Family Bank Limited v Kyalo & Somba (Suing as the legal representatives of Estate of Bernard Kyalo Mulandi (Deceased & 2 others (Civil Appeal 409 of 2018) [2023] KEHC 1095 (KLR) (Civ) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1095 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 409 OF 2018

JN MULWA, J

FEBRUARY 23, 2023

BETWEEN

FAMILY BANK LIMITED ..... APPELLANT

AND

RACHEL MUTHOKI KYALO & JAMES MULWA SOMBA (SUING AS THE LEGAL REPRESENTATIVES OF ESTATE OF BERNARD KYALO MULANDI (DECEASED) ..... 1ST RESPONDENT

FELIX NJUGUNA ..... 2ND RESPONDENT

MANGI WILLIAM ..... 3RD RESPONDENT

(Being an appeal against the Judgment and Decree of the Chief Magistrate's Court at Milimani in CMCC No. 4892 of 2014 delivered by Hon. M. Obura (SPM) on 7th August 2018)

JUDGMENT

1. This appeal arises from a judgment delivered on 7th August 2018 in Milimani CMCC No. 4892 of 2014. The deceased, Bernard Kyalo Mulandi, died in a road traffic accident which occurred on 8th March 2012 along Outering Road. In the Plaint dated 20th August 2014, it was pleaded that the deceased was a lawful pedestrian on the material day when the 2nd Respondent herein negligently and carelessly drove, managed and/or controlled motor vehicle registration number KAU 796T, property of the Appellant and the 3rd Respondent, causing it to knock down and fatally wound the deceased. The 1st Respondent thus sought compensation for the loss suffered against the Appellant as well as the 1st and 2nd Respondents.

2. The 2nd Respondent filed a Statement of Defence dated 4th September 2015 in which he denied the claim and contended that the deceased was wholly to blame for the accident.

3. The Appellant also filed a Statement of Defence dated 7th October 2014 under protest. It denied being the registered owner of the subject motor vehicle and contended that it was registered as such merely to secure its interest as a financier of a loan facility that it advanced to the 3rd Respondent.

4. Upon hearing the claim, the trial court determined liability at 100% against all the defendants, jointly and severally, and proceeded to award damages to the plaintiff, now the Responded as follows: Kshs. 50,000 for pain and suffering; Kshs. 100,000/- for loss of expectation of life and Kshs. 1,376,424/- for loss of dependency.

5. Aggrieved by the decision, the Appellant, Family Bank Limited lodged the instant appeal vide a Memorandum of Appeal dated 5th September 2018 in which it raised seven grounds as follows: -

    1. THAT the learned magistrate grossly erred in law and in fact by finding that she had jurisdiction to hear and determine the dispute.

    2. THAT the learned magistrate erred in law in finding that the issue of whether she has jurisdiction to determine the dispute could not be raised at the hearing of the suit and/or at submissions stage.

    3. THAT the learned magistrate erred in law and misdirected herself by disregarding the principles on limitation laid out in Section 29(4) of the *Limitation of Actions Act* and the case of Philomena Mutheu Nzyoka (Suing as a on the legal representative of the estate of the late TKM v Transpares Kenya Limited [2016] eKLR thus contravening the principle of stare decisis.

    4. THAT the learned magistrate erred in fact and in law by wrongly evaluating the evidence on record, disregarding the submissions of the Appellant and arriving at a wrong conclusion that the 2nd Respondent herein was at the material time driving as an agent of the appellant.

    5. THAT the learned magistrate erred in law in failing to consider and appreciate the principles laid out in the Court of Appeal case of Sumer Singh Bachu vs Nicholas Wainaina Kago Waweru [1976] eKLR thereby arriving at a wrong conclusion that the 2nd Respondent herein was an agent of the Appellant.

    6. THAT the judgment of the Learned Magistrate is contrary to the fundamental principle of stare decisis and in total disdain of the evidence and submissions of the Appellant on record.

    7. THAT there was no good or proper basis for the entire judgment.

6. The appeal was canvassed through written submissions which this court has duly considered alongside the grounds and Record of Appeal.

