Kannari v Gichuki & 2 others (Civil Appeal 425 of 2018)
[2023] KEHC 20857 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20857 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 425 OF 2018

JN MULWA, J

JULY 25, 2023

BETWEEN

JULIUS MAMALI KANNARI ..... APPELLANT

AND

SALOME WANJIRU GICHUKI ..... 1ST RESPONDENT

MICHAEL MUTUA KIOKO ..... 2ND RESPONDENT

CYPRIAN KANAKE AMBAO ..... 3RD RESPONDENT

(Appeal from the Judgment and Decree of the Chief Magistrate's Court at Milimani in Civil Suit No. 715 of 2016 delivered by Hon. G. A. Mmasi (SPM) on 13th August 2018)

JUDGMENT

1. By a Plaint dated February 9, 2016, the 1st Respondent instituted Milimani CMCC No 715 of 2016 against the Appellant and the 2nd and 3rd Respondents claiming damages under the *Fatal Accidents Act*, The Law Reforms Act, special damages, costs of the suit and interest thereon.

2. The claim arose from a road traffic accident that occurred on May 25, 2015 along Ongata Rongai Road near St Mary's Catholic Church. It was pleaded that on the material day, the 1st Respondent's son, one Kevin Wanjohi Wanjiru, was walking along the said road at 19.00 hours when the 2nd Respondent negligently drove a lorry registration number KSZ 300, property of the Appellant and the 3rd Respondent, causing it to knock him down. As a result, the Respondent sustained fatal injuries for which the 1st Respondent sought compensation.

3. The Appellant denied the claim through a statement of defence dated April 4, 2015. The 2nd and 3rd Respondents did not file any defences to the claim.

4. After full trial, the lower court held the Appellant, the 2nd Respondent and the 3rd Respondent jointly and severally wholly liable for the accident and awarded the Respondent damages totaling Kshs 1,216,030/- plus costs and interest. Aggrieved by the decision, the Appellant lodged the instant appeal vide an Amended Memorandum of Appeal dated September 26, 2016 in which he raised the following grounds: -

    1. That the trial magistrate erred in law and fact by finding that the Appellant jointly with the 2nd and 3rd Respondents were negligent whereas the Plaintiff failed to call evidence discharging this burden.

    2. That the trial magistrate erred in both law and fact in finding that the 2nd Respondent was an employee of the Appellant and the 3rd Respondent when no evidence was adduced to this effect.

    3. That the trial magistrate erred in law and fact in awarding general damages for loss of dependency where the proof of earnings (multiplicand) and dependency had not been proved.

    4. That the trial magistrate erred in law and fact by awarding high and excessive sum of Kshs 1,216,030/= for loss of dependency.

    5. That the trial magistrate erred in law and fact in awarding excessive damages under the head of Pain and Suffering (Kshs 200,000/=).

    6. The learned trial magistrate erred in law and in fact in coming to the conclusions and judgment he came to contrary to the evidence, the Law and the Submissions urged before him.

5. The Appellant now urges that the Appeal be allowed; the trial court's awards of loss of dependency and pain and suffering be set aside and or varied; and the costs of the and the suit in the lower court be awarded to him.

Evidence

6. PW1, No 40835 Sergent Moses Kisangi from DTO's office Ongata Rongai Police Station testified that on June 2, 2015, a report of a fatal road traffic accident at Rongai area was received involving motor vehicle registration number KSZ 300 Isuzu Lorry and a pedestrian. He stated that the police visited the accident scene and a file opened. He produced the police abstract that was issued in that regard as PExh.1 and stated that the Investigating Officer, Police Constable Robert Maina, was transferred from the station. It was further his testimony that the owner of the motor vehicle as per the police abstract is Julius Mamali Kanaari and the driver was Michael Mutua Kioko.

7. In cross-examination, PW1 stated that their records do not show who reported the accident on June 2, 2015. He mentioned that the occurrence book extract indicates that the pedestrian was crossing the road from left to right when facing Rongai but admitted that he did not have a sketch plan of the accident scene. Further, PW2 stated that the pedestrian sustained chest injuries and was taken to Mbagathi Hospital where he was declared dead on arrival. In addition, PW2 stated that investigations were done although he could not tell what the recommendations were and was not aware whether anybody was charged thereafter.

8. PW2 Salome Wanjiru Gichuki was the 1st Respondent herein and the mother of the deceased Kevin Wanjohi Wanjiru. She testified that friends of the deceased informed her about the accident whereupon she rushed to the scene near St. Mary's Church Ongata Rongai and found that he had been rushed to Jamii Nursing Home. PW2 averred that the deceased was later admitted at Mbagathi District Hospital but succumbed to his injuries after 9 days. Further, PW2 testified that the deceased was working in

a butchery prior to his death. PW2 also stated that the deceased had one child and she adduced the child's birth certificate in evidence.

9. On cross-examination, PW2 stated that the deceased used to maintain his child and she was also dependent on the deceased. Additionally, PW2 asserted that the owner of vehicle according to the search conducted by her Advocates is Kanake Cyprian Ambao and Julius Mamali.

