Wathiru v Wafula (Suing as the Legal Administrator of the Estate of the Late Ignatius Simiyu Wafula) (Civil Appeal E079 of 2021) [2023] KEHC 20968 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E079 OF 2021

DK KEMEI, J

JULY 28, 2023

BETWEEN

GEORGE NJENGA WATHIRU .... APPELLANT

AND

EUNICE NASIMIYU WAFULA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE IGNATIUS SIMIYU WAFULA) .... RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrate Hon. Charles Soi Mutai (SPM) at Bungoma delivered on 3rd December, 2021 in Bungoma CMCC No. 97 of 2017)

JUDGMENT

1. The Appellant George Njenga Wathiru appeals to this Court on liability and quantum awarded from the Judgement of Honourable C.S Mutai (SPM) delivered on 3rd December 2021 in Bungoma SPMCC No. 97 of 2017, in which he apportioned liability at 100% to the Appellant and proceeded to award the Respondent Kshs. 20,000/= under pain and suffering, Kshs. 5, 864,000/=under loss of dependency and Kshs. 11, 474/= under special damages.

2. The principal claim in the Plaint dated 13th March 2017 was for an award of damages arising out of an accident which occurred on or about 6th January 2017 when the deceased was lawfully travelling as a pillion passenger on a motorcycle registration number KMDU 883R when the Appellant so negligently drove, managed and or controlled motor vehicle registration number KCD 034Q permitting and/or allowing the same to move where the deceased was and it knocked him thereby causing him to sustain severe injuries that led to his death.

3. At the end of the trial, the learned trial magistrate entered judgement for the respondents as follows:

   i. Liability at 100% against the Appellant

   ii. Pain and Suffering at Kshs. 20,000/=

iii. Loss of dependency at Kshs. 5, 895, 475/=

iv. Special damages at Kshs. 11, 474/=

v. Costs of the suit and interest.

4. Aggrieved by the decision of the trial court on liability and quantum, the Appellant appealed to this court putting forth the following grounds:

   i. That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable in negligence.

   ii. That the learned trial magistrate erred in law and fact by failing to apportion liability on the basis of contributory negligence on the part of the deceased in view of the evidence adduced.

   iii. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the Appellant on both issues of liability and quantum.

   iv. That the learned trial magistrate erred in law and fact in using the wrong principles in the assessment of damages thereby arriving at an erroneous decision.

   v. That the learned trial magistrate erred in law and fact in adopting a multiplier of 25 years without taking into account the vagaries and vicissitudes of life

   vi. That the learned trial magistrate erred in law and fact by adopting a dependency ratio of 2/3 when the issue of dependency was not proved.

5. The Appellant prays for the judgement to be set aside and substituted with an order dismissing the Respondents' suit with costs and costs of this appeal. He also prayed that in the alternative, the multiplier adopted should be reduced to between 10-12 years and that the dependency ratio of 2/3 be set aside in its entirety.

6. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.

7. Vide submissions dated 27th February 2023 and filed on 28th February 2023, the Appellant submitted that the apportionment of liability to the Appellant at 100% was wrong and misguided. Counsel submitted that the dictates of Section 107, 108 and 109 of the *Evidence Act* were not adhered to. According to Counsel, PW2 did not witness the accident and thus the evidence tendered did not prove the particulars of negligence on the part of the Appellant. With regard to PW3, Counsel submitted that he alleged that the motor vehicle was overtaking and that the motor cycle was hit in the process. Counsel argues that it is trite that the motorist who intends to join a highway must first make sure that the road is clear before doing so. He relied on Section 78 of the *Traffic Act* and Section 40 of the Highway Code of Kenya. He argued that the deceased ought to have warned the motor cycle rider not to join the highway carelessly.

8. The Appellant submitted that PW1 was not the investigating officer, did not visit the scene of the accident, did not have the police file in Court, only produced the Police Abstract and that he testified that no one was blamed for the accident. He argued that PW1 did not do much to aid the Court in determining liability. He relied on the case of Kennedy Nyangoya vs Bash Hauliers (2016) eKLR where the witness did not have the Police file or sketch maps in Court to help build the Plaintiff's case. Counsel argued that PW1 simply produced a Police Abstract but did not prove negligence.

9. He urged this Court to set aside the holding of the trial Court on liability and dismiss the Respondent's suit with costs.

10. On quantum, Counsel for the Appellant submitted that the award was not appropriate under the dependency ration as dependency was not proved. It was submitted that the Respondent failed to attach any birth certificates to prove that the deceased was survived by five children and that she did not produce any proof of the claim that the deceased was married to two wives.

