Mutembu (Suing on her behalf and on behalf of the Estate of Francis Nzomo Kivindu - Deceased) v Kariuki (Civil Appeal 83 of 2016) [2023] KEHC 23913 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 83 OF 2016

OA SEWE, J

SEPTEMBER 29, 2023

BETWEEN

KIUNDU KAKUMBI MUTEMBU (SUING ON HER BEHALF AND ON BEHALF OF THE ESTATE OF FRANCIS NZOMO KIVINDU - DECEASED) APPELLANT

AND

PETER WAKIAMA KARIUKI ..... RESPONDENT

(Being an appeal from the Judgment delivered on 7th June 2016 by Hon. Henry Nyakweba, Principal Magistrate in Mombasa CMCC No. 1534 of 2004)

JUDGMENT

1. This appeal arises from the decision of the Principal Magistrate in Mombasa CMCC No. 1534 of 2004: Kiundu Kakumbi Mutembu (suing on her own behalf and on behalf of the estate of Francis Nzomo Kivindu, now deceased) v Peter Wakiama Kariuki. The appellant, as a personal representative of the estate of the deceased, had sued the respondent in that suit claiming general and special damages together with interest and costs in connection with a road traffic accident that occurred on or about 17th February 2002.

2. The appellant's cause of action was that the deceased, Francis Nzomo Kivindu, was travelling as a lawful passenger aboard Motor Vehicle Registration No. KAH 823J Mitsubishi Canter when the said motor vehicle veered off the road and overturned, thus causing the deceased to suffer fatal injuries. They blamed the accident on the negligence of the driver the subject motor vehicle and supplied particulars thereof at paragraph 5 of the Amended Plaint filed on 11th August 2004. Similarly, the plaintiff furnished Particulars of Special Damages and Particulars pursuant to the *Fatal Accidents Act*, Chapter 32 of the Laws of Kenya at paragraph 6 of the Amended Plaint. Thus, the appellant pleaded that the deceased was an adult aged 25 years and was engaged as a small scale businessman earning Kshs 100/= per day with prospects of a good future.

3. The respondent was initially sued as Peter Wakiari. This anomaly was however corrected by way of Amendment of Plaint read Peter Wakiama Kariuki. The respondent thereafter filed his Defence on 2nd May 2005 denying the appellant's claim. At paragraph 6 thereof, the respondent pleaded, in the alternative, that the deceased was not a lawful passenger in the suit motor vehicle; and that he was on board the said motor vehicle against the respondent's express instructions. In the same vein, the respondent averred, at paragraph 7 of the Defence that the accident was caused solely by the acts of a third party, namely, China Road and Bridge Construction Co. Ltd in placing unmarked piles of murram on the road at night without any notice to the users of the road. Accordingly, the respondent indicated his intention to apply for the joinder of the named third party as a co-defendant at paragraph 8 of his Defence. He consequently prayed for the dismissal of the suit with costs.

4. It is however manifest from the record that no co-defendant was enjoined to the suit; and that neither the defendant nor his counsel attended court for the hearing of the suit, in spite of service. Ultimately, the learned magistrate, Hon. Nyakweba, PM, delivered his Judgment on 7th June 2016 and dismissed the suit on the ground that the appellant had failed to prove negligence to the requisite standard. Here is what the learned magistrate had to say:

> " The plaintiff who testified did not witness the occurrence of the said accident. The only thing he did was to identify the body at the mortuary and taking it for burial. He did not tell the court how the alleged accident occurred...Though the police abstract was issued as a result, the motor vehicle involved is not shown. Though the name of the deceased is shown in the police abstract it is not shown the class of person he was. There are persons shown as witnesses but none of them was called as a witness. The only witness called did not tell the court how the accident occurred and which motor vehicle was involved. So whatever is alleged in the plaint remain as allegations which no attempt was made to establish. On a balance of probabilities therefore negligence was not established. The defendant cannot therefore be found liable...In the upshot, I dismiss the case against the defendant with no order as to costs."

5. Being aggrieved by the decision of the lower court, the appellant filed this appeal on 30th June 2016 on the following grounds:

   (a) That the learned magistrate erred in law and in fact in holding that the appellant had not proved his case on a balance of probabilities.

