Mbasu & another v Onyapindi & Cheseny (Suing as the Legal Representatives of Bernard Simiyu Wamalwa - Deceased) (Civil Appeal E014 of 2023) [2024] KEHC 11716 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E014 OF 2023

REA OUGO, J

SEPTEMBER 26, 2024

BETWEEN

ENES MBASU ..... 1ST APPELLANT

AL-RIAZ INTERNATIONAL LIMITED ..... 2ND APPELLANT

AND

WYCLIFF WAMALWA ONYAPINDI & RODA CHEROTICH CHESENY (SUING AS THE LEGAL REPRESENTATIVES OF BERNARD SIMIYU WAMALWA - DECEASED) ..... RESPONDENT

(Being an appeal from the judgment/decree of the Honourable Caroline M. Wamattimah (SRM) delivered on 22/02/2023 in Sirisia PMCC No 57 of 2020)

JUDGMENT

1. The respondent's case at the subordinate court was that the deceased was on 2nd April 2020 riding his motorcycle along Bungoma-Chwele road when the appellants carelessly permitted their motor vehicle KBZ 575P to hit the deceased causing fatal injuries. It was pleaded that the negligence of the appellants solely caused the accident. The respondent relied on the doctrine of res ipsa loquitor and the Highway Code and *Traffic Act* provisions.

2. It was averred that the deceased was 34 years old at the time of his demise, he was a motorcycle rider and a chicken seller making Kshs 1,800/-. His dependents were listed as his wife, parents and 4 children.

3. The appellants denied the occurrence of the accident and in the alternative, averred that if any such accident occurred the same was solely caused and contributed to by the respondent.

4. The trial magistrate in her judgment held that the appellants were 100% liable for the accident and made the following award:

a. Loss of expectation of Life Kshs 700,000/-

b. Pain and suffering Kshs 50,000/-

c. Loss of Life Kshs 100,000/-

d. Special damages Kshs 6,050/-

Total Kshs 856,050/-

5. The appellant is dissatisfied with the trial magistrate's finding on liability and part of the damages awarded. The memorandum of appeal dated 3rd March 2023 raises the following grounds:

1. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the appellant (defendant) despite finding that the respondent (plaintiff) did not call any eye witness to prove it was the appellant who was liable for the subject accident.

2. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the appellant (defendant) despite the respondent (plaintiff) witness, the police officer, testifying that she did not know who to blame and merely attended court to produce the police abstract which did not blame anyone.

3. That the learned trial magistrate erred in fact and law by shifting the burden of proof of negligence on the appellants the reason that the respondent did not call any eye witness.

4. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the appellant (despite) no evidence being adduced against him.

5. That the learned trial magistrate erred in fact and in law in finding in favour of the respondent (deceased) against the appellant (defendant) when there was no credible evidence or proof of negligence on the part of the appellant (defendant).

6. That the learned trial magistrate erred in fact and in law in failing to pay regard to authorities the defendant's submissions that were guiding on liability in similar cases as the case she was deciding.

7. That the learned trial magistrate's exercise of discretion in awarding pain and suffering of Kshs 50,000/- despite the deceased dying on the spot.

8. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on both liability and on pain and suffering by completely disregarding the submissions and authorities of the appellant as a result arrived in unjustified decision on quantum.

6. The appellants seek that the appeal be allowed and the decree of Hon. Caroline M. Wamattimah be set aside. In the alternative, they invite the court to re-assess the evidence on record on liability and quantum and make its own decision.

7. The appellant submits that the magistrate fell into error when she held the defendants 100% to blame when the evidence clearly stated otherwise and that there was no evidence on who was to blame for the accident. The respondent did not prove its case on a balance of probabilities as required by the law. The respondent's witnesses did not blame the appellant for the accident. Sections 107-109 of the *Evidence Act* provide that he who alleges must prove. The respondent offered no evidence to persuade the court that the appellant was negligent. The appellant submits that the trial court ignored the appellant's submissions.

8. It was also submitted that the award of Kshs 50,000/- for pain and suffering is excessive. They relied on the case of Moses Koome Mithika & another v Doreen Gatwiri & another (suing as the legal representative and administrator of the estate of Phineas Murithi (deceased) [2020] eKLR where the court upheld the trial court's award of Kshs 10,000/- for pain and suffering. The appellants submit that the award of Kshs 10,000/- is sufficient as the deceased died on the spot.

