Ngeno & another (Suing as the legal administrators of the Estate of John Kibet) v Ombui aka Joseline Ombui (Civil Appeal E014 of 2023) [2024] KEHC 13064 (KLR) (28 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13064 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CIVIL APPEAL E014 OF 2023

F GIKONYO, J

OCTOBER 28, 2024

BETWEEN

ROSE NGENO & MESHACK KIPLAGAT NGERECHI (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF JOHN KIBET) ..... APPELLANT

AND

JOSEPHINE GECHEMBA OMBUI AKA JOSELINE OMBUI ..... RESPONDENT

(Being an appeal from the judgment of Hon. P.L. Shinyada (S.R.M) delivered on 20.04.2023 in Narok CMCC Suit No. E010 of 2022)

JUDGMENT

Impugned judgment

1. The judgment which prompted this appeal is that of the Chief Magistrate's Court at Narok in Civil Suit No. E010 of 2022 delivered on 20.04.2023 making the following orders and awards: -

    a. Liability 80:20

    b. Pain and suffering Kshs. 70,000/=

    c. Loss of expectation of life Kshs. 100,000/=

    d. Loss of dependency Kshs.1,492,056/=

    e. Special damages Kshs. 81,550/=

    Subtotal Kshs. 1,743,606/=

    Less 20% contributory negligence.....Kshs. 1,394,884.80/=

    Total award Kshs.1,394,884.80/=

2. The appellants vide memorandum of appeal dated 16.05.2023 cited six (6) grounds of appeal which relate to; i) liability and ii) quantum of damages.

3. The respondent also filed a memorandum of response dated 05.03.2024 denying the grounds raised in the memorandum of appeal and stated that the learned magistrate applied her mind to both facts adduced and the law thereby rightly arriving at her judgment.

Background

4. The suit arose from a traffic accident involving motorcycle registration No KMCG 034C and motor vehicle registration No. KCL 184D on Narok-Bomet road on 10.07.2021. The deceased was a pillion passenger on the suit motorcycle. The suit motor vehicle lost control, swerved, and knocked the deceased thereby causing fatal injuries to him. The appellants blamed the respondent driver. The deceased lost his life in the accident. Particulars of negligence were set out against the respondent driver. The deceased was 37 years old.

5. During the trial, the appellants called one witness.

6. The respondent closed her case without calling any witnesses.

Directions of the court

7. The appeal was canvassed by way of written submission.

The Appellants' Submissions

8. The appellants submitted that the trial magistrate erred in finding the deceased 20% to blame against the overwhelming evidence that the deceased did all he could to avert the accident.

9. The appellants submitted that the trial court erred in adopting a multiplicand of Kshs. 8,109/= which was too low as the deceased was a businessman in narok town which is a former municipality and therefore the trial court ought to have adopted the minimum wage of a general labourer which is Kshs. 13,572.90 per month and not Kshs. 8,109/= under the Regulations of Wages (General)(Amendment) Order ,2022.

10. The appellants submitted that the trial court erred in adopting a multiplier of 23 years meaning the deceased would have worked up to the retirement age of 60 years which should not have been the case because the deceased was not a civil servant. The appellants urged this court to take judicial notice that there is no retirement age in business and farming as opposed to civil service. The deceased would have worked for a long time beyond 70 years. The appellants proposed a multiplier of at least 35 years. The appellants relied on Caleb Juma Nyabuta V Evince Otieno Magaka & Another [2021] eKLR, and Chania Shuttle Vs Mary Mumbi [2017] eKLR.

The Respondent's Submissions

11. The respondent submitted that the trial court directed itself well and therefore this court should not disturb the decision of the trial court. the respondent relied on Section 78 of the *civil Procedure Act*, Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, Butt V Khan [1981] KLR 349, and Mkube V Nyamuro [1983] LLR at 403.

12. The respondent submitted that the appellants did not furnish the court with any proof of the deceased's source of income or the existence of the alleged business therefore the proper wage was of Kshs. 8,109 as per the Regulations of Wages (General)(Amendment) Order, 2022 as the deceased

resided in Olmekenyo as per burial permit which is not considered as one of the former municipalities. The respondent relied on Patriotic Guards Ltd V James Kipchirchir Sambu [2018] eKLR And Beatrice W. Murage Vs Consumer Transport Ltd & Anor (2014) eKLR.

Analysis and Determination

Duty of court

13. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the *Civil Procedure Act*).

14. The first Appellate Court should, therefore, evaluate the evidence afresh and make its conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.

Issues

15. This court has been called upon to determine liability and the quantum of damages.

Liability

16. Who is to blame for the accident, and by what proportion if at all? Where does the evidence lead the court?

17. It was not disputed that the accident occurred on 10.07.2021. The motor vehicle and motorcycle involved were also not disputed.

18. PW2-Peter Kipkurui Ruto testified that there were two pillion passengers on the motorcycle plus the rider a total of three people. The motorbike was being ridden towards narok. The motor vehicle was being driven from narok headed to Bomet. The motor vehicle was driven into the motorbike's lane. He stated that the rider ought to also look out. He stated that the motor vehicle encroached into the motorbike lane. One of the persons on the motorbike had a helmet.

19. On re-examination he stated that the motor vehicle swerved into the lane of the motor vehicle. The passengers had helmets and reflector jackets on.

20. PW3- PC Gladys Chepkoech based at Ololulunga police station and attached to Ollululnga traffic base. she testified that the accident occurred on 10/07/2021 at about 13.30 hours along the Narok-Bomet area. The rider of the motorcycle was Wilson Terer.

21. She testified that the motor vehicle crossed the motorcycle's path. She blamed the driver of motor vehicle KCL 184D Toyota Wish, Stephen Obere for the accident. She visited the scene after 10 minutes. They found both motor vehicle and motorcycle were off-road on the left side of the road as one faced narok direction. From the impact, the motor vehicle was at high speed. She produced a police abstract P Exh 5 a, covering report P Exh 5b

22. On cross-examination, she testified that only one rider was wearing a helmet and reflective jacket.

23. On reexamination, she stated that the motorcycle carrying two passengers was not the cause of the accident.

24. The trial court found the respondent driver partly to blame for the accident, and so held the respondent liable in the ratio of 80:20.

25. In the police abstract, the police blame the driver of motor vehicle KCL 184D for the accident.

26. Liability draws upon the evidence. The evidence shows that the driver of the motor vehicle in question knocked the motorcycle of which the deceased was a rider. As a consequence, the deceased died.

27. The driver of the motor vehicle encroached into the path or lane of the motorcycle hitting the motorcycle; the impact and injuries sustained show the motor vehicle was in high speed. The hit was also huge and fatal to all the three on the motorcycle.

28. Evidence also show that the deceased had a helmet. Nevertheless, it is useful to note that, other than being a statutory requirement, wearing a helmet serves a noble purpose; protection of the person and mitigation of injuries on the head, and may save a life. Any person riding or aboard a motorcycle without a helmet opens himself or herself to danger. Thus, it is an important consideration which may affect liability as well as quantum in a properly argued case establishing a nexus between the cause of accident and failure to wear a helmet.

29. Reflective jacket is another item which also serves to warn other road users of your presence on the road; it is seen from far, and at night makes you visible on the road. In a properly argued case, failure to wear reflective jacket will affect liability.

30. Nevertheless, there was no evidence in this case establishing such nexus with the cause of the accident. Accordingly, the trial court did err in placing liability at 80:20 against the appellants.

31. Be that as it may, evidence show that, the deceased was carrying two pillion passengers. But, according to the police investigations, this was not the cause of the accident. The cause of the accident was the driver of the motor vehicle encroaching into the path of the motorcycle and hitting it; and so hard as evidenced by the impact and the injuries sustained by the three deceased persons.

