Shalom Transporters v Omare & another (Suing as the legal representatives of the Estate of Martha Moraa); Nyamo Investment & another (Third party) (Civil Appeal 4 of 2020) [2023] KEHC 27267 (KLR) (27 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CIVIL APPEAL 4 OF 2020

F GIKONYO, J

NOVEMBER 27, 2023

BETWEEN

SHALOM TRANSPORTERS ..... APPELLANT

AND

OKEMWA VINCENT OMARE ..... 1ST RESPONDENT

ZACHARY OIRUKERA OKEMWA ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARTHA MORAA

AND

NYAMO INVESTMENT ..... THIRD PARTY

CMC MOTORS GROUP LIMITED ..... THIRD PARTY

(Being an appeal from the judgment and decree of Hon. W. Juma (CM) delivered on 17.12.2019 in NAROK CMCC No. 123 of 2015)

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 123 of 2015 delivered on December 17, 2019 in which the trial court made awards as follows: -

    a. Liability 100%

    b. Global damages Kshs. 800,000/=

    c. Special damages 50,800/=

Total = 850,800/=

d. The trial court entered judgment in favour of the respondent against the appellant.

e. The respondent was awarded costs of the suit and interest on general damages and costs from the date of the trial court's judgment but for special damages from the inception of the suit.

2. The memorandum of appeal dated 16.01.2020 cited seven (7) grounds of appeal which relate to; i) liability and ii) quantum of damages.

Background

3. The suit arose from a road traffic accident, which occurred along Maai -Mahiu -Narok- road on January 24, 2016 involving a motor vehicle registration no. KBN 096H a trailer registration number ZD5198. The deceased was traveling in motor vehicle registration number KBK 984D. It was averred that the owner of motor vehicle KBN 096H parked it negligently in the road thereby causing motor vehicle no. KBN 096H to collide with an oncoming motor vehicle registration number KBT 871A. The respondent blamed the driver of the appellant. The deceased lost her life in the accident. Particulars of negligence were set out against the driver of the appellant. The deceased was 60 years old.

4. The respondent during the trial called two witnesses- Zachary Oirurukera Okemwa and Dominic Oyunge Nyambonga.

5. The appellant called one witness- the appellant.

Appellant's Submissions

6. The Appellant submitted that the totality of the evidence on record points to the cause of the accident to have been over-speeding and negligence on the part of the driver of motor vehicle No. KBK 984 D owned by the 1st third party herein. The appellant therefore blames wholly the 1st third party for the accident.

7. The appellant submitted that in the alternative this court may consider contributory negligence on the part of the appellant concerning the position of the vehicle after the accident and failure to exercise due care and attention on the part of the driver of motor vehicle KBK 984D. In the circumstances urged this court to apportion liability at 50: 50 percent basis. The appellant relied on the case of *Hussein Omar Farar v Lento Agencies* C.A. Nairobi Civil Appeal No. 34/2005[2006] eKLR.

8. The appellant submitted that the deceased died at the age of 60 years. Survived by two adults the respondents herein. Respondent PW1 is a high school teacher and Zachary Okemwa is a farmer. The respondents did not produce any document to support their claim that the deceased was a business lady earning a monthly income of between Kshs. 15,000 and 20,000.

9. The appellant urged this court to award kshs. 100,000 for loss of expectation of life.

10. On pain and suffering, the appellant submitted that the deceased died on the spot. He therefore urged this court to the conventional sum of kshs. 20,000/=.

11. On loss of dependency, the appellant submitted that the deceased had no dependants. The fact of dependency was not pleaded. In the absence of proof of income minimum wage of a farm foreman be applied to the deceased having been a farmer. the sum of kshs. 9,808 at the year gazette via legal notice No. 116 dated 26.06.2015 is applicable. Therefore 9,808 x 12 x5 x1/3 = Kshs.196,160.

12. The appellant submitted that the special damages proven were Kshs. 20,000/=.

13. The appellant urged this court to allow the appeal, set aside the judgment of the lower court, and proceed to dismiss the lower court case against the appellant thereby substituting the same with judgment against the 1st third party. In the alternative, the 1st third party bears higher liability for the cause of the accident.

The 1st Respondent's Submissions

14. The 1st respondent submitted that the appellant's appeal on liability should be dismissed. PW2 and DW1 testified on liability. The trial court observed that the only eyewitness in the case was PW2. The appellant did not witness the accident. The driver of the appellant's motor vehicle did not testify on the suit accident. The trial court correctly observed that the appellant's motor vehicle (trailer) obstructed with no warning signs and it would have been impossible for the 1st third party's motor vehicle driver(bus) to evade the accident given that if he swerved far left, the bus would have landed in a ditch. It is no coincidence that the two judicial officers in the trial court arrived at a similar finding on liability.

