



IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: WAKI, NAMBUYE, KIAGE, J.J.A)

CIVIL APPEAL NO. 74 OF 2010

BETWEEN

BEATRICE WAMBUI NGINGA.....APPELLANT

AND

SAMUEL GICHURU KARIUKI.....1ST RESPONDENT

JOSEPH MATU MACHARIA.....2ND RESPONDENT

JAMES M. GITAU.....3RD RESPONDENT

JOEL WANYEKI.....4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nakuru (Mugo, J.) dated 5th August, 2009

in

H. C. C. No. 107 of 1999)

JUDGMENT OF THE COURT

The appellant **BEATRICE WAMBUI NGINGA (Beatrice)** in her capacity as the wife and administrator of the estate of the late JOHN NGINGA KIMOTHU sued the respondents **SAMUEL GICHURU KARIUKI, JOSEPH MATU MACHARIA, JAMES M. GITAU and JOEL WANYEKI** on the 26th day of February 1991, claiming damages on behalf of the estate of the deceased and the deceased's dependants.

She averred in her suit that on the 29th day of February 1988 the deceased was lawfully travelling in motor vehicle registration number KXU 556 along Molo-Elburgon Road when the said motor vehicle, owned by the 4th respondent **JOEL WANYEKI** and driven by his driver, servant and/or agent, and motor

vehicles registration number KYT 504 and KYC 498 owned by the second and 3rd respondents **SAMUEL GICHURU KARIUKI, JOSEPH MATU MACHARIA** respectively and driven by their drivers, servants and/or agents were so negligently and recklessly driven, managed and/or controlled that they were involved in a collision in which accident, the deceased sustained severe injuries as a result of which he died on the same day.

The particulars of negligence attributed to the 1st, 3rd and 4th respondents were given. Particulars of dependants pursuant to the statute as well as special damages were also given, as were the reliefs sought.

The respondents admitted the occurrence of an accident involving their motor vehicles on the date specified in the plaint but denied each and every accusation of negligence attributed to them and put the appellant to strict proof. In the alternative they claimed that the accident was solely caused due to circumstances not within the control of the drivers of the three said motor vehicles which were being driven properly and carefully along the said road when suddenly they went into a skid while in the process of passing each other. Despite the exercise of all due care and skill on the part of all the three drivers, the vehicles lost control and collided with each other. They pleaded inevitable accident in further alternative.

Beatrice testified as PW1 and the sum total of her testimony is that the deceased died as a result of the fatal injuries sustained in the accident; and that she and her children lost financial support from the deceased who was in gainful employment as well as in transport business. He owned two lorries KXS 517 and KXN 340 which were used in the said transport business.

The only other witness in her support, PW2, Geoffrey Gikonyo Wanjohi (**Geoffrey**) gave evidence as an eye witness to the accident. It was his testimony that on the material day he was on the road side waiting to board a matatu. He saw motor vehicle KXU 556 approach at speed and collided with motor vehicle registration number KYC 498 from the opposite direction. According to Geoffrey, it is motor vehicle KYC 498 which was on the wrong as it was not being driven in its lane. The two witnesses gave their testimonies in chief in the absence of Mr. Githui learned counsel then on record for the respondents. Mr. Githui later applied to cross-examine only Beatrice. The respondents also elected not to call any witness(es) in support of their defence. Thereafter the parties filed written submissions. The learned Judge M. Mugo J. in the judgment dated the 5th day of August 2009 dismissed the appellant's claim.

The appellant was aggrieved by that decision. She is now before this Court on a first appeal raising seven (7) grounds of appeal which may be summarized thus: The learned judge erred in law and in fact:

by holding that the plaintiff had not proved negligence against the defendant despite overwhelming evidence to prove (sic) negligence.

in failing to hold both motor vehicles KYT 504 and KYC 498 to blame even when none of the drivers testified to exonerate himself.

misdirecting her mind when she held that the plaintiff had failed in proving her case even when evidence had been tendered to the effect that KYC 498 a Peugeot was not being driven on its lane

in holding in favour of the defendants even when they had not tendered evidence in support of their case.

by disregarding the evidence of the eye witness.

in not addressing her mind to the claims by the appellant where she sought damages for the demise of her husband due to the negligence of the respondents

in misapplying the principles applicable on determination of liability when she arrived at the decision that she did.

