Kimani & another v Mungai & another (Suing as the Legal Representatives of the Estate of the Late John Mburu Kiarie) (Civil Appeal 233 of 2019) [2023] KEHC 18183 (KLR) (Civ) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 233 OF 2019

CW MEOLI, J

MAY 25, 2023

BETWEEN

HENRY KIMOTHO KIMANI .... 1ST APPELLANT

UNIKEN ENTERPRISES .... 2ND APPELLANT

AND

JOHN KIRIGU MUNGAI .... 1ST RESPONDENT

ALICE WANJIRU MAINA .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JOHN MBURU KIARIE

(Being an appeal from the judgment of B.S. Ofisi, RM, delivered on 29th March, 2019 in Nairobi Milimani CMCC No. 4863 of 2015)

JUDGMENT

1. This appeal emanates from the judgment delivered on 29th March, 2019 in Nairobi Milimani CMCC No. 4863 of 2015. The suit was commenced by way of the plaint dated 16th July, 2015 and filed by Alice Wanjiru Maina & John Kirigu Mungai being the 1st and 2nd plaintiffs in the lower court (hereafter the 1st and 2nd Respondents) against Henry Kimotho Kimani & Uniken Enterprises, the 1st and 2nd defendants in the lower court, respectively (hereafter the 1st and 2nd Appellants respectively).

2. The Respondents' claim was for damages under the *Law Reform Act* and *Fatal Accidents Act* in respect of the death of the late John Mburu Kiarie (hereafter the deceased) following fatal injuries sustained in a road traffic accident which occurred on 20th February, 2012. It was alleged that the 1st and 2nd Appellants

were the driver and registered owner of the motor vehicle registration no. KBL 977K (hereafter the second motor vehicle) respectively and at all material times. It was further alleged that the second motor vehicle was so negligently, carelessly driven or controlled and managed that it collided with the motor vehicle registration no. KAT 558D (hereafter the first motor vehicle) being driven by the deceased, thereby causing him fatal injuries.

3. Upon service of summons, the 1st and 2nd Appellants filed their statement of defence jointly, denying the key averments in the plaint. Alternatively, the Appellants pleaded contributory negligence against the deceased by setting out the particulars thereof in the statement of defence. The suit proceeded to full hearing during which only the 1st Respondent tendered evidence. In its judgment, the trial court found in favour of the Respondents thereby holding the Appellants wholly liable for the accident. Judgment was thus entered against the Appellants in the sum of Kshs. 1,091,500/- made up as follows

    a. General damages for pain and suffering Kshs. 100,000/-;

    b. Loss of expectation of life Kshs. 100,000/-;

    c. Loss of dependency Kshs. 880,000/-;

    d. Special Damages: Kshs. 11,500/-.

4. Aggrieved by the outcome, the Appellants preferred this appeal which is premised on the following grounds:

    " 1. That the learned magistrate erred in law and fact by finding that the Appellants were 100% liable for the accident while negligence against the Appellants had not been properly established.

    2. That no direct evidence was adduced to establish liability.

    3. That the learned magistrate erred in law and fact by failing to find that the Plaintiff had not established his case on a balance of probability.

    4. That the learned magistrate erred in law and in fact by failing to find that the deceased was 100% liable for the accident.

    5. That the learned magistrate erred in law and in fact by failing to consider contributory negligence on the part of the deceased and finding the Appellant 100% liable

    6. That the learned trial magistrate erred in law and in fact by failing to scrutinize and/or evaluate the evidence tendered in support of the Appellant and thereby failing to apportion liability in view of the evidence on record.

    7. That the learned magistrate erred in law and in fact by failing to appreciate the totality of the evidence before him and in not considering the submissions on behalf of the Appellants.

    8. That the learned magistrate erred in law and in fact by failing to take into account the evidence and submissions on quantum of damages given on behalf of the Appellants while considering his judgmen

    9. That the learned magistrate erred in law and in fact by failing to determine that the Respondents had not discharged their evidentiary burden of proving their claim under the Fatal Accident Act Cap. 32 and the *Law Reform Act* Cap.

26 Laws of Kenya as evidence was adduced to confirm and/or corroborate the respondent's claim.

10. That the learned magistrate erred in law and in fact by making excessive awards under the Fatal Accident Act Cap. 32 in regard to the multiplier, multiplicand and dependent ratio.

11. That the judgment arrived at by the learned magistrate was against the weight of evidence.

12. That the Plaintiff did not adduce the legal evidential burden.

13. That the learned magistrate erred in law and in fact by making an award on general damages which was manifestly excessive and inordinately high.

14. That the learned magistrate erred in law and in fact by disregarding the evidence of the appellant and considering extrinsic matters thereby basing his judgment on the same thus failing to judiciously exercise his discretion." (sic)

5. The appeal was canvassed by way of written submissions. Counsel condensed the Appellants' grounds of appeal into two salient issues, namely, the trial court's respective findings on liability and general damages. Addressing the first issue, counsel cited inter alia, Ann Wangare Mwombe & 2 others v Peter Mukiri Gateri [2014] eKLR; Alfred Kioko Muteti v Timothy Miheso & another [2015] eKLR and Kennedy Nyangoya v Bash Hauliers [2016] eKLR to contend that liability was not established, since no direct evidence by way of an eyewitness or circumstantial evidence in the form of an investigation diary or Occurrence Book was tendered to prove the manner in which the accident occurred and that the police abstract which indicated the matter as "pending under investigations" did not state who was to blame for causing the material accident. That the trial court therefore fell into error in finding the Appellants wholly liable in the absence of proof.

6. Concerning the award made on quantum of damages counsel relied on the decisions in Kemfro Africa Ltd v Lubia & Another, (No. 2) 1987 KLR 30 and Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR which set out the instances under which an award made by a lower court can be disturbed by an appellate court. Placing reliance on Kenya Railways Corporation v Samwel Mugwe Gioche [2012] eKLR counsel submitted that the award made under the head of pain and suffering is inordinately high and that a more suitable award would have been in the sum of Kshs. 10,000/-.

7. On damages for loss of dependency, it was submitted that in the absence of evidence to ascertain the deceased's employment, the minimum wage for a general worker should have been applied instead (Kshs. 6,743/-), coupled with a multiplier of 17 years and a dependency ratio of 1/3, resulting in an award in the sum of Kshs. 458,524/-. In conclusion it was contended that the trial court's judgment ought to be set aside.

8. The Respondents defended the trial court's findings in their totality. On liability, counsel reiterated the evidence of the Respondents and cited Billiah Matiangi v Kisii Bottlers Limited & another [2021] eKLR to argue that in the absence of any evidence by the Appellants as defendants, the evidence tendered by them at the trial remained uncontroverted and that the statement of defence filed consisted of mere denials and allegations. Counsel further cited the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR to argue that submissions do not constitute evidence and hence the Appellants could not be heard to defend their case through final submissions.

9. Concerning quantum counsel anchored his submissions on the decisions in Butt v Khan [1978] eKLR to contend that there was no basis for interference with the respective awards made by the trial court.

On the subject of the multiplicand applied in calculating the earnings of the deceased, counsel argued that proof of earnings need not be solely through the production of documents, placing reliance on the case of Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) v Dubai Superhardware [2021] eKLR. Ultimately, counsel for the Respondents submitted that the awards made by the trial court were reasonable and therefore asserted that the appeal lacks merit and ought to be dismissed with costs.

10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 demeanor of a witness is inconsistent with the evidence in the case generally."

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

12. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on two issues, namely, whether the finding of the trial court on liability was well founded, and if so, whether the award on damages was justified. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated the following in this regard:

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted

and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

13. The Respondents by way of their plaint averred at paragraphs 3, 4 and 5 that:

> " 3. At all times material to this suit, the 2nd Defendant was the registered owner of motor vehicle registration number KBL 977K. The 1st Defendant was the actual user and in possession of motor vehicle registration number KBL 977K.
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> 4. On or about the 20th February 2012, while the deceased John Mburu Kiarie was lawfully driving a Toyota Station Wagon registration number KAT 558D in his lane along Ruiru-Ruwai bypass, the 1st Defendant who was driving and in control of motor vehicle registration number KBL 977K drove the said motor vehicle so negligently, carelessly and dangerously as a result of which he lost control, veered off the road and allowed the said motor vehicle to hit the deceased motor vehicle hence causing an accident which resulted to deceased's sustaining fatal injuries which led to his death.
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> Particulars of The Defendant's Negligence
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> i. Driving motor vehicle registration number KBL 977K so negligently, carelessly and dangerously on the road.
>
> ii. Driving the said motor vehicle without focus and attention on the road.
>
> iii. Failing to stop, brake instantly and or swerve in order to avert the accident.
>
> iv. Failing to control the motor vehicle on the road hence allowing it to veer off its line of travel and knock down the deceased.
>
> v. Driving their motor vehicles at a speed that was high and excessive in the circumstances.
>
> vi. Failing to observe Traffic Rules and Highway Code while driving the said motor vehicle.
>
> 5. The Plaintiff holds the 2nd Defendant vicariously liable for the negligent acts of his employee and/or agent who is the 1st Defendant for causing the accident." (sic)

14. The Appellants filed a statement of defence denying the key averments in the plaint and liability. Alternatively, the Appellants pleaded contributory negligence against the deceased by stating at paragraphs 5 and 6 that:

> " 5. The Defendants deny the contents of paragraph 4 of the plaint and in particular denies that while the deceased John Mburu Kiarie was lawfully driving a Toyota Station Wagon registration number KAT 558D in his lane along RUIRU-RUAI BYPASS, the 1st defendant who was driving and in control of motor vehicle registration number KBL 977K, drove the said motor vehicle so negligently, carelessly and dangerously as a result of which he lost control, veered off the road and allowed the said motor vehicle to hit the

deceased motor vehicle hence causing an accident which the deceased sustained fatal injuries either as alleged therein or at all and shall insist on strict proof.

