Annihi Creations Enterprises Limited v Nyaga (Suing for and on behalf of the Estate of Kelvin Murimi Njeri (Deceased) (Civil Appeal E008 of 2022) [2023] KEHC 24188 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24188 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E008 OF 2022

FN MUCHEMI, J

OCTOBER 26, 2023

BETWEEN

ANNIHI CREATIONS ENTERPRISES LIMITED ..... APPELLANT

AND

FAITH NJERI NYAGA (SUING FOR AND ON BEHALF OF THE ESTATE OF KELVIN MURIMI NJERI (DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. C. C. Kipkorir (PM) delivered on 26th January 2022 in Kerugoya CMCC No. E077 of 2021)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Principal Magistrate in CMCC No. E077 of 2021 arising from a road traffic accident whereby judgment was entered in favour of the respondent against the appellant as follows:-
    a. Liability 100%
    b. General damages under the *Fatal Accidents Act* Kshs. 150,000/-
    c. General damages under the *Law Reform Act* Kshs. 6,408,796/-
    d. Special damages Kshs. 20,500/-
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds. The court determined grounds number 3 & 4 when the appellant filed an application dated 9th September 2022 seeking to introduce new and additional evidence. The said application was dismissed, thus the grounds to be determined in this appeal are hereby summarized:-

a. The learned trial magistrate erred in law by finding the appellant wholly liable in negligence and disregarded the evidence in regards to the deceased's contributory roles in the accident;

b. The trial magistrate erred in law and in fact in the manner that he assessed damages and in awarding damages that were excessive in the circumstances;

c. The judgment of the learned trial magistrate has glaring errors on the face of it for instance damages under the *Fatal Accidents Act* were awarded at a sum of Kshs. 100,000/- but indicates the figure as Kshs. 150,000/- in the final tabulations. The appellant states that the judgment is dated 26th January 2021 yet the suit was instituted about 6 months after the said date.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the respondent did not discharge the burden of proof as she failed to have PW3, the investigating officer produce the police file and sketch map to enable the court make an informed decision on the matter. The appellant states that during trial it testified that the police file had been forwarded to the Office of Public Prosecutions and since the matter was fairly new in the judicial system, the trial court ought to have adjourned the matter until the police file was availed. In the circumstances, the appellant submits that judgment was delivered without due regard to important aspects of the case.

5. The appellant submits that the evidence presented to the trial court points to extreme inconsistencies which makes it impossible to tell with certainty which party was to blame for the accident. The appellant contends that both their driver and the deceased ought to have taken vigilant steps to avoid the accident. The appellant further contends that they were only two eye witnesses, PW2 and DW1 and they gave contradictory narratives of the occurrence of the accident. PW2 stated that the point of impact was on the extreme left hand side of the road as one faces Kerugoya direction whereas DW1 asserted that the point of impact was towards the middle of the road near the yellow line, which evidence was corroborated by the investigating officer.

6. Given the contradictory versions of the events, the police abstract did not blame any party for the accident and that the respondent failed to ensure that PW3 produced the relevant documents, the appellant submits that it is greatly punitive for the court to fully admit one side of the story and condemn the other side. Placing 100% liability on the appellant and proceeding to grant a manifestly excessive amount, being more than double the insurance liability limit amounts is not justifiable. Relying on the case of Joseph Muthuri vs Nicholas Kinoti Kibera [2022] eKLR the appellant submits that the court ought to have apportioned liability at the rate of 50 : 50.

7. On the issue of quantum, the appellant submits that the same is excessive and urges the court to review it downwards. The appellant submits that in paragraph 15 of the judgment, the learned magistrate awarded Kshs. 100,000/- under the *Fatal Accidents Act* however in the final tabulation the award under paragraph 16 the sum awarded as general damages under the *Fatal Accidents Act* is Kshs. 150,000/-.

