Stecol Corporation Limited v Mudemba (Civil Appeal E026 of 2021)
[2022] KEHC 10677 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10677 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E026 OF 2021

RE ABURILI, J

MAY 25, 2022

BETWEEN

STECOL CORPORATION LIMITED ..... APPELLANT

AND

SUSAN AWOUR MUDEMBA ..... RESPONDENT

(Being an appeal from the Judgement of Hon. M. Agutu S.P.M delivered on 22.6.2021 in Ukwala Senior Resident Magistrates Court Civil Case No. 13 of 2019)

JUDGMENT

Introduction

1. The appeal herein arises from the judgment and decree of the learned Senior Resident Magistrate Hon CI Agutu in the Senior Resident Magistrate's Court at Ukwala in Civil Suit No 13 of 2019 delivered on June 22, 2021.

2. By a plaint dated January 28, 2019, the respondent sought for judgement against the appellant under the *Law Reform Act*, *Fatal Accidents Act* as well as general damages and special damages of Kshs 133,540 as a result of her son's death after he fell and drowned in a trench dug and left unmanned by the appellant, which trench had filled with rain water.

3. The trial court found the appellant 100% liable in negligence for the respondent son's death and proceeded to award the respondent damages as follows;

    Pain and suffering – Kshs 1,100,000

    Loss of expectation of life – Kshs 300,000

    Loss of dependency – Kshs 2,585,310

    Special damages – Kshs 119,380

Total Kshs 3,804,690

4. Aggrieved by the trial court's judgement and decree, the appellant filed this appeal as per the amended memorandum of appeal dated December 2, 2021 raising the following grounds of appeal:

    a. That the learned trial magistrate erred in law and fact by failing to make a decision on merits of the case after hearing the case on merit.

    b. That the learned trial magistrate failed to consider evidence tendered before court thus arriving at a wrong decision on loss of dependency.

    c. That the learned magistrate erred in law and fact by awarding excessive loss of dependency and not apportioning liability.

    d. That the learned trial magistrate erred in that the judgement was against the weight of the evidence tendered by submissions of the appellant on negligence on the part of the parents.

    e. That the learned trial magistrate erred in fact and law by overlooking the evidence on the age of the minor.

    f. That the learned trial magistrate did not consider the submissions by the defendant.

    g. The learned magistrate erred in totality in arriving at the decision and applied wrong principles.

    h. The learned magistrate erred in law in not finding that the respondent had not proved his case under section 207 and 108 of the *Evidence Act*.

The Respondent's case before the lower court

5. It was the respondent's case that the appellant undertook a project for the construction and/or rehabilitation of Ugunja – Sigomere road within Siaya County, in the deceased's neighbourhood whereby the appellant dug trenches and left them unmannered and as such the trenches were subsequently filled with rain water.

6. The respondent testified before the trial court that her son died in the trench by drowning, an accident that she solely blamed the appellant for being negligent. She listed the appellant's negligence as follows:

    i. Leaving the said trench exposed and more without a perimeter wall while aware of the risks posed.

    ii. Leaving the trench unmarked and or without security guards while aware of the risks it posed.

    iii. Leaving the said trench with no warning signs erected on it, no cordoning off, prohibiting trespass as notifying the public

    iv. Leaving the trenches unfilled even after completion of the construction works.

7. The appellant filed a defence on April 16, 2019denying the respondent' s claim in toto and contending that the accident if any was occasioned by the sole negligence of the respondent. The pparticulars of negligence were particularized as follows:

    i. Building her house on a road reserve, thus putting her children in danger from the ongoing constructions.

    ii. Failing to warn her children of the dangers of playing near construction sites.

iii. Failing to accompany her children as they played as a reasonable person would do with regards to a five-year-old.

iv. Knowingly leaving her children unsupervised as they played, while her house was near a construction site.

8. The parties agreed to dispose the appeal by way of written submissions.

The Appellant's Submissions

9. The appellant's counsel submitted on two essential issues: liability and quantum of damages awarded.

10. On liability, the appellant's counsel submitted that the respondent ought to have shouldered some blame for the deceased's death as they allowed the deceased to play near a construction site without supervision of an adult considering the deceased was 5 years old.

11. The appellant's counsel further submitted that the respondent failed to avail adequate answers on the appellant's alleged negligence. Reliance was placed on the case of *Regina Wangechi v Eldoret Express Company Ltd* (2008) eKLR where the court held inter alia that the burden is always on the plaintiff to prove that the accident was caused by the defendant's negligence.

