Devkan Enterprises Limited v Paul (Suing as the Administrator of the Estate of the Oliver Muema Paul) (Civil Appeal E155 of 2021) [2024] KEHC 14894 (KLR) (25 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14894 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E155 OF 2021

FR OLEL, J

NOVEMBER 25, 2024

BETWEEN

DEVKAN ENTERPRISES LIMITED ..... APPELLANT

AND

MARGARET MWENDE PAUL ..... RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE OLIVER MUEMA PAUL

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON MARTHA OPANGA (SRM) DELIVERED ON 24TH AUGUST 2021 IN KANGUNDO SPMCC No. 2 F 2020)

JUDGMENT

A. Introduction

1. The Appellant was the Defendant in the primary suit, where they had been sued by the respondent claiming damages arising from a road traffic accident, which occurred on 2nd June 2019 along Nairobi-Kangundo Road at Kaumoni Area involving the Appellant's Motor vehicle registration Number KCK 983W Mahindra Van (hereinafter referred to as the 1st suit motor vehicle) and motor vehicle registration number KAS 506W Toyota Matatu (hereinafter referred to as the 2nd suit motor vehicle).

2. The respondent averred that on 2nd June 2019, the deceased was lawfully travelling as a fare-paying passenger in the 2nd suit motor vehicle, when the appellant's employee, driver, servant and /or agent negligently drove, managed and/or controlled the 1st suit motor vehicle along the said road, drove on the wrong lane from the opposite direction and permitted/caused the 1st suit motor vehicle, to violently collide with the 2nd suit motor vehicle and as a result, the deceased sustained fatal injuries and died on the spot.

3. The appellant herein filed their statement of defence dated 3rd March 2020 where they denied all the averments made in the plaint and the occurrence of the accident. They stated in the alternative that if at all the accident did occur, (which was denied) then it was caused solely and/ or largely contributed to by the negligence of the driver of the 2nd suit motor vehicle. The particulars of the negligence of the 2nd suit motor vehicle driver, was outlined in the Appellants statement of defence.

4. The suit was heard on merit, and the learned magistrate in her judgment delivered on 24th August 2021 apportioned Liability at 100% as against the Appellant and proceeded to award the Respondent Kshs.3,347,350/= as aggregate damages plus costs and interest.

5. The Appellant, being dissatisfied by the judgement did file their memorandum of Appeal on 21st June, 2022 and raised several grounds of appeal namely: -

    a. That the trial court erred in finding the appellant liable for the suit accident when the respondent did not adduce evidence of negligence.

    b. In finding the appellant 100% liable for the subject accident, the trial court proceeded on the wrong principles and took into account irrelevant factors and failed to take into account the relevant factors.

    c. That the trial court awarded general damages which were too high for the injuries sustained by the respondent.

B. Facts of the Case

6. PW1 Margaret Mwende Paul testified that the deceased Oliver Muema Paul (the deceased) was her younger brother and she had obtained letter to administration to enable her file the suit. She relied on her filed witness statement, which she adopted as her evidence before the court, and produced all her claim supporting documents as Exhibits 1 to 12. She further testified that on 02.06.2019, she received a phone call and was informed that her brother who was travelling by public means from Nairobi to Tala had been involved in an accident and had passed on. The next day she went to Kangundo Level 4 hospital mortuary, viewed his body and thereafter went to Kangundo Police station, where she saw the accident motor vehicles and sort an explanation as to how the accident occurred.

7. She blamed the driver of the 2nd suit motor vehicle for causing the said accident and was informed that he had been subsequently charged with a traffic offense under Kangundo Traffic Case No 276 of 2019.The deceased also could not be blamed as he was a passenger in the 2nd suit motor vehicle and there was nothing he could have done to avoid the said accident. He died at 26 years old, was not married and was a student undertaking Diploma in Purchase and Supply chain. She prayed for general damages, special damages and the cost of the suit plus interest. Under cross-examination, she confirmed that her parents were elderly and all her other siblings were adults. She did not witness the accident, but the police had explained circumstances under which the said accident had occurred.

8. The Appellant did not call any witness to testify on their behalf.

C. Parties Submissions.

Appellant's Submission

9. The Appellant submitted that the trial Magistrate erred in holding its driver negligent in causing the said accident, yet there was no eye witness or police evidence adduced to support that assertion. The evidence of the respondent was therefore hearsay and could not be relied upon to establish

liability in disregard of Section 63(2)(d) of the *Evidence Act*, Cap 80 laws of Kenya, which provides that oral evidence must in all cases be direct evidence. Reliance was placed in the case of Cheserem v HZ & Company Limited (1892) KLR 24, Musyoka vs Returning Officer Independent Electoral and Boundaries Commission, Machakos county & 3 others. (Constitutional Petition E004 of 2021) {2022} KEHC 160 (KLR), Where it was emphasized that evidentiary burden does not shift where a party relies on hearsay.