On the hearing date learned counsel **Mr. Lawrence Karanja**, appeared for the appellant while learned counsel **Mr. George Mahugu** appeared for the respondents.

In his brief submissions Mr. Karanja argued all the grounds raised as one since they all touched on the issue of liability. In his view, the learned Judge fell into error on the issue of liability because, first, there is no dispute that a collision occurred between the three motor vehicles. Second, the deceased was a passenger and therefore had no control over the manner in which all the three motor vehicles were being driven. Third, the respondents admitted both the ownership of the vehicles and the occurrence of the accident. This being the position, the moment the learned Judge was informed that the deceased was a passenger, she ought to have held that in the circumstances the burden of proof was shifted to the drivers of the colliding vehicles to explain how the accident occurred. According to Mr. Karanja, the respondents failed to discharge that burden when they failed to tender any evidence in support of their defence. All the three colliding vehicles ought to have been held jointly and severally liable for the accident in which the deceased met his death.

On quantum, Mr. Karanja took no issue with the manner this was assessed save to urge that these were wrongly withheld from the appellant. On that account he urged us to allow the appeal, set aside the findings of the learned Judge on liability, substitute therefor an order that all the three colliding vehicles are jointly and severally liable and enter judgment in favour of the appellant in terms of the quantum of damages as assessed by the learned Judge.

To buttress his arguments Mr. Karanja cited the case of **HUSSEIN OMAR FARAH VS. LENTO AGENCIES [2006] eKLR** in which the court approved the holding in the case of **BARCLAY-STEWART LIMITED & ANOTHER VS. WAIYAKI [1982-880] 1 KAR 1118, BAKER VS. MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD [1953] IWLR 1472, WELCH VS. STANDARD BANK LTD [1970] EA 115, SIMON VS. CARLO [1970] EA 285; and RAHAB MICERE MURAGE** (suing as a representative of the Estate of **ESTHER WAKIINI MURAGE VS. ATTORNEY GENERAL & 2 OTHERS [2012] eKLR** all for the propositions that (i) proof of a collision should be held to be sufficient to call on the defendant for an answer; (ii) if both colliding drivers are alive and neither chooses to give evidence, then the court should not hesitate to hold that both were to blame.

Learned counsel also cited five cases namely **COMMERCIAL TRANSPORTERS LIMITED VS. REGISTERED TRUSTEES OF THE CATHOLIC ARCH DIOCESE OF MOMBASA [2015] eKLR, FARIDA KIMOTHO VS. ERNEST MAINA [2002] eKLR** and **CORNELIAS ELAINE WAMBA VS. SHREEJI ENTERPRISES LTD [2012] eKLR** all for the propositions inter alia that (i) a driver of any vehicle owes a duty to those in his vehicle to drive carefully and not recklessly or at a high speed under circumstances in which slow speed was required; (ii) where a party pleads inevitable accident, he has an obligation to, first, give particulars of the alleged inevitable accident; second, adduce evidence in support of the same; and third, show that something happened over which he had no control or could not have been avoided by the greatest care and skill; fourth, 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 of the accident was consistent only with an absence of negligence.

In response **Mr. Mahugu** urged us not to disturb the findings of the learned Judge on liability because, Geoffrey, the alleged eye witness, was unable to say in which vehicle the deceased was traveling and was not a passenger in any of the accident vehicles. Mr. Mahugu conceded that he was aware that accidents do not just happen, they are occasioned (caused); that the respondents admitted both the ownership of the accident vehicles as well as the occurrence of the accident; that the burden of proof does sometimes shift, but in the circumstances of the instant appeal since it was never discharged by the appellant, there was no possibility of it being shifted to the respondents.