12. The appellant proposed that liability ought to be apportioned in the ratio of 60:40 in favour of the respondent due to the negligence of the deceased's guardians who allowed him to play near the dangerous road alone.

13. On quantum under the *Law Reform Act*, the appellant submitted that the award for pain and suffering be reduced to Kshs. 15,000 as the deceased died within a few hours after the incident.

14. On loss of expectation of life, the appellant submitted that there was no certainty of what the age the child would have grown up to as the life expectancy in Kenya had reduced and as such an award of Kshs. 150,000 would have been sufficient as was awarded in the case of *Anthony Konde Fondo & another v RMC (the representative of FC (deceased)*[2020] eKLR.

15. On loss of dependency, the appellant relying on the case of *Anthony Konde* supra submitted that an award of Kshs. 900,000 would be sufficient as it was not clear how the child would turn out in future regardless of current good grades as was held in the case of *Simon Kibet & anor v Miriam Wairimu (suing as the administrator of the estate of Daniel Mwiruti Ngugi)* [2016] eKLR.

16. The appellant thus proposed as follows;

Loss of expectation of life – Kshs 150,000

Pain and suffering – Kshs 15,000

Loss of dependency – Kshs 900,000

Special damages – Kshs 119,380

Total Kshs 1,184,380

Less 40% contribution Kshs 473,752

Grand Total Kshs 710,628

The Respondent's Submissions

17. On the part of the respondent, her counsel framed three issues for determination namely:

a. Whether the appellant was fully liable for the accident

b. Whether the respondent discharged her burden of proof under sections 107 and 108 of the *Evidence Act*.

c. Whether the award on loss of dependency by the trial court was demonstrably right in the circumstances.

18. On liability, the respondent submitted that the appellant being the occupier of the land upon which the trench lay and was not adequately prepared for children by erection of warning signs, or other notices notifying the public of the impending danger, breached its duty of care and was thus liable in negligence for the accident.

19. On the burden of proof, it was submitted that the respondent through the testimonies of PW1, PW2 and PW3 discharged her burden of proof.

20. On loss of dependency, the respondent's counsel submitted that the deceased died at an age of 5 years and was a school going kid and as such his estate had lost dependency and further that the mother, who was a single parent, lost the security and insurance in her future sustenance that was to be provided by the deceased.

21. respondent submitted that the court ought, in its assessment, take judicial notice of the statutory minimum wage of Kshs. 12,926.55 and further a multiplier of 50 years as the deceased would have worked until he was 55 years old and a dependency ratio of 1/3 bringing the total award of Kshs 2,585,310 as calculated by the trial court.

22. The respondent submitted that the appellant in his amended memorandum of appeal had not contested damages under the rest of the awards specifically, damages for pain and suffering, loss of expectation of life and special damages and that as such, the judgement passed by the trial court ought to be upheld.

Analysis and Determination

23. This being the first appellate court there is need to give a fresh look at the evidence adduced before the lower court bearing in mind that I had no benefit of having seen or hearing the witnesses as they testified. This is the principle espoused in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate court: -

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that: -
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> "On a first appeal from the High Court, the Court of
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> Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

24. In *Margaret Njeri Mbugua v Kirk Mweya Nyaga* [2016] eKLR the Court of Appeal stated as follows of the role of the first appellate court:

> " ...The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered."

25. After considering the grounds of appeal, evidence adduced before the trial court and submissions both here and before the trial court I find the following issues for the issues for determination:

    a. Whether the trial magistrate erred in apportioning liability fully against the Appellant for negligence against the weight of evidence adduced.

    b. Whether damages awarded were inordinately high.

Liability

26. The appellant's case through its submission in this appeal was that the respondent should bear some of the liability for the deceased's passing as she allowed them to play near the trenches without supervision.

27. On the other hand, the respondent adduced evidence from PW1 – PW3 who all testified that the appellant while constructing the road had dug several trenches which were unmanned and lacked notices of the danger that they posed. PW2 testified that children usually played near the road.

28. It was the respondent's case that the appellant, as the one undertaking construction of the road, had sufficient control over the land on which all the trenches lay and was thus an occupier with a duty of care over children who came on land under his control.

29. The law is clear that he who alleges must prove. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

30. Section 107 of *Evidence Act* defines Burden of Proof as proving the matter in court. subsection (2) Refers to the legal burden of proof.

31. Section 109 of the *Evidence Act* exemplifies the rule in section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on

its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

32. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence and if so, to what extent, for the occurrence of the accident wherein the deceased lost his life.

