Tonui & another (Suing as the legal representatives of the Estate of Jesicah Cherono Ronoh - Deceased) v Anyona t/a Transline Classic & 2 others (Civil Appeal 11 of 2016) [2023] KEHC 22840 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 11 OF 2016

RL KORIR, J

SEPTEMBER 29, 2023

BETWEEN

HENRY TONUI ..... 1ST APPELLANT

DAVID KIBET ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JESICAH CHERONO RONOH - DECEASED

AND

EVANS ANYONA T/A TRANSLINE CLASSIC ..... 1ST RESPONDENT

RUBEYA NAILA ..... 2ND RESPONDENT

JOSEPH MOKAYA OBWAYA ..... 3RD RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate, Kiage G. at the Magistrate's Court at Bomet, Civil Suit Number 8 of 2014)

JUDGMENT

1. The Appellants (then Plaintiffs) as the Legal Representatives of the estate of Jesicah Cherono Ronoh, sued the Respondents (then Defendants) for General and Special Damages that arose from an accident on 20th December 2010 in which the deceased was knocked down by Motor Vehicle Registration Number KBM 256Y occasioning the deceased fatal injuries.

2. The Respondents did not enter appearance or file a defence and as a result, interlocutory judgment was entered against them. The matter proceeded to formal proof hearing where the Appellants produced two witnesses and the exhibits they relied upon.

3. In its Judgement dated 8th June 2016, the trial court dismissed the Appellants' case on account of improper service of the Summons to enter Appearance to the Respondents.

4. Being aggrieved with the Judgment of the trial court, the Appellants through their Memorandum of Appeal dated 30th June 2016 appealed against the whole Judgment and relied on the following grounds: -

   I. That the learned trial Magistrate erred in law and fact in dismissing the suit when there was no legal or otherwise basis of doing so.

   II. That the learned trial Magistrate erred in law and fact in failing to consider the evidence adduced in support of the claim.

   III. That the learned trial Magistrate erred in law and fact in failing to appreciate that once interlocutory judgment had been entered, his only and sole duty was to assess quantum of damages.

   IV. That the learned trial Magistrate erred in law and fact in reviewing and setting aside the interlocutory judgment of 20/08/2014 after assessment of damages had been done.

   V. That the learned trial Magistrate erred in law and fact in reviewing the interlocutory judgment after assessment of damages had been done.

   VI. That the learned trial Magistrate erred in law and fact in failing to appreciate that if service of summonses was not proper, this was not a ground to dismiss the suit.

   VII. That the learned trial Magistrate erred in law and fact in relying on the case of Nagendra Saxena vs Miwani Sugar Mills and 3 others (2011) eKLR.

   VIII. That the learned trial Magistrate erred in law and fact in considering extraneous issues in the judgment.

   IX. That the learned trial Magistrate erred in law and fact in failing to make a finding in the Judgment of the possible awards he would have given had the Appellants succeeded in their claim, as is required of him.

   X. That the Judgment and Decree of the learned Magistrate is in the circumstances unfair and unjust and irregular and should not be allowed to stand.

5. It is now settled that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and fact and come up with its own findings and conclusions. In the case of Selle & Another vs Associated Motor Boat Co. Ltd and Others (1968) EA 123, the Court of Appeal pronounced itself as follows: -

> " .....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".

The Appellants'/Plaintiffs'/case.

6. Through their Plaint dated 18th December 2013, the Appellants stated that on 20th December 2010 at around 9.20 p.m., their sister Jesicah Cherono Ronoh (the deceased) was knocked down and killed by Motor Vehicle Registration Number KBM 256Y at Chepkesui area along Bomet-Narok road. That at all times, the deceased was a lawful and careful pedestrian.

7. The Appellants stated that the Respondents being the registered or beneficial owners and driver of Motor Vehicle Registration Number KBM 256Y, were negligent in causing the accident and particularized the negligence in paragraph 8 of the Plaint. It was the Appellants' further case that the deceased had dependants and the said dependants were listed in paragraph 11 of the Plaint.

