



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 9 OF 2014

(From the Original Judgement in Civil Case No. 175 of 2010 of the Principal Magistrate's Court at Kilifi
 – A.M. Obura, PM)

**CONSTANCE PILI STEPHEN [Suing as the Administrators of the
 Estate of the late GEOFFREY**

MWARO BADONA alias GEOFFREY MWARO – Deceased]

..... **APPELLANT**

VERSUS

ABDALLA OMAR 1ST RESPONDENT

EDARUSI HASSAN 2ND RESPONDENT

JUDGEMENT

The late Geoffrey Mwaro Badono was involved in a road fatal accident on 5.9.2009 along the Malindi-Kilifi road at Kwa-Mwango area. Constance Pili Stephen, the deceased's sister filed Civil Suit Number 175 of 2010 before the Kilifi Court claiming damages. The suit was dismissed leading to the filing of this appeal.

The grounds of appeal are that: -

- i. The trial court erred in law and fact by holding that the respondents were not liable for the occurrence of the accident.
- ii. That the court erred by failing to note that the respondents did not tender any primary evidence.
- iii. The trial court considered extraneous matters and did not take into account the appellant's written submissions.
- iv. The trial court failed to consider that an inquest had recommended that the driver of the accident motor vehicle be charged with the offence of causing death by dangerous driving.

Parties agreed to determine the appeal by way of written submissions. Only counsel for the appellant filed her submissions. The main issues being raised in the appellant's submissions are that the learned trial magistrate erroneously disbelieved the evidence of PW3 who was the only eye witness. The respondents did not call any eye witness to testify. PW3 was not approached by the police to give his statement. The evidence of PW1 and DW1 (police officers) was only based on what was contained in the police file. Being a civil suit, the evidence proved the case on a balance of probabilities.

The record of the trial court shows that three witnesses testified for the appellant while one witness testified for the respondents. PW1 Police Constable SAMSON NYAMWEYA was stationed at the Kilifi Police Station. The accident was reported on 5.9.2009 and together with other officers reached the accident scene within fifteen minutes. It is his evidence that the deceased was riding motor cycle registration Number KBG 99N from Malindi side heading towards Kilifi direction. There were three people pushing a handcart ahead of him. The deceased hit the rear of the handcart and veered towards the other land and in the process was hit by motor vehicle registration Number KBA 726Y, a Nissan matatu. The deceased's body was found about one metre off the left side of the road as one faces Malindi direction. The Nissan matatu vehicle was heading towards Malindi.

It is the evidence of PW1 that an inquest file Number 7/9/2009 was opened. The court ruled that the driver of the Nissan matatu vehicle was to be charged with the offence of causing death by dangerous driving.

PW2, CONSTANCE PILI STEPHEN is the appellant. Her evidence is that the deceased was her brother's son. He was 19 years old. He used to work as a "boda boda" cyclist earning about Kshs.300/= day. He had a driving licence. He was not married and had no children. He had an identity card. She does business at Kilifi and was informed of the accident the same day at about 6.30 pm. She arranged the funeral of the deceased. The deceased used to support his father and brother.

PW3 EMMANUEL KAI resides near Mwa Mwangi area in Kilifi Town. ON 5.9.2009 at about 5.00 pm he was walking near the accident scene and saw how the accident occurred. It is his evidence that the motor vehicle was coming from Kilifi side heading towards Malindi direction while the cyclist was riding on the opposite direction. The vehicle tried to avoid hitting a pothole and veered towards the cyclist and hit him. According to him, the vehicle left its lane. Three officers visited the scene immediately but did not interview him. He also saw a handcart from Malindi direction being pulled by three people. He was the only eye witness.

DW1, SERGENT BORU CHUME was stationed at the Kilifi Police Station on Traffic duties. His evidence is that the motor cyclist (deceased) tried to overtake the handcart and in the process hit the handcart. He rolled and was hit by the oncoming matatu. The matatu driver made a U-turn and drove to the police station. The handcart puller was charged for pulling a handcart at night. He pleaded guilty and was fined Kshs.1,000/=. The police investigations blamed the motor cycle rider for the accident.

The main issue for determination is whether the trial court was correct in holding that the respondents are not liable for the occurrence of the accident. The evidence from both sides does confirm that the deceased was riding a motor cycle, that there was a handcart puller ahead to the deceased and two other people were assisting him and that the matatu vehicle was coming from the opposite direction. Although PW1 testified that the deceased had a driving licence, it is clear that he had no licence. None was produced. It is also clear from the evidence of PW1 that the motor cycle belonged to one Meshack Mwanza Karisa and the deceased took the motor cycle while the owner was asleep. The deceased had no authority to ride the motor cycle.

It is true that the deceased suffered fatal injuries. The driver of motor vehicle registration number KBA 726Y, Nissan matatu was on his lane. Although the evidence indicate that the accident occurred at about 5.00 pm, it is clear to me that at the time of the accident it was getting dark. That is why the handcart puller was charged for pushing a handcart at night without lighting.

There is the evidence of PW3. He testified that the matatu driver was trying to evade a pothole and moved to the other lane. The police visited the scene shortly. There is the police investigation report. The police findings are that the condition of the road was that it is a tarmac road free from any potholes. The surface of the road was dry and free from any wetness. The police were at the scene at about 7.15 pm.

I have read the proceedings of the trial court including the judgement and do agree with its findings. It is the law that one has to prove his case on a balance of probabilities. The deceased was hit on the left lane of the road as one faces Malindi. That lane is reserved for vehicles coming from Kilifi

direction. Whether the deceased hit the handcart or not and whether deceased tried to overtake or not, it is clear to me that the deceased was not on his correct lane. The evidence of PW3 was correctly ignored by the trial court. Police went to the see and there was not pothole. PW3 did not volunteered to tell the police what had transpired. Instead, he claimed that he was talking to his colleagues at the scene. How could he see potholes yet the police who took measurements and drew a sketch plan could not. There is no evidence that the police were compromised. I do agree with the findings of the trial court that PW3 seemed not to be a reliable witness. PW1 and DW3 gave tangible evidence which exonerates the matatu driver.

There is no law that even if one causes his own death through his negligence still the other party must be found culpable. Negligence must be proved. In absence of proof of negligence, then the case must fail. There was nothing the driver could have done to avoid the accident. It is clear that the accident occurred abruptly. The mere fact that the cyclist died as a result of the accident does not prove negligence on the other party. The doctrine that where there is injury there must be a remedy does not apply where the injury is self-induced. The deceased was a young man who decided to take his relative's motor bike while the owner was asleep. He had no licence to enable him ride the motor cycle. He was the author of his own misfortune.

The trial court computed what it could have awarded the appellant had it found in her favour. I do not need to evaluate the proposed award as I find that the case was not proved to the required standard.

In the end, I do find that the appeal lacks merit and the same is hereby dismissed. Each party shall bear their own costs for both the appeal and the case before the trial court.

Dated and delivered in Malindi this 7th day of April, 2016.

S. CHITEMBWE

JUDGE