10. The Appellant then Defendant closed his case without calling any witness or adducing any evidence to controvert the Respondent's evidence.

Analysis and Determination

11. The Appeal was canvassed through written submissions which the court has given due consideration as well as the grounds and Record of Appeal. The issues that fall for determination are whether the trial court's finding on liability was erroneous and whether the trial court's assessment of damages was erroneous.

Liability

12. As a general rule, an appellate court will not interfere with the trial court's finding on apportionment of liability as it is an exercise of discretion. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held thus:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

13. The Appellant submitted that none of the two witnesses called by the 1st Respondent witnessed the occurrence of the accident and thus could not ascertain who was to blame for the accident. He urged that the evidence given by PW1 and PW2 was hearsay evidence and therefore of no probative value. Further, the Appellant contended that PW1's evidence was at variance and inconsistent with the material facts of the case and therefore should not have been relied upon by the trial court.

14. The first issue that this court will determine is who was to blame for the accident in question.

15. PW1, No 40835 Sergeant Moses Kisangi from DTO's office Ongata Rongai Police Station adduced a Police Abstract dated June 30, 2015 showing that an accident occurred on May 25, 2015 near St. Mary's Catholic Church Ongata Rongai involving a pedestrian, Kevin Wanjohi Wanjiru and Isuzu Lorry registration number KSZ 300 being driven at the time by the 2nd Respondent herein. Notably however, the Police abstract does not indicate who was to blame for the accident. Rather, it shows that the matter was pending under investigation although the investigating officer was not called to testify as to the outcome of the investigations conducted, if any. Further, there was no eyewitness account of how the accident occurred.

16. In determining liability, the learned magistrate held that the deceased did not contribute to the accident in any way. With due respect and considering the analysis in the preceding paragraph, this court finds that the evidence on record does not support the trial magistrate's position. The plaintiff who is the 1st Respondent herein did not tender any evidence that would have led the court to find, even on a prima facie basis, that the driver of the subject motor vehicle was wholly to blame for the accident. Be that is may however, the court holds the considered view that since there is proof that the accident occurred,

the driver of the subject motor vehicle which is a dangerous machine had a higher duty to exercise care and attention when driving in order to avoid injuring other road users including the deceased pedestrian. In *Masembe v Sugar Corporation & Another* [2002] 2 EA 434, it was held that:

> "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

17. Further, the deceased pedestrian cannot also be wholly absolved from blame in the absence of any evidence on what steps he took to avoid the accident, if any. Some degree of negligence ought to have been attributed to him since he was also expected to exercise care and caution when walking on the road. Such a pedestrian, in the absence of clear evidence must shoulder some blame.

18. The next issue is whether the Appellant was vicariously liable for the negligent acts of the driver of the subject motor vehicle. In his submissions, the Appellant blamed the learned magistrate for relying on the police Abstract as conclusive proof of ownership of the subject motor vehicle. The Appellant argued that he is not the actual, beneficial or possessory owner of the motor vehicle. He also contended that no evidence whatsoever was adduced to show any relationship that could have given rise to vicarious liability on his part.

19. In the police abstract adduced by PW2, the owner of the subject motor vehicle at the time of the accident is indicated as Julius Mamali Kanaari, the Appellant herein and his name and address were duly provided. It is also indicated that the vehicle was at the time insured by BRITAM Insurance Company Ltd under policy number B7293147 which covered the period being May 21, 2015 to May 20, 2016. Despite denying the claim entirely in his Statement of Defence, the Appellant did not call any witness nor adduce any evidence to controvert the evidence adduced by the 1st Respondent's witness.

20. In the case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another* [2010] eKLR, the Court of Appeal while considering the evidentiary value of a police abstract as regards proof of ownership of a motor vehicle and held as follows: -

> "Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

21. Further in the case of *Ibrahim Wandera v P N Mashru* Civil Appeal No 333 of 2003 the Court of Appeal expressed itself as follows:

> "The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied

with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgment by the trial court against the respondent."

22. Indeed, it is noteworthy that the Appellant was the only defendant that participated in the proceedings in the lower court but his Counsel never raised any objection to the production of the police abstract nor did he cross examine the witness on it. In the premises, the court finds that the 1st Respondent proved on a balance of probability that the Appellant was one of the owners of the subject motor vehicle alongside the 3rd Respondent who is indicated as the owner in the copy of records obtained from the department of Road Transport. In the premises, the court finds that the trial court did not err by holding the Appellant vicariously liable for the negligent acts of his agent, servant or driver, the 2nd Respondent herein.

23. For the foregoing, the Appeal on liability succeeds partially to the extent that liability is apportioned between the 1st Respondent on the one hand and the Appellant, the 2nd and 3rd Respondents on the other hand at the ratio of 10:90. The Appellant, the 2nd Respondent and 3rd Respondents shall bear 90% liability jointly and severally.

