Oduor v Njagi (Civil Appeal 100 of 2020)
[2024] KEHC 12437 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 100 OF 2020

MA OTIENO, J

SEPTEMBER 26, 2024

BETWEEN

GEORGE ROBIN ODUOR ..... APPELLANT

AND

BERNARD JULIUS NJAGI ..... RESPONDENT

(Being an appeal from the judgment of the Hon. B.J Ofisi, RM delivered on 7th February 2020 in MILIMANI CMCC NO.7449 OF 2017)

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court delivered on 7th February 2020 in the Milimani CMCC No. 7449 of 2017 in which the Respondent, as an administrator of the estate of Doreen Karimi Mutegi –Deceased, sued the Appellant on 23rd February 2017 seeking compensation in the form of general and special damages for a fatal accident that occurred on 14th March 2016 involving the deceased and motor vehicle registration No. KCF 973N, then being driven by the Appellant.

2. The Appellant, then a defendant, entered appearance and filed their Statement of Defence dated 8th February 2017 denying liability and instead blaming the deceased for the negligence.

3. On 7th February 2017, the trial court rendered its judgment in the dispute in the following terms; -

    a. Liability apportioned in the ratio of 50:50

    b. General damages under the *Law Reform Act*

    Damages for pain & suffering: - Kshs. 50,000/=

    Damages for loss of expectation of life: - Kshs. 100,000/=

c. General damages under the *Fatal Accidents Act*
Loss of dependency: Kshs. 1,085,830/=

d. Total (less 50% contribution) = Kshs. 632,985/=

e. Costs and interests to the Plaintiff

The Appeal

4. Aggrieved by the decision of the trial court, the Appellant vide his memorandum appeal dated 19th February 2020 lodged an appeal to this court, raising five grounds of appeal that; -

   i. The learned trial Magistrate erred in law and in fact in arriving at a finding on liability that was not supported by facts nor evidence.

   ii. The learned trial Magistrate erred in law and in fact in apportioning liability at 50%:50% ratio which finding was not based on evidence as prosecuted before court.

   iii. The learned trial Magistrate erred in law and in fact in making an award on General Damages on Loss of Dependency which had not been proved and which was inordinately high. The deceased died on 14th March 2016 yet the learned trial Magistrate in awarding Damages on Loss of Dependency relied on the Regulation of Wages (General) Amendment Order 2017 which came into operation on 1st May 2017.

   iv. The learned trial Magistrate erred in law and in fact in making an award on General Damages on Pain & Suffering which was inordinately high. The deceased died on the spot.

   v. The learned trial Magistrate erred in law in failing to consider and/or appreciate the Defendant's (Appellant's) Submissions as well the authorities thereto.

Submissions

5. The appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 1st September 2023 whilst the Respondents filed theirs dated 14th March 2024.

Appellant's submissions

6. On liability, the Appellant submitted that no negligence on his part was proved by the Respondent to the standards required under Section 107 and 109 of the *Evidence Act*, Cap. 80 Laws of Kenya. According to the Appellant, Mr. Bernard Julius Njagi, the deceased father who testified as PW1 did not witness the accident.

7. It was further the Appellant's argument in this appeal that the other witness for the Appellant, Police Constable Stephen Mbui who testified as PW2, confirmed to court that the accident was still pending under investigations and that none of the parties had been blamed for the accident.

8. Consequently, the Appellant urged this court to set aside the trial court's finding apportioning liability in the ratio of 50%:50% between the Appellant and the Respondent. That instead, the Respondent be found 100% liable by this court.

9. On quantum of damages, the Appellant submitted that the trial committed an error of law and of fact by awarding an inordinately high sum of Kshs. 50,000/= for pain and suffering despite the fact that the deceased died on spot. Citing the case of Antony Njoroge Ng'ang'a (Legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v James Kinyanjui Mwangi & 2 others

[2022] eKLR the Appellant submitted that a sum of Kshs. 30,000/= is reasonable in the circumstances of this case since there was no evidence that he deceased was conscious after the impact.

10. On damages under the *Fatal Accidents Act*, the Appellant submitted that in computing Loss of Dependency, the trial erred by relying on the Regulation of Wages (General) Amendment Order 2017 which came into effect on 1st May 2017 and set the minimum wage for workers under the category where the deceased belonged at Kshs. 12,926.55. According to the Appellant, the deceased having died on 14th March 2016, the correct version ought to have been the Regulation of Wages (General) (Amendment) Order, 2015 which set the basic the minimum wage for a general labourer in former municipalities (where the decease lived & worked) at Kshs. 10,107.10/= per month.

