



REPUBLIC OF KENYA



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Juma (Suing as the Dependant (sic) of the Estate of Lewis Eshailale Mukhonjwa) v Kcb Bank (K) Limited (Civil Appeal E010 of 2022) [2023] KEHC 24383 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E010 OF 2022
JN KAMAU, J
OCTOBER 25, 2023**

BETWEEN

**WINNIE ADHIAMBO JUMA (SUING AS THE DEPENDANT (SIC) OF THE
ESTATE OF LEWIS ESHAILALE MUKHONJWA) APPELLANT**

AND

KCB BANK (K) LIMITED RESPONDENT

*(Being an appeal from the Judgment of Hon. M.M. Gituma Resident
Magistrate in Vihiga PMCC No 111 of 2018 delivered on 27th April 2022)*

JUDGMENT

Introduction

1. In her decision of 27th April 2022, the Learned Trial Magistrate, Hon M. M. Gituma, Resident Magistrate dismissed the Appellant's suit in which she had sought the following:-
 - a. General Damages
 - b. Special Damages
 - c. Costs of the suit
 - d. Interests (sic)
 - e. Any other relief that the court deemed fit to grant.
2. Being aggrieved by the said decision, on 24th May 2022, the Appellant filed a Memorandum of Appeal dated 18th May 2022. She relied on ten (10) grounds of appeal.



3. Her Written Submissions were undated and filed on 6th October 2022 while those of the Respondent were dated 4th October 2022 and filed on 17th October 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound necessarily to accept the findings of fact by the court below but that the appellate 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.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and that the question that had been placed before it was to consider whether or not the liability that was apportioned was against the weight of evidence in the circumstances warranting its interference.
7. Be that as it may, this court deemed it necessary to analyse the evidence touching on both liability and quantum under the following distinct and separate headings.

I. Liability

8. The Appellant submitted that she adduced sufficient evidence and that the Trial Court ought to have made a decision in her favour on a balance of probabilities. She argued that PW 1 who was an eye witness testified that the driver of the motor vehicle that hit the deceased was being driven in a zig zag manner and at a high speed. She added that he had also told the Trial Court that the deceased was unable to swerve to the far left to avoid the accident because there was a big ditch and instead swerved to the right and collided with the said motor vehicle. She emphasised that PW 3 produced in court a Police Abstract Report that showed that the accident did in fact occur.
9. She pointed out that the Respondent herein enjoined the deceased's employer, M/S Kenya Power & Lighting Co Ltd as a third party on the ground that it had contributed to the causation of the accident by allowing the deceased to ride a motor cycle when he was drunk but that the Trial Court absolved the said employee from any negligence. She therefore averred that the Trial Court's dismissal of her claim amounted to double speak.
10. She further pointed out that PW 2 categorically stated that there was no lorry which DW 1 had alleged the deceased was trying to overtake, a fact which she asserted was proven by the Police Abstract Report. She therefore argued that DW 1's evidence of how the accident occurred ought to be disregarded. She added that PW 3's evidence that the driver of the motor vehicle could not be blamed also ought to be disregarded as he did not produce the sketch maps.
11. In this regard, she placed reliance on the case of *PAS vs George Onyango Orochi* [2020] eKLR where it was held that the evidence of a police driver on who was to blame based on the entry in the Occurrence Book that was not produced was hearsay and inadmissible.
12. On its part, the Respondent relied on the provisions of Sections 107, 108 and 109 of the [Evidence Act](#) Cap 80(Laws of Kenya) to the effect that he who alleges must prove. It referred this court to Halsbury's



Laws of England 4th Edition at Para 662 at pg 476 where it was stated that the burden of proof lay on a plaintiff to prove that he was injured as a result of negligence or omission of a defendant. It added that the standard of proof in civil proceedings was on a balance of probabilities.