11. On the multiplier aspect, Counsel submitted that the trial Court's adoption of a multiplier of 25 years while the deceased died at the age of 35 years clearly indicated that the trial magistrate failed to take into account the vagaries and vicissitudes of life. Counsel submitted that a multiplier of 10-15 years would have been appropriate and he relied on the case of Alex Koech and Another vs Mary N. Odhiambo HCCA No. 42 of 2016 (2018) eKLR.

12. He urged this Court to allow this appeal, set aside the decision of the lower Court and substitute the same with an appropriate one and that the costs of this appeal be borne by the Respondent.

13. By submissions dated 20th March 2023 and filed in Court on 22nd March 2023, the Respondent submitted that she proved her case on liability against the Appellant vide the evidence of PW2 who was an eye witness and who blamed the Appellant for the accident and that the same evidence was never rebutted by the Appellant. Counsel relied on the case of Embu Public Road Services Ltd vs Riimi (1968 EA 22. He urged this Court to uphold the decision of the lower Court on liability.

14. On quantum, Counsel submitted that the lower Court observed the principles on assessment of damages as elaborated in Kemfro Africa Limited t/a Meru Express Services (1976) & Another versus Lubia & Another (No. 2) (1985) eKLR.

15. On the dependency ratio, Counsel submitted that the 2/3 dependency as adopted by the lower Court was as per the Appellant's lower Court submissions at page 103 of the record of appeal and paragraph 42 where he submitted that the ratio of 2/3 would be appropriate.

16. On the multiplier, Counsel submitted that the deceased was 35 years at the time of his death and according to Historical life expectancy data as of the year 2017, the same was 65 years, meaning that he had 30 years remaining to reach his life expectancy prior to his demise. The trial Court award of 25 years means 5 years were meant to factor in the vagaries and vicissitudes of life.

17. This being the first appellate court, it is imperative to analyze the evidence tendered before the trial court. It was the evidence of PW1, PC Dennis Murunga, that he is attached to Bungoma Police Traffic Base and who proceeded to produce the Police Abstract as PEXH.1 regarding the accident that occurred on 6th January 2017 involving motor vehicle registration number KCD 034Q and motor cycle KMDU 883R that led to the demise of the deceased. He testified that he was able to establish that the owner of the motor vehicle was George Njenga Wathiru.

18. On cross-examination, he told the Court that he was not the investigating officer and that he did not visit the scene of the accident even as he produced the Police Abstract. He testified that he did not produced the police file before the Court and that no one was to be blamed for the accident as the same was pending investigations.

19. PW2 was Eunice Nasimiyu Wafula, who testified that she is the first widow of the deceased herein. According to her, the second widow is Esther Chepkemoi and that the deceased is survived by five children. Both of them relied on their husband for survival and that the deceased was employed

and was earning Kshs. 35,000/= on a monthly basis. She produced the following documents as the Respondent's exhibits in Court:

i. Copy of limited grant-PEXH.II

ii. Copy of the death certificate- PEXH.III

iii. Copy of the records and receipts thereof- PEXH.IV(a) & PEXH.IV(b)

iv. Invoice from Bungoma West- PEXH.V

v. Receipt from Bungoma Law Courts- PEXH.VI

vi. Letter from the Chief- PEXH.VII

vii. Fees structure and report card- PEXH.IIX (a), (b) & (c).

viii. Copy of pay slip from Doshi & Co. ltd- PEXH.IX (a) & (b)

ix. Birth Certificate of Emmanuel Wafula- PEXH.I

20. On cross-examination, she told the Court that she did not witness the accident and that the deceased had five children.

21. PW3 was Fred Wamalwa Wekesa, who testified that he is a businessman and that he recalled on 6th January 2017 while at Mayanja near Nabwala Hospital, he witnessed an accident involving motor vehicle registration no. KCD 034 Q ISUZU and a motor cycle registration number KMDU 883 R. According to him, the motorcycle was being ridden towards Mayanja while the lorry was being driven towards Bungoma. The motorcycle rider proceeded to fuel his motor cycle at a petrol station which was on the left side from Bungoma and as he entered the road where the lorry was being driven at high speed and was also overtaking another motor vehicle, he hit the motor cycle rider who instead of falling on the left side of the road fell on the right side due to the impact. The pillion passenger was critically injured and that he helped to put him out of the vehicle and he was rushed to Bungoma West Hospital. He blamed the driver of the motor vehicle for the accident and for being negligent by overtaking at a busy place and driving at excessive speed.

22. On cross-examination, he told the Court that the accident occurred on 6th January, 2017 at about 6.30 pm along Bungoma-Chwele road to be specific at Nabwala Hospital. H e told the Court that he was about 20m to 30 m from the scene and that at around 6.30 pm to 7pm the lights of the Hospital and petrol station were on. According to him, the driver of the motor vehicle was heading from Chwele to Bungoma while the Motor cycle rider was headed in the opposite direction and that there were no other vehicles in front of the lorry. He told the Court that the impact of the accident was on the right side of the road as you head towards Bungoma and that the motor cycle was thrown on the side of the hospital.

