Murigi & another v Mwangi & another (Administrator of the Estate of Bernard Njuguna (Deceased) (Civil Appeal 389 of 2019) [2023] KEHC 27113 (KLR) (Civ) (22 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 389 OF 2019

DAS MAJANJA, J

DECEMBER 22, 2023

BETWEEN

ANTONY MWAURA MURIGI ..... 1ST APPELLANT

PAUL MUCHIMBI GICHIMU ..... 2ND APPELLANT

AND

SACIDAH WANJIRU MWANGI & MARGARET NDIKO NGARUIYA (ADMINISTRATOR OF THE ESTATE OF BERNARD NJUGUNA (DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.H. M. Obura, SPM dated 14th June 2019 at the Nairobi Magistrates Court, Milimani in Civil Case No. 1361 of 2017)

JUDGMENT

1. Before the trial court, the Respondent sued the Appellants for damages following the death of Bernard Njuguna ("the Deceased") after an accident which took place on 08.03.2014. According to the plaint, the Deceased was a passenger in motor vehicle registration number KBP 950J when the 2nd Appellant so negligently managed the said motor vehicle that he caused it collide with motor vehicles registration numbers KAV 641J and KAY 791J.The Deceased sustained severe injuries and passed away on 12.03.2014. The Respondent lodged the claim for damages under the *Law Reform Act* (Chapter 26 of the Laws of Kenya) and the *Fatal Accidents Act* (Chapter 32 of the Laws of Kenya) and upon hearing the case the Subordinate Court found the Appellants fully liable and awarded the Respondent Kshs. 200,000.00 for pain and suffering, Kshs. 100,000.00 for loss of expectation of life, Kshs. 2,118,811.00 for loss of dependency and Kshs. 239,774.00 as special damages. It is this judgment that has precipitated this appeal.

2. The Appellants have preferred this appeal on the basis of the Memorandum of Appeal dated 10.07.2019. The appeal raises two main issues. First, the trial magistrate erred in law and in fact in finding the Appellants 100% liable for the accident. Second, the trial magistrate erred in law and in fact in awarding damages under the several head without proof. The parties filed written submission to support their respective positions.

3. On the issue of liability, the Appellants fault the trial court on holding them 90% liable for the accident contrary to the evidence. They argue that the trial court failed to give her reasoning on how she arrived at the decision. They submit that the Respondent's version on how the accident occurred as pleaded in the plaint differs with the version given during the hearing. That in the Plaint, the Respondent averred that his motor cycle was hit from behind by the Appellants' motor vehicle but at the hearing he testified that he was hit from the side.

4. Whether the Appellants are liable is a question of fact. Thus, the first appellate court is called upon to reconsider the evidence, evaluate and draw its own findings keeping in mind that the trial court interacted first hand with the parties thus had the advantage of observing their demeanor and general conduct during the trial (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).

5. At the trial, the Deceased's wife (PW 1) testified. She admitted that the she did not witness the accident but she produced proceedings in Kigumo Traffic Case No. 153 of 2014 where the 2nd Appellant was convicted on his own plea of guilty for causing death by dangerous driving. The Appellants did not call any evidence. The trial magistrate found the Appellant fully liable on the ground on the conviction was conclusive proof of negligence and that the Appellant did not join the driver of motor vehicle KAV 641J to indeed call any evidence to support its defence.

6. The thrust of the Appellants' case is the trial court effectively shifted the burden of proof from the Respondent who was required to prove that the Appellants' were responsible for the accident. They add that there was no evidence to show that how the accident took place as PW 1 was not at the scene of the accident.

