Kenya Power & Lighting Company Limited v Mwangi (Suing as the Legal Representative of the Estate of Geoffrey Muthii Muthike - Deceased) (Civil Appeal 13 of 2019) [2023] KEHC 24211 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 13 OF 2019

FN MUCHEMI, J

OCTOBER 25, 2023

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT

AND

BRENDA NYAWIRA MWANGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY MUTHII MUTHIKE - DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Y. M. Barasa (RM) delivered on 9th November 2018 in Kerugoya CMCC No. 12 of 2013)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Resident Magistrate in CMCC No. 12 of 2013 in a claim arising from a road traffic accident whereas the respondent claimed both general and special damages. The court found the appellant fully liable and awarded all inclusive damages of Kshs.1,730,000/= to the respondent.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds summarized as follows:-

    a. The learned trial magistrate erred in fact and in law in finding that the respondent had legal capacity to institute the suit in the manner she did;

    b. The learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident yet there was no eye witness to the accident;

c. The learned trial magistrate erred in law and in fact in adopting a multiplier of Kshs. 10,000/- without proof of income.

d. The learned trial magistrate erred in law and in fact in awarding general and special damages under the Fatal Accident Act and *Law Reform Act* when the respondent lacked the locus standi to institute the suit.

3. This appeal was disposed of by filing written submissions by both parties.

Appellant's Submissions

4. The appellant submits that the respondent lacked the requisite locus standi because she had no co-administrator contrary to Section 58(1)(a) of the *Law of Succession Act* which provides that no grant of letters of administration is supposed to be made to one person where there is a continuing trust. The appellant argues that limited grants are also letters of administration which must be made in compliance with Section 58(1)(a) of the *Law of Succession Act*. To support this contention, the appellant relies on the case of Gikera Munene vs Mwangi Nguro & 3 Others [2005] eKLR. It therefore follows that the suit is a nullity which is in consonance with the holding in the cases of Julian Adoyo Ongunga & Another vs Francis Kiberenge Bondeva (Suing as the administrator of the Estate of Fanueel Evans Amudavi (Decaesed) [2016] eKLR and Mohammed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR.

5. The appellant submits that the trial court erred by attributing liability at 100% on its driver. The trial court's analysis of the evidence produced by PW2 and DW1 was skewed as it meant to blame DW1 at all costs. The appellant argues that both the driver and the pedestrian owe a duty of care to each other as road users and thus the trial magistrate based on the evidence ought to have apportioned liability at 50:50. Thus the appellant urges the court to find that the trial magistrate's apportionment of liability was untenable and substitute it with an apportionment of 50:50.

6. On the issue of multiplier, the appellant argues that the trial court adopted a multiplier of Kshs. 10,000/- without providing any reason thereof and further the respondent did not produce any evidence of the deceased's income. The appellant argues that in the absence of proof of income, the trial magistrate ought to have used the minimum wage. To support its contentions, the appellant relies on the case of Wilson Ondicho Mboga vs Nicholas Maina Arisi & Another (Suing as the legal administrators of the Estate of Alice Kwamboka (Deceased) [2022] eKLR. Thus, the Regulation of Wages (General) (Amendment) Order 2017 is applicable and provides for the income at the sum of Kshs. 5,844/=. Accordingly the damages on loss of dependency should work out as follows:-

7. 5,844/- x 12 x 20 x 2/3 = 935,040/-.

The Respondent's Submissions

8. The respondent submits that she has legal capacity to institute the suit herein as she was issued with a limited grant ad litem on 24/9/2012 in Succession Cause No. 188 of 2012 for the purpose of filing a civil suit only. The respondent further submits that the limited grant issued to her is only for the purpose of filing the suit and not for distribution of the deceased's estate. To support her contention, the respondent relies on the case of The Matter of the Estate of Morarji Bhanji Dhanak (Deceased) [2000] eKLR.

9. The respondent submits that the appellant's driver was solely to blame for the accident as the driver veered off his lane and knocked the deceased who was a pedestrian walking along the opposite lane.

10. The respondent further submits that the trial court did not err by adopting a multiplier of Kshs. 10,000/-. She further submits that although there was no proof of income, the deceased had two minors that he was providing for. The respondent further contends that in the trial court, the appellant had submitted for Kshs. 7,500/- yet they currently submit for the sum of Kshs. 5,844/-.

Issues for determination

11. The main issues for determination are:-

    a. Whether the respondent had legal capacity to institute the suit;

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

    c. Whether the court erred in adopting a multiplicand of Kshs. 10,000/-.

The Law

12. 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."

13. 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.

14. 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."

15. Therefore this Court is under a duty to examine 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 the respondent had legal capacity to institute the suit.

16. The appellant argues that the respondent did not have legal capacity to institute the suit in view of Section 58(1) of the *Law of Succession Act* which provides that:-

> No grant of letters of administration in respect of an estate shall be made to one person alone except where that person is the public trustee or a trust corporation.

17. In this matter, the respondent filed a petition for limited grant ad litem vide High Court Misc. Succession Cause No. 188 of 2012 for purposes of filing a civil suit under Section 67(1) of the *Law of Succession Act*. A Limited grant is different from letters of administration of estate in a Succession cause. The respondent obtained a limited grant which does not require two people to be appointed.

18. The appellant has got it all wrong on this ground of appeal. Section 67(1) of the *Law of Succession Act* does not require that the petition be represented by two persons as is the case under Section 58(1) of the Act. The issue was raised before the magistrate and it was fully and rightly addressed. I find no merit in this ground of appeal.

