Kokoko & another v Kenya Power & Lighting Company Limited (Civil Case 38 of 2017) [2024] KEHC 11364 (KLR) (Civ) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11364 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 38 OF 2017

JN NJAGI, J

SEPTEMBER 25, 2024

BETWEEN

DAVID KHAYO KOKOKO ..... 1ST PLAINTIFF

CHRISTINE KARUMBA (SUING AS ADMINISTRATORS OF THE ESTATE OF EDWIN LAWRENCE KHAYO - DECEASED) ..... 2ND PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiffs herein instituted this suit against the Defendants in their capacity as the administrators of the estate of the late Dr. Edwin Lawrence Khayo (herein referred to as the deceased) wherein they are seeking compensation in general and special damages under the *Law Reform Act* and under the *Fatal Accidents Act* after the deceased was killed in a road traffic accident upon being knocked down by a vehicle belonging to the defendant. The deceased was a pedal cyclist at the time of the accident.

2. The plaintiffs called two witnesses in the case, the 1st plaintiff, David Khayo Kokokok PW1 and Chief Inspector Lazarus Owiti PW2. The 1st plaintiff testified that he was the father to the deceased. He said that the deceased was a medical doctor who at the time of his death was working with Machakos County Government. That he was also a post graduate student at the University of Nairobi where he was pursuing psychiatry. The witness relied on his witness statement dated 12/4/2019 and a bundle of documents that he produced as exhibits in the case, P.Exh. 1-86.

3. The other witness for the plaintiffs, PW2, told the court that the accident was investigated by an officer who has since retired from police service. The witness produced the following documents as exhibits – a copy of Police Abstract, an extract of the Occurrence Book where the accident was reported,

the Investigation Diary and Investigation Report and a sketch map of the scene of the accident, all produced as exhibits 3(a) – 3(d) respectively.

4. The defendant on their part denied liability for the accident and blamed the deceased for causing the accident. They pleaded in the alternative that the deceased substantially contributed to the occurrence of the accident.

5. The defendant called two witnesses in the case - Caroline Wanjiru Warui DW1 and Emilio Njeru DW2. DW1 told the court that she is an Insurance Officer for the defendant company. It was her evidence that the driver of the accident vehicle was one Samuel Mwangi who has since retired from the company. It was her further evidence that the defendant referred the matter to their insurance company, Jubilee Insurance, to appoint an independent investigator to investigate the accident. That the investigator returned a report that the police officer who investigated the case blamed the pedal cyclist for causing the accident.

6. DW2 testified that he is an insurance investigator. That he was given instructions by Jubilee Insurance Company to investigate the accident. He did so and prepared a report that indicated that the police blamed the cyclist for occasioning the accident. He presented his report in court as exhibit.

Submissions

7. At the close of both the plaintiffs` case and the case for the defendant, the advocates for the parties tendered written submissions to the court.

Plaintiffs` Submissions

8. The plaintiffs submitted that although the police abstract produced in the case did not indicate as to who was to blame for causing the accident, the circumstances and testimony of witnesses indisputably placed liability on the defendant`s driver. That the extent of the injuries suffered by the deceased and the twisted wreckage of his bicycle showed that it is the driver of the vehicle who was at fault.

9. It was submitted that the defendant did not call any eye witness in the case despite the fact that there were three people in the accident vehicle. That the witnesses called by the defence in this case, DW1 and DW2, were not eye witnesses to the accident. Therefore, that the plaintiffs` account demonstrating negligence on the part of the defendant`s driver remains unchallenged. The plaintiffs urged this court to find the defendant to be wholly liable for the accident.

10. On quantum, the plaintiffs submitted that they had demonstrated that they were entitled to damages under the *Law Reform Act* and under the *Fatal Accidents Act*.

Defendant`s Submissions

11. The defendant submitted that the evidence of Chief Inspector Lazarus Owiti PW2 was heresy as he did not investigate the accident and did not visit the scene. It was submitted that no eye witness testified in the case. That there were no conclusive findings on how the accident occurred. Therefore, that the plaintiffs had failed to discharge their burden of proof on how the accident occurred.

12. The defendant submitted in the alternative that should the court find that the defendant was liable, the court should find both the cyclist and the driver to have been equally to blame for the occurrence of the accident. The defendant in this respect relied on the holding in the case of Hussein Omar Farah v Lento Agencies, Civil Appeal No. 34 of 2008 Nairobi. Consequently, the defendant urged the court to, in the alternative, make a finding that the liability on the part of the defendant is 50%.