8. It was the Appellants' case that at the time of her death, the deceased was aged 31 years and was a diligent, industrious, hardworking and ambitious farmer. That after her demise, the deceased's estate and dependants suffered grave loss.

9. The Appellants' claim against the Respondents was for Special and General Damages under the *Law Reform Act* and *Fatal Accidents Act*.

The Appellants' Submissions.

10. The Appellants submitted that the Respondents had been served with Summons to Enter Appearance and they did not enter appearance or file a defence that ocassie..... an interlocutory judgment to be issued against them. That the grounds for setting aside an interlocutory judgment were set out in Order 10 Rule 11 of the Civil Procedure Rules. The Appellants further submitted that the Magistrate had no legal basis for reviewing the judgment that was already on record.

11. It was the Appellants' submission that once an interlocutory judgment had been entered, the only duty of the court was to assess damages. They relied on Felix Mathenge vs Kenya Power and Lighting Company Ltd (2008) eKLR.

12. The Appellants submitted that the trial court erred in law by improperly dismissing their suit. That the Summons to Enter Appearance were properly served to Andrew Ogonyo who was an agent of the 1st Respondent and they relied on Order 5 Rule 8 of the Civil Procedure Rules. The Appellants further submitted that they had filed an affidavit of service which indicated that the agent was personally known to the process server. That the agent, Andrew Ogonyo even signed the Summons.

13. It was the Appellants' submission that the trial court erred when it failed to make a finding on the quantum of damages even if it were determine the case in favour of the Respondents. They relied on Jacob Omulo Onyango & 2 others vs Jubilee Jumbo Hardware Limited (2017) eKLR and D.T Dobie & Company (Kenya) Limited vs Muchina (1982-88) 1 KAR 1.

14. The Appellant submitted that in their view, this court should assess the damages based on the evidence on record.

15. The Respondents have not participated in the Appeal. There is an affidavit of service on record dated 3rd March 2023 showing that service was effected on the 1st Respondent on 24/2/2023 by one Geoffrey Ngeno, process server. The record shows that matter was adjourned several times with directions given to the Appellant to effect service.

16. I have gone through and carefully considered the Record of Appeal dated 3rd March 2017, the undated Appellant's Written Submissions and the issues for determination are: -

i. Whether the trial court erred in dismissing the suit.

ii. If the answer in (i) is in the affirmative, what are the damages payable to the Appellants.

Whether the trial court erred in dismissing the suit.

17. This matter was filed in the trial court on 20th January 2014. As earlier indicated, the Respondents did not enter an appearance or file a defence. Order 10 Rule 7 of the Civil Procedure Rules provides that: -

> Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

18. The Appellants filed a Request for Judgment dated 27th June 2014 and interlocutory judgment was entered for the Appellants against the Respondents on 18th August 2014. The matter was then set down for formal proof hearing.

19. Order 10 Rule 2 of the Civil Procedure Rules provide that: -

Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of the summons unless the summons has been served by a process-server appointed by the court.

20. The Appellants filed an undated Affidavit of Service that was sworn by Juma William who swore that he was a licensed process server and was authorized to effect service of court processes. He stated that on 5th May 2014, he served one Andrew Ogonyo with Summons, Plaint and the Pre-trial set of documents. That he met the said Andrew Ogonyo at the reception of the Kisii branch office of Transline Classic. He further stated that after serving him with the documents, Andrew Ogonyo signed and dated the documents and even indicated his name on the principal copies.

21. The trial court dismissed the Appellants' suit citing improper and irregular service of the Summons to Enter Appearance to the Respondents. The trial court was not convinced by the contents of the affidavit of service and further stated that there was no way to ascertain whether Andrew Ogonyo was an authorized agent of the Respondents or whether he was the company secretary as alleged and for those reasons, the trial court was unable to find that valid summons had been effected upon the Respondents.