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

19. 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 he had employed the driver who caused the accident DW1. On the material day DW1 was driving motor vehicle registration number KAT 951X from Embu to Nyeri belonging to the appellant. The appellant also does not dispute that an accident occurred on 22/5/2012 involving the said motor vehicle and the deceased who was a pedestrian and the deceased died as a result of the injuries sustained therein. However, he asserts that the accident was substantially caused by the deceased.

20. 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.

21. The respondent did not witness the accident but she called the Base Commander Baricho Police Station who testified that he did not visit the scene of the crime but the records of the investigating officer who visited the scene showed that the appellant's driver was solely to blame for the accident. He testified that the records indicated that the appellant's driver left his lane and hit the deceased, a pedestrian who was walking off the road on the opposite side. A police abstract as proof of the accident was produced. In evidence the appellant's driver was to blame for the accident. The appellant's driver's evidence was that as he was approaching Mutindo area when he saw the deceased staggering downhill and he suspected that he was drunk because he was wavering a lot on the road. He further testified that he was driving uphill at an average speed of 40km/hr when all of a sudden the deceased jumped onto the road on his side and before he could apply the brakes, he hit the deceased. On re-examination, the appellant's driver testified that the deceased was crossing the road from right to left thus rendering untrue his evidence in chief.

22. The trial court analyzed the evidence of the appellant's driver and noted that he had ample time to anticipate the likelihood of the pedestrian crossing the road if he was staggering and the weather was clear at the material time. It was further noted that since the deceased was crossing from the opposite direction, the appellant's driver would have swerved to avoid hitting him. Additionally, the fact that the deceased died on the spot meant that the impact was heavy being an indication that the appellant's driver was over speeding. I have analysed the evidence and agree with the trial magistrate that from the evidence that the appellant's driver was to blame for the accident. Evidently the driver of the appellant must have been over speeding for the heavy impact to occur causing death of the deceased on the spot. Furthermore, DW1 testified that the pedestrian was crossing from right to left and this leads to a

conclusion that he had ample time to anticipate that the pedestrian would cross the road. Furthermore, the police officer testified that there was no evidence that the deceased was drunk as alleged by DW1.

23. On the issue of an eye witness, the Court of Appeal in Abbay Abubakar Haji vs Marain Agencies Company & Another [1984] KCA 53 dealt with matter as follows:-

> It is clear that the duty of the court to arrive at a finding of facts, however difficult the circumstances may be, if that is at all possible, although that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitable point that way.

24. Therefore, it follows that a case cannot collapse merely on the basis that there were no eye witnesses. The base commander produced the records of investigating officer who visited the scene. This was sufficient documentary evidence which was not controverted by any other evidence. I take notice that even circumstantial evidence or evidence adduced by the defendant that tends to prove his involvement in the alleged act can infer culpability on part of the defendant. As such, it is my considered view that the respondent discharged the burden of proof and proved on a balance of probabilities that DW1 the appellant's driver was negligent. I find no evidence to apportion liability between the deceased and the appellant's driver. I find the appellant's driver wholly liable.

Whether the court erred in adopting a multiplicand of Kshs. 10,000/-

25. 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."

26. 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."

27. 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.

28. The appellant argues that the learned magistrate applied a multiplicand of Kshs. 10,000/- but did not give reasons why considering that the respondent did not provide evidence of the deceased's income. Accordingly, the appellant argues that the trial court ought to have used the minimum wage. The respondent supports the sum of Kshs. 10,000/- and states that although she did not provide proof of income, the deceased had two minors who he was providing for.

29. The trial court in its judgment noted that there was no proof of income and adopted Kshs. 10,000/- as the multiplicand. In arriving at this figure, she was guided by the decision in Chania Shuttle vs Mary Murubi (2017) eKLR.

30. I have perused the trial record and noted that the respondent stated that the deceased was a business man in the hotel industry and used to earn Kshs. 1,200 per day but did not produce any proof to that effect. I have noted that the trial magistrate did not give reasons why she applied the multiplicand of Kshs. 10,000/-. It is my considered view that this constitutes an error on the part of the learned magistrate since the income of the deceased could not be ascertained with precision. Thus the trial court ought to have used the minimum wage.

31. It is trite law that where there is no evidence of income, the court is free to resort to minimum wage as was stipulated in the case of Petronila Muli vs Richard Muindi Sayi & Catherine Mwende Mwindu (2021) eKLR. The deceased died on 22nd May 2012. Therefore the order applicable is the Regulation of Wages (General) (Amendment) Order 2012. The respondent testified that the accident occurred along Baricho – Kiburu road and that they lived nearby, thereby column 4, "other areas" in the Regulation of Wages (General) (Amendment) Order 2012 is applicable as the resident of the deceased at the time of death. It is my considered view that in the absence of proof of earnings, the deceased shall fall under general labourer and the minimum wage provided is Kshs. 4,577.20/-. Thus, this court upon re-evaluation of the evidence tendered finds that the minimum wage applicable in respect to the deceased was Kshs. 4,577.20/-.

32. Therefore the award of loss of dependency works out as follows:-

    4,577.20/- x 20 x 12 x 2/3 = 732,352/-

33. The awards for loss of expectations for special damages and for pain and suffering remain intact. The total conclusion is Kshs. 130,000/=

34. The award by the court below of Kshs.1,600,000/= for loss of dependency is hereby set aside and substituted with Kshs.862,352/=.

35. The appeal is partially successful.

36. The respondent shall have the costs of the suit.

37. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October , 2023