Osiche & another v Nyongesa (Suing as the legal administrator & rep of the Estate of Dickson Maina Kuloba Sirengo) (Civil Appeal 18 of 2016) [2023] KEHC 24227 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24227 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 18 OF 2016

DK KEMEI, J

OCTOBER 27, 2023

BETWEEN

SIMPLICIOUS MAENDE OSICHE .... 1ST APPELLANT

WEST KENYA SUGAR CO LTD .... 2ND APPELLANT

AND

RESAH NEKESA NYONGESA (SUING AS THE LEGAL ADMINISTRATOR & REP OF THE ESTATE OF DICKSON MAINA KULOBA SIRENGO) .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Kingori, Chief Magistrate, Bungoma Law Courts in Bungoma CMCC No. 579 of 2013 delivered on the 5/4/2016)

JUDGMENT

1. The respondent in her capacity as the administrator of the estate ofDickson Maina Kuloba Sirengo (deceased) had instituted a suit against the appellants herein vide a plaint dated 16/12/2013 seeking for general damages under the *Law Reform Act* and *Fatal Accidents Act*, special damages, costs and interest. It was pleaded that the deceased on 6th April 2016 was a pillion passenger on a motorcycle reg. No. KMCP 254F along Webuye-Kitale road. When they got to Malaha area, the 1st appellant being the driver of vehicle registration No. KBG 083R, drove the vehicle in a negligent manner causing it to veer off the road knocking the rider and the deceased and causing them fatal injuries. The 1st appellant was an employee of the 2nd appellant who was the registered owner of the vehicle. The respondent advanced that the accident was caused by the negligence of the 1st appellant and thereby the 2nd appellant was vicariously liable. It was pleaded that deceased was aged 56 years old and employed by the Teachers Service Commission and then earning Kshs 49,376/- per month. It was also pleaded that the deceased was married to Resah Nekesa Nyongesa with whom they had seven children. The

respondent claims to have spent Kshs 44,000 on funeral expenses, Kshs 925 on obtaining the grant od letters of administration and Kshs 500 for a search of copy of records of motor vehicle.

2. The appellants filed their statement of defence dated 25/2/2014 wherein they denied the respondent's claims. The appellants averred that if an accident occurred then the driver of motorcycle registration number KMCP 254F was the sole author of the respondent's misfortune and that no blame should be attributed to the appellants. They also pleaded that the deceased by way of his conduct contributed to the accident.

3. After an elaborate hearing, the trial magistrate apportioned liability between the parties in the ratio of 50:50. The trial magistrate entered judgment in favour of the respondent in the following terms:

   a. Pain and Suffering Kshs. 10,000/-

   b. Loss of expectation of life Kshs. 100,000/-

   c. Special damages Kshs. 1,425/-

   d. Loss of dependency Kshs1,280,000/-

   Sub-total 1,380,321/-

   Less loss of expectation of life 100,000/-

   Less 50% contribution 640,160.5/-

   Total Kshs. 640,160.50/-

4. The respondent was also awarded costs and interest at court rates.

5. The appellants have now filed a memorandum of appeal dated 4th May 2016 challenging the decision of the subordinate court on the following grounds:

   1. The learned trial magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.

   2. The learned trial magistrate erred in fact and in law in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.

   3. The learned trial magistrate erred in fact and in law in finding that the respondents had proved his case on a balance of probability.

   4. The learned trial magistrate erred in fact and in law in failing to dismiss the respondent's suit with costs to the appellants.

   5. The learned trial magistrate erred in fact and in law in ignoring the pleadings and submissions for the defence.

   6. The learned trial magistrate erred in fact and in law in failing to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence thus lowering the respondents probative evidentiary value.

7. Without prejudice to the foregoing the award of damages in the circumstance was excessive.

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

7. The appellant filed submissions dated 16th October 2019 and 31st July 2023. The appellant submits that it is not in dispute that an accident occurred and that the deceased was fatally injured. The respondent's evidence and testimony on the manner of the occurrence of the accident were also controverted by the appellants. They submitted that the trial magistrate therefore reached a wrong finding that it was not clear if the appellant's driver caused the accident and which part of the road the accident occurred. They cited the decision in Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR where the court observed as follows:

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" 27. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.""