7. The issues that arise for determination in my considered view are:

    a. Whether the 1st Respondent's suit was time barred by virtue of the provisions of Section 29(4) of the Limitations of Actions Act;

    b. Whether the trial court erred by holding the Appellant vicariously liable for the negligent acts of the 2nd Respondent; and,

    c. Whether the trial court's award of Kshs. 1,376,424/- for loss of dependency was inordinately excessive.

Whether the 1st Respondent's suit was statutorily time barred by virtue of the provisions of Section 29(4) of the Limitations of Actions Act;

8. This issue arises from grounds 1, 2 and 3 in the Memorandum of Appeal through which the Appellant contends that the trial court had no jurisdiction to hear and determine the suit by virtue of Section 29(4) of the *Limitation of Actions Act*. Notably however, the Appellant did not tender any submissions on this issue. On the other hand, the 1st Respondent argues that this assertion by the Appellant is misconceived since the suit was based on the tort of negligence whose limitation period of 3 years had not lapsed by the time the suit was filed on 21st August 2014.

9. Section 29(4) of the *Limitation of Actions Act* states:

> " 29. Provision where injured person has died
>
> (1) In relation to an action to which section 27 of this Act applies, being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 2 of the *Law Reform Act* (Cap. 26), section 27 of this Act and section 28 of this Act shall have effect subject to subsections (4) and (5) of this section.
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> (2) Subsections (1), (2) and (3) of section 27 of this Act and section 28 of this Act shall have effect, subject to subsections (4) and (6) of this section, in relation to an action brought under the *Fatal Accidents Act* (Cap. 32) for damages in respect of a person's death, as they have effect in relation to an action to which section 27 of this Act applies.
>
> (3) In the following provisions of this section, and in sections 27 and 28 as modified by those provisions, "the deceased" means the person referred to in subsection (1) or subsection (2), as the case may be.
>
> (4) Section 27(1) of this Act shall not have effect in relation to an action falling within subsection (1) or subsection (2) of this Act, unless the action is brought before the end of twelve months from the date on which the deceased died."

10. Section 27(1) of the Act provides that:

> 27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.
>
> (1) Section 4(2) does not afford a defence to an action founded on tort where—
>
> a. the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
>
> b. the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
>
> c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

d. the requirements of subsection (2) are fulfilled in relation to the cause of action."

11. In support of its assertion, the Appellant is clinging to the decision of Aburili J. in Philomena Mutheu Nzyoka (Suing as a on the legal representative of the estate of the late TKM v Transpares Kenya Limited [2016] eKLR where an accident victim suffered fatal injuries and Aburili J. had this to say:

> "69. From the provisions of Section 29 of the *Limitation of Actions Act* set out above, it is trite that where the person injured as a result of a tortious act or omission of another dies, then his or her personal representatives can only bring an action on behalf of the estate of the deceased person within twelve months from the date when the deceased died. And therefore it follows that where such period of twelve months from date when the deceased dies has lapsed, unless, by application of Sections 22, 27 and 28 of the *Limitation of Actions Act*, leave of court is sought and obtained extending such period for bringing an action, the action would be statute barred.
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> 70. It is on the basis of the above provisions of Section 4 (2) of the *Limitation of Actions Act* as read with Section 29 of the same Act that I find that although this suit was instituted within 3 years from the date when the cause of action arose on 14th November 2005, it nonetheless involves a person who died as a result of the injuries sustained in the accident. As such, the suit founded on the tort of negligence should have been lodged within one year from the date when the cause of action arose thus, by 14th November 2006."

12. With all due respect, this court disagrees with the learned Justice Aburili's interpretation of the provisions of Section 29(4) of the *Limitation of Actions Act* in the above case. It is also imperative to note that the decision is not binding to this court as it was made by a court of concurrent jurisdiction. It is only persuasive.

13. In this court's considered view, Section 29(4) above falls under Part 3 of the Act which deals with extension of limitation period in case of ignorance of material facts where an injured person has died as opposed to the limitation period itself. The 1st Respondent's action was founded on the tort of negligence whose limitation period under Section 4(2) of the Act is three years. The cause of action arose on 8th March 2012 and the suit was filed on 21st August 2014 before the three years limitation period lapsed. In the premises, the court finds that the suit was not statute barred by limitation of time and the trial magistrate had jurisdiction to hear and determine the suit.

