



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 37 OF 2018**

**(Being an Appeal from the judgment of the Hon. P. Achieng, Ag. Principal Magistrate  
delivered in Kakamega on 28<sup>th</sup> day of November, 2014 in CMCC NO. 400 OF 2012)**

**(Before Hon. Justice Mathews N. Nduma)**

**PETRONILA TSISIKA ANYANDA (Suing as the administrator and  
personal representative of the estate of**

**PHILIP LUVALE MWANJE – Now deceased).....APPELLANT**

**VERSUS**

**BUTALI SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Appeal arises from a decision of Hon. P.A Achieng Ag. Principal Magistrate in Kakamega CMCC NO. 400 of 2012 delivered on 28<sup>th</sup> November 2014 in which the trial court dismissed the suit by the Appellant against the respondent in respect of a road traffic accident that arose in the course of employment of one Philip Luvale Mwanje, now deceased and represented by the administrator of the estate Petronila Tsisika Anyanda the Appellant.

2. The Appeal is premised on grounds that maybe summarized as follows:

- (i) The learned trial magistrate erred in law and fact in dismissing the suit by the Appellant in view of the evidence placed before the trial court.
- (ii) The trial court erred in finding that the case had not been proved on a balance of probabilities and in holding that the tractor that was involved in the accident was not defective.
- (iii) That the trial court misdirected itself in interpreting and applying the law in the circumstances of the case leading to gross injustice.

3. Following the well-known decision in *Selle and another vs Associated Motor Boat Company Limited and others (1968) EA.*, this being a first appeal, the court is obliged to consider and evaluate a fresh the evidence placed before the trial court bearing in mind that the appeal court did not have the advantage of listening to the witnesses directly and arrive at its own considered decision based on the facts and law applicable in the circumstances of the case. The court must also bear in mind that it should not alter the decision of the trial court merely because it would have arrived at a different decision. The court must find gross misdirection by the trial court on the facts before it and the law applicable that led to unjust conclusion of the matter.

**Facts of the case**

4. PW1, the appellant herein testified before the trial court that she was the wife of the deceased employee who died on 11<sup>th</sup> August 2011. That the deceased was involved in an accident along Eldoret Webuye road. That the deceased was a driver of a tractor owned by the respondent Butali Sugar Company. That the deceased was driving the tractor at the material time the accident occurred. PW1 was not at the

scene of the accident but only received a report of the accident and death. Post mortem was conducted. That the respondent gave PW1 Kshs. 45,000 to assist in the funeral arrangements. That the money was used to buy the coffin, postmortem and transport. The deceased had worked for the company for a period of two years. That the accident was reported at Webuye police station. PW1 produced police abstract as exhibit '3'. PW1 produced the death certificate as exhibit '4'.

5. That PW1 was married by the deceased in 1994 and they had 5 children aged between 14 years and 6 years. That the children depended on the deceased for food, shelter, education and medication. That the children now lack the same due to the death of their father. That the deceased also supported PW1. That he earned Kshs. 16,000 per month and he gave PW1 Kshs. 7,000 fortnightly for up-keep. PW1 produced letter from the chief confirming that she was the wife of the deceased produced marked exhibit '5'. PW1 produced letters of administration marked exhibit '6'. She produced receipts for fees paid to her advocate for the sum of Kshs. 15,000. PW1 produced also a demand letter dated 11<sup>th</sup> October 2011 marked exhibit '8'.

6. PW1 prayed for award of damages for the loss of her husband. PW1 was cross examined by advocate Nyikuli for the respondent and she confirmed her evidence in chief in all material respects. She did not have the pay slip of her husband. PW1 refuted the assertion by the advocate that the deceased was not an employee of the respondent. PW1 added that she was a subsistence farmer and produced crops as additional support for her family. PW1 added that PW1 died while undergoing treatment at Webuye. PW1 reiterated that the tractor that was involved in the accident belonged to the respondent.

7. PW2 James Lumbasi Khisa testified that he was a casual worker. That on 11<sup>th</sup> August 2011 at about 5 p.m, he was walking along Eldoret –Webuye road to visit his brother at Eldoret. That a tractor appeared ahead of him. That the tractor was making unusual sound. The tractor was carrying sugar cane. That the head and the trailer were not straight as the head was bent. The tractor fell and threw the driver who was then covered by the trailer. The trailer was Registration Number KBM280P. PW2 went to the scene with other people who gathered there. The driver was removed and was taken to Webuye hospital. PW2 also went to the hospital and they left the driver there. PW2 stated that the sugar cane belonged to Butali. PW2 said he did not know the driver before. PW2 recorded a statement at the police station.