22. I have gone through the impugned Affidavit of Service and it indicated that Andrew Ogonyo introduced himself as the company secretary of Transline Classic and it was on that basis that he was served with the documents. There was no evidence to suggest that the said Andrew Ogonyo was not an agent of the Respondents. Agents are authorized to receive court documents as provided in Order 5 Rule 8 of the Civil Procedure Rules which states that:-

(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

23. Andrew Ogonyo received the documents and confirmed receipt by signing and putting his name on the principal documents that were returned and filed in the trial court. If the trial court was dissatisfied with the service of the Summons, it would have dealt with that issue at that point by issuing directions for fresh and proper service to the Respondents.

24. There is nothing on record to indicate that the trial court was not satisfied with the service of the Summons. The trial court went ahead and listed the matter for formal proof hearing. I have noted that when the matter was ready for formal proof hearing, the Respondents attended court in person on 8th July 2015 and 16th September 2015.

25. The impugned Affidavit of service was undated. The question then became whether the absence of the date was fatal and incurable. The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the Act provides that: -

> Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

Further, Section 8 of the *Oaths and Statutory Declarations Act* states: -

> A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.

26. The impugned Affidavit of Service was signed by the process server, Juma William and was sworn before Mr. George Morara who was a Commissioner for Oaths. In my view the absence of the date was a small, technical and procedural issue which should not be used to drive the Appellants away from the seat of substantive justice. What was important was that the Affidavit clearly showed that the Respondents were served through their agent, Andrew Ogonyo and they personally attended court for the formal proof hearing. In the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR the Court of Appeal stated as follows: -

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.....Essentially the rules remain subservient to *the Constitution* and statutes. Article 159 (2) (d) of *the Constitution*, Section 14 (6) of the *Supreme Court Act*, Section 3A and 3B of the *Appellate Jurisdiction Act*, Sections 1A and 1B of the *Civil Procedure Act* and Section 80 (1) (d) of the *Elections Act* place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice."

27. Similarly in the case of Saggu Vs Roadmaster Cycles (U) Ltd (2002) 1 E A. 258, the Court of Appeal of Uganda held that: -

> " .....the defect in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (8), of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. I should perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn. It would follow that the learned judge had the power to order that the undated affidavit be dated in court or that the affidavit be re-sworn before putting it on record. He was also correct to penalize the offending party in costs."

28. There are two disturbing issues in this matter. Firstly, the record does not show any application by any party disputing service. Even if there was such a dispute, the proper procedure would have been for the process server to be cross-examined on his affidavit of service. Secondly, the just approach if the court procedurally found the service to be effective was not to dismiss the plaintiff's suit but to set aside the interlocutory judgement. Dismissing the plaintiff's suit was rather draconian.

29. It is my finding that the trial court erred in dismissing the Appellants' suit as the Summons and pleadings were properly served upon the Respondents. Consequently, the Judgment of the trial court dated 8th June 2016 is set aside and substituted with an order reinstating the suit.

30. This court now has the option of remitting the suit back to the trial court or to proceed to dispose of it on its unlimited original jurisdiction. In this regard I observe that the suit was filed way back in 2014. It is therefore just not to precipitate further delay by remitting it to the lower court. Consequently I proceed to determine the suit in the succeeding paragraphs.

31. The issue of liability is not in question as the trial court entered an Interlocutory judgment against the Respondents. I therefore find the Respondents 100% jointly liable for the accident. The outstanding issue is assessment of damages. I am guided by the case of Felix Mathenge vs Kenya Power & Lighting Company Ltd (2008) eKLR, where the Court of Appeal held that: -

> " .....The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages....."

32. The occurrence of the accident was proven by the Police Abstract produced by PW1 (Henry Tonui) and marked as P.Exh 1 stated that the accident occurred on 20th December 2010 at around 9 a.m. The fact of the deceased's death was confirmed by the production of the Death Certificate which was marked as P.Exh 3.