The Respondent's Submissions

8. The respondent submits that he was about 50 metres from the scene of the accident. He testified that the appellant's motor vehicle registration number KCW 959W Toyota Probox was overtaking other vehicles when it rammed into the motorcycle from the front occasioning the rider fatal injuries. He stated that the motor cycle was heading in the opposite direction, that is towards Kerugoya and that the impact was on the lane heading to Kerugoya which was the rider's lawful lane of travel. The respondent

further submits that PW3, the investigating officer testified that he visited the scene and noted that the impact was on the left lane while heading towards Kerugoya direction which was along the lawful lane of the motorcycle ridden by the deceased. Thus it was clear from the point of impact that the appellant's motor vehicle had encroached on the deceased's lawful lane of travel. The respondent further submits that in determining the point of impact, PW3 gave evidence that he relied on the debris on the road, where the deceased's body was lying and the blood at the scene which were all on the lane heading to Kerugoya from Kutus direction which was the deceased's lawful lane.

9. The respondent thus submits that there are no discrepancies in the judgment or record as alleged by the appellant. Therefore base on the evidence of the two witnesses, the trial court arrived at a just determination that the appellant's driver of motor vehicle registration number KCW 959W was wholly to blame for the accident. The respondent urges the court to uphold the same.

10. The respondent further submits that there is no error in the computation of damages as the total computation of Kshs. 150,000/- included Kshs. 50,000/- for pain & suffering and damages for loss of expectation of life at Kshs. 100,000/-. The respondent further submits that the judgment was delivered in open court on 26th January 2022 and parties were represented by their respective counsels as such there can be no dispute as to when it was delivered. The respondent states that an indication of the wrong date can only be taken as an error and should not be subjected to appeal.

11. The respondent submits that the deceased was earning a gross salary of Kshs. 86,430/-. From the payslip produced the statutory deductions were PAYE Kshs. 13,057/-, NHIF Kshs. 1,500/- and NSSF Kshs. 200/- all making a total of Kshs. 14,757/-. The deceased therefore had a net salary of Kshs. 71,673/-. Further the deceased was 26 years old at the time of death and was survived by his mother. Therefore he had 34 working years before his retirement. Further the respondent states that the appellant never challenged the multiplier adopted by the court. The court adopted 34 years and a dependency ratio of 1/3. As such, the respondent relies on the case of Evaline Chepkirui (Suing as the legal representative of the Estate of the late Kiprotich Cheruiyot) vs Stella Asuga & Erick Omwenga (2021) eKLR and urges the court to re-assess the quantum while factoring in the statutory deductions only. Thus the award on loss of dependency should work out as follows:-

    71,673/- x 12 x 34 x 1/3 = 9,747,528/-

Issues for determination

12. The main issue for determination are:-

    a. Whether liability apportioned by the trial court was against the weight of the evidence adduced;

    b. Whether the damages awarded by the trial magistrate were inordinately high as to amount to an erroneous estimate.

The Law

13. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

    " .....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. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some

point to take into account of particular circumstances or probabilities materially to estimate the evidence."

14. It was also held in Mwangi vs Wambugu [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

15. Dealing with the same point, the Court of Appeal in Kiruga vs Kiruga & Another [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

16. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether liability apportioned by the trial court was against the weight of the evidence adduced.

17. The appellant seeks to have the court substitute the trial court's findings of 100% liability with equal liability between the deceased and the appellant. The appellant does not dispute that on the material day he was driving motor vehicle registration number KCW 959B Toyota Probox. The appellant also does not dispute that an accident occurred on 14/2/2021between his motor vehicle and motor cycle registration number KMFD 026L ridden by the deceased. However he asserts that the accident was substantially caused by the deceased.

18. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

> 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 circumstances, 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.

19. The respondent did not witness the accident but she called an eye witness, PW2 and the investigating officer to testify. According to PW2, the appellant's motor vehicle was being driven at an excessive speed from Kerugoya towards Kutus direction began overtaking carelessly and collided with the motor cycle which the deceased was riding on his lawful lane. The said motor vehicle went to the opposite lane and met an oncoming car and to avoid collusion, the motor vehicle swerved to its extreme right side and collided with the motor cyclist who was riding on his lawful lane. The witness further testified that when the motor cyclist saw the oncoming motor vehicle encroach on his lane, he tried to avoid hitting it by swerving to his extreme left side and left the tarmac road but the motor vehicle hit him.

