Sagion Contractors Limited v Chege (suing as the dependant and personal representative of the Estate of the Late Benson Chege Mwangi-Deceased) (Civil Appeal E101 of 2021) [2023] KEHC 21499 (KLR) (Civ) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E101 OF 2021

CW MEOLI, J

JULY 28, 2023

BETWEEN

SAGION CONTRACTORS LIMITED .... APPELLANT

AND

SAMUEL MWANGI CHEGE (SUING AS THE DEPENDANT AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE BENSON CHEGE MWANGI-DECEASED) .... RESPONDENT

(Being an appeal from the judgment of A.N. Makau, PM, delivered on 12th February, 2021 in Nairobi Milimani CMCC No. 7677 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on February 12, 2021in Nairobi Milimani CMCC No. 7677 of 2019. The suit was commenced by way of the plaint dated August 6, 2019and filed by Samuel Mwangi Chege being the plaintiff in the lower court (hereafter the Respondent) against Sagion Contractors Limited, the defendant in the lower court (hereafter the Appellant).

2. The claim was for damages under the *Law Reform Act* and *Fatal Accidents Act* in respect of the death of the late Benson Chege Mwangi (hereafter the deceased) following fatal injuries sustained in a road traffic accident which occurred on or about the October 19, 2018. It was alleged that the Appellant was at all material times the registered and/or beneficial owner of the motor vehicle registration no. KCG 115V (hereafter the subject motor vehicle). It was further alleged that the subject motor vehicle was so negligently, carelessly driven or controlled and managed on the material day that it knocked down the deceased, thereby occasioning him fatal injuries.

3. The Appellant entered appearance and filed its statement of defence dated November 12, 2019 and amended on November 11, 2020, denying the key averments in the plaint. Alternatively, the Appellant pleaded contributory negligence against the deceased and set out the particulars thereof in the amended statement of defence.

4. The suit proceeded to full hearing, wherein the Respondent testified and called two (2) additional witness, while the Appellant summoned three (3) witnesses. In its judgment, the trial court found in favour of the Respondent thereby holding the Appellant wholly liable for the accident. Judgment was thus entered against the Appellant in the sum of Kshs. 2,610,000/- made up as follows:

    a. General damages for pain and suffering Kshs. 10,000/-;

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

    c. Loss of dependency Kshs. 2,500,000/-;

    d. Special Damages: NIL

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

    " 1. Thatthe learned magistrate erred in law and fact in holding that the Appellant was 100% liable for the accident.

    2. Thatthe learned magistrate erred in law and fact in disregarding the Appellant's evidence on how the accident occurred.

    3. Thatthe learned magistrate misconstrued the facts surrounding the occurrence of the accident.

    4. Thatthe learned magistrate erred in law in law in disregarding the Appellant's submissions on liability.

    5. Thatthe learned magistrate erred in law and fact in awarding the Respondent Kshs. 2,500,000/- for loss of dependency which award was so inordinately high, unmerited, unjustified, disproportionate, excessive and unreasonable.

    6. Thatthe learned magistrate erred in law and fact by arriving at an award not based on any judicial precedent or authority.

    7. Thatthe learned magistrate erred in law and in fact by failing to take into consideration the vicissitudes of life and the nature of work of the Respondent whilst awarding the loss of dependency.

    8. Thatthe learned magistrate erred in law and in fact in using the global method in awarding the loss of dependency.

    9. Thatthe learned magistrate erred in law and in fact in failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.

    10. Thatthe learned magistrate grossly misdirected herself in treating the Appellant's submissions on liability and quantum superficially thus arriving at an erroneous decision on liability and quantum." (sic)

6. The appeal was canvassed by way of written submissions. Counsel condensed the Appellant' 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 the decisions in *Hussein Omar Farah v Lento Agencies* [2006] eKLR and *Joseph Muthuri v Nicholas Kinoti Kibera* [2022] eKLR to contend that in instances where there are conflicting narrations as to how the accident occurred, as he asserted was the case here, the court ought to apportion liability equally between the parties involved. The court was therefore urged to disturb the trial court's finding on liability and to apportion liability between the Appellant and the Respondent, accordingly.

7. Concerning quantum of damages, counsel faulted the trial court for applying a global approach in awarding damages for loss of dependency, despite the parties both submitting on use of the multiplier approach. Counsel further faulted the trial court for awarding an excessive sum under the head, in view of factors such as the age of the deceased and his level of education. It was submitted that a more appropriate award of Kshs. 1,500,000/- would suffice.

8. In support of the foregoing, counsel cited several cases including *Charles Makanzie Wambua v Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased)* [2020] eKLR and *Twokay Chemicals Limited v Patrick Makau Mutisya & another* [2019] eKLR where the respective global awards of Kshs. 1,320,000/- and Kshs. 1,500,000/- were made for deceased persons aged 16 years. And the case of *Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased)* [2020] eKLR in which the court applied a global approach in awarding damages for loss of dependency in respect of a deceased who was aged 17 years. In that case, the court awarded a sum of Kshs. 1,500,000/-. In conclusion it was contended that the trial court's judgment ought to be disturbed in the manner set out hereinabove.