This is a first appeal. Our mandate is as set in Rule 29 (1) of the Appellate Jurisdiction Act, that is, to reappraise the record before us and then arrive at our own conclusion on the matter. This mandate was put more appropriately in **Selle v Associated Motor Boat Co. [1968] EA 123**, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

This Court further stated in Jabane v Olenja [1986] KLR 664, thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870.”

The learned Judge made the following findings on liability:

“No witness account was given regarding the part played by the motor vehicle registration number KYT 504 in the accident. However, in the abstract report produced in evidence, the driver of the said motor vehicle Samuel Gichuru Kariuki, the first defendant is stated as being the person that the police considered culpable. The abstract states that a charge of causing death by dangerous driving was preferred against him but the case was subsequently withdrawn under Section 87 (a) of the Criminal Procedure Code. Clearly the evidence adduced by the two witnesses is in contrast with the contents of the police abstract and falls short of proving the allegations of negligence as stated in the plaint.

There is no conclusive evidence as to which of the motor vehicles KYT 504 and KYC 498 collided with KXU 556. If both of them did, no evidence was adduced as would demonstrate the extent of their respective contributions to the collision. Whereas PW1 stated that her husband was travelling in a matatu/(minibus) from Molo towards Nakuru, PW2's testimony tends to suggest that the mini bus was travelling from Nakuru direction towards Molo. He stated that the accident occurred 200 meters from where he stood. In my view, it is highly impossible that he could have seen what exactly happened. The speed at which either of the vehicles was driving was not stated in evidence neither was the point of impact. Furthermore, no attempt was made to describe the scene of the accident. With such scanty pieces of evidence it is quite impossible for this court to attribute liability to any of the defendants, or their respective drivers despite the fact that the ownership of the motor vehicles was admitted in the defences as is the fact that the accident did occur. Save for the abstract and the death certificate, which confirm that the deceased may have died at the scene, the evidence tendered does not prove that the deceased died as a result of defendants' negligence. Liability can only be established on the basis of facts as tendered in evidence. As matters stand, herein the evidence adduced to support the plaintiff's case is quite insufficient and her suit cannot succeed. This being the case, this court cannot therefore make any findings on agreed issues nos 2, 3 and 5.....”

It is the above conclusions on liability that the appellant has now invited us to upset, while the respondent has invited us to affirm.

Issues number 2, 3 and 5 that the learned Judge declined to interrogate and determine read as follows:-

“(2) whether the accident was caused by the negligence of the defendants' driver(s) as detailed in paragraph 7 & 8 of the plaintiff's

(3) whether the accident was caused by circumstances beyond anyone's control as alleged in the defence.

(5) whether the accident was inevitable as alleged in the defence

It is now trite that he who alleges must prove unless the law otherwise dictates. See **Section 109** of the **Evidence Act** which provides thus:-

“The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In the case of **BAKER V. MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD [1953] WLR 1472 at 1476**, Denning L. J. made the following observations:-

“Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them....”
See Hussein Farah Case (Supra).

In **WELCH VS. STANDARD BANK LTD [1970] EA 115 at 117 and SIMON VS. CARLO [1970] EA 285** it was also observed thus:

“it cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame.....”

Finally in the case of **RAHAB MICERE MURAGE (Suing as a Representative of the Estate of ESTHER WAKIINI MURAGE) VS. ATTORNEY GENERAL & 2 OTHERS [2012] eKLR** the following observations were made

“Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent, and through such negligence caused the accident in which the deceased died. It is not a presumption arising out of the doctrine of res ipsa loquitur, but from the evidential burden as imposed under Section 11, of the Evidence Act.

Having come to the foregoing conclusion, it is our judgment that Ang'awa J. erred in ruling that no negligence on their part was proved. The burden was on the respondents to disprove negligence on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law. It follows that each of the three respondents is liable to the appellant in damages in equal shares.”

Bearing all the above in mind, we proceed to make our findings as follows:

With regard to the evidence on the collision generally, the appellant pleaded that three vehicles were

involved in the collision. PW2's unchallenged testimony was that he was at the scene about twenty (20) meters away when he witnessed three vehicles collide. The respondents admitted the occurrence of the collision. In this respect we find no truth in the learned Judge's observation that the evidence on the alleged collision was scanty and inadequate. It was also not necessary to describe the role motor vehicle registration No. KYT 504 played in the causation of the said collision or any other affected vehicle as observed by the learned Judge.

