Ouma (Suing as legal representative of the Estate of the Late Peter Ouma Ngada - Deceased) v Wilson & another (Civil Appeal 158 of 2023) [2024] KEHC 16669 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16669 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 158 OF 2023

AC BETT, J

DECEMBER 19, 2024

BETWEEN

CHRISTINE ANYANGO OUMA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE PETER OUMA NGADA - DECEASED) .... APPELLANT

AND

WANJAU CHARLES WILSON .... 1ST RESPONDENT

SILVER BILL .... 2ND RESPONDENT

(Being an appeal from the Judgement and decree of Hon. J. Ndururi (SPM) in Kakamega CMCC No. 42 of 2016 delivered on 12th October 2023)

RULING

1. By a plaint dated February 9, 2016, the Appellant, suing in her capacity as the legal representative of the estate of the deceased, sought general damages under the *Fatal Accidents Act* Cap 32 and *Law Reform Act*, Cap 26 of the Laws of Kenya and special damages of Ksh. 95,240/=.

2. The suit arose from an accident that occurred on 18th October 2014, where it was claimed that the deceased was riding motorcycle Registration No. KMCF 178H (Bajaj) along Kakamega-Kisumu Road at Muraka area when the 1st Respondent drove the 2nd Respondent’s motor vehicle Registration No. KBQ 248B (Toyota Hiace) so negligently that it collided with the motorcycle causing the deceased to sustain fatal injuries. The Appellant set out the particulars of negligence on the part of the Respondent as well as the particulars of dependents of the deceased and claimed special damages of Kshs. 146,560/=.

3. In their defence, the Respondents denied the averments in the plaint and blamed the accident wholly on the deceased. They also set out particulars of negligence on the part of the deceased and attributed the accident to the said acts of negligence.

4. The case proceeded to hearing and the trial court dismissed the Appellant's case with costs on the basis that she had not proved her case against the 1st Respondent to the required standard. Further, the trial court held that the 2nd Respondent lacked capacity to be sued and dismissed its case with no order as to costs.

5. The Appellant was aggrieved by the decision of the trial court and appealed to this court on the following grounds:

   a. That the learned magistrate erred in law and fact by holding that the plaintiff did not prove her case against the defendant whereby the plaintiff adduced evidence over the same.

   b. That the learned magistrate erred in law and fact by finding that the deceased was to blame for the said accident because of an outcome of an inquest whereby no evidence of the purported inquest was produced.

   c. That the learned magistrate erred in law and fact in making a finding in favour of the 1st Respondent who admitted colliding with the deceased in the road traffic accident.

   d. That the learned magistrate erred in law and fact in failing to consider that the deceased was a boda boda rider and also sold newspapers and was in fact involved in the road accident while driving his motor cycle.

   e. That the learned magistrate erred in law and facts in assuming that the deceased was a general laborer and awarding minimum wage of Kshs. 4,577/=.

   f. That the learned magistrate erred in law and facts in assuming a minimum wage of Kshs. 4,577/= whereas the minimum wage applicable to a general labourer at the material time of the suit (2014) was Kshs. 4,854/=.

   g. That the trial magistrate erred in law and in fact in finding that the 2nd Respondent was a non-entity whereas the 1st Respondent admitted ownership of the name and also presented the said name to the police who indicated in the police abstract as the owner of the subject motor vehicle.

Submissions

6. The Appeal was canvassed by way of written submissions.

7. The Appellant submitted that the subordinate court should have apportioned liability in the ratio of 80:20 in favour of the Appellant because DW1 admitted that he swerved to avoid an oncoming motor vehicle and consequently collided with the deceased's motorcycle. It was averred that the 1st Respondent stated that his motor vehicle got damaged on the front and blamed the deceased for knocking him down. The Appellant submitted that an inspection report would have assisted the court in determining liability if the point of collision was known and which part of the motor vehicle was damaged. It was averred that although the 1st Respondent stated that an inspection was carried out on the subject motor vehicle, he did not produce the same. It was also advanced that despite the 1st Respondent testifying that an inquest as to the cause of death of the deceased was conducted whereby the deceased was found to have been the author of his misfortune, the 1st Respondent did not produce the said inquest proceedings and ruling in prove of his assertion.