   (b) That the trial magistrate erred in fact and in law in failing to properly consider and evaluate the evidence before it.

   (c) That the trial magistrate erred in fact and in law in arriving at a decision which was not supported by the evidence on record and especially that of the appellant and his exhibits.

   (d) That the learned magistrate erred in law and in fact by failing to properly consider the exhibits produced by the appellant in support of his case and therefore failed to arrive at a decision in favour of the appellant.

   (e) That the learned magistrate erred in law and in fact by failing to consider the Plaint against the fact that the respondent did not adduce any evidence in support of his case.

6. In the premises, the appellant prayed for orders that:

   (a) The appeal be allowed with costs;

(b) The judgment and decree of the lower court dated be set aside;

(c) Judgment be entered in favour of the appellant against the respondent as prayed for in the appellant's Plaint and as proposed in the submissions;

(d) Alternatively, the Court do assess damages in this matter and proceed to award the same;

(e) Costs of the appeal be provided for.

7. Mr. Oddiaga, learned counsel for the appellant, urged the appeal by way of written submissions; and while he filed his written submissions herein on 14th June 2017, no submissions were filed on behalf of the respondent. Mr. Oddiaga submitted, first and foremost, that parties are bound by their pleadings and that the respondent opted not to respond to the allegations of negligence made by the appellant at paragraph 5 of the Amended Plaint. He further pointed out that the case proceeded ex parte after the respondent failed to attend court for the hearing of the suit before the lower court; and that the appellant duly discharged the burden of proof as required by Section 107 of the *Evidence Act*. Counsel relied, inter alia, on *JRS Group Limited v Kennedy Odhiambo Andwak* [2016] eKLR and *Palace Investments Ltd v Geoffrey Kariuki Mwenda & Another* [2007] eKLR in which the dictum in *Miller v Minister of Pensions* [1947] 2 AllER 372 to underscore his submission that, in the absence of rebuttal evidence from the respondent, the appellant had proved his case to the requisite standard. He consequently submitted that the lower court erred in not making a finding in favour of the estate of the deceased.

8. Mr. Oddiaga further submitted that the evidence of the appellant was completely ignored by the subordinate court and yet it contained pertinent facts as to the events leading to the death of the deceased, Francis Nzomo Kivindu, who was his son. He added that the documentary exhibits relied on by the appellant, including the Police Abstract were not countered. He cited *Joel Muga Opija v East Africa Sea Food Limited* [2013] eKLR, *Lake Flowers v Cila Francklyn Onyango Ngonga & Another* [2008] eKLR and *Ruth Wanjiku Muthare v Kenya Sugar Board* [2008] eKLR to buttress his submission that a Police Abstract is sufficient proof of negligence in a self-involving accident.

9. Counsel endeavoured to persuade the Court that the doctrine of res ipsa loquitor was applicable to the suit before the lower court; and therefore that the learned magistrate erred in not fixing full liability on the respondent. He made reference to the cases of *Obed Mutua Kinyili v Wells Fargo & Another* [2014] eKLR, *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR and *P I v Zena Roses Ltd & Another* [2015] eKLR for the proposition that the fact of the occurrence of an accident, taken with the surrounding circumstances raise the presumption of negligence, thus requiring an explanation from the defendant.

10. In support of Ground 5 of the appellant's Memorandum of Appeal, Mr. Oddiaga submitted that a Defence in response of the claim was indeed filed but was not placed on the subordinate court's file. He pointed out that, although the respondent blamed a third party for the accident, namely, China Road & Bridge Construction Co. Ltd, no efforts were made to enjoin the alleged third party to the lower court suit. He urged the Court to note that no response at all was made to the appellant's Amended Plaint; and that the respondent did not attend court for the hearing of the suit. He consequently prayed that a finding be made in favour of the appellant and the orders sought by him granted as prayed.

11. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions in respect of the disputation; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the

witnesses. This is in line with *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 wherein it was held that:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

12. Thus, I have perused the proceedings of the lower court and noted that the only witness before the lower court was the appellant. His testimony was taken on 2nd March 2016. He told the lower court that the deceased was his son, and that he died as a result of a road traffic accident that occurred on 17th February 2002 while he was travelling from Mombasa to Taveta. The appellant therefore confirmed to the lower court that he identified the body of the deceased for purposes of the post-mortem examination, after which the body was released to the family for burial.