32. It is important to state here that; the respondents bear the burden of proving contributory negligence on the part of the motorcycle. They did not prove any.

33. There is, therefore, no basis for any contributory negligence. Accordingly, the trial magistrate did err in apportioning a 20% contributory negligence to the motorcycle rider. The said finding and holding by the trial court is, therefore set aside. And, this court finds the driver of the motor vehicle to be 100% liable for the accident herein.

34. The respondent did not call any witnesses.

Quantum

35. An appellate court will only interfere with the trial court's discretion in the assessment of damages where; i) there is an error in principle; and or ii) the award of damages is so inordinately high or low as to represent an entirely erroneous estimate of damages (Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR).

36. This claim was founded on the *Law Reform Act* and Fatal Accident Act. These laws provide for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years-loss of dependency.

Loss of Dependency

37. Section 4 *Fatal Accidents Act* provides as follows: -

> "Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents, and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct."

The concepts of multiplicand and multiplier

38. Simply, the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.

39. See Ringera J (as he then was) in the case of Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988.

40. The appellant submitted that the awarded general damages were inordinately low as the magistrate erred in using 23 years as a multiplier in disregarding of the fact that business people may work up to 90 years. The trial court adopted a multiplier approach and adopted Kshs. 8,109/= being the salary of a general worker and a multiplier of 23 years. The appellants contend that the multiplier adopted was inordinately low. The appellants proposed a multiplier of 35 years and the sum of Kshs. 13,572.90 /= as a multiplicand.

41. On loss of dependency, the respondent submitted that an award of general damages was at the discretion of the trial court the appellate court should not interfere unless the court acted on wrong principles

Of multiplier

42. A multiplier is not administered as a matter of course where loss of dependency has been claimed. Application of multiplier as a method of assessing damages for dependency must be informed by evidence and facts of the case.

43. See Ringera J (as he then was) in the case of Kwanzia Vs Ngalali Mutua & another where he stated that:

> "The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

44. It was not disputed that the deceased died at the age of 37 years.

45. But there was no proof of farming. This is case where the use of multiplier method of assessment of damages would have been avoided in favor of a global award. Given the age of the deceased, the fact that he could have worked even beyond 60 years and the relevant facts of the case would entitle the deceased an award of Kshs. 1,500,000. The trail court awarded a sum of Kshs. 1,492,056, albeit upon application of the multiplier method. This figure is not inordinately low. Except, for clarity of decision, the said award is set aside. And, in lieu thereof, this court makes a global award in the sum of Kshs. 1,500,000 in loss of dependency.

Loss of expectation of life

46. The appellants were awarded Kshs. 100,000/= for loss of expectation of life. The award is not out of the normal.

47. The appellants have not also challenged this award.

48. This court therefore, upholds the award of Kshs. 100,000/=.

Pain and suffering

49. The deceased died on the spot.

50. The appellants have not challenged this award. The award made by the trial court was within acceptable range.

51. This court therefore, upholds the award of Kshs. 70,000/=.

Special damages

52. None of the parties have challenged this award.

53. This court therefore upholds the award of kshs.81,550/=

54. In the upshot, this court finds that the appeal herein succeeds. Judgment is entered in favour of the appellants in the following terms-;

    i. The respondent is 100% liable

    ii. Loss of dependency Kshs. 1,500,000/=

    iii. Loss of expectation of life Kshs. 100,000/=

    iv. Pain and suffering Kshs. 70,000/=

    v. Special damages of Kshs. 81,550/=

    Total Kshs. 1,751,550/=

    vi. The appellant gets costs on the appeal.

    vii. The appellant gets costs of the award.

    viii. Interest on the award from the date of this judgment

    ix. Interest on special damages from the date of institution of suit.

    Orders accordingly

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION, THIS 28TH DAY OF OCTOBER, 2024.

F. GIKONYO M

JUDGE

In the presence of: -

1. Chelagat for the appellants
2. Kimani for respondent
3. Otolo C/A