Whether the trial court erred by holding the Appellant vicariously liable for the negligent acts of the 2nd Respondent;

14. The Appellant submitted that by holding it vicariously liable for the negligence of the 2nd Respondent, the trial court created a non-existent and unproven agency relationship between it and the 2nd Respondent at the material time of the accident yet it was merely a financier of the 3rd Respondent in the purchase of the vehicle. The Appellant argued that although the learned magistrate found that it did not adduce evidence to disapprove this claim, the burden lay on the plaintiff (the 1st Respondent herein) to call sufficient evidence to prove negligence. Further, the Appellant argued that before the 1st Respondent discharged that burden, it was not bound to tender evidence to disprove the claim.

15. The Appellant cited various cases in which the superior courts have discussed the position of a financier registered as a part owner of a motor vehicle involved in an accident. Among them are: Ali Abdi Dere v Hash Hauliers Limited & Another [2018] eKLR; Nairobi HCCC No. 4772 of 1980 Richard Obiero Mwai v E. Guerci & Co. Ltd and Diamond Trust of Kenya Ltd; Jane Wairimu Turanta v Githae John Vickery and Equity Bank Limited & Munene Don - Nairobi HCCC No. 483 of 2012; and Kiema Muthungu v Kenya Cargo Handling Service Ltd (1991).

16. On its part, the 1st Respondent submitted that the trial court cannot be faulted for its finding on liability as the Appellant did not adduce any evidence in support of its Defence that it was just a financier of the motor vehicle. Indeed, the Appellant never filed any documents together with its statement of defence or thereafter. Surprisingly too, the Appellant did not tender any evidence before the trial court. In the case of Linus Nganga Kiongo & 2 Others v Town Council of Kikuyu [2012] eKLR, Justice Odunga cited with approval the case of Autar Singh Bahra & Another v Raju Govindji HCC 548 of 1998 in which it was stated as follows: -

> " Where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence by the plaintiff against them is uncontroverted and therefore unchallenged. See also Trust Bank V. Paramount Universal Bank Ltd & 2 Others, Nairobi (Milimani) HCCC No. 1243 of 2001."

17. As a general principle, a financier of a motor vehicle who is jointly registered as a co-owner of the motor vehicle to protect his interest in the repayment of the facility advanced towards purchasing it, is not liable to a person injured in an accident involving the motor vehicle, over which he has no control or is not being used for its benefit. In Ali Abdi Dere v Hash Hauliers Limited & Another (supra), Muriithi J stated thus:

> " ... a person in the position only of a financier to the acquisition of a motor vehicle and who is registered as a joint owner of the motor vehicle for the purpose of protecting his interest in the full payment of the funds that he has invested in the financing arrangement, without any interest in the operation of the motor vehicle by the purchaser of the motor vehicle, and therefore not vicariously liable for the use of the vehicle by the purchaser's agent/driver is not a necessary party to a suit for the recovery of damages in negligence arising from alleged negligent use of the motor vehicle."

18. In the judgment of the trial court, the learned magistrate appreciated the above position but noted that the Appellant herein had not placed any evidence before her to show that it was merely a financier. Indeed, the Appellant did not tender any documentation in evidence to that effect. Once the plaintiffs discharged their legal burden by proving that the Appellant was one of the owners of the subject motor vehicle, the evidential burden shifted to the Appellant to prove that it was registered as such because it was merely a financier as this was a matter that was peculiarly within its knowledge. In the absence of any evidence to that effect, the court finds that the trial court did not err by holding the Appellant vicariously liable for the negligent acts of the 2nd Respondent.

19. It is noteworthy that the Appellant had the option of approaching this court through the legally laid down channels for leave to adduce additional evidence at the appeal stage but did not do so. Therefore, it must suffer the consequences of its negligence.