13. Before the lower court, the appellant produced a Certificate of Death No. 70XXX dated 2nd April 2003 to prove the fact of death of the deceased. He likewise produced a Police Abstract and other documents to demonstrate that he had the requisite *locus standi* to file the suit against the respondent on behalf of the estate of the deceased. Thus, it was on that account that the appellant prayed for general damages, special damages, interest and costs on behalf of the estate of the deceased, Francis Nzomo Kivindu.

15.

(14) As has been indicated hereinabove, the respondent filed no response to the appellant's Amended Defence. He similarly adduced no evidence before the lower court in rebuttal of the claim against him, notwithstanding that he entered appearance and filed a Defence. Accordingly, in the light of the foregoing summary of evidence, there is no dispute that a road traffic accident occurred on the 17th February 2002, involving Motor Vehicle Registration No. KAH 823J, Mitsubishi Canter. It is not in contest that the deceased was a passenger in the subject motor vehicle; and that the accident happened when the motor vehicle veered off the road and overturned, thereby occasioning the deceased fatal injuries.

15. Granted that the respondent did not attend court to defend the suit by way of adduction of evidence, the issues that emerge for consideration are:

(a) Whether the learned magistrate erred in law and in fact in holding that the appellant had not proved his case against the respondent on a balance of probabilities; and,

(b) Whether the learned magistrate erred in principle in failing to assess the quantum of damages payable.

A. On the Burden of Proof:

16. Needless to say that it is not sufficient that an accident occurred as a result of which the deceased died. The appellant, as the plaintiff before the lower court, was under obligation to prove the link between that accident and the allegations of negligence made by him at paragraph 5 of his Amended Plaint. As

was observed by the Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258:-

> " ...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..."

17. The same position was reiterated in *Statpack Industries v James Mbithi Munyao* [2005] eKLR thus:

> " It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

18. Considering that the appellant was not at the scene when the accident occurred, he could not prove any of the particulars of negligence set out at paragraph 5 of the Plaint. Indeed, the appellant was content to rely on the fact that the accident was reported to the police and a police abstract was issued which was produced in court to demonstrate that a self-involving accident occurred on the 17th February, 2002 at around 5.00 a.m. That of itself was insufficient as proof of negligence.

19. Accordingly, I am in agreement with the position taken by Hon. Odunga, J. (as he then was) in the case of *Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karenge* [2021] eKLR, that:-

> " ...A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents...."

20. Thus, in the absence of such proof of negligence, as was the case herein, it is my finding that the decision arrived at by the trial magistrate on liability is justified in the circumstances and is hereby upheld. Indeed, as was observed by *Sir Kenneth O'Connor in Peters vs. Sunday Post Limited* [1958] EA 424:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

21. In arriving at the foregoing conclusion I have taken into account the submission of Mr. Oddiaga that no rebuttal evidence was presented by the respondent; and therefore that the appellant's case was entirely unopposed. It is now settled that mere failure by the defence to adduce evidence does not, of itself,

relieve a plaintiff of the legal burden of proof. Thus, in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR the Court of Appeal held:

> " The appellant relies on a number of decisions to press the view that in the absence of rebuttal evidence by the respondent, its case must automatically be taken as proved. We have already alluded to some of those cases in this judgment... First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 when he stated:
>
> "The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."
>
> The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities."

22. The Court of Appeal reiterated its posturing in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR thus:

> " ...It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. see Mwangi Muriithi (*supra*) and Mumbi M'Nabea v David Wachira Civil Appeal No. 299 of 2012."

23. In the premises, the lower court was obliged to consider the appellant's evidence in its totality and determine whether his allegations of negligence against the respondent had been proved. I am unable to find fault with the conclusion reached by the lower court; and although Mr. Oddiaga brought in

the plea of res ipsa loquitor at page 8 of his written submissions, no such argument was made before the lower court and therefore I have no basis for re-evaluation to ascertain whether or not the lower court erred in its appreciation of the doctrine.