7. In my view, the Appellants ignore the fact that the 2nd Appellant was convicted of the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act* (Chapter 403 of the Laws of Kenya). As to the effect of a conviction, section 47A of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides:

> 47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

8. The meaning of section 47 aforesaid is that the fact of conviction is a conclusive proof that such a person was convicted and that fact cannot be challenged. This means that in accident cases, a conviction implies negligence on the part of the person convicted hence that person cannot deny negligence or otherwise assert that he is completely blameless. It is open for him to assert that another person including the claimant is blameworthy (see *Chemwolo and Another v Kubende* [1986] KLR 492). In *Robinson v Oluoch* [1971] EA 376, the court observed as follows:

> Section 47A of the *Evidence Act* was introduced into the *Evidence Act* by an amendment in the schedule to the *Statute Law (Miscellaneous Amendments) Act* 1969 and it states that a final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal

against such judgement or after the date of the decision of any appeal therein, whichever is latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged. The respondent in this case was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the Judge was right in not striking out the defence as a whole.

9. The same position was expounded on by the court in *Queens Cleaners and Dryers Ltd v East African Community and ot hers* [1972] EA 229 as follows:

> Careless driving necessarily connotes some degree of negligence, and in those circumstances it may not be open to the respondent to deny that his driving in relation to the accident, was negligent...The expression "conclusive evidence" in section 47A of the *Evidence Act* means evidence which cannot be the subject matter of dispute, qualification or challenge. The word 'conclusive' has a number of meanings such as final, that closes the question, and decisive, and, in the context of the section "conclusive evidence" is evidence of such a nature. It would therefore be wrong to admit evidence to explain why a plea of guilty was tendered for it would at least go to qualify if not to nullify what the Legislature has decreed shall be conclusive. There is nothing in section 47A that supports the view that the section has no applicability except to criminal proceedings. That section simply lays down that a final judgement of the court (or an appellate court in appeal thereon) cannot be impugned. It must relate to both criminal and civil proceedings. Generally speaking, traffic offenders are not criminals in the narrow sense of the word, but I fail to see that because in certain places such cases are dealt with in courts trying no other kind of case, and because they are referred to as 'traffic cases" rather than as "criminal cases", they are not cases within the criminal jurisdiction of the courts. The offence to which the third appellant pleaded guilty (careless driving), as its definition makes clear, is that there was lack of care in the manner of his driving and care, or rather in the legal duty to take care, is at the root of the tort of negligence...The "degree of negligence" cannot be resolved by referring back to what happened in the other court; that has never been possible. It must be done by evidence in the instant proceedings. To establish a claim in negligence simpliciter the degree thereof is immaterial for if you are negligent in the smallest degree it is enough to fix you with liability and there is no problem: applying section 47A the conviction spells out negligence and that concludes the matter. But where contributory negligence is concerned, it is different for the court must investigate whether one or the other or both of the parties were at fault so as to apportion the damage according to the relative importance of their acts in causing the damage and their relative blameworthiness. What section 47 does is to make it impossible to hold that the person convicted was not negligent at all for the conviction is conclusive

evidence that he was, i.e. the court can find that his blameworthiness was small enough; it cannot find that he had none.

10. Ultimately, the Appellants could not deny that the 2nd Appellant was negligent. In their statement of defence they stated that the Deceased and the driver of motor vehicle KAV 641 J were to blame or at least contributed wholly or substantially to the accident. They Appellant however, failed to call any evidence to support their defence hence the averments remained just that meaning that the conclusiveness of the conviction was not dislodged. The trial magistrate therefore came to the correct conclusion that the Appellants were fully liable.

11. The Appellants contest the award of damages under the various heads. They abandoned the contest on special damages as this was in fact conceded before the trial court. The Appellants criticise that the award of Kshs. 200,000.00 for pain and suffering on the ground that it is excessive as there was no evidence that the Deceased was conscious after the accident. They urged the court to award Kshs. 20,000.00. The available evidence is that the accident took place on 08.03.2014 while he passed away on 12.03.2014 while undergoing treatment. In *Sukari Industries v Clyde Machimbo Jume* [2016] eKLR it was held that:

> [I]t is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.

12. Based on the aforesaid decision, in the absence of any further evidence of pain and suffering of such a nature that would attract higher damages, I find that the award of Kshs. 200,000.00 is on the higher side. It is reduced to Kshs. 100,000.00.