8. Under cross examination by Mr. Nyikuli, PW2 stated that the tractor had the name of Butali Sugar Company. PW2 stated that he was not a mechanic and had no knowledge of vehicles. PW2 stated that he was also not a trained driver. PW2 stated that the weight of the trailer was pulling the tractor and that is when it fell. PW2 stated that he did not know if the tractor had mechanical defects. PW2 insisted however that the weight of the trailer pushed the tractor to fall.

9. PW3 was PC NO. 8617, Peter Wambua. PW3 testified that he was based at Webuye police station at the traffic records office. PW1 produced the abstract in respect of tractor registration no. KBM280P which he said was driven by one Philip Mwanje. PW3 said that the abstract was issued on 11<sup>th</sup> August 2011. That the tractor was owned by Butali Sugar Company the respondent.

10. DW1 Josephine Chemeli Letting testified that she was the Deputy Human Resource Manager of Butali Sugar Mills. DW1 was not working for the respondent at the time of the accident. That the tractor KBM280P belongs to the respondent. That in the year 2011, the deceased was employed by the respondent vide a contract. DW1 stated that she knew the deceased and was employed as a tractor driver by Ready Construction Ltd. Which company had been contracted by Butali Sugar. DW1 stated that she was aware of the accident involving tractor KBM 280P. That the accident was reported at Webuye police station. DW1 stated that investigations were done. That the deceased was taken to Webuye district hospital where he died. DW1 stated that the tractor had overturned and had fallen on the deceased. The tractor was inspected. DW1 produced the inspection receipt which she produced as exhibit 'D1'. DW1 stated that the tractors were inspected daily before they left for work. That Ready Construction was supposed to hire their own drivers and loaders. Under cross examination by Advocate Mwebi for the Appellant, DW1 stated that the tractor and the sugar belonged to the respondent. DW1 did not have a contract between the respondent and Ready Construction before court. DW1 stated that the owners of the vehicle are responsible for what happens to it. That Ready construction was not part of the suit.

11. DW1 stated that a tractor was supposed to carry minimum luggage of 10 tones. DW1 stated that the load is not measured at the time of loading. DW1 stated she could not tell how much sugar load was in the tractor when it overturned. DW1 admitted that if the load exceeds the capacity of the tractor, it can cause an accident. DW1 said she could not tell if the tractor was overloaded at the time. DW1 did not have the inspection record of the tractor.

12. In the judgment of the trial court delivered on 15<sup>th</sup> October 2016, the learned trial magistrate found that on August 2011, the deceased was in the ordinary course of his employment driving tractor registration no. KBM280P having a trailer registration No. 2D6549 New Holland, along Eldoret Webuye road, when an accident occurred and the deceased sustained fatal injuries. That DW1 admitted that the said accident occurred and the tractor belonged to the respondent and the deceased was the driver at the time of the accident. The trial magistrate however found that the plaintiff had not proved that the respondent was liable for the accident since the only eye witness PW2 had no driving skills. That his evidence that the said tractor made an unusual sound and it was not going straight was not reliable.

13. The trial magistrate found further that DW1 produced a copy of an inspection certificate marked exhibit '1' which shows that upon inspecting the said tractor, the motor vehicle inspector did not notice any pre-accident defects.

14. The trial magistrate concluded therefore that there was *“no evidence pointing to the fact that the defendant was to blame for the said accident in any way.....it is unfortunate that the driver of the said tractor lost his life but defendant liability must be proved”*

15. The court has carefully analyzed the testimony by PW2 and DW1 from the record before court from page 20 of the typed proceedings, which is page 74 of the record and is satisfied that DW1 only produced an “inspection receipt” which was marked exhibit 1. DW1 did not speak of an inspection certificate and did not tell the court who had done the inspection and why they were not in court to produce and explain the same.

16. The record does not show at all the state of the tractor on the material day from an inspection expert. However the testimony by PW2 an

eye witness was not controverted at all. PW2 told the court what he saw with his naked eyes which testimony was not contradicted at all by any other witness. The testimony by PW2 in this respect was that he was walking along the Eldoret -Webuye road at the material time. He saw a tractor ahead of him which was making an unusual sound. It was carrying sugar cane. The head and the trailer were not straight as the head was bent. The tractor went and fell. The tractor threw the driver and he was covered by the trailer. Under cross-examination PW2 insisted “*the weight of the trailer was pulling the tractor and that is when it fell. I don’t know whether there were any mechanical defects.*” DW1 on the other hand told the court under cross examination that “loaders load the cane. The tractors are required to carry a minimum luggage of 10 tones. We don’t measure the same at the time of loading. I have no evidence to prove the amount of cane which the tractor was carrying at the time. If the load exceeds the capacity of the tractor it can cause an accident.”

17. The totality of the evidence adduced by PW2 together with that by DW1 leads the court to the incapable conclusion that the plaintiff had proved on a balance of probabilities that the tractor most probably overturned due to overload in its trailer. Testimony by DW1 that the respondent did not measure the load placed on a trailer at the time of loading and that overloading of a trailer may lead to an accident points to gross negligence on the part of the respondent. The respondent placed the tractor drivers at risk of overturning on a daily basis, every time, a trailer is loaded and nobody knows the weight of the load in the trailer yet DW1 admitted that overloading of a tractor may lead to an accident. This is the scenario described by PW2 a lay person which was not controverted at all. He said the weight of the trailer pulled the tractor and that is when it fell.

18. It is the considered finding of the court that the trial magistrate ignored material evidence in this matter leading to an erroneous finding of fact, that the plaintiff had not proved on a balance of probabilities that the respondent was liable wholly and/or contributed significantly to the accident of the tractor that caused the death of the deceased driver in the course of duty.

19. The court finds that the plaintiff had proved that the respondent was liable for the accident in loading the tractor-trailer without ascertaining the weight of the load well knowing an overload could result in a fatal road traffic accident as happened in this case. In any event the plaintiff had in the Amended plaint dated 28<sup>th</sup> December 2012 pleaded at paragraph 7 that:

“The plaintiff as so far as may be necessary will rely on the doctrine of *Res Ipsa loquitor*”

20. Indeed, the facts as presented by PW2 and DW1 presents a *Res Ipsa Loquitor* scenario. The negligence by the respondent caused the occurrence of the accident that lead to the death of the deceased.

21. In ***Kago vs Njenga C.A of 1979, quoted in Joash Musikhu Munanje vs Wanjiru Mwangi and another (2016) eKR*** the court stated:

“*For the defence to rebut the presumption of negligence arising from Res Ipsa Loquitor it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident or that there was a probable cause of the accident that did not connote negligence on their part as that the accident was due to circumstances not within their control*”.

22. In the present case, the respondent failed to rebut the presumption of negligence on their part. Indeed the testimony by DW1 herself points to overwhelming contribution to the accident by loading unknown quantity of cane in the trailer leading to the accident in the manner described by PW2.

23. The learned trial magistrate upon finding the defendant not liable proceeded to quantify damages she would have awarded to the plaintiff had she found otherwise. The quantum by the trial magistrate was not challenged in this Appeal and the court proceeds to award the plaintiff damages as already quantified in the judgment of the trial magistrate as follows:

- (a) Pain and suffering Kshs. 20,000
- (b) Loss of expectation of life Kshs. 100,000.
- (c) Lost years  $(5,000 \times 21 \times 12 \times \frac{2}{3})849,000$
- (d) Special damages in letters of administration adliten Kshs. 15,000.

24. Accordingly the judgment of the trial court is set aside and judgment entered in favour of the plaintiff against the respondent as follows:

- (a) Pain and suffering Kshs. 20,000
- (b) Lost expectations of life Kshs. 100,000
- (c) Lost years Kshs. 849,000.
- (d) Special damages Kshs. 15,000.

**Total award Kshs. 984,000**

- (e) Interest at court rates from date of judgment till payment in full.
- (f) Cost of the suit.

**Judgment Dated, Signed and delivered this 9<sup>th</sup> day of December, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

C.M Mwebi for the Appellant.

E.K. Owinyi and Company for the Respondent.

Chrispo – Court Clerk