8. It was further submitted that the police abstract produced by the Appellant confirmed that the subject motor vehicle belonged to the 1st Respondent and that the accident actually did occur and that the matter was still under investigation. The Appellant asserted that the circumstances of this case were

that there was no witness to the said accident except for the 1st Respondent and the deceased person. It was contended that whatever way the accident occurred, the Respondent had the duty to exercise care and attention as a driver of a motorized vehicle in order to avoid injuring other road users. The Appellant relied on the case of Hussein Omar Farah Vs Lento Agencies (2006) eKLR which expressed the same views.

9. The Appellant's advocate argued that the 1st Respondent did not deny being the owner of the subject motor vehicle since he confirmed that the subject motor vehicle belonged to him. It was advanced that courts have apportioned liability at 50:50 where it was not clear who was to blame for the accident. Reliance was placed the cases of Henry Shikonga Wamukoya (suing as the administrator of the Estate of the Late Elphas Wakhule Wamukoya) Vs Makokha Sylvester, Hussein Omar Farah Vs Lento Agencies (2006) eKLR, Tipper Hauliers Limited & Salim Jalala Mwaita Vs Mercy Chepngeno Towet & Another (2021) eKLR, Anne Wambui Ndiritu Vs Joseph Kiprono Ropkoi & Another (2004) eKLR and Valley Bakery Ltd & Another Vs Musyoki (2005) eKLR.

10. On quantum, the Appellant's advocate submitted that they are in agreement with the proposed award given by the trial court in the case that their claim would have succeeded, save for loss of expectation of life and the formula of calculation of dependency. They posited that Kshs. 200,000/= would suffice for loss of expectation of life. They cited the case of Jamal Aleem Versus Jane Chebore Too (Suing as administrator and/or personal representative of the estate of Stephen Kipkemoi Koros) where the court upheld an award of Kshs. 150,000/= for loss of expectation of life in 2018.

11. On the formula relied on in the calculation of dependency, the Appellant counsel averred that the deceased sold newspapers and was also a boda boda rider and that despite the absence of proof of earning, the subordinate court should have awarded at least Kshs. 15,000/= per month. They relied on the case of Miriam Moraa Vs J.O.O & Another (suing as a legal representative of the estate of VNO) (2021) eKLR where the court held that:-

> " 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 his dependants."

12. The Appellant further relied on the case of Jacob Aviga Maruva & Another Vs Simeon Obaya (2005) eKLR where the court held that it is possible for one to hold a paid job or earn from an employment without formal documentation particularly in the informal sector and employment. The Appellant posited that in the instant case, there was proof that the deceased was a boda boda rider and earned therefrom. They acknowledged that the trial court's adoption of the sum of Kshs. 10,000/= per month was justified but they alternatively proposed that the court adopts a sum of Kshs. 15,000/= per month as the earnings of the deceased.

13. The Appellant proposed that the final award should be as follows:

    i. Pain and suffering Kshs. 100,000

    ii. Loss of life Kshs. 200,000

    iii. Loss of dependency (15,000 x 12x 18x 2/3) Kshs. 2,160,000

    iv. Special Damages Kshs. 165,000

    Total Kshs. 2, 625,000/=

    Less 20% Liability Kshs 2,100,000/=

14. On their part, the Respondents argued that the Appellant failed to prove negligence against the 1st Respondent and contended that the trial magistrate was right in dismissing the suit. It was submitted that it was the duty of the Appellant to prove liability against the Respondents but she failed to. They relied on the case of Treadsetters Tyres Ltd -VS- John Wekesa Wepukhulu (2010) eKLR where the court held that the onus is on the plaintiff to adduce evidence of the facts of which he bases his claim for damages. They further relied on the case of Eastern Produce (K) Limited Vs Christopher Atiado Osiro (2006) eKLR where the court enunciated similar principles.

15. Counsel for the Respondents averred that grounds a), b), and c) of the Memorandum of Appeal dated 16th October 2023 are devoid of merit and the instant appeal is unwarranted. The Respondents argued that the Appellant did not prove that the 2nd Respondent was the owner of the subject motor vehicle nor was there any legal basis for having enjoined the 2nd Respondent in the suit herein which renders ground g) of the appeal without basis in law and fact. They posited that the trial magistrate held that the 2nd Respondent herein had no legal capacity to be sued, and the Appellant did not produce any evidence to the effect that the 2nd Respondent is a legal entity capable of being sued.