13. As regards the award of loss of expectation of life, the Appellants submit that this award is intended to compensate the estate of the deceased for the loss of expectation of his life that has been diminished as a result of the fatal injuries (see *West Kenya Sugar Co., Ltd v Philip Sumba Julaya (suing as the administrator and personal representative of James Julaya Sumba)* [2019] eKLR). It urges that the award of Kshs. 100,000.00 should be reduced to Kshs. 70,000.00 as the award is not intended to compensate the dependants. The award for loss of expectation of life is a conventional sum and from the decisions issued by the courts, the sum ranges from Kshs. 70,000.00 to Kshs. 100,000.00. I do not think an award of Kshs. 100,000.00 is excessive in the circumstances.

14. The Appellants assail the award for loss of dependency made under the *Fatal Accidents Act*. In the Plaint, the Deceased was in good health aged 49 years old, an accountant by profession, self-employed businessman engaged in various income generating activities earning an average of Kshs. 200,000.00 per month. He was survived by his mother aged 67 years, his wife aged 40 years and children aged 14, 12 and 4 years respectively.

15. The trial magistrate held that the Deceased was a breadwinner and supporting his family. As the Respondent did not provide how much income he earned, the court admitted the minimum wage under *Regulations of Wagers (General) (Amendment) Order*, 2013 for a cashier as Kshs. 22,070.95 per month and a multiplier of 12 making a total of Kshs. 2,118,811.20 made up as follows: Kshs. 22,070.95 X 2/3 X 12 X 12. The Appellants assail this finding on the ground that there was no basis for or

evidence for adopting this multiplicand. Further, even in the absence of actual proof of earning, the only remedy was to apply *Legal Notice No. 197 of 2013* which was applicable at the time and which provided for a minimum wage of Kshs. 9,780.00 for an unskilled worker.

16. The determination of dependency is a question of fact. The Respondent produced evidence that the Deceased was supporting his family from paying school fees and house rent. There was also evidence that he was a qualified accountant but no evidence of what he was actually earning, let alone holding a salaried position. The Respondent relied on the Deceased's Eulogy to show that the Deceased held various salaried positions throughout his life. It also pointed out his hospital bill was paid by an insurance company which shows that the Deceased was a person of means. It is true that the Court of Appeal in *Jacob Ayiga Maruja and Another v Simeone Obayo* [2005] eKLR held that documentary evidence was not the only way to prove earnings as this could be proved by other evidence. I would however add that each case depends on its own facts. To assert that someone is a businessman of the stature and qualification of the Deceased without providing any evidence of such business or that he is a professional without any documentary evidence of earning from such professions falls far short of the proof required. This is not a case where, "that kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn a livelihood in various ways."

17. While both parties resorted to the *Regulations of Wagers (General) (Amendment) Order*, 2013 as a basis for the multiplicand, I do not think that the multiplicand – multiplier approach was suitable in this case. Given that the nature of the Deceased's business, his income or his earnings were not clearly established, I would adopt the reasoning by Ringera J., in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* quoted by Koome J., in *Albert Odawa v Gichimu Gichenji* NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view;

> 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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy 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.

18. The totality of the evidence is that the Deceased was earning income. He was married with children whom he was supporting. Taking into account all these facts including his age, I award Kshs. 1,800,000.00 as a lumpsum as damages for loss of dependency under the *Fatal Accidents Act*.

19. In the final analysis, I vary the trial court's judgment to the following extent:

    (a) The judgment of the Subordinate Court dated 14.06.2019 is set aside only to the award for loss of dependency under the *Fatal Accidents Act* which is set aside and substituted with judgment for Kshs. 1,800,000.00 and the award for pain and suffering which is set aside and substituted with an award of Kshs. 100,000.00.

    (b) Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2023.

D. S. MAJANJA

JUDGE

Mr Ngechu instructed by C. W. Githae and Company Advocates for the Appellants.

Ms Chege by R. W. Chege and Associates Advocates for the Respondent.