8. The appellants submit that the inescapable conclusion is that the respondent failed to prove on a balance of probabilities that it was the 1st appellant who caused the accident.

9. On the issue of quantum, the appellants submit that the trial court failed to take into consideration the loan that had been taken by the deceased. They relied on the decision of the court in Joshua Mulinge Itumo (suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) v Bash Hauliers Limited & another [2021] eKLR where the court held that:

" 93. In my view, where the deceased had taken some temporary advance or loan, the same ought to be taken into account for the period covered by the facility and not for the entire period which the Court finds as regards the reasonable figure representing so many years purchases, otherwise known as the multiplier. I therefore agree with the Appellant that the learned trial magistrate erred in applying the amount stated in the payslip for the whole period of the multiplier. I agree that the prudent thing to do would have been to apply the net salary (gross salary less only statutory deductions) to get the total dependency sum, then deduct the total sum of the loan balances being the 3 SACCO loans with balances of Kshs. 50,000, Kshs. 657,325/- and Kshs. 251,650/-), a total of Kshs. 958,975/-. If that is done the amount due under the head of loss of dependency would Kshs. 7,011,840/- less total of the

loan balances amounting to Kshs. 958,975/- leaving the net balance as Kshs. 6,052,865/-. The appeal therefore succeeds on that ground to that extent."

10. The appellants urged that the court should take notice of the fact that lending institutions always insist on persons taking loans to insure the credit facility against eventualities like death. They proposed that the balance of the deceased's loan prior to his demise was Kshs 713,669.58 and this should be deducted from the total dependency sum of Kshs 1,268,896/- so that the sum under the head of loss of dependency is Kshs 555,226.42/-.

11. The appeal was opposed by the respondent who filed their written submissions dated 18/08/2023. She submits that the appellants abandoned their appeal on the award of general damages. She further submits that the apportionment of liability in the ratio of 50:50 by the trial court was well-founded. In any event, the appellant before the subordinate court argued that liability should be apportioned in the ratio of 80:20. The respondent argues that the appellants have failed to demonstrate that the trial court used the wrong principle in arriving at the apportionment of liability.

12. The respondent also filed supplementary submission and pointed out that the appellants in their submissions dated 16th October 2019 initially relinquished their claim for general damages but then changed their position in their submissions dated 31/7/2023. She contends that the appellants in the lower court never raised the current issue they have raised on quantum. It was submitted that the lower court correctly made statutory deductions and that the award should not be disturbed.

13. The appellants in a rejoinder submit that their submissions filed on 23/10/2019 were premature and erroneous as the appeal had not been admitted and neither were the directions taken. They submit that they erroneously filed the abandoned submissions on the same day they filed submissions for Bungoma HCCA No. 26 of 2016 believing that the two appeals ran simultaneously yet Bungoma HCCA No. 26 of 2016 had proceeded way ahead of the current appeal. They submit that in the lower court, they argued that the respondent should have been held to be 80% liable for the accident. They urged the court to consider their memorandum of appeal where they challenged the award of damages.

Analysis and determination

14. In this appeal the appellants have challenged the trial court's finding on both liability and quantum. The determination of liability calls for this court to re-evaluate the evidence before the trial court. The jurisdiction of a first appellate court is provided for under section 78 of the *Civil Procedure Act* and espoused in the case of Kenya Ports Authority vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated;

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion through it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

15. In this case, the trial court apportioned liability at 50:50. However, the appellants argue that the respondent did not prove her case to the required standard. The appellants urged the court that in the unlikely event that this court finds them liable, then they should only shoulder liability at 20%.

16. The respondent relied on the evidence of Dickson Simiyu Wamalwa (Pw2) who was at the scene when the accident occurred. On the material day, he was herding when he saw a lorry heading towards Webuye and the appellant's vehicle heading to Kitale. The two vehicles were on the opposite sides. The

land cruiser moved to give way to the lorry and as it moved, it collided with the motorcycle which was on the left side of the road. The motorcycle was behind the lorry. He testified on cross-examination that after the lorry passed the appellant's vehicle lost control, moved to the right side of the road and collided with the motorcycle. The left side of the land cruiser collided with the motorcycle. The vehicle stopped 20 metres from the point of impact.