33. With regard to the pain and suffering, Exhibit 1 above and the Post Mortem Report produced by PW1 and marked as P.Exh 2 indicated that the deceased died on 20th December 2010 at around 9 a.m. It was therefore clear that the deceased died on the spot day which means her pain was not prolonged. I therefore award Kshs 10,000/= for pain and suffering. I am guided by the persuasive case of Sukari Industries Limited vs Clyde Machimbo Jumba (2016) eKLR where Majanja J. held:-

> "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....."

34. On the issue of the loss of expectation of life, I award the conventional sum of Kshs 100,000/=. I am persuaded by 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".

35. Similarly, in the case of Makano Makonye Monyanche Vs Hellen Nyangena (2014) eKLR, Sitati J held: -

> " I find no reason to interfere with the award on loss of expectation of life under *Law Reform Act* as the same is always awarded at Kshs. 100,000/- across the board".

36. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall , subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

37. The general scope of assessment of damages was considered in the case of Beatrice Wangui Thairu vs Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 Of 1988 (UR) where Ringera J (as he was then) stated thus: -

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should them multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased and the dependants....."

38. The Appellants claimed that the deceased was a farmer who died aged 31 years old. The Appellants did not state how much the deceased earned from her farming. Courts normally use two systems in determining loss of dependency, one is the multiplier approach where a party has presented evidence of income and the other is the global sum approach where there is no evidence of income. In the case of

Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs Gichumu Githenji (2007) eKLR, where Ringera J. (as he then was) made the following observation:-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

39. Similarly in the case of Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) (2016) eKLR, Ngaah J. held as follows-

> " It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case....."

40. Persuaded by the above authorities and based on the fact that the deceased died aged 31 years, was a farmer and had two children who depended on her I find that the award of a global sum of Kshs 1,500,000/= to be reasonable for loss of dependency.

41. With regard to Special Damages, the Appellants stated that they had incurred the following expenses:-

    a. Court filing fee Kshs 895

    b. Records of Motor vehicle Kshs 500

    c. Coffin Kshs 10,000

    d. Transport expenses Kshs 20,000

    e. Mortuary Charges Kshs 4,300

    f. Post Mortem Kshs 10,000

    g. Funeral Expenses Kshs 20,000

42. It is trite that special damages have to be specifically pleaded and proved. The only receipt on record was the receipt for payment of search of Motor Vehicle Records which was marked as P.Exh 7 which showed that they had paid Kshs 500/= to which I accept as proven. With the exception of the funeral expenses, coffin, mortuary charges and transport expenses there was no evidence on record to prove that the Appellants incurred post mortem expenses.

43. Section 6 of the *Fatal Accidents Act* makes provision for funeral expenses as follows:-

> In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.

44. In Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited (2016) eKLR, the Court of Appeal stated that: -

> "We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However,..."

45. Guided by the precedents above, I award the Appellants Kshs 20,000/= for the funeral expenses, Kshs 20,000/= for the transport expenses, Kshs 10,000/= for the coffin and Kshs 4,300/= for the mortuary charges. The cumulative sum for special damages becomes Kshs 54,800/=

46. In the final analysis, the damages payable to the Appellants are computed below: -

    i. Pain and Suffering Kshs 10,000/=

    ii. Loss of expectation of life Kshs 100,000/=

    iii. Loss of dependency Kshs 1,500,000/=

    Kshs 1,610,000/=

    Add Special Damages Kshs 54,800 /=

    Total Kshs 1,664,800/=.

47. In the final analysis, the Appeal dated 30th June 2016 succeeds. The trial court Judgment dated 8th June 2016 dismissing the suit is set aside and the Appellants are awarded Kshs 1,664,800/= as general and special damages against the Respondents.

48. On costs, I observe that this suit was filed in 2014 and the prosecution of this Appeal filed in 2016 has dragged on owing to multiple adjournments occasioned by the parties. Due to the indolence of both parties in failing to have this matter concluded expeditiously, there will be no orders as to costs.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF SEPTEMBER , 2023

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the parties and Siele (Court Assistant)