Makuto v Saenyi & another (Suing as the Legal Representative of the Estate of Victor Juma Saenyi) (Civil Appeal E014 of 2022) [2023] KEHC 425 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEHC 425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E014 OF 2022

DK KEMEI, J

JANUARY 20, 2023

BETWEEN

PATRICK FEDHA MAKUTO ..... APPELLANT

AND

DICKSON WAFULA SAENYI ..... 1ST RESPONDENT

MARGARET NANGEKHE ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF VICTOR JUMA SAENYI

(Being an Appeal against the judgement and decree of the Hon.D. Ogal Senior Principal Magistrate delivered on 9th February 2022 in Kimilili SPMCC No. 19 of 2021)

JUDGMENT

Background

1. This appeal is against liability and the award of quantum by the trial court in respect of an accident involving motor vehicle registration number KCN 925D make Subaru Forester and motorcycle registration number KMFC 978U make Boxer which occurred on or about 18th September 2020 at 2130hrs at Kamukuywa area along Webuye-Kitale road wherein the deceased sustained severe bodily injuries resulting to his death while undergoing treatment. The Respondents vide a plaint dated 28/1/2021 prayed for orders against the appellant for: general damages under both the *Fatal Accidents Act* and the *Law Reform Act*; special damages; interest and costs of the suit at court rates.

2. Upon service, the Appellant entered appearance and filed a defence seeking the dismissal of the Respondents' suit with costs, denied ownership of the motor vehicle registration number number K.C.N 925D make Subaru Forester and denied the occurrence of the alleged accident, and in the alternative attributed the accident to the negligence of the Respondents.

3. The trial court upon consideration of the evidence, entered judgement in favour of the respondents which precipitated the present appeal.

4. This is a 1st appeal and as such the role of the court is to re-evaluate, re-assess and re-analyze the evidence which was tendered before the trial court and arrive at its own independent conclusions. This has been stated in various authorities and in Abok James Odera Trading as Odera & Associates v John Patrick Muchira & Company Advocates (2013) e KLR, the Court of Appeal re-stated the duty of the first appellate court which is that the court has to re-evaluate the evidence and come up with its own finding and also determine whether the conclusions reached by the trial court are to stand or not, and give reasons either way.

5. A perusal of the lower court record reveals that the matter proceeded to full hearing on assessment of quantum of damages.

6. PW1, Dickson Wafula Saenyi, adopted his recorded statement as his evidence in chief. He told the court that the deceased, on or about the 18th day of September, 2020 at Kamukuywa area along Webuye-Kitale road at 2130hours, was lawfully travelling as a pillion passenger on motor cycle registration number KMFC 978U make Boxer when the Appellant and/or his agent negligently and carelessly managed and/or controlled motor vehicle registration number KCN 915D make Subaru Forester that it lost control and rammed into the deceased hence occasioning fatal injuries that he died while undergoing treatment at Kory Hospital. He blamed the accident on the negligence of the Appellant and informed the court that the deceased died at the age of 20 years and who was of good health and a student at the time. He finally told the court that the deceased's dependents were Dickson Wafula Saenyi (paternal uncle), Justus Nyongesa (father) and Margaret Nangekhe(mother). The court allowed the documents filed in court to be adopted as exhibits in the manner they appear save for the abstract. He told the court that he paid Kshs. 45,000/= to the Kory dreams, Kshs. 15,000/=for the limited grant, Kshs. 550/= for the copy of motor vehicle records and Kshs. 1145/= as court fees for the Ad litem.

7. On cross-examination, he told the court that he was not at the scene of the accident and that the deceased was a student as he was in class eight and who used to depend on his family.

8. On re-examination, he told the court that the deceased was in class four and not eight.

9. PW2, Veronica Monica Namasaka, adopted her recorded statement as her evidence in chief. She told the court that she was a student at John Buko and that she was an eye witness on the accident that claimed the life of the deceased. On cross-examination, she told the court that she was off the left side of the road facing Kamukuywa direction, walking and that the motorcycle was coming from behind her as the motor vehicle was coming from the opposite direction from Kitale. The accident occurred on the left side of the road facing Kitale direction. She stated that the motor vehicle while trying to avoid knocking another vehicle swerved to the left and instead knocked the motorcycle and that the accident occurred at 8.30 pm and that the motorcycle had the headlights on.

10. On re-examination, she told the court that as a result of the vehicle knocking the motor cycle it equally knocked her.