16. On quantum, the Respondents submitted that grounds d), e) and f) of the Memorandum of Appeal on the issue of quantum have no merit. They further averred that the Appellant has not appealed on the assessment of loss of expectation of life since grounds d), e), and f) do not refer to loss of expectation of life but are instead in relation to the occupation of the deceased and the adoption of the minimum wage that the trial magistrate used. They submitted that the Appellant is bound by her Memorandum of Appeal and cannot introduce another ground of appeal that was not contained in the Memorandum of Appeal.

17. It was argued that the trial magistrate's award of Kshs. 100,000 under loss of expectation of life was reasonable and in keeping with the comparable awards for deceased of similar age. The Respondents relied on the case of Antony Njoroge Ng'ang'a (Legal Representative of the estate of the late Fred Ng'ang'a Njoroge) Vs James Kinyanjui Mwangi & 2 Others (2022) eKLR where a similar award was given for the deceased who was 42 years old like the deceased herein.

18. On the loss of dependency, the Respondents submitted that even though the Appellant averred that the deceased was a business man and a boda boda rider, no motorcycle driving license or proof of ownership of a motor cycle was produced in evidence. They further contended that the Appellant claimed that the deceased would supply newspapers to a school, but nothing was produced to corroborate her oral testimony. They averred that the Appellant's claim that the deceased used to earn around Kshs. 20,000/= per month was not backed by any documentary proof or a letter of appointment to prove that indeed the deceased was employed or even evidence of the contract to supply newspapers to the school.

19. It was submitted that although the Appellant claimed that she had 5 children with the deceased, she failed to produce the children's birth certificates or even a letter from the chief to authenticate her claim. They further averred that there was no proof to ascertain the claim that the deceased paid school fees. They relied on Section 109 of the *Evidence Act* which provides that:-

> " The burden of proof as to a particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

20. The Respondents submitted that the trial magistrate, for want of proof of the income availed, should have awarded a global award in keeping with the principles enunciated by the high court and guided

by comparable awards. They relied on the case of Albert Odawa Vs Gichimu Gichenji (2007) eKLR where the Judge was of the same view.

21. The Respondents argued that the multiplier approach is just a method of assessing damages but not a principle of law or dogma. They contended that on the account of the deceased having died at the age of 42 years and given the vagaries of life as well as comparable awards, the sum of Kshs. 600,000/= is a reasonable award for loss of dependency. They relied on the case of Gilbert Kimatare Nairi & Another (suing as personal representatives of the estate of Lemayian Richard Kimatare (deceased)) Vs Civiscope Limited (2021) eKLR.

22. The Respondents submitted that this honourable court should dismiss the Appellant's appeal with costs for want of merit.

Analysis

23. This being a first appeal, the Court is mandated to judiciously reconsider and re-evaluate the evidence and make its own determination keeping in mind the fact that it neither saw nor heard the witnesses' testimonies. This principle was espoused in the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, where the court held as follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, in particular the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

24. Having considered the evidence adduced in the lower court and the judgement of the court thereof, the rival submissions by the parties, and the authorities they have relied upon, the pertinent issues presented for determination are as follows:

    1. Whether the Appellant proved her case against the Respondents on a balance of probabilities

25. The law on the burden of proof is well settled. Sections 107 -109 of the *Evidence Act* provide as follows:-

> " 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Who would fail if no evidence at all were given on either side.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

26. Courts have time and again expressed their views in regard to who bears the burden of proof between two parties in a suit. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

27. Similarly, the court in Muthoka & another (Suing as Administrators and Legal Representatives of the Estate of the Late Elijah Maina Wangui) v Ndirangu & another (2024) eKLR enunciated thus:-

> " It follows that the initial burden of proof lies on the Plaintiff on the matters they assert and on the defendant on the matters they assert. The evidential burden can shift to the other side and crystalize if not rebutted. Therefore, the burden is not on the plaintiff, or the defendant, it is on the party who alleges. That is essentially the place of pleadings. Whereas parties tend to have generic particulars of negligence, it is incumbent upon a party raising specific issues to prove them. As such the burden of proving negligence is on the plaintiff while contributory negligence is on the defendant."