33. Firstly, it is not in doubt that the deceased died after drowning in a trench dug by the appellant, which trench was not covered in any way or cordoned off from the public in any way.

34. It is also evident from the testimonies of PW2 and PW3 that there were many trenches dug by the appellant in its construction of the Ugunja – Sigomere road and that the neighbourhood children played thereabouts.

35. The appellant did not call any evidence to controvert the allegations by the respondent and her witnesses and closed its case without calling any witness.

36. The respondent in her submissions both before the trial court and this court sought to imply that the alleged acts of negligence by the appellant fall within the rules developed at common law but which are now enacted into a legislation, the Occupiers Liability Act Chapter 34 of the Laws of Kenya, which came into effect on January 1, 1963 that imposes a duty on the land owners to those who come onto their land to ensure their reasonable safety while on the land.

37. It is my view that this is not the case. A road construction site is strictly not an occupied premise as envisioned under the *Occupiers Liability Act* such that the provisions of section 3(3)(a) of the *Occupiers' Liability Act* that mandate an occupier to be prepared for children who are less careful than adults does not apply within the context of this case.

38. That said, I do note that the evidence adduced by the respondent's testimony was that there were no signage or fences around the trenches dug by the appellant warning of the danger the trenches posed.

39. The appellant submitted that the respondent ought to bear some liability as she did not warn the deceased of the potential dangers. The respondent testified that she called her 2nd born child and warned her that the children should not play near the site. This testimony was not controverted in cross-examination and further the appellant failed to call any witness in support of their case. Further to this, it is not reasonable for the appellant to expect the respondent to stop all her tasks and sit and monitor the children playing.

40. As a road construction firm, a duty of care is imposed upon them to ensure that safety measures are put in place to protect road users or construction sites from injuries as a result of their construction works.

41. That there was no warning displayed in the area to warn the minor and other persons frequenting the roadside area on the dangers of the trench is not denied by the appellant. Children have rights undersection 17 of the *Children's Act* to Leisure and Play and that play is also in the best interest of the child and is guaranteed under article 53(2) of the *Constitution*. This court had the opportunity to determine a similar matter in *M N K (a minor suing through her father and next friend) Patrick Kyalo Maundu v Joseph Mwaura* [2017] eKLR that the defendant was responsible in negligence for the accident which occurred on April 22, 2010 involving the plaintiff minor aged 6 years wherein she fell from the storied building onto the ground thereby sustaining near fatal injuries. The minor fell from atop a building which was being constructed by the landlord as tenants occupied the lower part of the said building.

42. In holding the defendant 100% liable, this court relied on the Court of Appeal decision in the above *Bashir Ahmed Butt v Ahmed B. Khan* where the Superior Court held that:

> "It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness...A young child cannot be guilty of contributory negligence although an old child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child..."

43. It is for this reason that I opine and am in agreement with the trial court that the appellant is 100% liable for the deceased's death.

Quantum of damages

44. The starting point when discussing quantum would be the case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & another [1976] v Lubia & another (No. 2)* [1985] eKLR where the court wisely held the following:

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

45. From the foregoing, an award can only be interfered with where there is a clear indication that either of the above conditions have been met.

46. On pain and suffering the appellant submitted that an award of Kshs. 15,000 would be sufficient as the deceased died a few hours after the incident whereas the respondent submitted that the trial court finding ought to be upheld because the appellant did not challenge this award in the amended memorandum of appeal. Nonetheless, ground 7 of the said amended memorandum of appeal challenges the judgment on account of application of wrong principles and in my view that is sufficient attack on the judgment of the lower court as the appellant has submitted against the said quantum arrived at by the lower court.

47. In the case of *Rahima Tayab & others v Anna Mary Kinanu* – Civil Appeal No 29 of 1982 (1983) KLR 114, KAR 90 Potter, JA had this to say:

> "But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

48. In the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Mwangi)* 2019 eKLR it was observed that:

> " 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 award range from Kshs 10,000 to Kshs 100,000 with higher damages being awarded if the pain and suffering was prolonged before death."

49. PW2 and PW3 both testified that they learned that the deceased died upon his arrival at the hospital. Accordingly, the trial court's award of Kshs 1,100,000 for pain and suffering was excessive in my opinion. The appellant's proposal of an award of Kshs 15,000 is more reasonable in the circumstances. I thus find that an award of Kshs 15,000 would be sufficient for pain and suffering.