10. The allegation that the respondent's driver was negligent therefore remained unproven. No nexus was shown to exist between the unidentified traffic charge and the particulars of negligence made against the appellant's driver. Finally, the particulars of the traffic offense charges were not produced in court to show that the appellant's driver was found guilty and fined and/or jailed for Section 47A of the *Evidence Act* to come into play. Reliance placed on the case of Kennedy Muteti Musyoka v Abedinego Mbole [2021] e KLR, Calistus Ochieng Oyalo & Others Vrs Mr & Mrs Aoko, Civil Appeal No. 130 of 1996 & CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] EKLR.

11. On whether the damages awarded were too high, it was submitted that the award for loss of dependency made of Kshs.3,000,000/= was too high and ought to have been reduced. The deceased had been survived by his parents and siblings and under Section 4(1) of the *Fatal Accidents Act*, it was only the parents who could claim damages. The trial court had also erred in applying a Multiplier of 30 years to assess damages yet the average life expectancy in Kenya was between 64 years and 69 years. The Appellant urged the court to reassess the damages awarded afresh and proposed that the award be reduced to Kshs 1,000,000/= . Reliance was placed in the case of Elvina Nyevu Garama & Another Vrs Samson Kahindi Kitsao & Another (2020) eKLR.

12. The Appellant urged this court to find that their Appeal had merit and it be allowed as prayed.

Respondent Written submission

13. The Respondent gave a background of the pleadings and facts relating to the accident, which resulted in the plaintiff sustaining serious injuries. The Appellant stated in their defence that they would initiate third party proceedings as against the owner/driver of the 2nd suit motor vehicle but did not do so and further during hearing did not deem it necessary to call any witness. It was to be noted that the Appellants witness had filed their witness statement, where Magaton Kinona Wamati, (the 1st suit motor vehicle driver) expressly admitted liability for the accident, which occurred while he was overtaking, without having due regard to other road users. Reliance was placed on the case of Peters vs Sunday post limited [1958] EA 424 to emphasis the duty of the first appellate court to reevaluate the evidence and come up with its own independent findings and conclusions.

14. By virtue of provisions of Order 2, Rule 11 of the Civil Procedure Rules, the parties were bound by the pleadings filed, unless traversed by the opposite party. At paragraph 5 of the plaint, the respondent had expressly blamed the Appellants driver for causing this accident and in response, the Appellant had traversed the same and alleged that it was the driver of the 2nd suit motor vehicle that was negligent. This implied that they admitted that an accident did occur save for contribution, but failed join the 2nd suit motor vehicle driver as a third party. The trial court was therefore right to hold that the Appellant driver was negligent and they were fully liable for the accident that occurred. Reliance was placed on the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 0thers(2014) EKLR, Adetoun Oladeji (NIG) Vrs Nigeria Breweries PLC SC 91/2002 & Charles Okwoyo Getume v Caroline Ntangarisa{2018} eKLR.

15. The respondent further submitted that, their evidence that the Appellants driver was subsequently charged in Kangundo Traffic Case No 276/2019 was never controverted nor did the Appellant

challenge the production of the police abstract, and its content could not be ignored by court. Reliance was made to the case of Joel Muga Opija v East African Sea Food Limited [2013] eKLR , Dakianga Distributors (K) LTD vs Kenya Seed Company Limited[2015] eKLR, Super foam Ltd & Another vs Gladys Nchororo Mbero [2014] eKLR.

16. Finally, on the issue of liability, the respondent did submit that the Appellant never called any witness to rebut their evidence and the negligence alleged on the part of the 2nd suit motor vehicle driver was never proved. Their evidence, therefore stood unchallenged as the averments made in the statement of defence were unsubstantiated. The finding on liability was therefore correct and they urged the court no to interfere with the trial Magistrate's decision on the same. Reliance was made to the case of Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 others [2012] , Autah Singh Bahra and Another vs Raju Govindji, HCCC NO 548 of 1998, Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009} and the case of Gateway Insurance Co Ltd v Jamila Suleiman & another [2018].

17. On damages, the Respondent submitted that special damages was pleaded and proved. Kshs.50,000/= for pain and suffering and Kshs.200,000/= for loss of expectancy of life was reasonable. It was also to be noted that the Appellant had not contested the above awards and she urged the court no maintain the same. Reliance was placed on Elvina Nyevu Garama & Another Vrs Samson Kahindi Kitsao & Another (2020) Eklr, Sukari Industries Limited Vrs Clyde Machimbo Juma, Homa Bay Hcca No 68 of 2016) eklr, Rose Vrs Ford (1937) AC 826, West Kenya Sugar Co Limited Vrs Philip Sumba Julaya (Suing as legal administrator and personal representative of the estate of James Julaya Sumba (2019) eklr.

18. On loss of dependency, it was proved that the deceased was pursuing a diploma course in Purchase and supply chain management at Kenya institute of professional studies and in the African context/ practice it was expected that all benefits would accrue to his parents and where applicable to his younger brothers and sisters both physically and materially and by his untimely demised they had suffered loss.

19. On Multiplicand and Multiplier applied by the trial court, the respondent did submit that the trial court used the correct parameters in determining the same based on the value of annual dependency and expectations of earning. It was also to be noted that the Appellant in their submissions filed before this court had also estimated that the deceased earnings at approximately Kshs.25,000/= and it was to be rightly presumed that the multiplicand as awarded by the trial court was not disputed.

20. The award of Kshs.3,000,000/= was therefore reasonable looking at the dependency ration used and age of the deceased. Reliance was placed on Sheikh Mushtaq Hassan Vrs Mathan Mwangi Kamau Transporters & Others (1982 -88) KAR 946, Leornard Ekisat & Another Vrs Major Kibingen (2005) eklr, Joshua Mungania & Another vrs Gregory Omondi Angoya (2018) Eklr , Samwel Kimutai Koriri Vrs Nyanchwa Adventist Secondary School & Another (2016) eklr, Rosemary Mwasya Vrs Steve Tito Mwasya & Another (2018) eklr .

21. It had also not been shown that in arriving at the said decision, the trial court had exercised its discretion in an arbitrary manner, misapprehended the law or evidence adduced. The award also, was not too high to represent an entirely erroneous estimate of damages awardable. The Respondent urged court not to interfere with the same.

22. The court was urged to dismiss this appeal with cost to the Respondent.

Analysis and Determination.

23. I have considered the pleadings, evidence presented and submissions of the parties in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its

own conclusions. As held in Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 it was 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 by the high court is by way of retrial and the principals 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 conclusion 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed Saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270,

24. Also in the court of appeal case of *Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No 77 of 1982*{ 1982 -1988}1KAR 278 the appellate court did state that;

> " A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

25. The issues which arise for determination in this appeal, is whether liability was correctly apportioned and whether the quantum awarded was inordinately high to warrant a review of the same by this court.

Liability

26. The court in Khambi & Another vs. Mahithi and Another [1968] EA 70, held 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."

27. PW1 was the only witness who testified and produced all her claim supporting documents as Exhibits in support of her case. She did not witness the said accident but blamed the 1st suit motor vehicle driver for being negligent based on information given to her by the police. She further alleged that the said driver was eventually charged in Kangundo CMCR Traffic case No 276 of 2019, but did not provide proof thereof.

28. The Appellant did not call any witnesses to rebut the respondent's evidence, but averred that her evidence was hearsay and therefore the evidentiary burden did not shift. The burden of proof was not discharged and it was therefore wrong for the trial court to find them 100% liable for the accident which occurred.

29. Order 7 Rule 5 of the Civil Procedure Rules provides that,

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by;

a. an affidavit under order rule 1(2) where there is a counterclaim,

b. a list of witnesses to be called at the trial,

c. written statements by witnesses, except expert witness, and

d. copies of documents to be relied upon.

30. Order 7 Rule 5 of the Civil Procedure Rules as read with Section 2 of the *Civil procedure Act*, confirms that the statement of defence and accompanying documents are pleadings, which a party relies upon to prove/defendant their case, as the circumstances may dictate. It is clear that the pleadings filed include witness statements and in determining all issues in contention, the court must primarily consider the pleadings filed and evidence adduced to enable it arrive at a logical determination of matters arising.

