Mwiti (Being Sued as the Administrator of the Estate of Julius Mwiti Mitobi - Deceased) v Kalunge (Suing as a Legal Representative of the Estate of Eric Mutwiri Kamiu – Deceased) (Civil Appeal E019 of 2022) [2023] KEHC 25169 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 25169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E019 OF 2022

LW GITARI, J

OCTOBER 27, 2023

BETWEEN

KAREMA MWITI (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF JULIUS MWITI MITOBI - DECEASED) ..... APPELLANT

AND

MWITI MARTIN KALUNGE (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF ERIC MUTWIRI KAMIU – DECEASED) ..... RESPONDENT

JUDGMENT

1. The appeal arises from the judgment and decree of the trial court in Maua Civil Case no 133 of 2017 delivered on 3rd February, 2022. The grounds of appeal as listed in the Amended Memorandum of Appeal dated 10th March, 2022 are as follows:

    a. That the learned magistrate erred in law in failing to consider the submissions of the counsel for the Appellant, the evidence and the witness testimonies presented at the hearing and find that the Respondent herein is not a dependant under the *Fatal Accidents Act*.

    b. That the learned magistrate erred in law in awarding general damages for loss of dependency at ksh 2,779,200/= where dependency was not proved by the Respondent.

    c. That the learned magistrate erred in law and fact in awarding ksh 200,000/= as general damages for loss of expectation of life which amount is manifestly excessive.

    d. That the learned magistrate erred in law and in fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case while arriving at the award in damages.

e. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.

2. The Appellant thus prayed that:

a. The Appeal herein be allowed and the judgment of the lower court be set aside.

b. The costs of the Appeal be granted to the Appellant.

3. The Respondent's claim was that on or about 17th July, 2015, one Eric Mutwiri Kamu (deceased) was a lawful passenger in motor vehicle registration no xxxx Toyota Fielder along Thika-Sagana road at Swara area when Julius Mwiti Itobi (deceased) negligently and carelessly drove motor vehicle registration no xxxx Toyota Fielder causing the same to collide with the Appellant's motor vehicle registration no xxxx Mbez Strailer. The Appellant was sued as the administratix of the estate of the said Julius Mwiti Itobi.

4. The Appeal was canvassed by way of written submissions which I have highlighted below.

Appellant's Submissions

5. It is the Appellant's submission that the award of ksh 2,969,000/= as the total for the general and special damages was exorbitantly high.

That the deceased was unmarried and did not children and that the Respondent did not prove that the deceased used to support him financially. The Appellant urged this Court to set aside the judgment of the trial court with respect to the award of damages for loss of dependency as a brother and a sister to a deceased person are not recognized as persons eligible to claim compensation following the death of a deceased. The Appellant thus prayed for the appeal to be allowed as prayed with costs to the Appellant.

Respondent's Submissions

6. On his part, the Respondent submitted that the trial court was right in awarding the Respondent ksh 2,969,000/= as damages for the incurred. Further, that contrary to the assertion by the Appellant, the trial court put into consideration submissions by both parties. That on the contention that the trial court's judgment was against the doctrine of *stare decisis*, the Respondent implored this Court to find that courts do not always have to rely on precedents while making its decision. That the learned magistrate had the discretion to make her decision based on her individualized evaluation guided by the principles of law.

Issues for Determination

7. From the pleadings on record, the grounds of appeal and the submissions of the parties, the main issues that arise for determination are:

a. Whether the respondent was a dependant.

b. Whether the award of ksh 2,779,200/= and ksh 200,000/= as general damages for loss of dependency and loss of expectation of life respectively was manifestly excessive.

Analysis

8. This Court is the first appellate court. I am aware of the Court's duty to evaluate the entire evidence on record bearing in mind that it had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co.*

Ltd. [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

The case laid down the principles to guide the court and stated as follows:

> " An appeal to this court from the High Court is by way of retrial and the principles upon which the 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 or heard the witnesses and should make due allowance to this respect, in particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistence with the evidence in the case generally."