9. The Respondent defended the trial court's findings in totality. On liability, counsel contended that the Appellant did not tender any evidence at the trial to support its claim on contributory negligence and hence the trial court acted correctly by not apportioning liability in the manner suggested by the Appellant, citing the decisions in *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR and *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 on the standard of proof in civil cases.

10. Concerning quantum, counsel supported the decision by the trial court to apply a global approach and further submitted that the decisions cited by the Appellant on appeal and in respect of the award made under the head of loss of dependency are irrelevant to the present circumstances. Consequently, it was asserted that the appeal lacks merit, and ought to be dismissed with costs.

11. 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."

12. 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.

13. 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 under the head of loss of dependency was justified.

14. 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).

15. The Respondent by way of his plaint averred at paragraphs 3, 4 and 5 thus:

> " 3. At all material times relevant to this suit, the Defendant was the registered and/or beneficial owner and insurance policy holder of motor vehicle registration number KCG 115V (hereinafter referred to as m/v).
>
> 4. On or about October 19, 2018, the deceased was hit and his head run over by the defendant's m/v which was being driven recklessly and negligently at Juja Road bus stop near Kariobangi roundabout around 0830 hours thus occasioning him fatal injuries.
>
> Particulars of the Defendant's Driver's Negligence
>
> a. Driving without due care and attention to other road users especially the deceased.
>
> b. Failing to employ evasive action to avoid the accident.

c. Driving at excessive speed in the circumstances and losing control of the m/v thus provoking the accident.

5. The Plaintiff and the estate of the deceased hold the Defendant liable for the actions of its driver and will rely on the doctrine of *res ipsa loquitur* where applicable." (sic)

16. The Appellant filed an amended statement of defence denying the key averments in the plaint and liability. Alternatively, the Appellant pleaded contributory negligence against the deceased by stating at paragraphs 4 and 5 that:

"4. The Defendant admits that an accident occurred on or about the 19th of October 2018 but denies that its motor vehicle was being driven recklessly or otherwise and the plaintiff is put to strict proof thereof.

5. In further response to paragraph 4 of the plaint the defendant states that one Benson Chege Mwangi (deceased) met his unfortunate death when he tried to steal a lift by hanging on the side of the lorry. He had clutched the metallic holder wielded on the side of the lorry and was stepping on the spare wheel when he slipped, fell and landed on the path of the moving left rear tyres of the Lorry. The defendant denies that it caused the accident by negligent driving as alleged and states that the said accident was solely and substantially caused by negligence of the deceased.

Particulars of Negligence

a. Trying to board and cling onto a moving vehicle.

b. Illegally boarding and clinging onto a moving vehicle.

c. Wilfully exposing himself to danger.

d. Boarding a vehicle at an undesignated area.

e. Failing to heed the instructions on safety precautions as a pedestrian.

f. Failing to take any adequate precautions for his own safety.

g. Failing to observe the provisions of the *Traffic Act* and the Highway Code.

h. Causing the accident." (sic)

17. The trial court upon restating the said evidence in its judgment stated the following concerning liability:

"Having considered the parties versions of how the accident occurred and who was to blame I make a few observation that:

1. The deceased died out of the road traffic accident.

2. He was child aged 17 years.

3. There was no eye witness in this case and if there was none recorded a statement with the police.

4. The defendants driver did not see the deceased hanging on the vehicle, he was only alerted by members of the public that he had injured someone and also he felt as if he was crossing a bump.

5. The police have not finalized investigations according to both PW1 and DW2. None of these officers was an investigating officer of this accident.

6. The police officers herein made reference to the police abstract which shows the deceased was a pedestrian. The court takes note that from the OB extract produced by the defence the reportee of the accident is unknown.

7. The cause of death was due to multiple injuries of the head and abdomen due to blunt force trauma.

Having made the above observation and after considering the testimonies of parties witnesses and the documents herein produced, I find that the defendant who is the only person who can clear the air about how the accident occurred has majorly relied on evidence whose source is unknown and/or speculations that the deceased was stealing a ride since no single witness recorded such evidence with the police.

...

I find the defendant and or his driver was to be blamed wholly for the accident and the fatal injuries the deceased sustained. He was not sued and as such the registered owner carries the blame under the principle of vicarious liability at 100%." (sic).

18. 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 Kenya stated:-

> " 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:
>
> > "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.
>
> However, Section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:
>
> > "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."

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:

> "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."

19. The latter statement affirms the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof in civil cases, 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.
> >
> > 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."

20. From the foregoing decisions, it is evident that the duty of proving the averments contained in the plaint lay squarely with the Respondent. 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)

21. In the present case it was not in dispute that an accident occurred on the material date, involving the subject motor vehicle and the deceased as a result of which the deceased sustained fatal injuries. Suffice it to say however that, 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."

22. The Respondent's case was based on the evidence of three (3) witnesses including the Respondent himself. PC Dennis Muchiri who was PW1 stated that he was at all material times stationed at Pangani Police Station. He produced the police abstract and postmortem report as P. Exhibits 1 and 2 respectively. The witness testified that he was not the investigating officer of the accident and that the officer who investigated the said accident had left the station. In cross-examination, the officer confirmed that the matter was still pending under investigation and that he could not tell who was to blame for the accident, although according to the OB extract, the deceased was attempting to ride on the subject motor vehicle when he met his death. In re-examination, the officer stated that according to the police abstract, the deceased was listed as being a pedestrian and not a passenger.

