



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 1 OF 2015

(An appeal arising from Judgement in original Kitale CMCC case No. 78 of 2012 delivered 18/12/2014 by J.M. Nange'a Senior Principal Magistrate)

E T R Suing as Administrator and Personal Representative of the Estate of the later A T (Deceased).....APPELLANT

VERSUS

BENSON RIRIMPOI LONGARITO.....RESPONDENT

J U D G M E N T

This is an appeal against the decision of the learned Senior Principal Magistrate pursuant to the judgment delivered on 18/12/2013

The brief facts as per the plaint are that the deceased A T was walking to school with her siblings on 2nd February 2011 at around 7.45 am along Kitale - Kapenguria road at a place near Kesogon trading Centre. The respondent was driving his motor vehicle Registration No KAU O84A. The said vehicle hit the deceased causing fatal injuries whereby at the time she arrived at the hospital she was pronounced dead.

The appellant then filed the suit for damages where after hearing all the parties the trial court dismissed the same on the grounds that no negligence had been proved against the respondent hence this appeal.

Before determining the issues raised in the memorandum of appeal it is worthwhile to summarised the evidence as presented by the parties during trial.

PW1 E T R the deceased father told he court that he received information from his son concerning the incident.

He rushed to the scene and found that the deceased had been taken to hospital.

He produced the certificate of death and grant of letters of administration beside other uncontested exhibits.

He said that they spent kshs 10,000/- for the coffin and Kshs 15000/- to apply for the letters of administration.

On cross-examination he confirmed that the respondent was charged with a traffic offence over the incident.

PW2 E E aged 9 years gave unsworn evidence. He said that he was with her sister that morning heading to school. He had crossed the road with the other sister called M when they had a sound of vehicle from behind. When they looked they realised that the deceased had been knocked. He then went to inform PW1. **PW3 P.C. Linda Akoth** produced the police abstract. He said that she was not the investigating officer.

The respondent in his defence relied on his statement dated 10/8/12 in which he confirmed that indeed the accident occurred and the deceased died.

He also confirmed that he was charged with the offence of driving a defective motor vehicle and fined Kshs 5000/-. He said from the statement that at the time of the incident he was driving at a speed of between 70-80Kmph.

The appellant has mounted 2 grounds of appeal which can be summarised as hereunder;

1. That the court erred in failing to find liability against the respondent.

2) The court failed to appreciate the weight of evidence presented by the applicant.

I have perused the entire proceedings together with the written submissions by the parties herein as well as the attached annexed authorities.

What is clear and not disputed is that the accident occurred on the material day and the deceased who was aged 7 years old died. The other documents presented as exhibits were not disputed and that the respondent was charged with the offence of driving a defective motor vehicle which charge he admitted, convicted and sentenced.

The big question is whether or not in the light of the evidence on record the respondent can be said to have been not to be liable. Except PW2 who said that they had crossed the road with M and on looking behind they saw the deceased having been knocked by a vehicle there is no any other eye witness to the accident. The said PW2 although minor and gave unsworn evidence was not cross-examined.

The respondent in his statement stated as follows;

“ On reaching Kesogon Centre I slowed down and then started accelerating once I was past the centre.

After moving for a distance of about 500 m from the Centre I could see two school children ahead walking on the left side of the road towards school.

Suddenly a school girl emerged from the right side of the road running across the road towards the left where the other children were walking.

Immediately I tried to brake while hooting and swerved to my left to avoid hitting the girl. The girl however continued to run towards the end of the road. When I was almost off the tarmac, at the furthest edge of the tarmac, the motor vehicles right side of the bonnet met with the girl.

Due to the impact she was thrown to the edge of the tarmac where she landed. I was driving at a speed of 70-80 KPH by the time I saw the girl.”

I have quoted the above statement extensively because that is the proximate stage at which the accident occurred.

From the said statements one can deduce that first of all the respondent saw the two children walking on the left side of the road. Its again assumed that they were walking outside the main road.

PW2 confirms that the deceased was crossing the road on the right side to where they were.

The respondent I think owed a duty of care to the other road users. Although he claimed to have been travelling at a speed of between 70-80 KM, he had hardly passed Kesogon trading Centre which I presumed is populated and busy. At such morning hours one for sure expects many people to be rushing to jobs and schools as was the deceased. Beside this the respondent clearly admitted that he saw two school going children walking beside the road. Most probable than not one would expect that there are either school going children as it was a school day.

My above observations is buttressed by the fact that the respondent was charged with the offence of driving a defective motor vehicle which he readily admitted and fined Kshs 5000 or in default 3 months in jail. Although there was no evidence led as to the defect in the vehicle, one can conclude that such defect may have caused the respondent not to be in a position to control the vehicle and therefore avoid the accident. In any case why would he admit that his vehicle was defective?

Consequently I find that the trial court was in error in finding that no negligence was proved against the respondent. He was in my opinion better placed to avoid the accident. His motor vehicle had defects and although it was not clearly indicated what the defects were, moreso in his defence I easily conclude that the vehicle was not perhaps in a road worthy conditions or if it was it was not possible to control it so as to avoid the accident. I do find that the appellants proved negligence on the part of the respondent as provided under **Section 107(1) of the Evidence Act Cap 80 Laws of Kenya** which states that;

“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.”

The next question is whether any negligence could be attributed to the deceased who was aged 8 years old at the time of her demise.

In *Gough Vs Thorne (19966) WLR 1385* Lord Denning stated as hereunder

“A very young child cannot be guilty of contributory negligence.

An older child may be. But it depends on the circumstances. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her.

A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.”

At the aged of 7 years is it possible that the deceased was in a position to appreciate the road safety requirements. I highly doubt. Having been left by her siblings who by then had already crossed the road I do not find it possible that she would have had the full faculties to consider that there was probably a speeding vehicle as she crossed.

As regards quantum I do not think the trial court misdirected itself. Neither did the appellant nor the respondent submitted on that. I would therefore not disturb.

Consequently I shall allow the appeal by setting aside the lower court decision of dismissing the suit and substitute it with the following;

- a) Judgment is hereby entered against the respondent**
- b) Liability is assessed at 100% against the respondent.**
- C) Damages is assessed at Kshs 1,740,250/- all inclusive.**

d) Costs of this appeal and at the lower court to the appellant.

e) Interest on (c) above from the date of this judgment.

Orders accordingly.

Delivered this **5th day of October 2016.**

H.K. CHEMITEI

JUDGE