9. PW1 was Miriti Martin, a brother to the deceased. He adopted his witness statement as his evidence. On cross examination, he stated that he used about ksh 150,000/= for the burial of the deceased.

10. PW2 was PC Rodgers Miriti. It was his testimony that the subject accident occurred when the driver of xxxx failed to keep to his lane. He blamed the said driver for the accident.

11. The Appellant on the other hand closed his case without calling any witnesses. I now proceed to consider the issues.

a. Whether the respondent was a dependant

The contention by the appellant under this head is that the deceased was un-married and did not have any children. He relies on exhibit P, exhibit 9 a letter from the Chief which stated that the deceased was unmarried and had no children. That in this case the respondent who was the brother of the deceased was the only beneficiary of the deceased's estate. That the respondent, though contending that the deceased used to support him financially he did not adduce any evidence to show how he depended on the deceased. The respondent has relied on Section 4(1) of the *Law Reform Act* and cited various authorities.

12. I have considered this ground. Section 4(1) of the *Law Reform Act* (Cap 32 Laws of Kenya) provides as follows:-

> " Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was 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 costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct.
>
> Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased persons."

The above provision is couched in mandatory terms. The pre-amble to the *Fatal Accidents Act* states-

> "An Act of Parliament for compensating the Families of Persons killed in Accidents."

The Act under Section 4 has identified the persons who have capacity to claim under the Act. The case law cited by the appellant –*Pleasant View School Limited v Rose Mutheu Kiuthoi & another* held that

> "in the absence of any evidence, this court agreed with appellant's submission that 2nd respondent, the deceased's brothers and sister were not entitled to his estate....."

I have also considered the case of *Mary Nabwire Omalla v David Wachira & 2 Others* Nairobi HCCC 605/2009 where the court stated that,

> "under Section 4(1) of the said Act, dependants are specified and brothers and sisters would not be considered."

I have also noted the holding in *John Mungai & another Kariuki v Kaibei Kangai Ndethia & 2 Others* where the Judge stated that brothers and sister of the deceased are not dependants for the purposes of the *Fatal Accidents Act*.

I find under the *Fatal Accident Act*, the dependants are defined and one only need to prove that he was a child, a wife husband or parent of the deceased. A person who is not provided for under the Section 4(1) of the Act (*supra*) is not a dependant and it would be futile to prove dependency. To do so is to expand the scope of the Act. I find that a brother is not a dependant within the meaning of the Act.

I note from the submissions which were made before the learned trial magistrate by the appellant that the issue as to whether the respondent was a dependant was raised. The learned trial magistrate simply disregarded the submissions. This being the case, ground no.2 on the Memorandum of Appeal has merits. It is evident that proceedings under the *Fatal Accident Act* (*supra*) could not be brought for the benefit of the Respondent who was a brother of the deceased and as such is excluded as dependant under the Act. No damages were awardable to the respondent for loss of dependancy. I find that the trial magistrate erred by awarding damages for loss of dependency to the respondent.

b. Quantum of damages:

13. In the case of *Mbogo & another v Shah* [1968] EA 93, it was held that an award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Court.

14. I am further guided by the case of *Kigaragar v Agripiana Mary Aya* [1982-1988] KAR 768, where the Court of Appeal held that an appellate court would interfere with the Trial Court's decision if it was shown that the sum awarded was demonstrably wrong or that the award was based on wrong principle or it was so manifestly excessive or inadequate, that a wrong principle may be inferred.

15. Similarly, in *Mkube v Nyamuro* [1983] LLR at 403, Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a 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 reaching his conclusion."

16. The respondent called two witnesses, PW4 was Miriti Martin a brother of the deceased. In cross-examination he told the court that he did not witness the accident and did not call any witness to testify on how the accident occurred. On the other hand P.C Rodger's Miriti (PW2) testified that the accident occurred on 17/7/2015 involving motor vehicle xxxx Mercedes Benz with trailer xxxx and xxxx Toyota Fielder. In cross-examination he told the court that he was not the investigating officer.