Quantum of Damages

24. As a general principle, the assessment of damages is a matter of the exercise of the court's discretion. As such, an appellate court will normally be slow to interfere with such discretion unless it is very necessary. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR stated as follows in this regard:

> " 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..."

25. In the judgment of the lower court, the learned magistrate held as follows regarding the quantum of damages (quoted verbatim):

> " The *Law Reform Act*
>
> The deceased died 9 days after the accident. He was hit on 25/5/2015 and died on June 2, 2015 from injuries sustained following the accident.
>
> I have perused the submissions and the comparative authorities cited by counsels and herewith award the plaintiff Kshs 200,000/- for pain and suffering and Kshs 200,000/- for loss of expectation of life.
>
> Under the *Fatal Accidents Act*, the court will adopt Kshs 11,279.50 x 12 x 1/3 x 25 = Kshs 1,127,900/-....
>
> It is trite law that giving awards under the *Law Reform Act* and the *Fatal Accidents Act* amount to double award hence I will proceed to award general damages in the tune of Kshs 1,127,900/-.
>
> Special damages.....Kshs 82,120/-
>
> Ad litem fees.....Kshs 1,010/-
>
> Witness Summons.....Kshs 5,000/-

Grand Total.....Kshs 1,216,030/-"

Special damages

26. In his submissions, the Appellant raised issues with the special damages awarded by the trial court. He claimed that the same was not strictly proved as by law required, submitting that there were no corresponding stamped receipts or any other document to show that the said amounts were expended by the 1st Respondent as a result of the accident. Notably however, the issue of special damages did not feature in the grounds enumerated in the Appellant's Memorandum of Appeal. Be that as it may, the court notes that the 1st Respondent pleaded special damages in the sum of Kshs 134,085/- but the trial court awarded Kshs 88,130/-. However, upon carefully examining the receipts adduced in evidence, this court finds that the total amount expended is Kshs 78,630/-.

Pain and suffering

27. The court was invited to review the trial court's award for pain and suffering vide grounds 3, 4 and 5 of the Memorandum of Appeal filed herein although the Appellant did not address the issue in his submissions filed herein.

28. It is clear from the body of the impugned judgment that the trial court awarded Kshs 200,000/- for pain and suffering. However, this court does not understand why the said award did not make it to the final computation of the trial court's total sum awardable. Be that as it may, this court has accordingly reviewed the evidence tendered in this regard. The awarded sum of Kshs 200,000/- was not excessive considering the fact that the deceased died nine days after the subject accident as a result of injuries sustained therein. Accordingly, the award for pain and suffering shall be included in this court's computation of the damages awardable to the Estate of the deceased.

Loss of Dependency

29. The Appellant is aggrieved by the multiplicand and dependency ratio adopted by the trial court in calculating damages for loss of dependency. In his submissions filed herein, he contended that PW2 did not produce any documents to prove that the deceased was working in a butchery and earned Kshs 25,000/- per month as alleged. The Appellant also claimed that no documents were adduced to show that the deceased's mother and child were wholly dependent on him for support.

30. As regards the multiplicand, the trial magistrate used Kshs 11,279.50 on the basis that it was the minimum wage applicable to the deceased at the time under the *Regulations of Wages (General) (Amendment) Order 2015*. The court has examined the said Regulations and noted that Kshs 11,279.50 was the minimum wage payable to the following group of people: printing machine operator, bakery machine operator, plywood machine operator, sawmill dresser, shop assistant, machine tool operator, dough maker, table hand baker or confectionary, copy typist, driver (cars and light vans). There is no evidence on record to show that the deceased had been employed to do any of the aforementioned jobs prior to his demise. PW2 testified that he worked in a butchery in Ongata Rongai but nothing was adduced in that regard. In the premises, the applicable multiplicand ought to have been the minimum wage payable to a general labourer in the area where the deceased lived which at the time was Kshs 5,844/-.

31. On the dependency ratio, the court notes that the trial magistrate adopted 1/3 without giving any reasoning for the same. This is an indication that the court did not consider PW2's testimony that she and the deceased's daughter were dependent on him as well as the birth certificate of the deceased's

daughter which was adduced without any objection. This court will therefore interfere with the dependency ratio, set it aside and substitute it with a 2/3 ratio.

32. In totality therefore, damages for loss of dependency shall now be calculated as follows: Kshs 5,844 x 12 x 2/3 x 25 = 1,168,800/=

Conclusion

33. For the foregoing, the appeal succeeds Partially in the following terms:

a. Liability is apportioned between the 1st Respondent on the one hand and the Appellant, the 2nd and 3rd Respondents on the other hand in the ratio of 10:90. The Appellant, the 2nd Respondent and 3rd Respondents shall bear 90% liability jointly and severally.

b. Damages;

i. Special damages.....78,630/=

ii. Pain and suffering.....200,000/=

iii. Loss of dependency.....1,168,800/=

Total.....1,447,430/=

90% thereof.....1,302,687/=

c. Each party shall bear own costs of the Appeal.

Orders accordingly.

Dated, Delivered and Signed in Nairobi this 25th Day of July 2023.

JANET MULWA

JUDGE