13. On quantum the defendant submitted that the amount of quantum claimed by the plaintiffs was excessive.

Analysis and Determination

14. I have considered the evidence adduced before the court and the submissions by counsels for the parties. The issues for determination are on liability and on quantum of damages. I will deal with the two issues separately.

Liability

15. The plaintiffs pleaded in their plaint that on the 3rd June 2016 at around 9am along Thika Superhighway, the deceased was lawfully cycling his bicycle to work when he was violently hit by the deceased`s motor vehicle as a result of which he suffered fatal injuries. They contended that the accident was caused by the negligence of the defendant`s driver. The particulars of negligence on the part of the defendant`s driver were stated to be, inter alia: driving at excessive speed; driving without due regard and attention as a prudent driver and failing to swerve, break and or do anything to prevent the occurrence of the accident.

16. The defendant in its statement of defence denied the claim and the particulars of negligence stated by the plaintiffs. They blamed the deceased for occasioning the accident and contended in the alternative that he substantially contributed to the occurrence of the same. They gave particulars of negligence that included: cycling across the road without due care and attention, riding in the middle of the road, riding onto the path of the defendant`s motor vehicle, failing to keep a proper look out and not taking any steps to avoid the accident.

17. It is to be noted that neither the plaintiffs nor the defendant called an eye witness to the accident. There is thus no evidence on how the accident took place. It is then obvious that the contention by the plaintiffs that the defendant`s driver was to blame for the accident was not based on any evidence. Similarly, the contention by the defendant that the deceased was to blame for the accident was not backed by any evidence. It is trite that where a party fails to call evidence to support its case, that party`s pleadings remain mere statements of fact – see *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*. In view of the fact that none of the parties called evidence as to how the accident took place, there was no evidence on which the court could determine as to which party was to blame for occasioning the accident.

18. It is trite that where the court is not in a position to decide from the evidence adduced before it as to which party is to blame for causing the accident, both parties should be held equally to blame. This was the position taken by the Court of Appeal in Hussein Omar Farah v Lento Agencies [2006] eKLR where it held as follows:

> "In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

19. In the absence of evidence from either side as to how the accident occurred, I find that both the deceased and the driver of the defendant`s motor vehicle were equally to blame for occasioning the accident. Liability is therefore apportioned in the ratio of 50:50 as between the plaintiffs and the defendant.

Quantum

20. The plaintiffs are seeking general damages for pain and suffering and loss of expectation of life under the *Law Reform Act* and for loss of dependency under the *Fatal Accidents Act*. They are also seeking to recover special damages. I will consider the issues as hereunder.

Pain and Suffering

21. The deceased died on the spot. The plaintiffs submitted that a sum of Ksh.250,000/= would be reasonable compensation under this head.

22. The defendant on the other hand submitted that since the deceased died at the place of the accident, a figure of Ksh. 20,000/= would suffice. They made reliance on the case of Lucy Wambui Kihoro v Elizabeth Njeri Obuong [2015] eKLR where Ksh. 20,000/= was awarded in a case where the deceased died at the spot of the accident.

23. I have considered 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 where the deceased died on the spot of the accident and Ksh.30,000/= was awarded for pain and suffering. In the case of Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] eKLR, Mativo, J upheld an award of Ksh. 50,000/= where the deceased was said to have died on the spot. In *Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019*) [2022] KEHC 11823 (KLR), Sewe J. reduced an award of Ksh.150,000,/= to Ksh.50,000/= for instant death. In view of these authorities, I award Ksh.50,000/= in damages for pain and suffering.

Loss of expectation of life

24. The plaintiffs submitted that the deceased died at the prime age of 31. That he was a medical doctor with a promising life that was suddenly cut short by the accident. The plaintiffs proposed a sum of Ksh.300,000/= under this head.

25. The defendant on their part submitted that an award of between Ksh.70,000/= and Ksh.100,000/= would suffice under this head. They relied on the cases of *Hellen Muhonja Maina v Peter Kinagi Gituka HCCC No.3723 of 1990*, Nairobi where a sum of Ksh.70,000/= was awarded and Lucy Wambui Kihoro v Elizabeth Njeri Obuong (supra) where Ksh.100,000/= was awarded.