28. Having asserted which party the burden of proof lies on from the authorities above, I will delve into what amounts to proof on a balance of probabilities. In Re H and Others (Minors) [1996] AC 563, 5 the court held as follows on the degree of proof in civil matters:-

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

29. The Court of Appeal in Palace Investment Ltd –vs-Geoffrey Kariuki Mwenda &Another [2015] eKLR cited with authority the case of Miller –vs- Minister of Pensions [1947] 2 All ER 372 and stated as follows:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

30. In the instant case, it was incumbent upon the Appellant to demonstrate that the accident occurred as a result of the Respondents' negligence. It is only then that the burden of proof would shift to the Respondents to prove that there was no negligence on their part.

31. The Appellant testified as PW1 in the trial court and stated that on 17th October 2014, the deceased, who was a boda boda operator, left home but did not return. She stated that she went to search for him the following day and found out that he had been in General Hospital but had passed on from the injuries he had sustained in the accident he was involved in. She produced a postmortem report, and police abstract as exhibits to prove that the deceased was involved in an accident where the 1st Respondent knocked him down. In cross-examination, she stated that she did not witness the accident and that she found out that the 1st Respondent was responsible through the police abstract. The Appellant did not call any other witness to testify in support of her case.

32. It was this evidence that the court deemed insufficient to prove negligence to the required standard against the Respondents.

33. From the evidence on record, it is not in dispute that the 1st Respondent was the owner and driver of the accident motor vehicle. The police abstract indicated the owner of the accident motor vehicle as Silver Bill. The 1st Respondent asserts that Silver Bill is an unregistered entity which should not have been sued. He testified that the name Silver Bill was written on the door of the vehicle, and he does not know why the police indicated Silver Bill as the owner. He also said that Silver Bill is just a name he was using. It is not clear whether Silver Bill is a trade name, however. What is clear from the evidence is that the 1st Respondent admitted that the car was in his name.

34. The argument by the Appellant that the trial court erred in holding that she did not prove that the 2nd Respondent was a legal entity capable of being sued cannot hold. In the face of the copy of the records from the Registrar of Motor Vehicles, the 1st Respondent's admission that he was the owner of the accident motor vehicle, and his assertion that Silver Bill was a name he used on the said accident motor vehicle, the onus of proving that the 2nd Respondent was a legal personality capable of suing and being sued lay on the Appellant. The Appellant did not adduce evidence to prove that the 2nd Respondent is a competent legal entity. This could have been done by production of a copy of a search from the Registrar of Companies but clearly the Appellant only relied on the police abstract in presumption that the details therein were proof of legal capacity. This presumption was contested in the 1st Respondent's testimony. For the said reasons, I find that the trial court did not err in holding that the 2nd Respondent did not have capacity to be sued. The claim against the 2nd Respondent could not be sustained and was rightfully dismissed.

35. I note that the Appellant, in her plaint dated 9th February 2016, pleaded the applicability of the doctrine of Res ipsa loquitur.

36. The Court of Appeal, in the case of Margaret Waithera Maina v Michael K Kimaru [2015] eKLR held as follows on res ipsa loquitur:

> " Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth &Percy on Negligence, 12th edition, appears this passage: Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine: I think that it is no more than an exotic although convenient; phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. The question whether to apply the maxim has usually arisen where the claimant is able to prove

the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."

37. I am persuaded by the decision of the court in the case of Muthoka & another (Suing as Administrators and Legal Representatives of the Estate of the Late Elijah Maina Wangui) v Ndirangu & another (Supra) where the court held that:-

> " In cases like this where one party is deceased and there are no eye witnesses it will be placing a humongous burden to show the exact cause of the accident. However, where it can be inferred that there was negligence in the circumstances of the case, the burden of disproving the negligence is on the party alleging that the facts do not speak for themselves."

38. Further, in Mukusa vs. Singa & Others (1969) E. A 442, the court held as follows :-

> " The doctrine of Res ipsa loquitur is concerned with the onus of proof and is not a substitute for proof of negligence…The plaintiff must first plead the particulars of negligence on which he relies, and which will be binding on him, before he can shift the onus of disproving negligence on the Applicant."

39. In the instant case there was no eye witness to shed light on how the accident occurred. The police abstract on record was not helpful in apportioning liability to any party. The Appellant however, proved that an accident occurred indeed and that the 1st Respondent was driving the suit motor vehicle at the material time. The Appellant also pleaded the particulars of negligence on the 1st and 2nd Respondent in her plaint.