13. It further placed reliance on the case of *Kiema Mutuku vs Kenya Hauliers Services Limited* (eKLR citation not given) which was cited with approval in the case of *Dharmagma Patel & Another vs T.A (Minor)* suing through his mother and next friend HH 9 [2014] eKLR where it was held that there was no liability without fault and that a plaintiff had to prove negligence against a defendant.
14. It also relied on the case of *Alfred Kioko Muteti vs Timothy Miheso & Another* [2015] eKLR where the court therein observed that the police abstract showed that the matter was pending under investigations.
15. It pointed out that PW 3 confirmed that it could not be blamed for the accident. It submitted that the Appellant did not demonstrate its carelessness or negligence and it could not therefore be blamed on a balance of probabilities.
16. A perusal of the proceedings showed that all the witnesses adopted their Witness Statements as their evidence in chief. According to the Appellant herein, on the material date of 21st June 2017 at around 7.30 pm, she received a call from a friend of her husband, Lewis Eshialile (hereinafter referred to as “the deceased”) namely, Wycliffe Malova Eboso (hereinafter referred to as “PW 2”) informing her that the deceased had been involved in a road traffic accident along Kisumu- Kakamega Road.
17. In his testimony, PW 2 stated that on the material date at about 6.30 pm -7.00 pm, he and the deceased were riding their motor cycles heading to the Kenya Power Company Limited (KPLC) office at Mbale where they were employees. As they were descending the slope at Majengo Centre, Motor Vehicle Registration Number KCA 454 (sic) (hereinafter referred to as “the subject Motor Vehicle”) appeared from the Kakamega direction being driven in a zigzag manner and at a high speed. He said that he was riding ahead of the deceased herein.
18. His evidence was that the said subject Motor Vehicle veered to their side but the deceased could not veer to the left because there was a deep ditch. As a result, the said subject Motor Vehicle hit the deceased causing him to sustain severe injuries to the left leg and hip joint. He blamed the driver of the said subject Motor Vehicle for having caused the accident herein.
19. No 59708 PC John Koech (hereinafter referred to as “PW 3”) produced the Police Abstract Report in court. He pointed out that the Investigating Officer had been transferred. He confirmed that investigations were still pending. On being cross-examined, he stated that the Respondent was not charged with the accident (sic) and it could not be blamed for having caused the accident.
20. On his part, the Respondent’s driver, Barnabas Ochunyi Munga (hereinafter referred to as “DW 1”) blamed the deceased for the misfortune that befell him. His testimony was that the deceased veered into his lane and hit him. He asserted that the deceased was drunk as he was smelling of alcohol and at the material time, he was trying to overtake a lorry.
21. Notably, PW 1 did not witness the accident. PW 2’s evidence during cross-examination was inconsistent and jumbled up. He seemed to say one thing then another, making it difficult for this court to follow his testimony. At one point, he said that the deceased and his woman, whose name he could not recall were involved in the accident. He then stated the woman was not a pillion passenger. This court was therefore not able to ascertain whether or not the woman who was at the scene of the accident was the deceased’s pillion passenger.



22. However, if she was the deceased's woman and they were together while the deceased was riding his motor cycle KCH 014Q (sic) (hereinafter referred to as "the subject Motor Cycle"), she was the deceased's pillion passenger. All the same, whether or not the woman was the deceased's passenger or not, it was not material in ascertaining who was to blame for the deceased's death.
23. What was relevant was that PW 2 did not witness the accident as he was riding in front of the deceased. PW 3 did not also assist the Appellant's case as he admitted that the Respondent was not to blame for the accident.
24. Having said so, a court is under a duty to go through the evidence that has been adduced during trial to ascertain to itself if indeed, the oral evidence that was adduced during trial was in tandem and/or consistent with the documentary evidence that was tendered in court as evidence.
25. The Appellant urged this court to disregard PW 3's evidence that DW 1 was not to blame for the accident because he did not produce the sketch maps. As there were no sketch maps and DW 1 was not charged with any traffic offence, the Police Abstract Report showing that the matter was pending under investigations (PUI), it was difficult to determine who really was to blame for the accident. It was for that reason that this court deferred to the photographs that were tendered in evidence by the Respondent herein to establish who may have been to blame for the accident on a balance of probability.
26. A perusal of the photos showed that the impact of the accident was on the lane of the subject Motor Vehicle. The impact of the accident was on the left front side of the subject Motor Vehicle. If the subject Motor Vehicle was being driven in a zig zag manner, the deceased would have been expected to have swerved his subject Motor Cycle to the left. Even so, the impact would have been expected to have been on the right side of the subject Motor Vehicle.
27. There was a body of a woman off the road and on the left side of the subject Motor Vehicle. It was difficult to comprehend how the subject Motor Vehicle ended up suffering damage on the left front side or how the body of the woman who was a pillion rider of the deceased ended up on the left side of the subject Motor Vehicle. In the absence of any logical explanation of how the deceased found himself on the lane of the subject Motor Vehicle, this court was persuaded to agree with the Respondent and the Trial Court that it was the deceased who veered into the lane of DW 1.
28. Going further, it is important to point out that the Appellant could not assert that the deceased was not drunk at the material time of the accident and again purport that the Trial Court erred for not having found his employer to have been liable for negligence having allowed him to ride the subject Motor Cycle while he was drunk. He was either drunk or he was not. If he was drunk as the Appellant wanted to insinuate and actually veered into the lane of the subject Motor Vehicle, he was therefore the author of his own misfortune thus exonerating the Respondent herein. Be that as it may, this court found and held that the Trial Court came to a correct conclusion that there was no evidence that the deceased was drunk at the material time.
29. While there was no dispute that an accident involving the deceased and the subject Motor Vehicle did occur as was stated by PW 1, PW 2, PW 3 and DW 1 and confirmed by the entries in the Police Abstract Report, there was no evidence that DW 1 contributed to the causation of the accident herein to make the Respondent herein vicariously liable for his actions and/or omissions.
30. This court therefore came to the firm conclusion that the Trial Court did not err when it found that the Appellant did not prove negligence on the part of the Respondent herein and acted correctly when it dismissed the Appellant's case.