26. I have considered the submissions on the loss of expectation of life. In the case of Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (suing as the Legal Administrator of the estate of the late Robert Mwangi) [2019] eKLR where Muchemi J. stated:

> "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".

27. The plaintiffs in this case have not cited any authority to support the high award of Ksh.300,000/=. I find an award of Ksh.100,000/= to be sufficient under this head.

Loss of Dependency

28. The appellants submitted that they had demonstrated that at the time of death, the deceased was living with his parents who were dependent on him. That the deceased was a medical officer and a master`s student. That the documents produced in court showed that he was earning a total salary of Ksh.137,000/= per month. That his life was cut short by 29 years. That as he had dependants the correct dependency ratio is 2/3. The appellant proposed an award for loss of dependency as follows:

    137,000 x 12 x 29 x 2/3 =31,784,000.

29. The defendant submitted on this issue that the deceased was a medical officer intern. That his salary inclusive of allowances was Ksh.137,000/= which when subjected to statutory deductions left him with a net pay of Ksh.93,672.30. The defendant urged the court to use the latter figure as the multiplicand. The plaintiffs cited the case of Loice Muchenyi Masoso (Estate of the late Joseph Masoso – Deceased) v Maurice N Karanja & another where the court deducted statutory dues of PAYE (30%) NHIF and NSSF to arrive at the multiplicand.

30. It was submitted that the deceased was unmarried and a master`s student, hence a large portion of his salary must have been used for his own living expenses. It was submitted that the documents filed in court showed that the deceased was a professional biker. That a certain percentage of his earnings must have been put to these activities. The defendant urged the court to use a multiplicand of Ksh.50,000/= in determining the multiplicand.

31. On the issue of multiplier, the defendant urged the court to apply one of 18 years. They relied on the cases of Loice Muchenyi Masoso– Deceased) v Maurice N Karanja & another (supra) where a multiplier of 20 years was used for a 31 year old; Lucy Wambui Kihoro v Elizabeth Njeri Obuong (supra) where a multiplier of 16 was used for a 32 year old and Nelson Ndawa Kioko & another v Mombasa Liners (2012) eKLR, where a multiplier of multipliers of 18 years was used for a 31 year old.

32. The defendant submitted that the deceased was a bachelor and therefore a dependency ratio of 1/3 would be appropriate. They urged the court to award loss of dependency as follows:

    50,000 x 12 x 18 x 1/3 = 3,600,000

33. I have considered the submissions on loss of dependency. The deceased died at the age of 31 years. He was in government employment and would therefore have retired at the age of 60 years. However due to vicissitudes of life, there was no guarantee that he would reach that age. A person`s life cut be cut short by other factors of life such as decease. I think that a multiplier of 27 would be reasonable.

34. The deceased was earning a salary of Ksh.137,660/= which when subjected to statutory deductions of PAYE, NSSF and NHIF left him with a net figure of Ksh.93,672/=. In the case of Hellen Gesare Ayoti v P.N. Mashru [2016] eKLR it was held by Mulwa, J that:

    > "...the net salary of a person's earnings is gross salary including allowances, less statutory deductions (PAYE, NHIF and NSSF). It is also my finding that any other deductions towards union dues, contributions and Sacco loans and any other loans are assumed to be so deducted for the benefit of the family, that goes to the improvement of the living conditions for the family".

35. In my view the NSSF and NHIF deductions went to the welfare of the contributor and should therefore not be deducted from the gross salary when determining the multiplier. It is only the PAYE,

in my view, that should be deducted from the total earnings, thereby leaving a sum of Ksh.102,490/= as the multiplier. I will use that figure as the applicable multiplier in this case.

36. The deceased was a bachelor. He was a master`s student and a motor bike professional rider. It would be expected that a large portion of his earnings would go into supporting these activities. I consider a dependency ratio of 1/3 to be reasonable. The loss of dependency therefore works out as follows:

102,490 x 12 x 27 x 1/3 = 11,068,920.

Special Damages

37. The plaintiffs claimed special damages amounting to Ksh.2,174,570/= made up as follows:

Death certificate .....Ksh. 200/=

Legal fee on probate cause.....Ksh. 20,000/=

Funeral Expenses .....Ksh. 1,977,355/=

Police Abstract .....Ksh. 200/=

Vehicle Search .....Ksh. 500/=

38. The plaintiffs submitted that the claim of special damages was supported by receipts which were produced in court without objection from the defendant. That the claim was pleaded and strictly proved. That the same ought to be awarded.