Whether the trial court's award of Kshs. 1,376,424/- for loss of dependency was inordinately excessive

20. On this, the Appellant submitted that the trial Court erred in applying the multiplicand approach instead of the global sum approach in calculating damages for loss of dependency. It argued that the trial court had no basis for adopting a multiplicand of Kshs. 8,193/- as there was no satisfactory proof of the deceased's monthly income. Reliance was placed on the cases of Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR and Mwanzia v Ngalali Mutua Kenya Bus Ltd as quoted in Albert Odawa v Gichimu Githenji [2007] eKLR where the courts advocated for the use of global lump sums principle where circumstances do not favour the multiplier approach. The Appellant further submitted that the trial court failed to adhere to the doctrine of precedent to make comparable awards for comparable injuries. In its view, the 1st Respondent should have been awarded Kshs. 400,000/- under this head. In support, it cited the case of John Wamae & 2 Others v Jane Kituku Nziva & Another [2017] eKLR, arguing that the court therein awarded a lump sum of Kshs. 400,000/- to a farmer cum guard aged 61 years who had children aged between 13 and 17 years.

21. As for the 1st Respondent however, this court finds that the trial court did not err in adopting the multiplicand approach as there was sufficient material on record that favoured its application and the learned magistrate analysed the same appropriately. In support of this submission, the 1st Respondent cited the case of Jacob Ayiba Maraya & Francis Karani v Simeon Obayo (suing as administrators of the estate of Thomas Ndayo Obayo) C.A No. 167 of 2002 (Kisumu).

22. It is well settled that an award of damages is an exercise of discretion by the trial court and thus an appellate court will not interfere with such discretion unless there are good grounds to do so. In Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR, the Court of Appeal stated thus:

> " An appellate court will not disturb an award for general 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 arrived at a figure which was either inordinately high or low..."

23. The deceased's wife PW1, Rachel Muthoni Kyalo testified that the deceased was working at Parklands Sports Club at the time he met his death and she produced a letter of appointment dated 15th October 1999 showing that he had been employed as a glass hand earning Kshs. 4,626/- plus Kshs. 1,589 house allowance monthly. It was also her testimony that the deceased was earning Kshs. 15,000/- monthly and together they had three children.

24. In adopting the multiplier approach, the learned magistrate noted that there was no proof that the deceased earned Kshs. 15,000/-. For that reason, she adopted a multiplicand of Kshs. 8,193/- being the minimum wage for waiters and cooks in Nairobi in the Regulation of Wages (General) (Amendment) Order, 2011 noting that there was no category for glass hand or barman. The learned magistrate also reasoned that it was highly unlikely that the deceased could still have been earning Kshs. 4,626/- monthly from 1999 when he was employed to 2012 when he died.

25. As for the multiplier, the court noted that as the deceased was 34 years (as per the Death Certificate tendered in evidence), a multiplier of 21 years was appropriate taking into account the vicissitudes of life. Further, the court's adoption of dependency ratio was based on the fact that the deceased was married with three children whose birth certificates were duly tendered in evidence. In the premises, this court finds that the magistrate's decision to adopt the multiplier approach was based on sound reasoning and cannot be faulted.

26. Was the award of Kshs.1,376,424/- for loss of dependency inordinately excessive?

27. In determining this issue, the court will look at the multiplier adopted in cases where victims were within the same age group and working under comparable environments. The court notes that the case of Jacob Ayiba Maraya & Francis Karani (supra) cited by the Appellant is distinguishable as the deceased therein was much older. In K.B. Sanghani & Sons v Dorothy Munini Mutisya & another (Suing as Legal Representatives of the Estate of Jackson Mutuku Mutisya-Deceased) [2021] eKLR, the appellate court noted that it would have adopted a multiplier of 23 years for a deceased who was 34 years and worked as an unskilled artisan. In Joseph King'ori Wandurwa & another v Loise Karimi Nyaga & another [2021] eKLR, a multiplier of 22 years was upheld on appeal, for a businessman who was 34 years at the time he met his death.

28. Upon careful consideration of all the relevant factors in this appeal in respect of damages awarded to the 1st Respondent, this court finds that the sums were sufficient compensation for loss of dependency in the circumstances of this case, and need no interference from this court.

29. Consequently, the court finds and holds that the Appellant's appeal lacks merit. It is dismissed in its entirety with costs to the 1st Respondent.

Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

J.N. MULWA

JUDGE.