31. The Appellant filed two witness statements of Magaton Kinona Wamati (the driver of the Appellants motor vehicle) and Titus Kipngetich Solit, (turnboy) both of whom confirmed that the said accident occurred when the Appellant driver was overtaking a salon car and his vehicle collided head-on with an oncoming matatu, being the 2nd suit motor vehicle. The Appellant deliberately failed to call the said witnesses to testify as their evidence would bolster the respondents' case. The court cannot turn a blind eye to the pleadings filed and takes judicial notice of the facts stated in the said witness statement, which amount to admission of liability.

32. Section 17 and 18 of the *Evidence Act*, Cap 80 also deals with issue of Admission of evidence. Section 17 of the *Evidence Act*, Cap 80 defines admission general as;

> " An admission is a statement, oral or documentary, which suggests and inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned."

33. Section 18(1) of the *Evidence Act*, Cap 80 also provides that;

> " statements made by a party to the proceedings, or by an agent to any such party whom the court regards in the circumstances of the case as expressly to impliedly authorized by him to make them, are admissions."

34. Therefore, while I do find and hold that PW1 did not witness how the accident occurred and gave hearsay evidence regarding the Appellants liability, the Appellants witness statements which are part of the pleadings field herein, confirmed the Appellants culpability and having "fried themselves in their own fat," they cannot be allowed to run away from their pleadings where they themselves had established their own wrong doing. The trial court finding that they were 100% liable for the accident therefore cannot be faulted.

Whether Quantum Awarded for loss of dependency was Excessive.

35. In Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to

prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

36. The Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 also restated these principles which should guide the court in awarding damages, where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured.

37. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision on whether or not to interfere with an award by the trial court must necessarily be restricted.

38. From the submissions filed by the Appellant, they only challenge the award of loss of dependency, which was awarded at Kshs.3,000,000/=. They deemed the award to be too high and urged this court to reconsider the same and assess it downward.

39. On loss of dependency, it was held by the Court of Appeal in *Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995* that the issue of dependency is always a question of fact to be proved by he who asserts. Further I am guided by the observation of the Court of Appeal for East Africa in the case Chunibhai J Patel and Another vs PF Hayes and Others [1957] EA 748, observed that:

> " The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependent's, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependent's. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."

40. However, in determining the multiplicand, it was held in by Ringera, J (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 that:

> " In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependents such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

41. In the case of Endege & another (Suing as the legal representatives in the *Estate of John Madede Endege (Deceased)) v Benard & another (Civil Appeal 4 of 2021*) [2024] KEHC 709 (KLR) where the deceased was said to be a student and the dependents were his siblings as is the case herein, the court had this to say;

> " There are two (2) schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.
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> 36. This court had due regard to the case of Mwanzia vs Ngalali Mutua Kenya Bus Ltd that was cited in Albert Odawa vs Gichumu Githenji[2007]eKLR where the court therein observed as follows:-"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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the 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."

42. It was proved at trial that the deceased was 25 years old, and was a student pursuing a Diploma course in Supply chain Management examined under KNEC at Kenya Institute of Professional Studies (KIPS). In the Kenya context, there is no doubt that the parents and where applicable his younger siblings would have benefited had he completed his studies and proceeded to be employed. His family thus suffered damages by his loss, which could not be adequately compensated by monetary terms. See Sheikh Mushtaq Hassan (Supra).

43. The trial court took judicial notice of the fact that the deceased on completion of his studies, would been employed as a supply chain management officer and at entry level he would have earned a salary of

between Kshs.25,000 to Kshs.50,000/=. The court used the lower scale of Kshs.25,000/= to determine the multiplicand and this approach cannot be faulted. See Rosemary Mwasya Vrs Steve Tito Mwasya & Another (2018) eklr, Samwel Kimutai Koriri (Suing as personal and legal representative of the Estate of Chelangat Silevia) Vrs Nyanchwa Adventist Secondary School & Another (2016) eklr & Joshua Mungania & Another Vrs Gregory Omondi Angoya (2018) Eklr

44. He was not married and the trial court correctly awarded the dependency ratio of 1/3. Finally, also taking into account the restitutes of life and the official retirement age in Kenya, the court also awarded a multiplier of 30 years.

45. The Appellant has therefore not proved that the trial court erred in her apprehension of the applicable law and in her estimation of the damages awarded. There is therefore no basis upon which this court can interfere with the damages as awarded as the same was proportional and reflected the trend of previous, recent, and comparable awards.

Disposition

46. Having exhaustively analyzed all the issues raised in this appeal I find that the same has no merit and is dismissed with costs to the Respondent.

47. The Costs herein are assessed at Kshs.300,000/= all inclusive.

48. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 25th day of November, 2024.

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam/Susan Court Assistant