11. Consequently, the Appellant asked this court to set aside the trial court's award of Kshs. 1,085,830/= under this heading and substitute the same with a sum of Kshs. 848,996.40/=, computed as follows; Kshs. 10,107.10 x 12 x 21 x 1/3 = Kshs. 848,996.40.

Respondent's submissions

12. On his part, the Respondent's submissions on liability were that Appellant having failed to tender any evidence at trial in support of his defence, the Appellant's case remained uncontroverted. The Respondent cited the case of Mary Njeri Murigi Vs Peter Macharia & Ano. 2016 eKLR where it was stated that where a party fails to call evidence in support of its case, that party's pleadings remain to be unsubstantiated statements of facts and this failure to produce countering evidence renders the opposing party's pleadings uncontroverted.

13. The Respondent further submitted that in his plaint before the trial court, he had pleaded and sought to rely on the doctrine of res ipsa loquitor. According to the Respondent once the doctrine of res ipsa loquitor is pleaded, a plaintiff is presupposed to have discharged his burden of proof and that in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his part or that there was contributory negligence.

14. Relying on the decision in Susan Kanini Mwangangi & Ano. Vs Patrick Mbithi Kavita (2019) eKLR, the Respondent submitted that the Appellant having failed to tender any evidence at trial in opposition to the doctrine of res ipsa loquitor or the facts pleaded by the Respondent, then the Respondent's case at trial remained uncontroverted and liability ought to have been found 100% in favour of the Respondent. The Respondent asked this court to find the Appellant liable for the accident.

15. On quantum, the Respondent simply submitted that the damages as awarded by the trial court ought not be disturbed by this court.

Analysis and determination

16. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion on the issue of liability and on quantum. I am however aware to the fact that unlike the trial court, I did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. I will therefore give due allowance for this. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial 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..."

18. I have perused the memorandum of appeal and submissions by the parties in this appeal and note that there are only two issues for determination in this appeal, that is, the issue of liability and that of quantum of damages.

Liability

19. In its judgment of 7th February 2020, the trial magistrate apportioned liability at 50:50 between the Appellant and the Respondent. In reaching this conclusion, the trial court noted that the Appellant did not call any witness in support of his case and therefore the Respondent's case remained uncontroverted. However, the court also noted that while the Respondent evidence had connected the Appellant's vehicle with the accident, the Respondent did not avail an eye witness to corroborate his averments.

20. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both parties. See Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal stated 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 is cast 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."

21. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in Khambi and Another vs. Mahithi and Another [1968] EA 70, where the court stated that: -

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

22. From the pleadings and proceedings, it is not disputed that an accident happened on 14th March 2016 involving the Appellant's motor vehicle registration No. KCF 973N along Oloika Nkroroi Road, in which Doreen Karimi Mutegi (Deceased) lost her life. The post mortem report (P. Exh 9) and the death

certificate (P. Exh 1) tendered by PW1, the deceased father at trial established that fact to the standards required under civil law.

23. The testimony by PW1 on the occurrence of the accident was corroborated by PW2, Police Constable Srephen Mbue who testified and produced the police abstract issued on 12th April 2016 as P. Exh 1. Without providing details, the police officer told court that the investigations file had been referred to the Director of Public Prosecutions for advise.

24. The Respondent in this appeal challenged the trial court's finding on liability that the Respondent's whiteness did not actually see the accident happen. While it is true that the Appellant's witnesses did not give a first-hand account of how the accident happen, the failure by the Appellant to call as a witness, the driver of the subject motor vehicle on the material day, to dispel the Respondent' evidence did not help his cause, especially taking into account the fact that the Respondent had in his pleadings pleaded the doctrine of res ipsa loquitor.

25. It is trite that in an action for negligence as a result of road traffic accident, the burden of proof rests upon the plaintiff alleging it. However, under the doctrine of res ipsa loquitor, negligence can be inferred in the absence of any either plausible explanation on how the accident occurred. In the case of Sally Kibiii and Another versus Francis Ogaro [2012] eKLR, the court, stated the following in relation to the doctrine; -

> "The Plaintiff in the trial only produced two witnesses who admitted that they did not witness the accident and could not tell how it happened. The police abstract showed that the accident was caused by collusion of two vehicles and investigation were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to blame and the absence of an eye witness diminishes the appellant's chance to prove a case of negligence against the defendant....to successfully apply this doctrine (res ipsa loquitor) there must be proof of facts that are consistent with negligence on the part of the defendant as against any other cause.....can safely presume that the mere fact that two cars being KAK 746J and KAG 331K collided, negligence was on the part of the defendant's cause and not the other. The plaintiff must prove fact which give rise to what may be called res-ipsa loquitor situation."