23. I have given due consideration to the appeal herein, the evidence before the trial Court, the grounds of appeal and the submissions by the counsels in this appeal as well as the parties' submissions in the lower Court. In my humble view, I find the only issues for consideration are whether the trial Court's apportionment of liability for the accident was proper and whether this Court should interfere with the award of damages by the trial Court.

24. It is trite that this is a first appeal to this Court and as provided in the well settled principles, I am obligated 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.)

25. 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; -
>
> "An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."

26. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin phrase ''Onus Probandi'' and when we talk of burden we sometimes talk of onus.

27. Burden of proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

28. Section 107 of *Evidence Act* defines burden of proof as– of essence the burden of proof is proving the matter in court. Subsection (2) Refers to the legal burden of proof.

29. Section 109 of the *Evidence Act* exemplifies the Rule in section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

30. The question therefore is whether the Respondent herein discharged the burden of proof that the Appellant was liable in negligence for the occurrence of the accident wherein the deceased was allegedly killed.

31. I have considered respective parties' arguments in this appeal. There is no denial that the deceased was a pillion passenger on motor cycle registration number KMDU 883 R. According to PW3, the motor vehicle registration No. KCD 034 Q ISUZU was being driven in high speed and was also overtaking another motor vehicle when he hit the motor cycle rider who instead of falling on the left side of the road he fell on the right side due to the impact.

32. The appellant or his driver did not adduce evidence to rebut the evidence as tendered by PW3.Only cogent evidence would assist the Appellant in demonstrating that there was no fault on his part. Indeed, the appellant did not call any witnesses in support of his case and thus it would seem that the Respondent's evidence was not controverted.

33. The Appellant blamed the deceased for contributory negligence for his failure to caution the motor cycle rider. I do not find the Appellant's argument persuasive. According to PW3, an eye witness, the motor vehicle registration No. KCD 034 Q ISUZU lorry was being driven at high speed and was also overtaking another motor vehicle when he hit the motor cycle rider. The appellant did not avail a witness to support his claim that the accident was due to a brake failure. The deceased had nothing to do with it. Even if the deceased had cautioned the motor cycle rider, the accident would still have occurred judging by how the Appellant was driving motor vehicle registration no. KCD 034 Q ISUZU. There was no nexus between failure to caution the motorcycle rider and occurrence of the accident. That is; there was no way failure to caution the motorcycle rider by the deceased could have caused the accident or contributed to its occurrence since the appellant or his driver was driving at high speed and overtaking other vehicles. For that reason, I am unable to fault the trial Court's finding on liability. The appellant failed to observe the Highway Code of traffic and failed to have a proper lookout for other road users and further driving at a high speed and overtaking other vehicles.

34. On the issue of quantum, according to the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR: -

    '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...'

35. The Appellant complained in his grounds of appeal that the trial court was wrong in adopting a dependency ratio of 2/3 without any proof, and that it failed to deduct the award made under the *Law Reform Act* from the total award of damages.

36. The Court awarded Kshs. 20,000 for pain and suffering; and Kshs. 5, 864, 000/=for lost years. The Appellant did challenge the awards as according to him the same were made using the wrong principles in the assessment of damages.

37. In regard to the pain and suffering, the trial court awarded Kshs 20,000/=. In the case of West Kenya Sugar Co. Limited vs Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] Eklr, Njagi J observed that:-

    > " The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident."

38. In the case of Sukari Industries Limited v Clyde Machimbo Jumba [2016] eKLR Majanja J. stated: -

    > " On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally

accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged after death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years………"

39. I have gone through the trial Court proceedings and noted that the deceased was rushed to Bungoma West Hospital where he succumbed to his injuries. A certificate of death which indicated that the deceased died on 6th January 2017 at Bungoma West Hospital, which means that he did not die on the spot. The Appellant did not controvert the evidence tendered by PW3. It is therefore my finding that the award of Kshs 20,000/= was sufficient in the circumstances of the case. Under this head, this appeal fails.

40. On loss of expectation of life, counsels placed reliance on the decision of James Gakinya Karienye & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR where my learned colleague Justice R.E Aburili awarded Kshs. 80,000. Also, in the case of Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (suing as the Legal Administrator of the estate of the late Robert Mwangi) [2019] eKLR where Muchemi J. stated: -

> "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000 while for pain and suffering the awards range from Kshs 10,000 to Kshs 100,000 with higher damages being awarded if the pain and suffering was prolonged before death".
>
> I note that the trial Court did not make any award under this head. Had the Respondent filed a cross-appeal over this sum, the same would have been awarded. As the same was not awarded, then I will leave it at that.