20. PW3, the investigating officer, visited the scene and testified that he found the motor cycle, motor vehicle and the deceased on the road. From the scene he stated that the motor cycle and the motor vehicle were on the same lane and the body of the deceased was lying slightly at a distance from the middle of the road headed towards Kerugoya. He concluded that the point of impact was on the lane

heading to Kerugoya from Kutus which was the motor cycle's lawful lane as that is where the debris was.

21. The appellant's driver's evidence was that on the material day he was driving the said motor vehicle along Kerugoya towards Embu general direction. He stated that he was driving at a speed of 30km/hr – 40km/hr since there was traffic build up. He further testified that on reaching Kaaria area, suddenly and without notice the motor cycle ridden by the deceased, encroached to his lane while trying to overtake another vehicle. The appellant's driver stated that he slowed down and swerved in an attempt to avoid a collision but the motor cycle was unable to go back to his lane as he was riding dangerously and in a high speed. On cross examination, the witness stated that the point of impact was not on the lane heading to Kerugoya.

22. The appellant argues that the respondent did not prove her case beyond probability because she failed to have PW3 produce the police file and the sketch map to enable the court make an informed decision. The appellant argues that both the deceased and their driver ought to have taken vigilant steps to avoid the accident.

23. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

> 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.

24. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

25. From the evidence, I am convinced that the point of impact was on the lane to Kerugoya direction which was the rightful lane of the motor cycle. The investigating office testified that there was debris on the road a small distance from the yellow line where he found the body of the deceased. Accordingly, it is my view that the evidence of PW2 corroborates that of PW3 on the point of impact. Further, the driver of the subject motor vehicle did not explain why his vehicle was on the wrong lane. PW3 visited the scene and found the motor cycle, motor vehicle and the deceased's body on the Kerugoya general direction lane. This confirms the respondent's case that the motor vehicle was speeding and encroached on the lane of the motor cycle and collided with it. Furthermore the evidence showed that the motor cycle was extensively damages on its front part. Accordingly, it is considered view that the appellant's driver was negligent for the accident.

26. The appellant argues that the respondent failed in discharging the burden of proof as they did not avail the police file and the sketch plans. I believe the converse is true, the appellant was at liberty to produce the said evidence to counter the respondent's evidence. As such, it is my considered view that the respondent discharged the burden of proof on a balance of probabilities that the appellant's driver was negligent. I find that there is no material to apportion liability between the deceased and the appellant's driver. The appellant was wholy to blame for the accident.

Whether the damages awarded by the trial magistrate are too high as to amount to an erroneous estimate.

27. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

28. Similarly in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

Damages under the *Law Reform Act*.

29. In the case of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR the court stated:-

> As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...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 the higher damages being awarded if the pain and suffering was prolonged before death.

30. In the instant case, it is not disputed that the deceased died on the spot. The trial magistrate awarded a sum of Kshs. 50,000/-relying the case of Sukari Industries Limited vs Clyde Machimbo Juma [2016] eKLR. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, the sum of Kshs. 50,000/- awarded by the trial court is reasonable and hence I do not see any reason to interfere with it.

31. On the issue of loss of expectation of life, the trial magistrate awarded Kshs. 100,000/- which is not unreasonable as to present an erroneous estimate. The award is hereby upheld.

32. The appellant submitted that there was an error as the trial magistrate gave an award of Kshs. 100,000/- but in her final tabulation she indicated Kshs. 150,000/-. I have perused the judgment and noted that there is no error but the final tabulation is a computation of the award of pain and suffering at Kshs. 50,000/- and the loss of expectation of life Kshs. 100,000/- making a total of Kshs. 150,000/-. As such, the said error is hereby corrected and in my considered view, it id not occasion any prejudice to any of the parties.