II. Quantum

31. It was the Appellant's submission that even when dismissing the case, the Trial Court was obligated to assess the general damages as was held in the cases of *Frida Agwanda & Another vs Titus Katichu Mbugua* [2015] eKLR and *Lei Masaku vs Kalpama Builders Ltd* [2014] eKLR where the common thread was that even if a trial court dismissed a claim, it was under a duty to assess damages as it was not the last court of resort and its decision was appealable. The above notwithstanding, the Appellant did not, however, set out what her claim was before this court.
32. On its part, the Respondent argued that an award for general damages entailed the discretion of the trial court and that an appellate court ought not to review and/or disturb awards by trial courts. In this regard, it relied on the case of *Henry Hiday Kanga vs Manyema Manyuka* (1961) E.A 705 at 714 where the East Africa Court of Appeal held that an appellate court could only intervene if the trial court had applied a wrong principle of the law or taken into account an irrelevant fact or left out a relevant factor or that the award was so inordinately high or inordinately low that it must have been a wholly erroneous estimate of the damages.
33. As the decision of this court was subject to appeal at the Court of Appeal, it deemed it prudent to consider what the Appellant could have been entitled to for damages both under the *Fatal Accidents Act* and *Law Reform Act* under the following distinct headings if she had proven negligence against the Respondent herein.

A. *Fatal Accidents Act* Cap 32 (laws Of Kenya)

34. The Appellant's evidence was that the deceased was aged thirty two (32) years and at the material time, he was an employee of KPCL earning a monthly salary of Kshs 35,000/= at the material time of the accident.
35. She adduced in evidence copies of the Certificate of Death, Birth Certificates for the deceased's two (2) children aged six (6) and three and a half (3 ½) years, Medical Report from Aga Khan Hospital, Kisumu, Police Abstract Report, the deceased's pay slip amongst other documents. The Respondent did not rebut and/or controvert the Appellant's evidence in this regard.

AA. Multiplicand

36. The Appellant's assertions in her evidence- in- chief that the deceased's monthly income was Kshs 35,000/= without any documentary proof were unfounded. She also proposed an income of Kshs 44,165/= in her written submissions without justifying how this figure was arrived at.
37. This court therefore agreed with the Respondent that the applicable multiplicand herein was Kshs 22,950/= which was indicated in the deceased's pay slip for May 2017.

BB. Dependency Ratio

38. The Appellant also proposed a dependency ratio of three quarters ($\frac{3}{4}$) without explaining how she had arrived at the said figure. On the other hand, the Respondent proposed a dependency ratio of two third ($\frac{2}{3}$).
39. As the deceased was married and had young children, he was expected to have spent two third ($\frac{2}{3}$) of his salary on his family. A dependency ratio of two third ($\frac{2}{3}$) would therefore have been adequate herein.



40. In arriving at this conclusion, this court had due regard to the case of Mary Isigi Adaji (Suing for and on behalf of the Estate of the Late Kefa Adaji) vs James Motanya Nyabochua [2021] eKLR, the court therein a dependency ratio of two third (2/3) where there were children.

BB. Multiplier

41. The Appellant suggested a figure of twenty five (25) years. She did not rely on any case law to support her argument. On the other hand, the Respondent suggested a multiplier of eight (8) years.
42. As the deceased was a civil servant, he was expected to have worked until sixty (60) years when he would have retired. He therefore had twenty eight (28) years remaining to his retirement. However, taking the uncertainties and vagaries of life into consideration, this court determined that a multiplier of twenty (20) years would not have been unreasonable.
43. In arriving at the said conclusion, this court considered the case of Bash Hauliers vs Dama Kalume Karisa & another [2020] eKLR where the appellate court upheld a multiplier of twenty (20) years where the deceased therein was aged thirty two (32) years at the time of his death.

B. Law Reform Act Cap 26 (laws Of Kenya)

AA. Pain And Suffering

44. Notably, the Appellant did not claim the award under pain and suffering. The award of pain and suffering sum of Kshs 20,000/= that the Respondent had proposed was inordinately low and the decision it had relied upon was old.
45. The deceased did not die on the spot of the accident. The Appellant told the Trial Court that PW 2 informed her that the deceased was rushed to Mungoma Hospital after the accident. The deceased was transferred to Kisumu Specialist Hospital and was later transferred to Aga Khan Hospital, Kisumu.
46. He was admitted to Aga Khan Kisumu Intensive Care Unit (ICU) for critical care and further management of the fracture to the left femur shaft and intertrochanteric fractures, injury to the left foot with multiple fracture and multiple soft tissue injuries. His left foot was removed. He, however, continued to deteriorate and died on 3rd July 2017, this was about thirteen (13) days after the accident.
47. This court had due regard to the case of Sanganyi Tea Factory Limited vs Norah Nyaboke Atei & Another (suing as Legal reps of Felix Bosire (Deceased) [2019] eKLR where the appellate court therein found that a sum of Kshs 100,000/= for pain and suffering was adequate.
48. Bearing in mind the inflationary trends into consideration and the fact that he must have suffered greatly before he died, it was this court's considered opinion that an award of Kshs 150,000/= would have been adequate compensation under this head.

BB. Loss Of Expectation Of Life

49. The Appellant did not claim a sum under this head. The court accepted the figure of Kshs 100,000/= that the Respondent had proposed.
50. In arriving at this figure, this court associated itself with the holding in the case of Joseph Mugweru Njenga & Another vs Joseph Kamau Ng'ang'a [2018] eKLR where the court therein awarded a sum of Kshs 100,000/= under this head.



C. Special Damages

51. The Appellant did not lead any evidence under this award in the lower court. She and the Respondent did not also submit on the same in this court. This made it difficult for this court to state with certainty how much the Appellant could have been entitled to had her claim been successful. Suffice it to state that special damages are subject to proof and that the Appellant would have been entitled to whatever amount she would have proved.

Conclusion

52. Assuming that the Appellant had been successful in her claim, it would have put the Trial Court between a rock and a hard place. This is because the evidence that was presented during trial showed that the deceased was wholly to blame for the accident. In addition, the Appellant's submissions on what she was entitled to was incomplete.
53. Although the Respondent had proposed figures under both the *Fatal Accidents Act* and the *Law Reform Act*, the only claim that the Appellant had set out in her submissions in the lower court was that of loss of dependency. She had computed the same as follows:-

$$25. \quad \text{Years} \times \text{Kshs } 44,165/- \times \frac{3}{4} \times 12 \text{ Kshs } 9,937,125/=$$

54. Be that as it may, if the Appellant would have succeeded in proving that the Respondent had been vicariously liable for DW 1's negligence and also pleaded damages both under the *Fatal Accidents Act* and the *Law Reform Act*, computation under the following figures would not have been unreasonable:-

Loss of dependency Kshs 3,672,000/=

$$\frac{2}{3} \times 22,950 \times 20 \times 12$$

Loss of expectation of life Kshs 100,000/=

Pain and suffering Kshs 150,000/=

Kshs 3,922,000/=

Plus proven special damages and costs. Interest on special damages would have been at court rates from the date of filing suit until payment in full while interest on damages for loss of dependency and loss of expectation of life would have been at court rates from the date of judgment of the lower court till payment in full.

55. For the avoidance of doubt, this computation was purely speculative as the facts of the case showed that the deceased was wholly to blame for the accident, with no vicarious liability attaching whatsoever against the Respondent herein.

III. Costs

56. The Respondent urged this court to dismiss the Appeal herein and award it costs as provided in Section 27 of the *Civil Procedure Act*. It relied on the case of *Impressa Ing Fortunato Federice vs Nabwire* [2001] 2 EA 383 as cited with approval in the case of *Matigari General Merchants & Another vs Nelly Wairimu Muthoni & Another* [2021] eKLR which emphasised the said principal that costs follow the event.
57. While it is correct that the party who wins a case is entitled to costs, the court can also deviate from that general principle if circumstances so demand. Undoubtedly, the Respondent herein, a financial institution had more financial might than the Appellant herein.



58. It was also not lost to this court that not only did the Appellant lose her husband and father of her children, she also lost compensation as her case was dismissed both at the lower court and at this appellate stage. Condemning her to pay the Respondent's costs herein would cause her to lose human dignity as she might not be able to pay the same having lost a breadwinner of the family. This court therefore found that it was in the best interests of justice that it protects her dignity as envisaged in Article 28 of *the Constitution* of Kenya, 2010 by deviating from the general principle that costs follow the event.

Disposition

59. For the foregoing reasons, the upshot of this court's ruling was that the Appellant's Appeal that was dated on 18th May 2022 and filed on 24th May 2022 was not merited and the same be and is hereby dismissed. Each party will bear its own costs of this Appeal.

60. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF OCTOBER 2023

J. KAMAU

JUDGE