With regard to the failure to indicate the speed at which the three colliding vehicles were traveling, we agree that no evidence was adduced on this. However, it is our view that failure to adduce such evidence was not fatal to the appellant's case for the reason that both PW1 and 2 were neither the drivers nor the passengers of the vehicles that collided. They could not therefore have been expected to tell the speed at which the said vehicles were going. The parties the learned Judge should have faulted for the failure to adduce evidence on speed should have been the respondents who gave no explanation for shying away from tendering such evidence.

With regard to the alleged failure to indicate first in which vehicle the deceased was travelling and second if he "may" have met his death as a result of the above alleged collision, the appellant tendered in evidence the death certificate and the police abstract without any objection from the respondents. The death certificate indicated clearly that the cause of death was a road traffic accident, while the police abstract indicated that the deceased was a passenger in motor vehicle registration No. KXU 556 driven by the 1st respondent SAMUEL GICHURU KARIUKI. The production of the two documents was in compliance with the requirements of **Section 65 (1) of the Evidence Act** (supra). It was therefore not open to the learned Judge, in the circumstances of this case to ignore the above documents and decide against the appellant that she had not established where the death occurred and or in which vehicle the deceased was travelling.

With regard to the discontinuation of the traffic offence prosecution in favour of the 1st respondent, SAMUEL GICHURU KARIUKI who was the driver of motor vehicle registration No. KXU 556, we find that although this was not disputed the learned Judge misapprehended its effect on any civil claim that may have been raised by the appellant against the said driver. The correct position in law is that such discontinuation did not make the 1st respondent immune to any civil action. See the case of **MICHAEL HUBERT KLOSS & ANOTHER VS. DAVID SERONEY & 5 OTHERS [2009] eKLR** wherein the following observation was made:-

"The acquittal of Kloss in the traffic case would, of course not be binding on a civil court subsequently considering the issue of negligence on a standard of proof which is lower than "proof beyond reasonable doubt". As this Court stated in ROBINSON VS. OLUOCH [1971] EA 376:

It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."

The same principle was reiterated in **KEFA OMANYALA INGURA VS. IBRAHIM OMERIKIT PAPA [2015] eKLR**, thus:

"However, an acquittal in a traffic case does not absolve a party of negligence in a civil suit. See Michael Herbert Kloss vs. David Seroney & Others [2009] eKLR. Conversely a person convicted of a traffic offence involving negligence can, in subsequent civil proceedings arising from the same accident, plead that another person also contributed to the cause of the accident. See this Court's decision in Salim & Another vs. Kikava [1989] KLR 531"

It was proper therefore for the appellant to enjoin the 1st respondent in the suit.

The appellant blamed the respondents for the causation of the accident. They denied responsibility and put her to strict proof. They however pleaded inevitable accident and/or “*act of God*” in the alternative.

As for the pleading of inevitable accident by the respondents, the cases of

Hussein Omar Farah (supra) and **Rahab Micere Murage** (supra) reiterated that where a party pleads inevitable accident, the burden of proof shifts to such a party first to give particulars of the alleged inevitable accident; and then to prove the same. The respondents neither gave particulars of the alleged inevitable accident, nor tendered evidence to prove the same. They should not therefore, have been shielded from responsibility for the causation of the accident in which the deceased met his death.

The upshot of the above is that the learned Judge not only misapprehended the facts but also the law with regard to proof of liability. On a proper application of the law to the facts, the issue of liability must be resolved in favour of the appellant as against the respondents jointly and severally, and we so find. The finding of the trial court on liability is accordingly set aside.

As for quantum, none of the parties made a serious challenge to the assessment. It was withheld from the appellant on account of the finding on liability which is no reversed. It follows that the damages assessed by the trial court together with the interest accrued thereon shall be paid over to the appellant together with the costs of this appeal and of the High Court.

Dated and delivered at Nakuru this 27th day of April, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR