Pepela v Choke (Suing as the Legal Representative of the Estate of Dickson Juma Choge - Deceased) (Civil Appeal E022 of 2023) [2024] KEHC 11300 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E022 OF 2023

AC MRIMA, J

SEPTEMBER 27, 2024

BETWEEN

MARTIN NYONGESA PEPELA ..... APPELLANT

AND

NICHOLAS SABWANI CHOKE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DICKSON JUMA CHOGE - DECEASED) ... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. C. M. Kesse (Principal Magistrate) in Kitale Chief Magistrates Civil Case No. 168 of 2021 delivered on 25th April 2023)

JUDGMENT

Background:

1. On 29th September, 2019, Dickson Juma Choge, [hereinafter referred to as 'the deceased'], was fatally wounded by a Motor vehicle registration number KTCB 385X make New Holland Tractor [hereinafter referred to as 'the Tractor'] belonging to the Appellant herein, Martin Nyongesa Pepela.

2. Through the Plaint dated 8th April 2021, Nicholas Sabwani Choke, the Respondent herein instituted Kitale Chief Magistrates Civil Case No. 168 of 2021 on behalf of the deceased's estate. It was his case that the Appellant was negligent and responsible for causing the accident.

3. The Respondent sought damages under *Law Reform Act* for loss of expectation of life and damages for lost years, loss of dependency and loss of earning capacity under *Fatal Accidents Act*.

4. The Appellant challenged the suit through the Statement of Defence dated 25th June 2021. He denied the Respondent's claims and asserted that if indeed there was an accident, it wholly happened on account of the deceased's negligence.

5. The suit was eventually fully heard and determined. The Respondent [then Plaintiff] testified as PW1 and called two witnesses being No. 74510 Cpl. Maxwell Kibon then attached to Matunda Traffic Base who produced a Police Abstract in respect of the accident. He testified as PW2. PW3 was one Philemon Ndirangu Wangai, an eye witness.

6. The Appellant testified through two witnesses. They were Evans Baraza who was the driver of the subject tractor [DW1] and Benson Wanjala [DW2] also an eye witness.

7. In its assessment of damages under *Law Reform Act* and *Fatal Accidents Act*, the trial Court, based on the evidence presented, awarded Kshs. 150,000/- for pain and suffering. As regards loss of expectation of life, the Court also awarded the sum of Kshs. 150,000/-.

8. The trial Court then assessed loss of dependency based on Section 4 of the *Fatal Accidents Act*. It utilized the multiplier approach as opposed to the global/lumpsum approach.

9. On the basis that the deceased was 23 years of age at time of his death and was working as a casual labourer, the Court settled for a monthly salary of Kshs. 10,000/-, adopted the multiplier of 37 years and a dependency ration of 2/3. Accordingly, it entered judgment on loss of dependency at Kshs. 2,960,000/-.

10. The Court also awarded Special damages of Kshs. 61,575/- which was inclusive of Kshs. 40,000/= for funeral expenses.

11. The Appellant was also found wholly to blame for the accident.

The Appeal:

12. The Appellant was dissatisfied with the trial Court's assessment of both liability and quantum.

13. Through the Memorandum of Appeal dated 8th May 2023, he urged the following grounds of appeal: -

    1. That the learned trial magistrate erred in law and fact in holding the appellant 100% liable and/or at all in view of the evidence on record.

    2. That the learned trial magistrate erred in law and fact in failing to take into account the totality of the evidence on record hence arriving at a wrong decision on the issue of liability.

    3. That without prejudice to the aforegoing, the learned trial magistrate erred in law and fact by failing to apportion liability on the part of the respondent in view of the evidence adduced.

    4. That the learned trial magistrate erred in law and fact in adopting the wrong principles in assessment of damages payable to the respondent both under the *Fatal Accidents Act* and the *Law Reform Act*.

    5. That the learned trial magistrate erred in law and fact in awarding damages which were excessive in the circumstances in view of the evidence on record.

    6. That the learned trial magistrate erred in law and fact in awarding excessive damages for pain and suffering in view of the evidence on record.

    7. That the learned trial magistrate erred in law and fact by failing to take into account the vagaries and vicissitudes of life in adopting the maximum multiplier of 37 years.

    8. That the learned trial magistrate erred in law and fact by failing to consider the submissions of the appellant.

14. The Appellant urged his case further through written submissions dated 7th November, 2023.

15. In making his case that the Court erred in wholly apportioning liability to the Appellant, it was submitted that the evidence on record was never analysed and that the trial Court only held that the driver [DW1] admitted being drunk in Court. To the Appellant that was a serious misapprehension of the law given that the Court disregarded the entire body of evidence on how the accident occurred.

16. The Appellant urged this Court to find that the deceased was wholly to blame for the accident and that the suit be dismissed on allowing the appeal.

17. On quantum, it was submitted that the award of damages for pain and suffering was excessive. The sum of Kshs, 10,000/- was instead proposed.

18. The Appellant referred to *Harjeet Singh Pandal - v- Hellen Aketch Okudho* (2018) eKLR where an award of Kshs. 10,000/- was made.

19. It was the Appellant's further submission that the award on loss of expectation of life was also excessive. The sum of Kshs. 100,000/= was proposed.

20. In contesting the quantum on loss of dependency, the Appellant submitted that the Court erred in adopting a multiplier of 37 years since it did not consider the vagrancies and vicissitudes of life.

21. Urging this Court to adopt a multiplier of between 20-23 years, the Appellant relied on the decisions in *Crown Bus Services Ltd & 2 Others v. Jamila Nyongesa & Another* (2020) eKLR and *Paul N. Kinyanjui v. Esther W. Mbugua* (2015) eKLR.

22. The Appellant submitted that the dependency ratio of 2/3 was not standard or automatic. It was his case that no material was placed before the Court to demonstrate how the Respondent depended on the deceased. Reference was made to *Rodgers Kinoti v. Linus Bundi Muriithi & Another* (2022) eKLR where it was observed that dependency is a matter of evidence. He submitted that dependency ratio of 1/3 would have been reasonable in the circumstances.

23. In challenging the multiplicand approach, the Appellant submitted that the Respondent failed to prove that the deceased was earning monthly wages of Kshs. 17,000/-. Therefore, the award of Kshs. 10,000/- made by the Court did not have any legal basis.

24. The Appellants urged the Court to be guided by the minimum wages of a general labourer as per the Regulation of Wages (General) Amendment) Order 2017 of Kshs 6,896/- per month in the circumstances.

25. The Appellant did not challenge the award on special damages.

26. The Respondent challenged the appeal through written submissions dated 27th November, 2023.

27. It was his case that the trial Court did not err in its finding on liability. He went through the evidence in demonstrating that indeed the Appellant was wholly to blame for the accident. The decision in *Mary Njeri Murigi v. Peter Macharia & Another* [2016] eKLR was referred to in support.

28. Referring to several decisions, the Respondent submitted in support of the awards on damages.

29. The Respondent urged the Court not to upset the trial Court's findings as the Appellant had failed to demonstrate how the trial Court was misguided.

Analysis:

30. From the foregoing appreciation of the disputants' respective cases, the issues that arise for determination are as follows;

    i. Whether the trial Court assessment of liability was in order.

    ii. Whether the trial Court assessment of quantum of damages was reasonable.

31. I will hence consider the issues sequentially, but first the Court's role in this appeal.

32. This Court is called upon to reconsider the evidence on record, evaluate it and reach its own conclusion. (See *Selle & Ano. v. Associated Motor Boat Co. Ltd* (1968) EA 123). This Court, nevertheless, appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd* (1982-88) 1 KAR 278, *Abdul Hammed Saif v Ali Mohamed Sholan* (1955) 22 E.A.C.A. 270 and *Kiruga –versus- Kiruga& Another* (1988) KLR 348) among others.

33. On the basis of the foregoing guidance, this Court now looks at the two main issues in this appeal.

Liability:

34. There is no doubt that an accident occurred on 24th September, 1019 along the Kisagame-Matunda murram road involving the deceased and the tractor. The accident took place during the day at around 3:30pm.

35. According to the record, the accident was witnessed by three witnesses. They were PW3, DW1 and DW2.

36. PW3 stated that he was with the deceased when the accident occurred. That, they were both walking on the right side of the tractor and that the deceased was ahead. PW3 attested that the deceased did not attempt to climb the tractor, but instead it was the tractor which swerved off the road and hit the deceased who was off the road. The deceased fell and died on the spot.

37. PW3 used the deceased's phone and called PW1.

38. However, on being examined further, PW3 stated that the deceased was hit when he was crossing the road.

39. DW1 and DW2, however, had a different version on how the accident occurred. To DW1, who was the driver of the tractor, the deceased jumped onto the tractor's dropper and over the mudguard and fell on the road. He was run over by a tyre.

40. DW2 was overseeing maize harvesting and transportation by the use of the tractor. On the fateful day and time, DW2 was seated on the tractor as it left a maize farm. He saw the deceased and many other labourers run after the tractor as it left the farm. The deceased, in particular, jumped over the fence and ran towards the tractor which was moving rather slowly.

41. It was his evidence that he saw the deceased board the dropper before attempting to get into the right mud guard. Since the deceased was drunk, he miscalculated his steps and instead fell down and was run over by the right tyre. DW2 raised alarm and DW1 stopped the tractor.

42. It was DW1 who reported the accident to Matunda Traffic Base.

43. The above were the two rival versions on how the accident occurred.

44. PW2 was one of the police officers who visited the scene of accident and also took part in the investigations. He confirmed that DW1 had not been charged of any traffic offence.

45. PW2 affirmed that investigations revealed that the deceased was '... attempting to steal a ride when he should [sic] and the accident occurred...' Since the investigations were still ongoing, the police could not apportion liability.

46. The evidence of DW1 and DW2 was, hence, corroborated by PW2 whereas that of PW3 was uncorroborated. Further, PW3 was not consistent on how the accident occurred. Whereas he initially stated that the tractor veered off the road and hit the deceased, he then changed and stated that the deceased was hit when he was crossing the road. The twin versions cannot be reasonably reconciled. As such, the evidence of PW3 is of very low probative value.

47. Therefore, on a balance of probabilities, this Court has to believe the joint testimonies of PW2, DW1 and DW3 as reflecting the true version on how the accident occurred.

48. This Court now finds and hold that the deceased, in attempting to jump into the moving tractor, slipped and fell on the path of travel of the tractor. He was then run over by the right tyre and died instantly.

49. DW2 was the in-charge of the process of transporting the maize from the farm. He saw the deceased run towards the tractor and that he was drunk. The deceased then jumped unto the dropper. DW2, however, did nothing. He neither alerted DW1 to stop the tractor nor did he stop the deceased, who according to him was drunk, from getting unto a moving tractor. DW2, therefore, also contributed to the accident.

50. The deceased would, no doubt, shoulder a higher blame than those who managed the tractor. By considering the fact that the deceased voluntarily assumed the risk of jumping unto a moving tractor, the deceased shall bear 60% of the blame.

51. In concluding this issue, this Court states that the trial Court erred in solely basing its finding on the fact that DW1 was drunk at the time he testified before Court yet the parties had adopted their respective statements as part of their evidence. If anything, there was evidence on record from the other witnesses. Further, despite the admission of being drunk, DW1 still testified on how the accident occurred. His evidence is part of the record. As a trial Court, it was duty bound to look at the pleadings, statements and the entire body of evidence as a whole in settling the issue of liability.

52. With utmost respect to the Learned Magistrate, it is on the foregoing that the sole liability against the Appellant ought to be interfered with.

Damages:

53. Regarding an appeal on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler v. Butler (1982) KLR 277*.)

54. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

55. This position was restated by the Court of Appeal in *Arrow Car Limited - v- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua - v- Kenya Power & Lighting Co. Ltd* (2013) eKLR.

56. Having laid down the law guiding appeals on quantum, this Court will now deal with the issues raised by the Appellant.

Pain and suffering:

57. Under this head, the trial Court awarded the sum of Kshs. 150,000/-. The contest is that the amount is high since, according to the Appellant, the deceased died on the spot.

58. The Respondent on the other had contended that the award was justified since the deceased sustained pain notwithstanding the time taken before death.

59. It is notable that during examination, the Respondent admitted that he did not witness the accident and that he did not know the time taken before the deceased died. PW2, PW3, DW1 and DW2 all testified that the deceased died on the spot. This Court believes that evidence.

60. That being the case, the outstanding issue is whether the award of Kshs. 150,000/- was excessive in the circumstances.

61. This Court will, hence, be guided by *Hyder Nthenya Musili & Another - v- China Wu Yi Limited & Another* [2017] eKLR, where the Court stated as follows: -

> .... As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death....

62. From the foregoing, the acceptable range where there is no prolonged pain and suffering is between Kshs. 10,000/- and Kshs.100,000/-.

63. In view of the fact that the deceased did not suffer for a protracted period of time, this Court finds that the award of pain and suffering was utterly excessive. The same is hereby reviewed to Kshs. 50,000/=.