26. In situations like this where the victim of the accident perished as a result of the accident, it would in my view be foolhardy to insist that a Plaintiff produces an eye witness to give a first-hand account of how the accident happened. Once the Respondent adduced the evidence that the accident happened on the day in question involving the Appellant's vehicle in which the deceased lost her life, it was therefore then incumbent upon the Appellant to adduce evidence to the contrary. The Appellant in this case chose not to. Consequently, I find no reason to fault the trial court's conclusion liability.

27. In his submissions, the Respondent asked this court to reverse the trial court's finding on liability and find the Appellant 100% liable for the accident on the basis that the Appellant failed to adduce any evidence controverting the Respondent's evidence on liability. However, to the extent that there was no cross-appeal by the Respondent on the issue of liability, this invitation by the Respondent is declined. Further, from the evidence and proceedings in this case, there is no unequivocal evidence that there was no contribution on the part of the deceased for the occurrence of the accident.

Quantum

28. The guiding principle is that assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where the trial court, in assessing damages, erred

in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see Mbogo vs Shah (1968) EA 93 and Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727).

29. The Appellant submitted that the trial committed an error of law and of fact by awarding an inordinately high sum of Kshs. 50,000/= for pain and suffering under *Law Reform Act* despite the fact that the deceased died on spot. Citing the case of Antony Njoroge Ng'ang'a (Legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v James Kinyanjui Mwangi & 2 others [2022] eKLR the Appellant submitted that a sum of Kshs. 30,000/= is reasonable in the circumstances of this case since there was no evidence that he deceased was conscious after the impact.

30. The principle governing the award for damages for pain and suffering under the *Law Reform Act* is that ward is to compensate the victim for pain and suffering suffered in the period before death. It is a general principle that very nominal damages of between Kshs. 10,000 to 100,000/= are awardable hereunder. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, court stated that; -

> " 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."

31. Further in West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR the court observed that-

> " 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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident."

32. In view of the above decisions and bearing in mind that there is no evidence that the deceased died on the spot as alleged by the Appellant in his submissions, I find no reason to interfere with the decision of the trial magistrate. I therefore maintain an award of Kshs. 50,000/= for pain and suffering.

33. On damages under the *Fatal Accidents Act*, the Appellant took issues with the trial court's reliance on the Regulation of Wages (General) Amendment Order 2017 which came into effect on 1st May 2017 and set the minimum wage for workers under the category where the deceased belonged at Kshs. 12,926.55 despite that the fact that the deceased died on 14th March 2016. According to the correct version of the Order ought to have been the Regulation of Wages (General) (Amendment) Order, 2015 which set the basic the minimum wage for a general labourer in former municipalities (where the decease lived & worked) at Kshs. 10,107.10/= per month.

34. Consequently, the Appellant asked this court to set aside the trial court's award of Kshs. 1,085,830/= under this heading and substitute the same with a sum of Kshs. 848,996.40/=, computed as follows; Kshs. 10,107.10 x 12 x 21 x 1/3 = Kshs. 848,996.40.

35. I have reviewed the evidence at trial and note that the deceased was aged 34 years at the time of his death and was said to have been a business lady. Plaintiff pleaded that the deceased worked as a hairdresser earning Kshs. 14,000/= per month however no evidence was availed as proof of earnings. The trial court therefore regarded the deceased as a general labourer and applied the provisions of the Regulation of Wages (General) Amendment Order 2017.

36. It is critical to point out that in the absence of proof of the deceased monthly income as pleaded in the plaint, the trial court took judicial notice and used the REGULATION OF WAGES (GENERAL) AMENDMENT ORDER 2017 simply as a guide to determine what would have been the monthly income of the deceased. It was simply a guide and not intended to be accurate, scientific mathematical formula, particularly taking into account that the rate of Kshs. 12,926.55 was applied and was assumed to remain constant for the next 21 years.

37. In the circumstances, find no fault on the part of the trial magistrate by using the REGULATION OF WAGES (GENERAL) AMENDMENT ORDER 2017 in determining what would have been the income of the deceased. In any event, it was the order in operation as at the time of the judgment and therefore formed the legal basis upon which the trial court could place reliance.

38. In view of the foregoing, I find the instant appeal unmerited and hereby dismiss the same with costs to the Respondent.

39. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF SEPTEMBER 2024

ADO MOSES

JUDGE

In the presence of

Moses – Court Assistant

.....For the Appellant

.....For the Respondent