



Migwi (Legal Representative of the Estate of Nixon Gachira Migwi (Deceased)) v Auto Selection Kenya Limited & 4 others (Civil Appeal E144 of 2022) [2024] KEHC 16967 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E144 OF 2022
F WANGARI, J
DECEMBER 20, 2024**

BETWEEN

**NANCY WAMBUI MIGWI APPELLANT
LEGAL REPRESENTATIVE OF THE ESTATE OF NIXON GACHIRA MIGWI
(DECEASED)**

AND

**AUTO SELECTION KENYA LIMITED 1ST RESPONDENT
PHINIAS KIMATHI 2ND RESPONDENT
MOHAMED HASSAN 3RD RESPONDENT
MAOW HUSSEIN GABOW 4TH RESPONDENT
KIPRUTO L MENEGO 5TH RESPONDENT**

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Mr. G. Kiage (SRM) delivered on 18/08/2022 in Mombasa CMCC No. 482 of 2008. The Memorandum of Appeal dated 06/09/2022 raises the following grounds challenging judgment of the court:-
 - a. That the learned magistrate erred in law and in fact in dismissing the appellant suit with costs.
 - b. That the learned magistrate erred in law and in fact in misrepresenting the proceedings before him.
 - c. That the learned magistrate erred in law in fact in misapprehending the effect of the Notice of Motion dated 29th November 2021 and the resultant order dated 5th May 2022.



- d. That the learned magistrate failed to appreciate that there was an interlocutory judgment against the 2nd and 3rd Appellants (sic).
 - e. That the learned magistrate failed to appreciate the legal effect of an interlocutory judgment.
 - f. That the learned magistrate failed to determine the quantum of damages in any event
2. The Plaintiff dated 18/02/2008 claimed general and special damages for an accident which occurred on 23/02/2007, involving motor vehicle registration No. KAW 306J owned by the 5th Defendant and driven by the 2nd Defendant and motor vehicle regn. No. KAH 536X ZA 8735 owned by the 3rd Defendant and driven by the 4th Defendant. The Appellant blamed the 2nd and 4th Defendants being the drivers of the accident motor vehicles. The suit against the 1st Defendant/ Respondent was withdrawn.
 3. The Plaintiff particularized negligence on the part of the 2nd and 4th Defendants and the 3rd and 5th Defendants being vicariously liable. She also pleaded special damages of Kshs. 60,250/- and General Damages.
 4. The Defendants failed to enter appearance nor file Statements of Defence. Interlocutory judgment was entered against the Defendants and final judgment entered apportioning liability on 50:50 basis, 2nd and 5th Defendants on one part and 3rd and 4th Defendants on the other part.
 5. Subsequently, the 2nd and 5th Defendants filed a Notice of Motion dated 04/08/2011 seeking to have the interlocutory judgment entered against them be set aside. The application was allowed and judgment against them was set aside but the judgment against the 3rd and 4th Defendants remained intact. The 2nd and 5th Defendants thereafter filed their Statement of Defence denying liability in the accident.
 6. The Plaintiff thereafter filed a Notice of Motion dated 29/11/2021 seeking to set aside the final judgment against the 3rd and 4th Defendants.
 7. I have perused through the court proceedings and the statements of the Plaintiff witnesses, the eye witness Eliud Muri Mbuteti (PW2) and Sgt. John Kamau (PW3), a traffic police officer who testified on behalf of the investigating officer, both gave evidence blaming the truck driver, 3rd Defendant, for ignoring the traffic lights and ramming into the tuk tuk which had a right of way, causing the death of the deceased who was a passenger in the tuk tuk.
 8. Based on the evidence, the trial magistrate in his judgment found the 2nd and 5th Defendants blameless for the said accident. I have perused through the judgment I the Record of Appeal and I the Supplementary Record of Appeal, and only the 1st and last page of the judgment was filed. However, it is stated in the last paragraph that the Plaintiff by her own conduct wrecked her own case against the 3rd and 4th Defendants.
 9. From the reading of the pleadings and proceedings, it is deemed to mean that the Plaintiff having sought to set aside the interlocutory judgment against them, it was the duty of the Plaintiff to establish a case against them. The Plaintiff's case was dismissed with cost to the 2nd and 5th Defendants.
 10. Having been dissatisfied with the judgment of the court, the Appellant/ Plaintiff filed this appeal. It was directed that the appeal be disposed of by way of written submissions. Both parties complied by filing their rival submissions.