40. Given the circumstances under which the accident occurred, being that there were no eyewitnesses since it happened in the wee hours of the night, it would be extremely difficult for the Appellant to prove the negligence by the Respondents. I am therefore of the opinion that the Appellant imported the doctrine of Res Ipsa Loquitur, rightfully so, and having pleaded the particulars of negligence in his pleadings, the burden of disproving the alleged negligence shifted to the Respondents.

41. The 1st Respondent testified in the trial court as DW1 and stated that he was driving from Kisumu to Kakamega on the morning of 18th October 2014 at around 1:00 a.m. He averred that there was a motor vehicle ahead of him that did not have lights. According to him, he tried to swerve to avoid a collision. He stated that he was driving at a speed of 60 Kilometers per hour. He collided with the motorcycle whose rider was riding very fast and was approaching his lane. He stated that he stopped to pick the rider and take him to Kakamega County General Hospital. He averred that the rider did not have any identification and that the only thing he found was a small bottle of alcohol. He further testified that he was later summoned to Kakamega Law Courts to testify in Inquest No. 3 of 2015 and that the conclusion of the inquest was that the rider did not have a licence and was to blame for the accident.

42. In cross-examination, the 1st Respondent averred that the middle part of the vehicle and the whole windscreen was shattered. He reiterated that the rider was driving towards Kisumu and that the point of impact was on the left side of the left-hand side of the road heading to Kakamega. He averred that it was not raining and the visibility was good. He also stated that the police did not go to the scene immediately.

43. I have carefully analyzed the 1st Respondent's evidence. I find it difficult to believe that the 1st Respondent was driving at 60 Kilometres per hour as he allegedly claimed. If that was so, he would have noticed the car ahead of him in time to brake or slow down to avoid the collision regardless of the fact that the vehicle did not have lights since visibility was said to be good. The act of swerving is normally done when a driver is too close to an obstacle that it would be impossible to apply the brakes or to slow down on time. Secondly, since the 1st Respondent swerved to avoid the collision, then he must have swerved towards the other side of the road and onto the path of oncoming motorists. He can therefore not be heard to say that the deceased, who was coming from the opposite direction, was on his side of the road. What most probably occurred is that the 1st Respondent did not exercise due care and failed to control his motor vehicle so as to avoid the accident. Equally, the deceased may have also been driving fast and in the middle of the road and was not mindful of other road users and therefore did not swerve on time to avoid the collision. Since there are no witnesses to the accident and dead men tell no tales, the question is whether the court should accept the 1st Respondent's evidence on the causation of the accident.

44. The 1st Respondent did not produce any proceedings or copy of the ruling to support his averments that the inquest that was allegedly conducted determined that the deceased was to blame for the accident. He also did not produce any evidence on his averments that the deceased was drunk as he alleged. Such pieces of evidence would be very critical to the Respondent's case to prove that negligence was wholly attributed to the deceased. The court in the case of Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR cited with authority the case of Bukenya & Others vs. Uganda [1972] EA 549 and held that:-

> "It is a well-known rule of evidence founded on section 119 of the *Evidence Act* that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination."

45. Considering the weight that the proceedings of the alleged inquest would have had in proving the 1st Respondent's allegations on the issue of liability, the failure to produce such evidence invites this court to make an inference that the inquest proceedings would have been detrimental to the 1st Respondent's case. Further, considering the fact that the deceased is not around to propound his case, this court is reluctant to accept the oral and uncorroborated evidence of the 1st Respondent as a true account of what actually transpired.

46. Based on the evidence that was before the trial court, it is not clear who, between the deceased and the 1st Respondent, is to be held liable for the accident. The Appellant insisted that the Respondents bore the negligence, but she did not produce any evidence to support her case. The 1st Respondent also apportioned the blame to the deceased, but he equally did not adduce any evidence to support his claim. Courts have time and again been faced with similar situations. The Court of Appeal in the case of Hussein Omar Farah Vs Lento Agencies (2006) eKLR stated that:-

> "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."

47. Based on the lack of precision in the evidence tendered by the 1st Respondent, and the lack of evidence by the Appellant in this case, I therefore apportion liability to each party equally.