39. The defendant on their part submitted that the pleaded amount in funeral expenses of Ksh.1,977,355/= included a sum of Ksh.354,205/= which was cost of putting up the deceased`s mausoleum which cannot be strictly called a burial expense. That the same was done after the burial and should therefore not be awarded. The defendant in this respect relied on the case of WMT & Another (Estate of the late *ETM v Sarova Hotels Ltd t/a Whitesands Beach Resort, Mombasa Civil Appeal No.79 of 2020*, where Okwany J. held that:

> " ..Funeral expenses should be reasonable and limited to the funeral ceremony but should not include other engagements the family members opt to conduct.."

40. It was further submitted that only receipts that comply with section 19 of the *Stamp Duty Act* by having revenue stamp affixed to them should be considered.

41. I have considered the plaintiffs` claim on special damages. They claim a total of Ksh.1,977,355/= in funeral expenses. This figure includes a sum of Ksh.354,205/= used in putting up a mausoleum for the deceased after the burial ceremony had been done. I agree with the defendant that this was not a necessary expense as it did not go towards the burial ceremony. I decline to award the same.

42. The plaintiffs` claim for burial expenses on page 20 of their bundle of documents is Ksh.1,617,530/=. Among the expenses is catering services of Ksh.360,000/= and provision of tents and chairs for 3 days at a cost of Ksh450,000/=. The invoice for catering expenses on page 28 of the bundle indicates that the figure of Ksh.360,000/= was for catering expenses for two days, 10th and 11th June 20216. I do not think that it was necessary to feed mourners for 2 days and to provide tents and chairs for 3 days. I award catering expenses for one day to the sum of Ksh.180,000/= and Ksh.150,000/= for provision of tents and chairs for one day.

43. The plaintiffs further claimed Ksh.180,000/= for still photography and videography coverage for 3 days. I do not think the coverage was necessary for 3 days. I award coverage for one day to the sum of Ksh.60,000/=.

44. The plaintiffs claimed hire of public address system and Mceeing services for 5 days at Ksh.10,000/= per day totaling to Ksh.50,000/=. In my view it was not necessary to hire such services for 5 days. I award Ksh.10,000/= for one day for the said services.

45. Arising from the above, I find that the plaintiffs have not proved a total sum of Ksh. Ksh. 994,205/= of the claimed burial expenses. The said sum is to be deducted from the sum of Ksh.1,977,355/=, thereby leaving a sum of Ksh.983,150/= which I award as the burial expense.

46. The other special damages claimed being the cost of obtaining the death certificate, police abstract and motor vehicle search and cost of legal fees on probate cause, all totaling to Ksh.20,900/= were proven by production of receipts. I award the said sum. This brings the total award for special damages to Ksh.1,004,050/= which I hereby award.

The claim for future earnings

47. The plaintiffs further claimed a sum of Ksh.167,727,915.13 being future earnings the deceased would have earned from the government employment till his retirement in the year 1945 and earnings he would have made in private practice after retirement. However, no such claim was pleaded. A claim for loss of future earnings is a special damage claim that must be specifically pleaded and strictly proved. In the case of Douglas Kalafa Ombeva v David Ngama [2013] eKLR, the Court of Appeal held that:

> " Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically."

48. In view of the fact that the claim for loss of future earnings was not pleaded, the court declines to consider it.

Disposition

49. The upshot is that the court apportions liability equally between the plaintiffs and the defendant in the ratio of 50:50 and awards damages as follows:

Pain and suffering .....Ksh. 50,000/=

Loss of expectation of life .....Ksh. 100,000/=

Loss of Dependency .....Ksh. 11,068,920/=

Special damages .....Ksh. 1,004,050/=

Total .....Ksh. 12,222,970/=

Less 50% liability.....Ksh. 6,111,485/=

Balance to the Plaintiffs .....Ksh. 6,111,485/=

50. Consequently, judgment is hereby entered for the plaintiffs against the defendant to the sum of Ksh.6,111,485/=, with costs of the suit and interest at court rates.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH SEPTEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Plaintiffs

Miss Njenga for Defendant

Court Assistant – Amina

30 days Right of Appeal.