He told the court that an inquest was held and he relied on the inquest. Sadly however, the witness did not produce the inquest file or even a copy of the ruling in the said inquest. His evidence is at its best a hearsay which is in-admissible in the absence of corroboration. The appellant had also relied on a Police Abstract which he produced as an exhibit. At paragraph 7 of the Abstract, on Result of Investigation of prosecution (if known) it is indicated P.U.I (This could mean Pending Under Investigations or under "Inquest")

The PW2 did not adduce sufficient evidence which would prove on a balance of probabilities that the appellant was to blame for the accident. It is trite that the fact that an accident occurred between two motor vehicles is not sufficient to find liability on any one of the drivers. There must be evidence adduced to prove that one of them was to blame for the accident in order to attach liability on that driver. In this case the defendants attributed blame to the other side. The respondent who attributed blame on the appellant had legal burden to proof that the appellant was at fault and therefore liable to compensate the family of deceased.

Section 107, 108, & 109 of the *Evidence Act* is clear he who alleges must proof. The Sections provides:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

I find that the evidence on the Police Abstract and the testimonies of the witnesses is inconclusive as to who was to blame for the accident. In such a situation, liability has to be appointed on 50:50 ration to both parties. This has been the approach by the courts. The Court of Appeal in *Hussein Omar Farah v Lento Agencies* (2006) eKLR held as follows:-

> " In our view, it is reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.
>
> The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

See also *Welch v Standard Bank Ltd* (1970) E.A 115 at 117 where the Court of Appeal stated;

> " It cannot be doubled that both drivers are to blame. In the ultimate analysis of the evidence in the instant case the circumstances are such that there is no concrete evidence

of distinguishing between the two drivers. The drivers should therefore be held equally to blame."

For the reasons stated above and guided by the above authorities I find that both parties should bear equal blame for the occurrence of the accident and I therefore apportion liability on 50:50 basis.

17. The deceased died at the age of 30 years old. He died on the spot. At the time of his death, the deceased had just been employed in Wajir in the Department of Livestock and Fisheries earning a monthly salary of ksh 25,692/=

18. The trial court used a multiplicand of ksh 25,692/=, a multiplier of 25 years and 1/3 as the dependency ratio. Hence, the learned trial magistrate arrived at an award of ksh 2,969,700/= plus costs and interest of the suit constituted as follows:

    a. Loss of dependency – 25,692 x 25 x 12 x1/3 – 2,569,200/=

    b. Loss of expectation of life – 200,000/=

    c. Pain and Suffering – 10,000/=

    d. Special Damages 190,500/=

    e. Costs and Interest of the suit.

    As stated in *Nkube v Nyamno* (1983) KLR 403. An appellate court will not normally interfere with the findings of fact by the trial magistrate unless it is based on no evidence or on a misapprehension of the evidence or the Judge has shown demonstrably to have acted on wrong principles in reaching his conclusion. This is the position at law and this being the case, save for the finding on dependency claimed by the respondent and on liability, I find no reason to interfere with the quantum of damages.

19. Considering the facts of this case and the evidence adduced, it is my view that the learned trial magistrate clearly exercised its discretion rightly and did not apply wrong principles in reaching its decision.

    In Conclusion:

    1. The Judgment of the learned trial magistrate on 3/2/2022 is set aside to the extent that the award of ksh 2,569,200/- under *Fatal Accidents Act* is set aside as the respondent was not a dependant.

    2. The finding on liability is set aside and substituted with 50:50 against the parties.

    3. The awards on general damages under Law Reforms Act are affirmed as follows:-

        a. Loss of expectation of life – ksh 200,800/-

        b. Pain and Suffering ksh 10,000/-

        c. Special Damages – ksh 190,500/-

        Total= 400,500.00

        Less 50% = 200,250/-

        Payable to the Respondent = 200,250.00

    4. There shall be Judgment for the Respondent against the appellant in the sum of ksh 200,250/-

    5. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE