Kimani (Suing as the Legal Administrator of the Estate of the Late Kennedy Kimani Gachoki) v Nyaga & another (Civil Appeal E049 of 2022) [2023] KEHC 24220 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E049 OF 2022

FN MUCHEMI, J

OCTOBER 25, 2023

BETWEEN

NAOMI WAWIRA KIMANI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE KENNEDY KIMANI GACHOKI) ..... APPELLANT

AND

MICHAEL MUNYI NYAGA ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Grace Kirugumi (PM) delivered on 18th May 2022 in Kerugoya CMCC No. 5 of 2018)

JUDGMENT

Brief facts

1. This appeal arises from the judgment in Kerugoya CMCC No. 5 of 2018 arising from a road traffic accident whereby the court found that the appellant failed to discharge the required burden of proof and dismissed the suit.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in finding that the appellant did not discharge the burden of proof and thus dismissed the suit;

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

Appellant's Submissions

4. The appellant relies on the cases of Isabella Wanjiru Karangu vs Washington Malele [1983] KLR 142 and Mahendra M. Malde vs George M. Angira Civil Appeal No. 12 of 1981 and submits that apportionment of liability is an exercise of discretion with which the appellate court can only interfere with when it is clearly wrong or based the application of wrong principles. The appellant argues that the trial magistrate erred in failing to apportion liability between the plaintiff and the defendant despite negligence been proved against the respondents. The plaintiff submits that there was an eye witness who witnessed the accident and testified as PW2. According to PW2, the 1st respondent was driving motor vehicle registration number GKA 321Y, land rover was overtaking a probox car and he hit the deceased who was riding motorcycle registration number KMDE 362W. The 1st respondent however testified that the accident occurred when the deceased had entered the lane of the land rover to enable him overtake a fielder car. The appellant argues that it is not disputed that the collision occurred head on but the trial magistrate found that the 1st respondent was not to blame in any way for the occurrence of the accident.

5. The appellant thus submits that the finding of the court was based on wrong principles as the 1st respondent admitted the collision, that he did not see the motorcycle in good time and that the accident occurred as he was approaching a junction leading to Gatwe shopping centre. He further admitted that he was driving at a speed of 50-60 km/hr above the recommended speed of driving when approaching a town and that he tried to brake but it was too late which indicates that he was not on proper look out and was distracted. The appellant further argues that the 1st defendant admitted that he did not do anything to avoid the accident as he did not swerve or try to stop but drove direct into the oncoming traffic. As such, the appellant argues that the trial court ought to have apportioned a percentage of liability to the 1st respondent in the circumstances. The appellant further relies on the cases of Butt v Khan [1982-88] 1 KAR, M. M. Kisoso v Express (K) Ltd [1999] eKLR and Hamisi Gunga Baya vs Salt Manufacturers Ltd & Another [1995] eKLR and submits that a driver of a motor vehicle is required to exercise caution while driving failing which he will be found liable, just as the 1st respondent herein.

6. The appellant submits that the trial court erred in believing the respondents' evidence and not the eye witness of the appellant despite the fact that there was conflicting evidence concerning where the accident took place and who between the deceased and the 1st respondent was overtaking. Thus, the trial court ought to have drawn an inference of negligence on both the drivers as there was conflicting evidence of how the accident occurred. To support her contentions, the appellant relies on the case of Lakhamshi vs Attorney General [1971] EA 118, 120.

7. The appellant relies on the cases of Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende [1982-88] 1 KAR and Ann Mukami Muchiri vs David Kariuki Mundia [2008] eKLR and submits that the trial court erred in dismissing her claim because she did not produce the conclusion of the inquest and further that the 1st respondent was never charged with any traffic offence. The appellant further argued that an acquittal of traffic charges did not exonerate a party from being found liable to have contributed to the causation of an accident.

8. The appellant submits that the trial court failed to consider the circumstances that led to the accident and thus failed to award compensation to the family of the deceased.

The Respondents' Submissions

9. The respondents rely on the case of Calvin Grant v David Pareedon et al Civil Appeal 91 of 1987 and submit that the appellant failed to prove her case on a balance of probability as she did not give

the court sufficient evidence that they were to blame for the accident. Further PW3, the police traffic officer produced the police abstract testified that during their investigations, they discovered that the deceased had no driving licence and that he was to blame for the accident as he was trying to overtake a vehicle which was ahead of him without taking care of other road users and himself. Furthermore, the respondents submit that the 1st respondent who was driving motor vehicle registration number GKA 321Y has never been charged.

10. The respondents thus argue that it was not necessary for the trial magistrate to apportion liability when it was clear that the deceased was 100% liable for the occurrence of the accident. As such, the respondents rely on Section 107, 109 and 112 of the *Evidence Act* and the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 and submit that the appellant failed to prove her case on a balance of probabilities.

11. The respondents submit that the appellant, PW1, testified that she was at home when the accident occurred and the deceased was already dead when she arrived at the scene of the accident. Thus she did not see how the accident occurred and her account of how the accident occurred is hearsay evidence pursuant to Section 63 of the *Evidence Act*. As a general rule, hearsay evidence is inadmissible. Thus the trial court dismissed the appellant's case due to the weaknesses in her case after analysing both parties evidence. The respondents argue that the appellant was unable to produce the riding licence of the deceased or the logbook of the subject motorcycle to prove ownership of the subject matter which begs the question as to whether the deceased was a licenced driver allowed by law to drive on the road. Relying on the cases of HCCC No. 3720 of 1995 Frida Kamotho vs Ernest Maina and V.O.W vs Private Safari (E.A) Limited (2008) eKLR the respondents argue that the appellant ought to have proved that the respondents were negligent and not the other way around.

12. The respondents further submit that the allegations that the 1st respondent was the one overtaking a probox car and hit the deceased are contrary to the testimony of PW3 who testified that during their investigations, they found that the deceased had no driving licence and that he was to blame for the accident as he was trying to overtake a vehicle which was ahead of him without regard to other road users. Those facts were supported by the respondents' documents which were produced as exhibits and confirmed by PW3 that the same document emanated from their offices. The respondents submit that the 1st respondent was driving in a lawful manner and with considerable speed as required by the relevant traffic laws. To support their contentions, the respondents rely on the case of Josphat Malalu Boyi v Republic [2019] eKLR and submit that an accident by itself is not proof of negligence or reckless driving however the appellant ought to have proved the negligent acts and recklessness of the 1st respondent.

13. The respondents rely on the case of Pinnacle Projects Ltd v Presbyterian Church of East Africa, Ngong Parish & Another [2018] eKLR and submit that both parties were given a fair chance to present their cases and put in submissions and the trail court analysed all the evidence presented by the parties and reached a determination. As such, the trial court properly analysed the evidence.

14. The respondents argue that the circumstances that led to the occurrence of the accident were clearly stipulated by the traffic officer who testified that the deceased was overtaking a vehicle which was in front of him and failed to see an approaching car. The police abstract that was also produced in court as evidence proved to the trial court that the deceased was the one on the wrong. The respondents further rely on the cases of Embu Road Services v Riimi [1968] EA 22 and Mzuri Muhhidin vs Nazza Bin Seif [1961] EA 201 and Menezes Stylianciers Ltd CA No. 46 of 1962 and submit that the burden of proving contributory negligence on part of the plaintiff is on the defendant. Moreover, the respondents argue that at no time did the 1st respondent admit that he was not in the proper look out. Furthermore, the 1st respondent was not charged in any traffic case.

15. The respondents contend that no award was given to the deceased family as the appellant did not prove negligence on part of the respondents and since the acts of negligence were caused by the deceased, the trial court deemed it sufficient not to give an award. The principles governing assessment of damages were espoused in the case of West (H) and Sons Ltd v Shepherd [1964] AC 326 cited with approval in Cecilia Mwangi & Another vs Ruth Mwangi CA 251/1996.

Issue for determination

16. The main issue for determination is whether the liability apportioned solely to the deceased was against the weight of evidence.

The Law

17. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another v 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."

18. 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.

19. Dealing with the same point, the Court of Appeal in Kiruga v 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."

20. 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 the liability apportioned solely to the deceased was against the weight of evidence.

21. The appellant seeks to have the court substitute the trial court's findings of 100% liability with equal liability between the deceased and the respondents. The appellant asserts that the trial court erred in finding the deceased solely liable and due to the conflicting evidence of the parties of how the accident occurred, the trial court ought to have apportioned equal liability.

22. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another v 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.

23. The appellant did not witness the accident but she called an eye witness, PW2 and the investigating officer to testify. According to PW2, motor vehicle registration number GKA 321Y Land Rover, was being driven from Kerugoya heading to Karatina at a high speed. The driver of the said motor vehicle was trying to overtake a probox car when he collided with the deceased's motor cycle. The witness further testified that the motor cycle landed on the roadside facing Kerugoya whereas the land rover fell in the trench and faced the Kerugoya direction it had come from.

24. PW3 testified that he received a report of an accident on 29/1/2017 and they rushed to the scene and found an accident had occurred between motor vehicle registration number GK 321Y Land rover and motor cycle registration number KMPE 362W. The witness further testified that an inquest was held and the case was concluded. He further testified that the 1st respondent who was driving the land rover was on his lane and that the deceased was overtaking and hit the oncoming motor vehicle of the respondents. PW3 further testified on cross examination that the land rover was moving from Kerugoya to Nyeri whereas the motor cycle was heading to Kerugoya from Nyeri. He further stated that the motor cycle was overtaking another motor vehicle, a fielder and that the land rover and the motor cycle collided on the lane heading towards Nyeri. The witness further testified that from their investigations, they discovered that the deceased had no driver's license and that they would have charged the deceased as he was to blame for the accident, if he had lived.

25. DW1, the 1st respondent testified that on the material day he was going to Nyeri when at Gitwe along Kerugoya Kagumo road, there was an oncoming vehicle which was about to pass when suddenly a motor cycle registration number KMPE 362W swerved to the right to his lane from the rear of the oncoming motor vehicle. DW1 further testified that the said motor cycle was overtaking the vehicle on his opposite direction and thus caused the accident. On cross examination, the witness stated that he saw the motor cycle at a distance of 10 meters and he pressed the brakes but it was too late. He further stated that he tried to stop but before he stopped he heard a loud bang as the front wheel of his motor vehicle had already come into contact with the motor cycle. DW1 further testified that the land rover rolled to the other side of the road facing Kerugoya and the motor cycle was also facing Kerugoya.

26. 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.

27. In Anne Wambui Ndiritu v 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.

28. From the evidence of PW3 the investigating officer, motor vehicle registration GKA 321Y Land rover was being driven from Kerugoya towards Nyeri whereas the motor cycle registration number KMPE 362Wwas from Nyeri heading to Kerugoya direction. According to PW3 their investigations unearthed

that the deceased was to blame for the accident as he was overtaking another vehicle. These facts were corroborated by the 1st respondent who was driving the said land rover. To support his contentions, he produced the Investigating Diary which PW3 confirmed was from their office. It is worth noting that although the appellant called PW3 to give evidence on the accident, she did not produce the sketch plan, the proceedings of the inquest or the conclusion of the investigations despite the inquest and the investigations been concluded. Thus the appellant did not provide sufficient evidence to prove her case on a balance of probabilities. Furthermore, PW3 was categorical that the deceased was overtaking and hit the oncoming land rover. This was supported by the fact that the motor vehicle and motor cycle collided on the lane heading towards Nyeri. Furthermore, the investigations revealed that the deceased had no driving licence and thus it is not clear whether he was a licenced driver allowed by the law to drive on the road. The investigation further revealed that since the deceased was to blame for the accident, he could have been charged if he was still alive.

29. Accordingly, it is my considered view that the evidence points at the deceased who was the one on the wrong and was to blame for the accident. As such, I find that the appellant did not prove her case on a balance of probabilities. Consequently, there is no material to apportion liability between the deceased and the 1st respondent.

30. Regarding assessment of damages, the trial court did not assess any damages, for the reason that it had dismissed the suit. That was manifestly erroneous as was espoused in the case of Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua [2015] eKLR where the court held that:-

    Indeed even when the learned magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.

31. Similarly in Lei Masaku v Kaplana Builders Ltd [2014] eKLR it was observed thus:-

    It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court need to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

32. I will therefore perform the duty of the court on first appellate court assess damages.

Damages under the *Law Reform Act*.

33. In the case of Hyder Nthenya Musili & Another v 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.

34. In the instant case, it is not disputed that the deceased died on the spot. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, it is my considered

the sum of Kshs. 50,000/- would be reasonable compensation for pain and suffering and Kshs. 100,000/- for loss of expectation of life.

Damages under the *Fatal Accidents Act*

Loss of Dependency

35. The Court of Appeal in Chunibhai J. Patel & Another v 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.

36. The deceased was 35 years old at the time of his death. The appellant stated in her pleadings that she was married to the deceased and together they had two children. The appellant further stated that the deceased was a business man and motor cycle driver carrying passengers for hire earning Kshs. 60,000/- per month.

37. Dependency is a matter of fact and must be proved by evidence as was held in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR as follows:-

    Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.

38. Further in Rahab Wanjiru Nderitu v Daniel Muteti & 4 Others [2016] eKLR the court held that:-

    The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same.

39. From the record it is evident that the deceased died at the age of 35 years as provided in the death certificate. Although the appellant stated in her submissions that she produced a letter from the chief to prove dependency, no such letter was produced in her list of documents. The appellant only annexed letters of administration ad litem. This court presumes that the said letter of the chief is what the appellant used to apply for letters of grant ad litem in P & A Cause No. 289 of 2017 Kerugoya. It is thus my considered opinion that the appellant proved dependency and thus the ratio of 2/3 is applicable.

40. The deceased died at the age of 35 years and the appellant proposed in her submissions that the court adopt a multiplier of 27 years. Relying on the case of Mellbrimo Investment Company Limited vs Dinah Kemunto & Francis Sese (Suing as personal representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR, the court adopts a multiplier of 20 years.

41. Although the appellant argued that the deceased was a businessman and used to earn an income of Kshs. 60,000/- per month, she did not produce any proof to that effect. Therefore in the absence of evidence of the deceased's earnings, the trial court ought to have applied the minimum wage. This principle was stipulated in the case of Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu [2021] eKLR where the court stated:-

On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income.

42. The deceased died on 29/1/2017 and thus the applicable guidelines are as per the Regulation of Wages (General) (Amendment) Order, 2015. The appellant led evidence that the deceased used to carry passengers for hire on his motor cycle and that he was a businessman. Therefore we can classify him as a general labourer. From the death certificate, the deceased resided at Kirunda which falls under the column for "all other areas". The minimum statutory wage for a general labourer was Kshs. 5,844/- as per the Regulation of Wages (General) (Amendment) Order, 2015. Accordingly, the courts adopts a multiplicand of Kshs. 5,844/-. Therefore the loss of dependency will work out as follows:-

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

43. Out of the appellant's claim for special damages in the sum of Kshs. 70,250/-, Kshs. 30,000/- was proved by way of receipts.

44. In view of the foregoing, I find that the appeal lacks merit and is dismissed with costs to the respondents.

45. Each party to meet their own costs.

46. 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