6. The defendants aver that in the alternative and without prejudice to the foregoing that if the alleged accident occurred which is hereby denied then it was solely caused by or substantially contributed to by the negligence of the plaintiff.

Particulars of Negligence ofThe Plaintiff

a. Driving at an excessive speed in the circumstances.

b. Hitting the motor vehicle registration number KBL 977K thus causing the accident.

c. Failing to give warning of its approach on the road.

d. Failing to see motor vehicle registration number KBL 977K in sufficient time so as to avoid the said collision.

e. Driving without any or any due care and attention.

f. Driving a defective motor vehicle.

g. Failing to keep any or any proper lookout or to have any sufficient regard for traffic that was/might reasonably be expected on the said road.

h. Failing to give way to motor vehicle registration number KBL 977K.

i. Failing to maintain a safe distance.

j. Failing to drive on its designated path.

k. Permitting an unregistered and defective motor vehicle to be used on the road.

l. Driving in a zigzag manner.

m. Failing to stop, to slow down, to brake, to swerve or in any other way to act so as to manage and/or control the said motor vehicle to avoid the said accident.

" The doctrine of Res ipsa loquitur and the provisions of the High Way Code and *Traffic Act* are inapplicable in this matter." (sic)

15. The Appellants have challenged the finding on liability as going against the weight of evidence. It is not in dispute that none of the parties herein called an eyewitness to the accident in question. The trial court upon restating the Respondents' evidence stated in its judgment as follows concerning liability:

> "On the issue of liability, I find that the Plaintiffs' evidence is uncontroverted. The 1st Defendant has a duty of care towards other road users and in this case the deceased herein. The 2nd Defendant is vicariously liable for the acts of its driver/agent. The Defendants are

therefore held 100% liable since they did not call any witness to substantiate the plaintiffs' claim. The acts of negligence they plead are mere allegations." (sic).

16. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "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." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "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 perso
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal 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."

17. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller v Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "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.
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> 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."

18. From the foregoing guiding authorities, it is clear that the duty of proving the averments of negligence contained in the plaint lay squarely with the Respondents. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

19. The mere occurrence of an accident cannot in itself be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges, and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, while reiterating the foregoing, stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

20. As earlier observed, neither the 1st Respondent who testified as PW1 at the trial nor the Appellants called any eyewitness to the material accident. The gist of PW1's evidence in this regard was that she came to learn of the accident after the fact and lodged a report at the police station but did not follow up on the status of the investigations thereon. PW1 also admitted that in line with the contents of the police abstract on record, no one was blamed in relation to the accident. It is therefore clear that the account presented by PW1 did not contain any credible evidence as to how the accident had occurred and from which negligence could be inferred against the Appellants.

21. As regards the applicability of the doctrine of res ipsa loquitur, the Court of Appeal in Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited [2022] KECA 477 (KLR) stated thus

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

22. The Court proceeded to conclude that:

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable. There cannot be an assumption of liability as

the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding."

See also Nandwa v Kenya Kazi Limited [1988] eKLR.

23. Similarly in this case, beyond proof of the occurrence of the accident, the Respondents failed to prove facts which could give rise to or justify the invocation of the doctrine. Nevertheless, the trial court proceeded to enter a finding of liability against the Appellants on account of their alleged failure to adduce any evidence to controvert the Respondents' evidence. In so finding the trial court shifted the burden of proof upon the Appellants which in the court's view was a serious misdirection of law and fact.

24. In view of the foregoing, the court finds that the Respondents' evidence failed to rise to the standard of balance of probabilities. Put another way, under section 107 of the *Evidence Act*, the burden of proof lay with the Respondents to prove the particulars of negligence pleaded in their plaint and if the evidence did not support the facts pleaded, they failed to meet the threshold of proof. See the case of Wareham t/a A.F. Wareham (supra). There was therefore no evidential material to support the trial court's conclusion that the accident was the result of negligence on the part of the 1st Appellant, and that the Appellants were wholly liable for the accident consequently.

25. In view of all the foregoing findings, the appeal succeeds on the issue of liability and the court need not consider the challenge to the quantum of damages. The appeal is therefore allowed. Consequently, the court hereby sets aside the judgment of the lower court in its entirety, and substitutes therefor an order dismissing the Respondents' suit in the lower court. In the circumstances of the case, the parties will bear their own costs both in the lower court suit and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kamau h/b for Mr. Kinyanjui

For the Respondent: Ms. Waitiki

C/A: Carol