Damages under the *Fatal Accidents Act*

Loss of Dependency

33. The Court of Appeal in Chunibhai J. Patel & Another vs P. F. Hayes & Others [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

> 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 dependents, 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 dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

34. In the instant case, both the appellant and the respondent were aggrieved by the award made by the trial court. The appellant only submitted that the said sum was high without pointing out the specifics whereas the respondent disputes the statutory deductions from the deceased's pay slip.

35. The respondent led evidence that the deceased was 26 years old and a clinical officer at Kerugoya County Hospital. She stated that he earned a gross salary of Kshs. 86,430/- and produced his pay slip as proof of his earnings. She stated that the deceased was her only child and she depended on him as she was not employed but did causal work from time to time.

36. The trial magistrate adopted the dependency ratio of 1/3 as the deceased was unmarried and adopted a multiplier of 34 years using the deceased's net income of Kshs. 47,123.50/- as the multiplicand. The court then arrived at the total award of Kshs. 6,408,796/-.

37. The respondent argues that from the pay slip the statutory deductions are PAYE Kshs. 13,057/-, NHIF Kshs. 1,500/- and NSSF Kshs. 200/- thus the trial court ought to adopt a multiplicand of Kshs. 71,673/-.

38. A perusal of the said pay slip reveals that the deceased's basic salary was Kshs. 26,580/- with rental house allowance of Kshs. 3,850/-, commuter allowance of Kshs. 4,000/-, health risk allowance of Kshs. 3,000/-, leave travel allowance of Kshs. 4,000/-, emergency call allowance of Kshs. 10,000/-, health workers extraneous of Kshs. 15,000/- and health service allowance of Kshs. 20,000/- which totals to Kshs. 86,430/-. The statutory deductions as contained in the pay slip are P.A.Y.E at Kshs. 13,057/-, NHIF at Kshs. 1500/- and NSSF at Kshs. 200/- which comes to a total of Kshs. 14,757/-. The other deductions are Faulu Kenya Kshs. 22,349/- and Ollin sacco at Kshs. 2,200/-. These deductions do not amount to compulsory statutory deductions as they are either in the form of savings or loan repayments, which ought not to be factored in when determining a multiplicand. This was enunciated by the Court of Appeal in the case of Mary Osano (personal representative of Charles Otwori Ogechi (Deceased) vs Simon Kimutai [2020] eKLR where the Court of Appeal stated:-

> This Court is therefore tasked to consider whether the learned Judge erred by using the figure of Kshs. 40,000/- as the multiplicand instead of the Kshs. 70,000/-. We appreciate the principle behind this finding is that courts must factor in statutory deductibles prior to arriving at the appropriate figure to

use as a multiplicand. The same was held by this Court in Rosemary Mwasya vs Steve Tito Mwasya & Another [2018] eKLR:-

> The figure chosen of Kshs. 118,546/- took into consideration yearly increments had the deceased followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. 118,546/- X 1/3 = 39,512/-.

Counsel for the appellant submitted that the deceased's net pay as evidenced by a copy of his pay slip was Kshs. 53,550/- per month, with house allowance of Kshs. 45,000/- per month which totals to Kshs. 98,550/-. The statutory deduction as contained in the pay slip are: P.A.Y.E at Kshs. 23,947/-, NHIF at Kshs. 320 and NSSF at Kshs. 3,748/- which totals to Kshs. 28,015/-. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.

39. As outlined, the total statutory deductions amount to Kshs. 14,757/- which when deducted from the gross pay would amount to Kshs. 71,673/-. Accordingly, the correct multiplicand is Kshs. 71,673/-. Therefore loss of dependency will work out as follows:-

    Kshs. 71,673/- x 34 x 12 x 1/3 = Kshs. 9,747,528/-.

Conclusion

40. Consequently, the award for loss of dependency of Kshs.6.408.796/- set aside and substituted with an award of Kshs.9,747, 528/-. The total award payable to the respondent amounts to Kshs.9,918.028/-.

41. This appeal therefore fails on part of the appellant. The costs of the appeal goes to respondent.

42. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October , 2023