Loss of expectation of life:

64. Whereas the trial Court awarded Kshs. 150,000/= under this head, the Appellant prayed for the sum of Kshs. 100,000/=.

65. In keeping with the need for this Court to exercise restraint in upsetting awards made in exercise of discretion, and in the peculiar circumstances of this case, this Court finds the award made by the trial Court as reasonable.

Loss of Dependency:

66. The Appellant challenged all the aspects of this award. He contended that the Respondent did not adduce any evidence to establish that the deceased left behind any dependent including the Respondent.

67. It was also contended that no evidence on income was adduced and that the figure of Kshs. 10,000/= had no basis. The dependency ratio as well as the multiplier were challenged.

68. With the foregoing petametres, can the trial Court be said to have erred in tabulating the loss of dependency?

69. On the loss of dependency, it is generally settled in law that global/lumpsum damages are to be awarded in instances where there is no proof of the deceased's earnings. In some instances, reference may be made to the Regulation of Wages (General) Amendment) Orders.

70. Given the state of the record in this matter, it is this Court's finding that the trial Court was right in settling for the multiplier approach. I will, therefore, deal with the multiplicand, multiplier and the dependency ratio.

71. On the multiplicand, since there was no evidence of any earnings by the deceased and given that he was a casual labourer, then reference ought to have been made to the then prevailing Regulation of Wages (General) (Amendment) Order.

72. This Court further aligns with the Court of Appeal in Civil Appeal No. 167 of 2002 *Ayiga Maruja & Another - v- Simeone Obayo* (2005) eKLR where the Court observed thus: -

> .... We do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and that earn their livelihood in various ways. If documentary evidence is available that it well and good. But we reject any contention that only documentary evidence can prove these things.

73. As at the time of the death in issue, that was on 24th September, 2019, the Order in force was the Regulation of Wages (General) Amendment) Order 2018 which came into force on 1st May, 2018.

74. According to the Order, a general labourer within Trans Nzoia County would earn a monthly earning of Kshs. 7,240/95 and not Kshs 6,896/- as proposed by the Appellant.

75. This Court, therefore, finds that the correct multiplicand in this case was, and hereby adopts, the monthly sum of Kshs. 7,240/95. The award of Kshs. 10,000/= is hereby set-aside.

76. On the multiplier, there was no contention that the deceased was aged 23 years old at the time he met his death. The general retirement age in Kenya is at 60 years. The deceased had around 37 years of his active working life. The trial Court settled for a multiplier of 37 years.

77. In considering the vicissitudes of life and the nature of work the deceased was engaged in generally, there is need to settle for a multiplier that would take all that into account. In this case, that cannot be the remainder of the years to the general retirement age.

78. A multiplier of 30 years would be reasonable in this matter. This Court adopts the same.

79. There is also the dependency ratio of 2/3 adopted by the trial Court. Dependency is a question of fact that must be demonstrated by way of evidence.

80. According to the evidence adduced before the trial Court, the deceased lived with his grandfather. He must, no doubt, have been taking care of him.

81. Taking the foregoing into consideration, coupled with the fact that the deceased was not married, it is the finding of this Court, respectfully so, that the dependency ratio of 2/3 was steep thereby warranting this Court's intervention.

82. Since Courts have overtime found that the ratio of 1/3 to be on the lower side, this Court finds that the circumstances of this case would call for equal apportionment.

83. Therefore, the loss of dependency in this case would be arrived at Kshs. 7,240/95 x 30 x 12 x 1/2. That would translate to Kshs. 1,303,371/=.

84. The amount would be subject to liability.

Disposition:

85. As there was no contest on the special damages awarded, the appeal can now be safely determined.

86. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

87. Having said as much, the appeal herein partly succeeds and the following final awards do hereby issue: -

    Liability: - 60%: 40%

    Pain and suffering - Kshs. 50,000/-

    Loss of expectation of life - Kshs. 150,000/-

    Loss of dependency - Kshs. 1,303,371/-

    Special Damages - Kshs. 61,575/-

    Subtotal - Kshs. 1,564,946/-

    Less 60% contribution - Kshs. 938,967/60

    Grand Total.....Kshs 625,978/40

    Orders accordingly.

88. Since the appeal has partly succeeded, each party to bear their own costs. However, costs of the suit in the lower court shall be borne by the Appellant herein.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Were, Counsel for the Appellant.

Miss Masinde, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.