17. In the lower court, the evidence of Dw1 in CMCC 580 OF 2013 was adopted as the appellant's evidence. However, the appellants did not file the proceedings inCMCC 580 OF 2013 which contains the testimony of Dw1 for the court's consideration. However, I note the same magistrate, Hon. Kingori (CM), presided over the two cases, Bungoma CMCC 579 OF 2013 and CMCC 580 OF 2013. The evidence of Dw1 as captured by the trial magistrate in the judgment was as follows:

> "DW1 Simplicious Maende testified that he works with West Kenya Company and (sic) a driver. He adduced a copy of his driving licence D. ExDI. On 6/04/12 he had been assigned to deliver diesel to Misihli and between Webuye and Lugulu, as he drove his vehicle registration KBG 083 a Land Cruiser, he encountered a motorcycle registration KMCP 2541. It was overtaken by other (sic) motor vehicle. The motorcycle had a pillion passenger, it came to his side and hit behind the driver door landing in a ditch on the right side of the road. He stopped his pickup and was arrested by members of the public to put the injured onto his pickup and take them to hospital. He denied he was overtaking the lorry. He blames the motorcyclist for the accident in overtaking other motorcycles and denies that he was speeding. He admits having been charged in a traffic case which is still pending. Under cross-examination, he claimed the accident occurred on (sic) blame and denies that he is the one who caused the accident."

18. Sections 107 and 108 of the *Evidence Act* cap 80 stipulates who bears the burden of proof with respect to a matter in issue. The burden of proof in civil cases is on a balance of probabilities. In this case, there is no dispute with respect to the occurrence of the accident.

19. The evidence of Pw2 was that the appellant's driver lost control and went to the side of the motorcycle thereby causing the accident. Pw2 testified that the driver of the vehicle was driving at high speed and managed to bring the vehicle to a stop 20 meters after the impact. On the other hand, Dw1 testified that the motorcycle in which the deceased was a pillion passenger while trying to overtake another motorcycle caused the accident byhitting the driver's door. Pw2 and Dw1 were the only direct witnesses. However, based on their testimonies regarding the occurrence of the accident, it is not possible to decide which party was at fault. The Court of Appeal in Hussein Omar Farah v Lento Agencies [2006] eKLR while dealing with a similar issue observed:

> "In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the 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......
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> 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."

20. The trial magistrate was uncertain on whether the accident occurred on the left or right side of the road and apportioned liability at 50:50. The appellants and respondent gave two opposing accounts of the

accident, each claiming that the other party was at fault. In the circumstances, I find the two drivers to be equally at fault and find no reason to disturb the decision of the lower court on liability.

21. I now turn to consider the issue of quantum. The parameters under which an appellate court will interfere with an award in general damages were outlined in Butt v Khan [1978] eKLR thus:

> "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..."

22. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia [1982 –88] 1 KAR 727 at p. 730 Kneller J.A. said:

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

23. The only issue that the appellants have challenged on this head is loss of dependency. They fault the trial court's decision for not factoring the deceased's loan. Interestingly, the appellants also urged the court to take judicial notice of the fact that lending institutions take out insurance for credit facilities in the eventuality of death and therefore insurance companies usually settle such loans. The appellant's arguments were inherently paradoxical. Deductions which the deceased has voluntarily subscribed to such as the Pension scheme, Emergency Loans, Co-operative shares, and Co-operative loans, form part of his earnings and are for the benefit of his estate and cannot be withheld from his net earnings. (See Joseph Ndegwa & another v Japhet Ndungu Muhoro the Legal Representative of the Estate of late Dishon Irungu Ndungu [2019] eKLR). I therefore find no fault when the trial magistrate only subtracted statutory deductions from the deceased's gross salary. The award under loss of dependency was properly computed. There seems to be no dispute by the appellants on the other heads of damages and hence they shall remain undisturbed.

24. In the result, it is my finding that the appeal is devoid of merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF OCTOBER,2023

D.KEMEI

JUDGE

In the presence of :

Mairo Jackson for Appellants

Onyando for Respondent

Kizito Court Assistant