Abel & another v Ngolya & another (Suing as the Administrators to the Estate of the Late Peter Ngumbi Wambua) (Civil Appeal 140 of 2018) [2023] KEHC 17669 (KLR) (Civ) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17669 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 140 OF 2018

JN MULWA, J

MAY 25, 2023

BETWEEN

WERE ABEL ..... 1ST APPELLANT

BOAZ OTIENO ..... 2ND APPELLANT

AND

SABINA KATUMBI NGOLYA ..... 1ST RESPONDENT

DOMINIC WAMBUA NGUMBI ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS TO THE ESTATE OF THE LATE PETER NGUMBI WAMBUA

(Originating from the Judgment of the trial court in Milimani CMCC No 6092 of 2013 delivered on 20/02/2018)

JUDGMENT

1. This appeal arises from the Judgment of the trial court in Milimani CMCC No 6092 of 2013 delivered on 20/02/2018 whereupon the Appellants were found wholly liable for the accident that claimed the life of the Respondents son who was riding a motorcycle Registration No KMCC 724R, and the Appellants vehicle, a lorry truck registration No KBK 720U Mercedes Benz on the fateful day, March 21, 2012.

2. Being dissatisfied with the entire judgment on both liability and quantum of damages, the Appellants preferred this appeal upon grounds stated at the Memorandum of Appeal dated March 15, 2018 and a Record of Appeal and Supplementary Record of appeal dated July 16, 2020 and February 15, 2021 respectively.

3. The grounds of appeal may be summarized into two; on liability seeking that the judgment of the trial court be set aside and this court to apportion liability; and on damages, that the same be re-assessed as having been excessively high in the circumstances.

4. Parties filed written submissions on the two arms of the Appeal. The court has read the Record of Appeal, the pleadings and evidence adduced before the trial Court including their submissions.

   This is what a first appellate court is required to do; to re-evaluate and re-analyze the entire evidence, draw its own conclusions bearing in mind that the judge never saw or heard the witnesses testify; and taking into account that it is not bound to follow the findings of fact as found by the trial court- *Selle V Associates Motor Boat Company* [1968] EA 123.

Liability

5. The Appellants fault the trial Magistrate on two fronts:

   > Failing to consider the evidence tendered before the court by the driver of the lorry (DW1), the alleged eye witness (PW2) and alleged harsh language used by the trial Magistrate in his judgment thus exhibiting bias towards the Appellants.

6. To discredit PW2's (the alleged eye witness) evidence, the appellants stated in cross examination, that he could not remember how many lanes are at Mombasa road, or whether the deceased rider changed lanes bringing himself in front of the lorry abruptly; and further that the Traffic Police Officer - PW1 could not shed light on the occurrence of the accident as he was not at the scene when it occurred; that other than producing the OB, Police abstract, and a sketch plan of the scene of accident, he could not produce the police file stating on cross examination that it could not be traced thus relied on the OB and the Police Abstract for his evidence.

7. By the above, the Appellants submit that the Lorry driver's (DWI) evidence was more compelling and credible, that the deceased was at fault by changing lanes causing the lorry driver to ram on the motor cycle from behind.

   It is the Appellants submissions that this evidence was not challenged, and therefore urges the court to apportion liability at 50:50 basis.

8. The Respondent by his submissions is of a different opinion stating that its witnesses the investigating officer (PW1) and (PW2) the alleged eye witness evidence was sufficient to place full liability on the Appellants.

9. There is no dispute over the occurrence of the accident as clearly evidenced by the police abstract, and admission and confirmation by the driver of the vehicle (DW1).

   By the evidence placed before the trial court, the Lorry and the motorcycle were being driven towards the same direction, and were going uphill along Imara Daima towards Nairobi City.

10. There is also no counter evidence that the motorcycle was not in front of the lorry and was hit by the lorry by its bumper while on the same lane with the lorry.

    The question is therefore whether the motorcycle suddenly changed lane from the left lane, and to the middle lane infront of the lorry as testified to by the driver of the lorry (DW1) such that he could not take action as to avoid the accident.

11. In his evidence, DW1-lorry driver stated:

> I was in the middle lane. The lanes were three. To my left there was a trailer. The motorcyclist attempted to overtake the trailer – had already reached him. My bumper hit him---- I saw the motorcyclist who intended to change lane (on the side mirror). I did not see the indicator. I applied brakes. My bumper hit him----. The motorcyclist was at fault for changing lanes. He fell on the lane he was using. He did not have a helmet or reflector. There was nothing I could do to avoid the accident....

12. Further, on cross examination, DW1 (driver) testified that

> "--- The motorcycle was on the third lane. It was infront of the trailer. I was behind the motorcycle----."

Upon re-examination, the driver (DW1) stated that he could see the motorcyclist from the side windscreen while he was on the left lane.

13. As to the evidence of PW2 the alleged witness, his evidence is full of contradictions. It cannot be relied on by the court to come to a well-informed finding. This witness in my view may not have witnessed the occurrence of the accident, but could have just been around among the mob, at the accident scene. His evidence that he blamed the driver of the lorry cannot be taken seriously save that the lorry hit the motorcycle from behind, a fact admitted by the lorry driver himself.

14. There is an alleged sketch plan produced by the Respondent and stated to be found at page 162 of the Record of Appeal.

I have perused the record. No such document is attached thereto.

15. I have also looked at the Supplementary Record of Appeal at page 340-345. No such sketch plan is attached thereto, or elsewhere at the entire record.

I shall therefore not consider the submissions on the matter of the sketch plan. The Respondent failed to call any evidence to persuade the court that the deceased could have abruptly changed lanes and brought himself infront of the lorry leaving the lorry driver with no option but to ram onto the motor cycle from behind without taking any evasive action so as to avoid the accident.

What is important however is that the driver of the lorry admitted in very many words in his evidence in chief and on cross examination that he rammed onto the motorcycle from behind, as he was behind the motorcycle; and that indeed he had seen the said motorcycle from his left side mirror, from his lane.

16. Evidence by PW1 PC Hussein was that the driver of the lorry failed to keep safe distance as a result rammed onto the motorcycle.

17. In my view, this evidence is more credible more so as the lorry driver admitted having rammed on to the rear of the motorcycle.

18. He further testified that without the police file, he could not say anything as to whether or not the motorcyclist moved ahead of the traitor; stating that:

> " there is a possibility that the motorcycle left its lane and moved ahead of the trailer".

19. In the case *William Kabogo Gitau V George Thuo & 2 Others* (2010) eKLR, the court held that

> " .... A case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place---- he has to establish that it is probable than not that the allegations that he made occurred..."

20. The question therefore that begs an answer is which of the two lethal weapons, the vehicle or the motorcycle caused the accident and or contributed to the said accident, and if so, to what extent.

21. Whenever two vehicles collude, one or both must be held at fault, as was held in the case *Baker vs Market Marlborough Industrial Co-operative Society Ltd* [1953] IWLR 1497 Lord Denning (as he was then) observed.

22. Further, in *Kiema Muthungu vs Kenya Cargo Handling Service Ltd* [1991] 2, it was held that:

> " there can be no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence".

See also *Brian Muchiri Waihenya V Jubilee Hauliers Ltd & 2 others* [2017] eKLR.

The standard of proof in a traffic accident is beyond reasonable doubt, and even when one of the parties is convicted for a traffic offence, it is still not conclusive proof that the defendant is fully to blame.

23. In perspective therefore, the Appellants blame the deceased for the causation of the accident and has urged that the trial court's decisions be set aside, and to apportion liability between the two parties.

24. In view of lorry driver's express evidence on how the accident occurred, and there having been zero assistance from the traffic police officers who visited the scene of accident well over five hours after the accident, and further taking into account the rider of the motorcycle died in the said accident, this court finds and holds that the trial Magistrate did not err in finding that the lorry driver was the cause of the accident.

25. The driver of the accident vehicle testified to have seen the deceased using his vehicles' left side mirror. If indeed it is true that the deceased changed lanes and rode on the front of his lorry, he ought to have taken some erasive actions to try to avoid the accident. He had a duty and obligation slow down, swerve or stop or to keep safe distance as he stated to have seen the alleged events unfold.

26. This is what the court observed in the case of *Masembe V Sugar Corporation & Another* (2002) 2EA434 when it stated; -

> " --- a reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationery object on his way, merely because the object is wrongly there; he takes reasonable steps to avoid hitting or colliding with the object!"

27. It is clearly on record that the 2nd appellant, despite testifying that he saw the motorcycle rider trying to overtake another trailer, he took no reasonable steps or at all to prevent a foreseeable danger. He did nothing, and simply rammed onto the back of the motorcycle that obviously he could clearly see in front of his lorry.

To that extent, I am persuaded that the 2nd Appellant failed in his expectation as a reasonable driver to try and avoid the accident. It matters not that he was not charged with any traffic offence.

28. With all due respect to the Appellants, there is no difficulty in finding out who between the two was to blame, in view of the evidence adduced before the court.

Obviously, the lorry driver (2nd Appellant) saw the motorcycle infront of his lorry. He simply did not slow down or swerve or in any other manner try to avoid ramming onto the motorcycle.

On the other aspect, I do not fault the trial Magistrate for arriving at the same finding; save that he did not analyze the evidence on record in depth, or if he did, he did not record the same.

29. I therefore find no plausible reason to interfere with the trial court's finding on liability.

30. On the matter of bias by the trial magistrate, nothing turns on the complaint as no evidence has been placed before this court to warrant any adverse action against the said trial magistrate.

Suffice to state that harsh language in a judgment should be avoided as it may raise questions as to the independence and motive of the court.

Liability is therefore upheld at 100% against the Appellants jointly and severally.

That arm of the appeal is dismissed.

Quantum of damages

31. The only issue on this sub-head, in my view is on the assessment of damages for loss of dependency and in particular the multiplier.

The deceased was 22 years old when he met his death.

32. The trial Magistrate in his Judgment observed that the deceased would have worked for at least 35 years before attaining the retirement age of 60 years, and would have spend at least 1/3 of his undisputed income of Kshs 7000/- to support his parents.

He therefore stated that he would apply a multiplier of 30 years as proposed by the Defendants in their submissions. This was upon taking into account by vagaries and uncertainties of life.

33. However, and this is the bone of contention by the parties, when calculating or assessing the damages, the trial Magistrate applied a multiplier of 35 years, to arrive at Kshs 980,000/= as loss of dependency, instead of 30 years he had stated he would apply.

Obviously, there is a glaring contradiction by the trial court.

Having stated that he would apply a multiplier of 30 years, then I agree with the Appellants that he erred to that extent.

34. This is well captured in the Appellants' submissions, who again have urged the court to set aside the adoption of 35 years and adopt a multiplier of 25 years.

35. For the Respondent, it is submitted that the multiplier of 35 adopted by the trial Magistrate was not based on the figure proposed by the Appellants but the available facts including the age of the deceased, his health at the time of his death and his occupation.

I agree that the awards made by the trial Magistrate cannot be termed as excessive in the circumstances.

36. Having considered the trial Magistrate's pronouncement on what he wished to apply as the multiplier, and giving reasons for the same, I come to a conclusion that, in my view, the multiplier of 35 years as opposed to 30 years was a slip of the pen, an error that can easily be corrected. From the tone of both parties submissions, a multiplier of 30 years would be welcome. This court will adopt the same.

37. I shall therefore re-calculate the award under the subhead – loss of dependency as hereunder:

7,000 X 12 X30 X1/3 – 840,000/=

Consequently, and in conclusion, the Appeal herein succeeds partially and the awards in general damages are re-assessed as follows:

a. Liability at 100% against the Appellants upheld

b. Pain and suffering - Kshs. 30,000/= upheld

c. Loss of expectation of life - Kshs. 150,000/=upheld

d. Loss of dependency - Kshs. 840,000/=

   Total - Kshs. 1,020,000/=

e. Special damages - Kshs. 11,750/= upheld

f. Interest on special damages shall accrue interest at court rates from date of filing the lower court suit; while interest on the general damages shall accrue from date of the trial court's judgment; including the re-assessed damages.

Each party shall bear own costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF MAY, 2023

JANET MULWA

JUDGE