11. PW3, NO. 72276 PC Bramwel Wanyonyi, told the court that he was based at Kimilili Sub-base and wished to produce the police abstract that was recorded vide OB 50/18/09/2020. He told the court that the accident involved motor vehicle registration number KCU 915D and a motor cycle registration number KMTC 978U Boxer. The accident occurred at 2030 hrs along Kitale-Webuye road and that the owner of the motor vehicle was the appellant herein. He told the court that as a result of the accident the pillion passenger succumbed to injuries while undergoing treatment and that the matter was still under investigation.

12. On cross examination, he told the court that he was not the investigating officer and did not visit the scene and thus could not ascertain on which side of the road the accident occurred.

13. On re-examination, he told the court that the matter was still under investigation and that he was not the investigating officer.

14. At the close of the respondents' case, the defence called DWI, Patrick Fedha, who adopted his recorded witness statement dated 20th April 2021 as his evidence in chief. He told the court that the motor cycle was carrying four passengers who included the rider and three other passengers and that they were not wearing jackets. He blamed the rider for the accident as he entered the road from the wrong side and wished the case to be thrown out.

15. On cross-examination, he told the court that he was heading to Webuye from Kitale and was on the right side facing Kitale. He emphasised that the motorcycle was on the right lane of the main road and that the accident occurred on the left lane and that the same occurred at 7.30 pm and not 9.30 pm as alleged.

16. On re-examination, he reiterated that the motorcycle had four people and that he had not been charged with any traffic case.

17. On consideration of the matter as a whole, the learned trial magistrate held that as per the police abstract produced by PW3, the deceased was a pillion passenger aboard the motorcycle meaning that he was not in control of the same and could not be blamed on how the motorcycle was driven. He proceeded to hold the appellant solely liable for the accident and awarded the respondents general damages under the *Law Reform Act* as follows: pain and suffering-Kshs. 30,000/= and Loss of expectation of life-Kshs. 100,000/=; under *Fatal Accidents Act* as follows: Loss of dependency-Kshs. 1, 300,000/= and special damages to a tune of Kshs. 61, 995/= plus costs and interest.

18. Aggrieved by the judgment of the trial court, the appellant filed his memorandum of appeal dated 15th February, 2022. The grounds are essentially:

    a. That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable in negligence without taking into account the evidence on record.

    b. That the learned trial magistrate erred in law and fact in failing to take into account the evidence on record hence arriving at a wrong decision on the issue of liability.

    c. That the learned trial magistrate erred in law and fact by failing to apportion liability on the part of the respondent in view of the evidence adduced.

    d. That the learned trial magistrate erred in law and fact by failing to consider the submissions by the Appellant.

    e. That the learned trial magistrate erred in law and fact in adopting the wrong principles in the assessment of damages payable to the respondent thereby arriving at an erroneous decision.

    f. That the learned trial magistrate erred in law and fact by awarding the Respondents Kshs. 1, 300,000/= for lost years which is inordinately high bearing in mind the deceased was a high school student aged 20 years and thus not working and/or was not engaged in any service and had no source of income.

    The Appellant prayed for orders inter alia; that appeal to be allowed and the subordinate court's judgement on liability be set aside and substituted with an order dismissing the Respondent's suit with

costs; that the award for lost years/loss of dependency be set aside and same be re-assessed downwards and that the costs of the appeal be awarded to the Appellant.

19. By directions of the court, parties canvassed the appeal by way of written submissions. Both parties duly filed and exchanged submissions.

20. On liability, it was submitted for the appellant that the Respondents did not establish their burden of proof as outlined under section 107, 108 and 109 of the *Evidence Act*. Counsel urged this court to find the rider of the motor cycle 100% liable for the occurrence of the accident and that the Respondents' suit be dismissed with costs.

21. On quantum, the Appellant submitted that no documentary evidence was availed to prove that the deceased was a student and from the death certificate, the deceased was a student attending class eight and if he was in primary school then he depended on his parents. Counsel relied on the case of P1 vs Zena Roses Limited & another (2015) eKLR. Counsel submitted that the trial court failed to take into account that no evidence for academic performance was tendered to prove the deceased's capabilities and that the deceased was a student depending on his parents. He urged this court to substitute the Kshs. 1, 300,000/= award with Kshs. 700,000/= and relied on the case of Kegen Limited & Another vs Jane Nesunga Khula (suing as the personal representatives and administrator of the estate of Alex Wekesa Nyongesa(deceased) (2017) eKLR where the court adopted a global sum of Kshs. 500,000/- for a deceased aged 17 years and 6 months at the time of his death.

22. The Respondent submitted that the Appellant was fully to blame for the accident as the deceased was merely a pillion passenger and was never in control of the motor cycle. Counsel relied on the case of Masembe vs Sugar Corporation and another (2002) 2 EA 434 and James Gthirwa Ngugi vs Multiple Hauliers (EA) Limited & another (2015).

23. On quantum, the Respondents submitted that the award of the trial court was reasonable and as per the set legal principles. Counsel relied on the cases of Mohamed Mohamoud Jobane vs High Shine Butty Tongoi CA no. 2 of (1986) KLR vol.1, Ugenya Bus Service vs Gachuki CA no. 66 of (1981) (1986) KLR 567 and Southern Engineering Co. Ltd vs Musinga Muhia (1985) KLR 730

24. It was therefore submitted that, this appeal should be dismissed with costs to the Respondents as it is unmerited.

Analysis and determination

25. For emphasis, I wish to reiterate that this is the first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am duty-bound to re-evaluate and reconsider the evidence adduced before the trial court in order to draw my own independent conclusions remembering that, unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See Selle V Associated Motor Boat Company ltd (1968) EA 123; Williamson Diamond Ltd V Brown (1970) EA 1.

26. The issues cropping up in this appeal are basically two namely, whether the trial court was right in its finding on liability and whether this court should interfere with the award made by the trial court.

27. For emphasis, it is trite this is a first appeal to the court and as provided in the well settled principles, I am entitled to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before him, that advantage is not availed this court (See Peters Vs Sunday Post Limited [1958] EA 424.)

28. The Court also in the cases of Bundi Murube V Joseph Omkuba Nyamuro [1982-88]1KAR 108 had this to say; -

> " However, a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did." And also, in Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90 Law JA also stated; -
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> "An appellant Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanour of witnesses who have given evidence before him."

Liability

29. There is no doubt that these principles lie at the heart of this appeal. Whereas it is true that the accident involved a motor cycle and a motor vehicle, the burden of proof that the accident was caused by the negligence on the part of the Appellant lay squarely with the Respondents. That is the issue which stood out throughout the trial before the learned magistrate.

30. From the Judgement, the learned trial magistrate had to decide on a balance of probabilities who between the Appellant and the Respondent caused the accident. The starting point was for the Respondent under section 107 of the *Evidence Act* to present admissible material evidence for the trial court to give judgement in their favour on the proven facts to support negligence on the part of the Appellant. The court in Ciabaitani M'Mairanyi & Others V Blue Shield Insurance Co. Ltd CA No.101 of 2000(2005) 1EA 280 held that; -

> " Whereas under section 107 of the *Evidence Act*, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence."

31. In my interpretation of sections 107 and 108 of the *Evidence Act*, it places the burden of proving a fact on the party who asserts the existence of any fact in issue relevant to form the onus of proof which may shift from him or her to the Defendant. Lord Denning in Miller V Minister of Pensions [1947] 2 All ER at 374 held as follows;

> " If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion the way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The 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 the tribunal can say, 'We think it more probably than not', the burden is discharged, but, if the probabilities are equal, it is not."

32. Therefore, pleadings continue to be crucial in civil cases as the foundation upon which evidence is introduced to establish the facts in issue. Accordingly, it was the appellant's responsibility to establish

that the accident actually happened and that the respondent's negligence caused it to interact as it did. Furthermore, the court must presume the presence of certain circumstances in accordance with section 109 of the Act. The following is stated in this Act: -

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

33. This argument makes it clear that the types of proof that are required of litigating parties vary widely, as do the obligations that each type of burden of proof puts on a party. In the present instance, the learned trial magistrate had to decide whether the appellant had proven the existence of a fact demonstrating the respondent's negligence. If there is a prima facie case, the appellant must show the existence of a fact that implies the respondent now has the burden of establishing the veracity of the presumptive facts; otherwise, the trial court must uphold the inference.

34. The entire trial was basically on the law of negligence and liability on the part of the appellant. The correct statement of the test on the ingredients of this tort is as defined by Clerk & Lindsell on Torts 18th Edition in the following passage; -

There are four requirements for the tort of negligence namely; -

1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.

2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;

3. a causal connection between the defendant's careless conduct and the damage;

4. that the particular kind of damage to the particular claimant is not so unforeseeable as to been too remote. When these four requirements are satisfied the defendant is liable in negligence.

> " A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."

35. As a matter of fact, to begin with these were the ingredients of the Respondent's claim. My re-evaluation of that evidence is that it is clear that there is not causal connection between the Respondent and Appellant's breach of the duty of care. The deceased was simply a pillion passenger heading to his destination and lacked any control of the driving of the motorcycle at the time of the accident. He did not owe the motor vehicle driver any duty of care from his position as a pillion passenger. At this juncture, I find the decision of the trail court was appropriate and I do uphold the same. In any event, it is instructive that the appellant did not deem it necessary to enjoin the motor cycle rider as a

party so as to claim contribution and or indemnity over the accident. The deceased was not under any obligation whatsoever to see to it that the rider did not come into contact with the appellant's vehicle and further that the respondents were not under any obligation to sue the rider of the motor cycle since their concern was to pursue the appellant whose vehicle had hit the motorcycle thereby killing the deceased. The evidence of the eye witness left no doubt that it was the appellant who lost control of his vehicle and rammed onto the motorcycle thereby killing the deceased who was then a pillion passenger. The appellant's claim that he had a tyre burst will not come to his aid since he was duty bound to ensure that his vehicle was properly serviced and was road worthy before venturing onto the road. Consequently, the finding of liability by the learned trial magistrate was quite sound and I see no reason to interfere with it.

Quantum

36. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate)."

37. It was also held by the same court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

38. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

39. As the appeal also challenges the trial magistrate's decision on quantum of damages, it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with the

damages awarded by the trial court. In the celebrated case of Kemfro Africa Limited t/a Meru Express Services (1976) & Another V Lubia & Another (No. 2) (1985) eKLR, the Court of Appeal expressed itself as follows; -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...".

40. In Mariga V Musila (1984) KLR 251 the same court also stated as follows:

> " The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles...".

41. It is the law in Kenya that general damages must be compensatory. When one looks at the impugned judgment, it must be fair in the sense of what the claimant suffered. In my view whether at the trial court or on appeal, claimants should not aspire to a perfect compensation. They should take what has reasonably been found by the court as a fair compensation since the said award cannot by any chance replace a damaged part of a human body but that the same suffices as the tortfeasor's earnest response (sorry for the accident).

42. Guided by the above principles, I now proceed to highlight that the trial court noting the lack of evidence from the Respondents in form of report cards or even evidence of his interest in life, the court cautioned itself of the reliance of speculative figures and proceeded to rely on a global method approach.

43. The learned magistrate relied on the decision of Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] eKLR where the court dealing with a similar issue, stated:

> " 23. In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.
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> 24. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

44. He was further guided by the cases of Florence Mumbua Ndoo & Francis Kioko (suing as the Administrator and Personal Representative of the late Alfred Safari) v Ezra Korir Kipngeno & another (2017) where an award of Kshs. 700,000/= was made to the estate of a 20-year-old deceased person in the absence of proof of any earnings; Geoffrey Obiero & another v. Kenya Power & lighting corporation limited & another (2019) where the court awarded Kshs. 1, 200,000/- in the instance of a 25-year-old deceased young man and the case of Makueni Courts Ltd & another vs Felistus Kanini

Ndunda ((suing as the Administrator and Personal Representative of the estate of Eric Mutuku) (2020) eKLR where a 13-year-old deceased's estate was awarded Kshs. 1, 800,000/= for the loss of dependency.

45. As duly noted, the trial court considered all the above authorities and out of his own discretion made an award of Kshs. 1, 300,000/= as adequate.

46. I believe the same was within the set principles of awards and from the cases relied upon, mostly decided between the year 2017 and 2020 as a society we have experienced a massive inflation and the award made by the trial court was in consideration to that but also a way of this court to bid the family of the deceased our sorry for the loss of their son with this compensation as he was a future and hope for them. In the circumstances, I find the award on loss of dependency was neither excessive nor arbitrary. I will not interfere with it.

47. Under pain and suffering, the trial court held that the deceased died on the same day of the accident as per the death certificate. The magistrate relied on the case of Lilian Muthoni Kinyua and Others versus Julius N. Kinuthia and 2 others where an award of Kshs 30, 000/= was made under this head even though the deceased died on the spot. I find no reason to interfere with the discretion of the trial court as the same was within precedent and that the deceased who died while undergoing treatment must have experienced excruciating pain before breathing his last.

48. Under loss of expectation of life, the trail court made an award of Kshs. 100,000/=. I find the same was fair and within the conventional sums awardable under the *Law Reform Act*. Hence, will not interfere with it.

49. On special damages, it is clear that only what is pleaded shall be awarded. I note that there is no contention from the Appellant under this head of damages. My perusal of the lower court record shows that the Respondent pleaded and proved Kshs. 61,995/=. I, therefore, uphold the award by the trial magistrate.

50. The upshot of the foregoing observations is that the appeal lacks merit. The same is dismissed with costs to the respondents.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JANUARY, 2023

D. Kemei

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of :

Kinyanjui for Onyinkwa for Appellant

Weke for Otsula for Respondents

Kizito Court Assistant