9. The appeal is opposed. The respondent submitted that the deceased died as a result of high-impact collision. The appellant did not take any steps to prevent the collision and did not give any evidence to refute the account of the accident given by the respondent. In the case of Kennedy Muteti Musyoka v Abedinego Mbole, eKLR [2021] the court upheld the holding in Masembe v Sugar Corporation & Another, EA, 2022 where it was held:

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it...A reasonable person driving a motor vehicle on the highway with due care and attention, does not hit every stationary object on his way merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the objects."

10. The appellant failed to have due regard to other road users and therefore knocked the deceased. The appellants did not call any witness hence the respondent on a balance of probability proved that the appellant was 100% liable.

11. The respondent submitted that an award of Kshs 50,000/- is reasonable. They pointed out that the appellant cited the case of Mercy Muriuki &Another v Samuel Mwangi Ndwati & Another [2019] eKLR where the court held that damages for pain and suffering range from Kshs 10,000/- to Kshs 100,000/-.

Analysis And Determination

12. This being a first appellate court, I am guided by the principles set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " ...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 into account of particular circumstances or probabilities materially to estimate the evidence."

13. The provisions of sections 107,109 and 112 of the *Evidence Act* were discussed in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

14. The respondent who was the claimant in this case had the onus of proving his case against the appellants whether or not the appellants adduced evidence. Lord Nichol of the House of Lords in the case of Re: H & Others (Minors) (Sexual Abuse: Standard of Proof) (1969) stated the civil standard of proof to be:

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

15. The respondent relied on the evidence of four witnesses while the appellants closed their case without calling any witnesses. Roda Cherotich Cheseny (Pw1) testified that she was called and informed of the accident. She went to the scene and found that the deceased had been rushed to the hospital. Pw1 got to the hospital and found that the deceased had died. On cross-examination, she testified that she did not witness the accident. Wycliff Wamalwa Onyapindi (Pw2) testified that he was informed that the deceased was involved in an accident while ferrying chicken to the market. He testified that he did not witness the accident. He went to the scene. Pw2 testified that the deceased died at the scene. No 81576 PC Jackline Were (Pw3) produced the abstract issued after the occurrence of the accident. According to the abstract, the case was still pending investigations. She testified that she was not the investigating officer, did not visit the scene of the accident and did not know how the accident happened. The Assistant Chief of Lwandanyi sublocation, Alfred Simiyu Barasa (Pw4), produced the chief's letter that he authored.

16. While the occurrence of the accident is undisputed, none of the witnesses who testified before the subordinate court actually witnessed it. This was noted by the trial magistrate who held as follows:

> " While it is true that none of the plaintiff's witnesses gave a first-hand account of how the accident occurred, the defendants did not also testify to give their side of the story...I find that the failure on the part of the defence in giving evidence exonerating themselves from blame means they had no oral evidence to offer. I therefore find the defendant 100% liable for the accident."

17. The trial magistrate correctly noted that the respondent availed no eye witness, therefore, it was however erroneous in my view to hold the appellant fully liable, as the evidence on record did not establish how the accident occurred. In this case, it was rational to apportion liability in the ratio of 50:50 between the deceased and the appellant.

18. The second aspect of the appeal contested the amount awarded for pain and suffering. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR 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."

19. In this case the trial magistrate awarded Kshs 50,000/- as damages for pain and suffering. The trial court in Sukari Industries Limited vs Clyde Machimbo Juma, Homa Bay HCCA NO. 68 of 2015 [2016] EKLR held that the conventional award for pain and suffering ranges between Kshs 10,000/- to Kshs 100,000/-. The court in Mwaura v Asingo & Yugu (Suing as Administrator and Personal Representative of the Estate of Maurice Oketch Asingu - Deceased) [2024] KEHC 7842 (KLR) held that to insist that the award should remain at Kshs 10,000 in line with conventional awards is to ignore the realities of inflationary trends over the years. Having regard to the recent pronouncement by courts on the award on pain and suffering, I find that the award by the trial magistrate under this head was not excessive.

20. The appeal is therefore partly merited to the extent that the apportionment of liability at 100% as against the appellant is set aside. Liability is hereby apportioned in the ratio of 50:50. The appellant shall have half the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Miss Kinyanjui -For the Respondent

Wilkister -C/A