Analysis

11. I have considered the oral and documentary evidence on record. I have also perused through the submissions on record. The issue for determination is whether the trial court was justified in dismissing the Plaintiff's suit.
12. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. (See the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123).
13. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
14. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
15. From the evidence on record, it is a fact that the Plaintiff's witnesses blamed the 3rd and 4th Defendants for the accident notwithstanding the particulars of negligence by the 2nd Defendant as listed in the Plaintiff. The trial magistrate was in error by finding that there was no evidence blaming the 2nd and 5th Defendants for the accident and the death of the deceased.
16. As for the finding I respect to the 3rd and 4th Defendant, the Plaintiff sought for the setting aside of the interlocutory judgment against them. The application was allowed as it was not opposed. I do agree with the submissions by the Respondent that the setting aside of the interlocutory judgment would call for a retrial as against the 3rd and 4th Defendant. No summons were issued.
17. Further, it is submitted that the 3rd and 4th Defendants had already satisfied the decretal sum. As execution of the interlocutory judgment had been enforced by the Plaintiff. The Respondent was silent on the same. From the Record of Appeal, there is no indication that execution did take place. I shall leave it at that.
18. That notwithstanding, the fact that by restoring the suit to the state of summons, the interlocutory judgment having been set aside, failure to issue summons to have the 3rd and 4th Defendants defend the suit, was a fatal omission on the part of the Plaintiff/ Appellant, and I do concur with the statement of the trial court that the plaintiff wrecked her case.
19. On the failure to assess damages even after dismissing the suit, I do concur with the Respondent that that was an error on the trial court. All is not lost as this court shall proceed to assess the same. (See *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR). On the quantum of damages, the award is as hereunder;



i. Pain and Suffering

20. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis mine).

21. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, 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.
22. In Nairobi HCCC No. 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased vs. Elijah Oketch Adallah [2015] eKLR, the Court awarded Kshs 50,000/= on 6th February 2015 for pain and suffering where the deceased died shortly after the accident.
23. In Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & another vs. Hellen Karisa Thoya [2017] eKLR the court upheld an award Kshs 50,000/= on 4th October, 2017 and observed that although there was sudden death, it is clear that the deceased must have suffered a lot of pain.
24. In this case, the deceased died after he was taken to hospital. Cause of death as per the Certificate of Death is Hemorrhagic Shock due to multiple injuries sustained in a road traffic accident. The deceased having died the same day the accident occurred, I find that an award of Kshs. 50,000 would have been sufficient for pain and suffering.

ii. Loss of dependency

25. It is not dispute that the deceased was 37 years at the time of his demise. PW1 testified that the deceased worked as a supervisor earning Kshs. 1,200 per week. The same was not controverted. The deceased would have actively worked till the age of 60 years, being the normal retirement age. Considering the salary increment, I will work with a sum of Kshs. 10,000 as monthly income with a multiplicand of 23 years. Hence; $Kshs. 10,000 \times 23 \times 12 \times \frac{2}{3} = 1,840,000$.

iii. Loss of expectation of life

26. On the award of loss of expectation of life, Kshs. 100,000 would have been awarded. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

“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 award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

27. On special damages, the court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where it was stated that the Special Damages which is a specific pecuniary loss must be specifically pleaded.
28. I have perused the record filed in court and I find the Appellant indeed pleaded Kshs. 60,250/= for special damages. However, I find no documentary support of the same. The same would not have been awarded.

Determination

29. In the upshot, I make the following Orders:
 - i. The Appeal lacks merits and is hereby dismissed.
 - ii. Each party shall bear their own costs in the Appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF DECEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of: -

Maundu Advocate for the Appellant

Jengo Advocate for the Respondent

Brian, Court Assistant