23. The Respondent, being PW2 produced his signed witness statement and his bundle of documents as his evidence-in-chief. During cross-examination, he admitted that he was not at the scene of the accident but was informed of what had transpired by passers-by. It was also his testimony that the deceased, who was his son, was standing by the side of the road at all material times and hence he blamed the driver of the subject motor vehicle for the accident.

24. Martin Chege Mwangi was PW3. He proceeded to adopt his witness statement as his evidence-in-chief. In cross-examination, he testified that he was in the company of the deceased on the material date but that he boarded a matatu and left the deceased at the matatu stage. That shortly he heard shouting and upon alighting from the matatu, found the deceased lying on the ground. That he could not tell who was to blame for the accident. In re-examination, the witness added that he found the deceased lying next to a lorry which was the subject motor vehicle.

25. On its part, the Appellant called its driver, Gedion Kimani Kamau as DW1. Upon adopting his witness statements as evidence, the driver stated that on the material day he was enroute from Umoja driving along Juja Road when the traffic police stopped the subject motor vehicle and other vehicles to allow traffic to flow. That upon being permitted to proceed, he had driven for about 20 metres when he sensed a bump only to be alerted the rear tyres of the subject motor vehicle had ran over a person; that on alighting he learned that the deceased was trying to hang onto the vehicle intending to have a ride on the subject motor vehicle. In cross-examination, the driver stated that it was difficult to see someone hanging from the rear side and that he had not noticed the deceased prior to the accident. He also stated that though he was served with a notice of intended prosecution, he had not been charged with any offence in relation to the accident. This was reiterated in re-examination.

26. PC Alice Labau who was DW2 produced an extract from the OB as D. Exhibit 1. The police officer proceeded to state that she could not confirm the truth of the averments that the deceased had been trying to hang onto the vehicle for an unauthorised ride when he was ran over, or ascertain who was to blame for the accident. During cross-examination, the officer stated that she had no knowledge of the person who made the report concerning the accident or the outcome of the investigations.

27. The Appellant finally summoned Duncan Olonde as DW3. The witness stated that he was an insurance investigator. He and produced his witness statement as evidence and a copy of the Inspections Analysis Report as a Defence Exhibit. It was his testimony that he had gathered information on the circumstances surrounding the accident from the police and eyewitnesses. That his conclusions were that the deceased was trying to have an unauthorized ride aboard the subject motor

vehicle by hanging on the left side of the rear when he slipped and fell off, and hence run over by the said vehicle.

28. In re-examination, the witness attributed blame to the deceased while confirming that the subject motor vehicle belonged to the Appellant at all material times. The witness further stated that he did not have any statements from eyewitnesses or the report by the investigating officer.

29. On a review of the material and evidence tendered, the court observed that no eyewitnesses to the accident were summoned by the parties. The only person who was present at the scene of the accident was PW3 and he too did not witness the accident taking place and could not therefore provide any account as to the manner in which it occurred. None of the witnesses summoned on both sides could ascertain who was to blame for the accident or what led to the accident, not even the police officers who testified. Similarly, the investigating officer was not summoned to shed light on the events leading up to the accident, while the police abstract indicates that the matter was still pending under investigations.

30. On the Appellant's part, its witness DW3, who tendered an Inspection Analysis Report setting out his investigations and conclusions did not provide any eyewitness accounts and/or the police investigations report to corroborate his findings. Consequently, the court would be wary to rely on his findings.

31. Notwithstanding the above, the burden of proof at all material times lay with the Respondent to prove the particulars of negligence pleaded against the Appellant. Upon considering the material and evidence on record, the court is not satisfied that the Respondent discharged this burden to the required standard.

32. 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 Appellant 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.

33. 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.

34. In the present instance, beyond proof of the occurrence of the accident, the court is of the view that the Respondent failed to prove facts which could give rise to or justify the invocation of the doctrine. Despite the dearth of evidence, the trial court proceeded to enter a finding of liability against the Appellant. In the court's view, the decision by the trial court to shift the burden of proof to the

Appellant when the Respondent had failed to discharge his burden constituted a serious misdirection of law and fact.

35. In view of the foregoing, the court finds that the Respondent's 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 Respondent to prove the particulars of negligence pleaded in his plaint and if the evidence did not support the facts pleaded, then he 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 Appellant's driver , and that the Appellant was wholly liable for the accident therefore.

36. In view of all the foregoing circumstances, the court finds that the appeal succeeds on the issue of liability and the court need not consider the challenge to quantum of damages. The appeal is therefore allowed, and the court hereby sets aside the judgment of the lower court in its entirety, thus substituting it with an order dismissing the Respondent's suit in the lower court. In the circumstances of the case, the parties will bear their own costs both in the suit and on the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant: Ms. Opiyo

For the Defendant: Mr. Orenge

C/A: Carol