2. Whether the trial court rightfully assessed the quantum

48. The principles upon which an appellate court will disturb an award of damages are well settled. An appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages. It was held in the case of Butt v. Khan [1982-1988] KAR 1 thus:-

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrive at a figure which was either inordinately high or low."

49. The Appellant's Counsel submitted that they are in agreement with the lower court's proposed awards except for loss of expectation of life and the formula for calculation of dependency.

50. The trial court proposed a sum of Kshs. 100,000/= for the loss of expectation of life. The Appellant was however averse to the award and her advocate proposed an award of Kshs. 200,000/= for the loss of expectation of life.

51. In Benham vs Gambling, (1941) AC 157 the court expressed that caution should be exercised in granting high awards under the loss of expectation of life for the following reasons:- "In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."

52. Further, the court in the case of Mercy Muriuki & Uwezo DTM Limited v Samuel Mwangi Nduati & anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR) held 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 awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

53. Since it was undisputed that the deceased was 42 years old and the Appellant has not furnished any reason as to why the award of Kshs. 100,000/= should be considered as being inordinately low, I do not find any reason to disturb the finding of the trial court under loss of expectation of life.

54. On the issue of dependency there is a letter from the area Chief on the record that introduced the Appellant as the wife to the deceased. There was no reference to children. The said letter from the area

Chief is in my considered view sufficient proof of dependency in respect to the Appellant. In the case of Rahab Wanjiru Nderitu v Daniel Muteti & 4 others [2016] eKLR, the court held that:-

> " The plaintiff must prove dependency .If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same."

55. As regards the deceased's earnings, the Appellant's counsel submitted that the deceased sold newspapers and was also a boda boda rider and the subordinate court should have awarded at least Kshs. 15,000/= per month on loss of dependency. The trial court held that since the Appellant did not produce any evidence to support the claim that the deceased was earning Kshs. 20,000/= per month, the court would have assumed that the deceased was a general labourer and used the minimum wage applicable at the material time, which was Kshs. 4,577/-.

56. Despite the Appellant faulting the trial court's finding on what constituted the minimum wage at the time of the accident, there was no evidence adduced in proof of the correct minimum wage. I have no reason to disturb the said finding. The Respondents have urged the court to give a global award in view of the fact that there was no proof of income. Relying on the case of Gilbert Kimatare Nairi & Another (suing as personal representative of the Estate of Lemayian Richard Kimatare (deceased) v Civiscope Limited (supra) ,they submitted that a sum of Kshs. 600,000/= would be reasonable.

57. On perusal of the trial court's record, I find that the Appellant did not adduce any evidence to support her averments as to the deceased's earnings. This court would have adopted the global award approach, but the trial court's award is slightly higher than the award proposed by the Respondents and does not represent a huge departure from the prevailing awards in similar circumstances.

58. In the case of Muthuri v Njagi & Another (suing as legal representatives of the Estate of Michael Waiganjo Ngare) [2023] KEHC 24224(KLR), the appellate court applied the gazetted minimum wage for unskilled workers in making an award for a deceased who was said to be a mason due to the fact that there was no proof of earnings .Guided by the aforesaid, and the principles laid down in Butt v Khan (supra) and further guided by the holding in Kemfro Africa Limited t/a Meru Express Services (1976) & Another v Olive Lubia & Another [1987] KLR, I find the award by the trial court was not so inordinately low or so inordinately high as to represent an erroneous estimate of the damages. The trial court cannot be faulted for exercising his discretion in the manner that he did, and this court does not find a reason to disturb the award.

59. In the end, I find that the Appellant partially succeeds on the issue of liability in that liability ought to have been equally apportioned. The judgement of the lower court is therefore reversed. Instead, judgement is entered in favour of the Appellant as against the 1st Respondent as follows:-

    Liability 50:50

    General damages for pain and suffering Kshs. 100,00/=

    General damages for loss of expectation of life Kshs. 100,00/=

    Loss of dependency Kshs. 695,088/=

    Total Kshs. 895,088/=

    Less contribution Kshs. 447,544/=

    Special damages Kshs. 165,000/=

Total Award Kshs. 612,544/=

60. It is trite law that costs follow the event. The Appellant shall have the costs of the lower court and the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Masika holding brief for Ms. Shibanda for Appellant

Mr. Thuo for Respondent

Court Assistant: Polycap