41. The above awards are capped to a minimum so that the estate of the deceased does not benefit twice from the same death –under the *Fatal Accidents Act* and the *Law Reform Act*.

42. On the claim under the *Fatal Accidents Act*, I note that the respondents had a letter of administration ad litem to represent the estate of the deceased person. They sued in their capacities as father and mother of the deceased. They are therefore dejure dependants under section 4(1) of the *Fatal Accidents Act* which provide that:

> "Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused…"

43. The deceased was married and had five known issues. On the claim for lost years (loss of dependency), the manner of assessment of damages under the Fatal Accident's Act was set out in Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749 where the Court of Appeal stated that:-

> "The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or

proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the defendants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants."

44. On multiplicand, PW2 testified that the deceased worked as a Sales Executive with Doshi & Co. Ltd where he was earning and would earn a net pay of Kshs 20,236/= per month. I have gone through the trial Court proceedings and there was evidence on record to ascertain what the deceased actually earned and therefore the deceased's income was known. It is noteworthy that the Respondents only attached two pay slips of the deceased and as it is the principle is always that the latest pay slip is usually applicable in the computation of damages. The Appellant in the lower Court submissions proposed the use of the May 2016 net pay of Kshs. 12, 116/= which is the right position. I hereby find that the lower Court was in error for using the basic pay Kshs. 29, 310/= as the multiplicand. The appropriate amount would have been Kshs. 12, 116/= which is the net pay after the usual statutory deductions.

45. On multiplier, the deceased aged 35 years could have worked under Government Regulations up to 60 years, a difference of 25 years. The Respondent urged the Court to apply a multiplier of 25 years. The Appellant emphasizes vicissitudes of life to potentially curtail such working period. The adoption of a multiplier of 25 years by the trial Court was plastic and unreflective of the reality of life where the pilgrim's journey is fraught with many uncertainties, unknown unforeseen occurrences which may well shorten the expected working life of the employee in private or public service so that the contractual or statutory age of retirement is an unrealistic quotient. A court determination ought to be realistic and that the Court is better placed in justice to adopt a figure of the multiplier which is reasonable and in tune with realities of life. In this case in the absence of any debilitating health concerns, the Court shall make only a small reduction of three (3) years on the public sector retirement age of 60 so that the multiplier of 22 years is used in the computation. Obviously, it was unrealistic to expect the deceased to have lived up to the last date of retirement without any scratch. The vagaries of life must be contended with by all mortal beings on earth.

46. On dependency ratio, the Respondent availed a letter from the area chief detailing the dependents of the deceased's two wives and five children. There was no evidence in rebuttal by the Appellant and taking cognizance of the fact that in the village most people lack documentation on births of their children or their customary union, this Court ought not to fault them. The Respondent took all the necessary steps to prove what she alleged and as such discharged her evidential as well as burden of proof contrary to the submissions by the Appellant. In that regard, I note that the Appellant in the lower Court did propose a ratio of 2/3 which the Court duly considered. The deceased had a family that depended on him and hence the dependency ratio was appropriate in the circumstances. I agree with the lower Court that the ration of 2/3 was appropriate and should be maintained.

47. In summary therefore, the loss of dependency comes to Kshs 12,116 × 12 × 22 × 2/3= Kshs 2, 132,416. I must interfere with the award under this head and thus the appeal succeeds on that ground.

48. As the special damages are not contested in this appeal, this court will not venture into its analysis and that the same shall remain undisturbed.

49. In view of the foregoing observations, the appeal on liability lacks merit while the appeal on quantum partly succeeds only to the extent of the awards for loss on dependency. Consequently, the trial court's decision to apportion liability against the Appellant at 100% is hereby upheld. Similarly, the awards of Kshs. 20,000/= for pain and suffering is upheld as well as the sum of Kshs 11, 475/. The award of

Kshs. 5, 862,000/= on loss of dependency is hereby set aside and substituted with an award of Kshs. 2, 132, 416/=

50. For the avoidance of doubt, the judgment on appeal is as follows:

    a. Liability................100% against the Appellant

    b) General damages

        (i) Pain and suffering Kshs. 20,000.00/=

        (ii) Loss of dependency Kshs. 2, 132, 416.00/=

    b) Special damages Kshs. 11, 475.00/=

    Net Total Kshs. 2, 163,891.00/=

49. On costs, i find that it is just to order that each party bears their own costs of the appeal while the Respondents shall have full costs and interest in the lower Court.

50 Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY,2023.

D.KEMEI

JUDGE

<u>In the presence of:</u>

Nyabuto for Appellant

No appearance Wamalwa Simiyu for Respondents

Kizito Court Assistant