B. On whether the learned magistrate erred in principle in failing to assess the quantum of damages payable:

24. It is evident that the learned magistrate failed to assess the quantum of damages he would have otherwise awarded, had he found for the appellants. He took the view that it was needless making a finding on quantum; which clearly was in error. The obligation by a court of first instance to assess damages that would have otherwise been payable, even where liability is not established, cannot be overemphasized. This obligation was restated by the Court of Appeal in *Andrew Mwori Kasaya v Kenya Bus Service* [2016] eKLR thus:

> "...the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
>
> "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"
>
> This principle has religiously been followed by the courts below..."

25. In the premises, there is need to reiterate the expressions of Hon. Mabeya, J. in *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR, that:

> "It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

26. The guiding principles are now well settled. For instance, on loss of dependency, the approach taken in *Chunibhai J. Patel and Another v P.F. Hayes and Others* [1957] EA 748, by the Court of Appeal for East Africa, and which I find useful, was 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 dependants, the net earning power of the deceased (i.e. his income less 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 by a figure representing so many years' purchase."

27. The same principle was applied in High Court Civil Case No. 4708 of 1989: *Grace Kanini Muthini v Kenya Bus Service Ltd* (*supra*) thus:

> " The court must find out as a fact what the annual loss of dependency is, in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fraction to be applied. Each case must depend on its facts. When a court adopts any fraction, that must be taken as its finding of fact in the particular case... The annual loss of dependency must be multiplied by a figure representing a suitable number of years of purchase. In considering that reasonable figure, commonly known as a multiplier, regard must be had to the personal circumstances of both the deceased and the dependants such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependants' expectation of dependency. The chances of the life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand of the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and, if wisely invested, good returns can be expected."

28 There appellant availed credible proof that the deceased was 25 years old at the time of his demise. The appellant produced a Certificate of Death before the lower court, which confirms this fact. He also adduced evidence to show that the deceased was in good health and was earning Kshs. 100/= per day as a businessman. Accordingly, counsel proposed that he had the prospects of working past 60 years; and therefore that a multiplier of 30 was reasonable, taking into account the vicissitudes of life. He relied on *Monicah Donald v Mburu Wamugu* [2001] eKLR in which a multiplier of 25 years was adopted in respect of a 30-year-old deceased whose income was Kshs. 3,000/= per month together with a dependency ratio of 2/3. I have no quarrel with that proposal, namely Kshs. 100 x 30 x 12 x 2/3, which would have yielded an award of Kshs. 720,000/= under head of loss of dependency.

29. In respect of awards for pain and suffering and loss of expectation of life, credible evidence was adduced before the lower court by way of the Certificate of Death in proof of the fact that the deceased died on the same date of the accident due to haemorrhagic shock. Accordingly, Mr. Oddiaga proposed an award of Kshs. 150,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life. He relied on David Mukii Mereka v Riachard Kanyago & 2 Others in which Kshs. 100,000/= was awarded for pain and suffering and Kshs. 70,000/= for loss of expectation of life.

30. The guiding principle in this regard was well captured in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR thus:

> " ... 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 before 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..."

31. Similarly, in *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR the Court observed that:

> "...The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

32. In the premises, while I am in agreement with the proposal by Mr. Oddiaga of Kshs. 100,000/= for loss of expectation of life, I would have considered an award of Kshs. 50,000/= sufficient in the circumstances under the head of pain and suffering. I would have also approved Mr. Oddiaga's proposal for an award of Kshs. 100/= for the Police Abstract and Kshs. 10,000/= for funeral expenses, notwithstanding that no evidence was adduced in respect the component of funeral expenses. In *Premier Dairy Limited v Amarjit Singh Ssagoo & Another* [2013] eKLR the Court Appeal pointed out that:

> "...it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved."

33. Hence, the total amount that would have otherwise been due to the estate and dependants of the deceased, Francis Nzomo Kivindu, in my assessment would have been:

Under the *Law Reform Act*:
Pain and suffering - Kshs. 50,000/=Loss of expectation of life - Kshs. 100,000/=

Under the *Fatal Accidents Act*
Loss of dependency - Kshs. 720,000/=

Special Damages
Funeral expenses - Kshs. 10,000/=Police Abstract - Kshs. 100/=

Total - Kshs. 880,100/=

34. In the result, having found that subordinate court committed no error to warrant the setting aside of its judgment, this appeal fails and is hereby dismissed. Given the plight of the appellant, it is hereby ordered that each party shall bear own costs of both the appeal and of the lower court's proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE