearly establish liability against a defendant who has failed to take 3rd party proceedings who he/she blames for the accident, liability is assumed for failure to take out such proceedings as provided by the cited rules of procedure. My position is partly informed by the fact that rules of procedure under order 1 rule 15 does not displace the clear provisions of a statute (read section 107 & 108 of the Evidence Act). Secondly the rules of procedure under order 2 rule 4 Civil Procedure Rule clearly demands that where a plaintiff's suit is based on tort of negligence he/she must provide specific particulars and the law cited above states that the said particulars must be specifically proved. Where evidence on the specific particulars of negligence are lacking, a party cannot make allegations and seek refuge in the provisions of order 1 rule 15(1) Civil Procedure Rule. As correctly submitted by the appellant herein a fault cannot be where there is no blame. On this score this court fully concurs with the cited decisions in;

i) Michael K. Kimaru –vs- Margaret Waithera Maina [2015]eKLR

ii) Nzoia Sugar Company Ltd –vs- David Nalyanya [2008] eKLR

iii) Evans Muthaita Ndiva –vs- Father Rino Meneghello & Anor [2004] eKLR.

In the above decisions the courts reiterated the principles underpinning the provisions of section 107 and 108 of the Evidence Act and that failure to take out 3rd party proceedings cannot be used to hold a party liable when no material supporting the finding is placed before the trial court. This court finds that the learned trial magistrate clearly fell into error when he found that the appellant herein was 100% liable for the accident merely by failing to take 3rd party proceedings. As I have observed above no ioto of evidence linking the appellant with any particulars pleaded was placed before the trial court. The learned trial magistrate had no basis to find him liable because he was exonerated form blame by respondents' own witness.

18. The determination on liability in this appeal has the effect of disposing of this appeal and going into the issue of quantum is purely academic and certainly not in the interest of scarce judicial time. In the premises this court finds merit in this appeal. The same is allowed. The judgment entered against the Appellant on 29th June, 2016 is hereby set aside and is substituted with the orders dismissing the respondent's suit. The appellant shall have costs of this appeal.

Dated and Delivered at Chuka this 15th day of June, 2017.

R.K. LIMO

JUDGE

15/6/2017