15. The 1st respondent submitted that the global award of Kshs. 800,000 was not excessive. The 1st respondent relied on the case of *Texcal House Service station Limited and another v Jappien and another* (Nairobi CA No. 134 of 1998), *Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the estate of the late David Githae Kiririo Taiti* [2022] eKLR.

16. The 1st respondent urged this court to dismiss the appeal with costs.

The 1st And 2nd Third Parties' Submissions

17. The third parties did not file any written submissions.

Analysis And Determination

Duty Of Court

18. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (section 78(2) of the *Civil Procedure Act*).

19. The first Appellate Court should, therefore, evaluate the evidence afresh and make any of its conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & anor –v- Associate Motor Boat Co. Ltd* 1968 EA 123.

Issues

20. This appeal relates to liability and the quantum of damages.

Liability

21. Who is to blame for the accident, and by what proportion if at all?

22. The trial court found the driver of the appellant's vehicle to be solely to blame for the accident, and so held the appellant vicariously liable.

23. The appellant sought for contributory negligence on a 50:50% basis.

24. Where does the evidence lead the court?

25. The road traffic accident herein occurred along Maai -Mahiu -Narok- road on 24.01.2016. It involved three motor vehicles: motor vehicle registration no. KBN 096H whose trailer is registration number ZD5198, motor vehicle registration number KBK 984D, and motor vehicle registration number KBT 871A. The 1st respondent was traveling in motor vehicle registration number KBK 984D. It was averred that motor vehicle KBN 096H was parked negligently on the road thereby causing motor vehicle no. KBN 096H to collide with an oncoming motor vehicle registration number KBT 871A. The 1st respondent blamed the drivers of the three vehicles.

26. PW2-Dominic Oyunge Nyambonga testified that he was a passenger in motor vehicle KBK 984D and the deceased sat next to him. He sat behind the driver. He blamed the motor vehicle KBN 096H and a trailer that was parked across the road. He stated that nothing was alerting the oncoming vehicles of the obstructing motor vehicle. According to PW2, the bus hit the rear of the trailer. The trailer had blocked the left lane to the side of the bus and the right one was clear before the accident occurred. The bus tried to avoid the trailer and hit its rear which was across the left lane of the road. Before the accident, PW2 had seen the motor vehicle KBN 096H facing the ditch and the trailer behind it. From the positioning of the vehicles, none would park outside the tarmac as there were ditches on both sides of the road.

27. DW1-Joshua Mogere, director of Shalom Transporters and the owner of the motor vehicle KBN 096H, testified that the vehicle had a mechanical breakdown on January 21, 2015. A recovery van and mechanics were dispatched by DT Dobie to go and do repairs on the vehicle. He stated that he visited the scene and saw his vehicle parked on its lane with life savers placed strategically on both sides of the vehicle, front and rear. On January 23, 2015, the mechanics informed him that the motor vehicle had substantially been repaired and they wanted to offload to enable the moving of the vehicle to a flat place for completion of repairs. Before that could be done the vehicle was hit by a bus from Nairobi at the site of the breakdown. DW1 produced evidence that DT Dobie worked on the vehicle (D EXH1). He blamed the bus and the failure of its driver to manage it well leading to the accident. He claimed that the accident occurred at a clear place where there were no obstacles and one could see over some distance. He further stated that the trailer was not parked on the road as alleged.

28. The police abstract blames motor vehicle KBN 096H/ZA5198, the trailer for the accident.

29. The evidence adduced should vividly depict how things were on the ground. The impression created by the evidence is that the appellant's motor vehicle KBN 096H/ZA5198 stalled across both lanes of the road including the climbing lane. It was at night around 1.00 am. Although the appellant stated that he visited the lorry before the accident and saw life safer placed at strategic positions, he did not claim that he placed the said warning signs himself. There was no evidence especially by those who may have- if at all- placed the warning signs. There was no evidence that the mechanics from DT. Dobie or the driver of the stalled trailer placed warning signs on the road. This case turns on this point. Thus, much more cogent and coherent evidence that warning signs had been strategically placed to warn other motorists of the stalled vehicle was absolutely necessary.

30. It was averred that the driver of motor vehicle KBK 984D suddenly noted the trailer and braked and swerved away from it, thus, colliding with the on-coming vehicle. Evidence show that there were ditches on both side of the road leaving no room for a driver to swerve to the side of the road.

31. The appellant submitted that the court should find negligence, or consider contributory negligence on the part of the appellant's driver especially considering the position of the vehicle after the accident and failure to exercise due care and attention on the part of the driver of motor vehicle KBK 984D.

32. The use of the concept of 'contributory negligence' seems to make it at large. Ordinarily, 'contributory negligence' refers to the negligence of the claimant, not that of a third party which contributed to or wholly caused the harm. The latter is a claim between concurrent tortfeasors in form of contribution or indemnity; and is ordinarily done through special procedure, most common, by way of a notice to co-defendant or third-party notice; and directions are normally given on how liability between the joint tortfeasors will be tried. See third party procedures and notice to co-defendants in the CPR.

33. In common law jurisdictions, 'contributory negligence' in the former sense applies the relaxed common law rule which allows recovery by a claimant of damages less his contribution.

34. In other jurisdictions (some states in the USA), they use 'comparative negligence' for 'contributory negligence'.

35. But, some states have retained the old rule barring recovery. Others, have modified the rule to the extent that only cases of substantial contributory negligence are barred- but, the percentage may differ.

36. Most problematic, nevertheless, a practice whereby a concurrent tortfeasor claims 'contributory negligence' against a person who is not a party in the proceedings. Yet, with the aim of barring the claimants claim to the extent of the contribution by the said third party! Such impleading faces serious predicaments on the front of fair hearing requirements.

37. Be that as it may, the appellant bears the burden of proof and to establish negligence or contribution by the driver of the bus.

38. The appellant did not establish how the driver of the bus contributed to the accident either, for the alleged lack of attention or diligence. Upon stalling of the trailer, it was upon the driver to place such visible signs to warn other motorists of the stalled vehicle. The warning is intended to make other motorists aware of and take precautions as they approach the stalled vehicle. Despite claims by the appellant, there is no evidence to show the presence of any or appropriate warning signs of the stalled vehicle. The accident happened at night which placed a more onerous duty on the driver of the trailer to have placed appropriate and visible warning signs on the road so as to warn other road users from a reasonable distance. Evidence shows that it is more probable than not that there were no such signs that were placed on the road. Therefore, the submission by the appellant on negligence or contributory negligence remained merely a generalized submission without specific proof thereto.

39. The evidence by PW2 supports that the appellant's driver was solely to blame for the accident.

40. Accordingly, the trial court did not err in placing liability at 100% against the appellant on the basis of vicarious liability. The appeal on liability fails and is dismissed.

Quantum

41. An appellate court will only interfere with trial court's discretion in assessment of damages where; i) there is an error in principle; and or ii) the award of damages is so inordinately high or low as to represent an entirely erroneous estimate (*Bashir Ahmed Butt v. Uwais Ahmed Khan* (1982-88) KAR).

42. This claim was founded on the *Law Reform Act* and *Fatal Accident Act*. These laws provide for for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years- loss of dependency.

Dependency

43. Section 4 *Fatal Accidents Act* provides as follows: -

> " Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct."

The Concepts Of Multiplicand And Multiplier

44. Simply, the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.

45. See Ringera J (as he then was) in the case of *Beatrice Wangui Thairu v. Hon. Ezekiel Barngetuny & another*, Nairobi HCCC No. 1638 of 1988.

46. The appellant submitted that the deceased died at the age of 60 years and was survived by two adults the respondents herein. Respondent PW1 is a high school teacher and Zachary Okemwa is a farmer. The respondents did not produce any document to support their claim that the deceased was a business lady earning a monthly income of between Kshs. 15,000 and 20,000.

47. On loss of dependency, the appellant submitted that the deceased had no dependants. The fact of dependency was not pleaded. He suggested that, in the absence of proof of income minimum wage of a farm foreman be applied to the deceased having been a farmer. The sum of Kshs. 9,808 for the year which was gazetted via legal notice No. 116 dated 26.06.2015 is applicable. Therefore 9,808 x 12 x5 x1/3 = Kshs.196,160.

Loss Of Expectation Of Life

48. The appellant urged this court to award Kshs. 100,000 for loss of expectation of life.

Pain And Suffering

49. The appellant submitted that the deceased died on the spot. He therefore urged this court to award the conventional sum of Kshs. 20,000/=.

50. This court notes that, in awarding a global sum of Ksh.800,000/=, the trial magistrate held that:

> " On the issue of quantum, it is true the plaintiff has not produced evidence of the earnings of the deceased. At age 60 the deceased could still have been useful to her family and as a parent she could have still chipped in on care of her family.
>
> In the absence of sufficient ground on the earnings, I do consider that the deceased was doing something to earn a living and was able to move from point A to b which ended up in death.
>
> The court is of the opinion that a global award will be appropriate in the circumstances.

I award her global damages in the sum of Kshs. 800,000/= (eight hundred thousand) which in the court's view is reasonable."

51. The bone of contention is on the lump sum award for loss of dependency in the sum of Kshs. 800,000/= by the learned trial magistrate. The choice made by the trial court has attracted quite an argument.

As to whether the trial court should or should not adopt the multiplier method in the assessment of damages for loss of dependency or lost years, Ringera J (as he then was) stated in the case of *Kwanzia v. Ngalali Mutua & another* that:

> " The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

52. See also further nuances on application of multiplier and other forms of methods of assessment of damages which were advanced in the case of *Seremo Korir & another v. SS (Suing as The Legal Representative of the Estate of MS, Deceased)* [2019] eKLR, that:

> " 22. In the lower court's judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased's school and that the deceased was 12 years old, a fact that was not contested. It was the appellants' submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method.
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> 27. In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the 'global sum', 'separate heads', or 'mixed' approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach"

53. From the above, the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the court, but of course, as dictated by the circumstances of the case.

54. Courts are not therefore, compelled to adopt the multiplier method in cases where the exercise is a grope in the dark; speculation on the important aspects of lost years or dependency.

55. In this appeal, the deceased died at the age of 60 years. Given the age of the deceased, determining the length of dependency may be problematic. Similarly, in the absence of specific evidence, computation of the annual income could only be speculative.

56. In her judgment, the trial magistrate elected to make a global lump sum award and recorded her reasons to be; it was not tenable to apply the multiplier approach as no evidence had been adduced to prove the deceased's earnings or nature of business at the time of death.

57. The learned magistrate took note of the relevant factors and cited three authorities to support her position. The reasons given for awarding a global sum award were sound in law and backed by the facts of the case.

58. In the premises, the issues raised by the appellants and the 1st respondent concerning the multiplier approach are accordingly determined.

59. At this point, the court will determine whether the trial court's award of Kshs 800,000/- for loss of dependency was too low or manifestly high in the circumstances of the case. In *MNM & another v Solomon Karanja Githinji* [2015] eKLR, Hatari J awarded a lump sum of Kshs 3,000,000/- for loss of dependency where the deceased died at 46 years while in good health and left behind a spouse and four children. In *Amazon Energy Limited v Josephine Martha Musyoka & another* [2019] eKLR, Nyakundi J. reduced the trial court's global award of Kshs 2,500,000/- for loss of dependency to Kshs 1,200,000/- for the reason that the deceased was 56 years old and his only child was in college.

60. From the available judicial authorities, in making a global award, courts are guided by previous trends or precedents, whilst considering other factors such as the general health of the deceased before she met her death, her age as well as the number of dependent children and their ages.

61. In the instant case, no questions have been raised as to the health of the deceased before her death. Further, the deceased left behind three school-going children whose needs must be taken care of. In the premises, the court finds that the sum of Kshs 800,000/- awarded by the trial magistrate for loss of dependency was not too low or manifestly excessive in the circumstances of the case to warrant interference by this court.

Special damages

62. Of special damages, the appellant has stated the special damages proven were Kshs. 20,000/=.

63. The respondent in his plaint pleaded Kshs. 50, 750/= as special damages.

64. The trial court awarded Kshs. 50,800/= as special damages proved.

65. PW1 produced a receipt for professional fees for obtaining the grant as P Exh3 for payment of Kshs. 20,000/=. He stated that the expenses for the funeral were about Kshs. 150,000/= but he did not produce any receipts.

66. In *Jacob Ayiga & Anor v. Simion Obayo* (2005) eKLR, the court had awarded funeral expenses despite lack of proof, by way of receipts, on grounds that funeral expenses must be incurred in every case where someone died and there are arrangements and meetings for the funeral.

67. The Court of Appeal, in *Premier Diary Limited v. Amarjit Singh Sagoo & another* [2013] eKLR, stated that:

> " We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead

relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

68. In light of the foregoing jurisprudence, the award of funeral expenses in the circumstances of this case was properly made. The respondent pleaded Kshs. 20,000/= for funeral expenses, transport, and post-mortem. This court awards Kshs. 20,000/= for funeral expenses.

69. The respondents proved the cost of legal fees incurred/ paid towards procuring letters of administration of Kshs. 20,000/= other items pleaded as special damages were not specifically proved by way of receipts.

70. The respondent is awarded Kshs. 40,000/= as special damages.

71. In an upshot, this court finds that the appeal herein succeeds, in part. Judgment is entered in favour of the respondents in the following terms-;

    i. The appellant is 100% liable

    ii. Global damages of Kshs. 800,000/= for loss of dependence

    iii. Special damages of Kshs. 40,000/=

    Total Kshs. 840,000/=

    iv. The respondents are awarded the costs of this appeal and the suit at the trial court

    v. Interest on global general damages from the date of judgment

    vi. Interest on special damages from the date of institution of this suit.

72). Orders accordingly

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION, THIS 27TH DAY OF NOVEMBER, 2023.

HON. F. GIKONYO M.

JUDGE

In the presence of:-

1. C/A – Mr. Muraguri

2. Modi for Appellant

3. M/s Oganga for Respondents

4. Ongeri for 3rd party