50. On Loss of expectation of life, the trial magistrate awarded Kshs. 300,000. The appellant proposed Kshs 150,000 and the respondent once again urged this court to sustain the trial court's finding, arguing that the appellant did not challenge the same in the memorandum of appeal. However, in my view, the appellant did not have to raise issue with every award of damages in the appeal. A ground of appeal challenging the judgment of the lower court on account that it was based on wrong principles would be sufficient as this court being a first appellate court has the power to reassess the evidence on record and reach its own independent conclusion. Further, where there were errors of law, this court has the power to correct such errors.

51. The court in the case of *Mercy Muriuki & another* supra stated that an award of Kshs 100,000 was conventional for loss of expectation of life. I similarly find that the trial court's award of Kshs. 300,000 was excessive and as such ought to be set aside. I thus find that an award of Kshs. 100,000 is sufficient under this head.

52. Finally, under the head of loss of dependency, the trial court arrived at a sum of Kshs 2,585,310 after taking into consideration the multiplicand of the minimum wage of Kshs 12,926.55 and multiplier of 50 years.

53. The question before this court is whether this approach was the appropriate one in determine the award of such damages. In *Beatrice Wangui Thairu v Hon Ezekiel Barngetuny & another* Nairobi HCCC No 1638 of 1988 (UR) Ringera J stated: -

> " principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

54. In *Charles Ouma Otieno & another v Benard Odhiambo Ogecha (Suing as Brother and Legal Representative and Administrator of the Estate of the Late Oscar Onyango Ogecha (Deceased)* [2014] eKLR:

> " I am of the considered view that the learned trial magistrate fell into error in making awards under separate heads. As it were, the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full; nor how much he would earn; nor was there any way of knowing whether or not he would be able to support his brother, the respondent herein. The answer on the first issue is that the trial court fell into error in assessing damages under various heads instead of awarding a lump sum.
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> The second issue for determination is whether the trial court erred in applying a dependency ratio in the case of a 14-year-old boy who was still in school. The appellants have submitted that because the respondent was only a brother to the deceased, it was unlikely that the deceased would have spent a bigger portion of his earnings on the respondent once he (deceased) got a job. Further that the dependency ratio adopted by the trial court was not proved. Reliance was placed on the case of H. Young & Company EA Ltd. & another -vs- James Gichana Orangi – Kisii HCCA No.207 of 2009. In the said case, the learned trial magistrate awarded damages totaling Kshs. 323,300/= under various heads in respect of the death of the deceased who was aged 11 years at the time of death. On appeal, Musinga J (as he then was) set aside the award of Kshs. 323,300/= and in lieu thereof made a lump sum award of Kshs. 300,000/= subject to 25% contribution."

55. In her decision, Sitati J made a single global award of damages under the *Law Reform Act* and *Fatal Accidents Act*.

56. In this case, and taking into consideration the circumstances of this case, I find no justification for the trial magistrate applying the formula that she did in arriving at loss of dependency. I find and hold that the multiplier/multiplicand approach was not the appropriate method in the assessment of damages in respect of lost dependency of a child who died aged 5 years.

57. I am persuaded because of the uncertainties relied on by the court are misleading. By taking a multiplier of 50 years, the trial court assumed that the minor would have started earning the minimum wage of Kshs 12,926.55 immediately, and for the next 50 years. This is presumptive on the part of the trial court and erroneous.

58. The only solid facts laid before the court were the age and date of death of the deceased. His future could not be predicted in that what he might have become had he lived to full age is uncertain. Whether he would have been able to hold down a job and earn enough for himself and his mother and to what extent, fall within the realm of conjecture. To sustain such an award is setting a dangerous precedent.

59. In the case *Kenya Breweries Ltd v Saro* (1981) eKLR 408, the court held that the age of a child must be considered in assessment of damages. The court further went ahead to state that it is possible to assess abilities of an older child than of a younger child of say 7 years and below as opposed to one of 14 years and above. The court awarded Kshs 300,000 for the minor who was 6 years old as a conventional sum.

60. Accordingly, it is my opinion that this was a case that the trial court would have used the global award approach and it is for the reasons herein above that I have come to the conclusion that the trial court erred in its approach, and further that the figures arrived at, especially with regard to lost dependency were the result of applying the wrong principles as to dependency.

61. I shall now proceed to determine the award for loss of dependency. The appellant proposed an award of Kshs 900,000 relying on the case of Simon Kibet & Anor supra where the court upheld a sum of Kshs 720,000 as a fairly reasonable sum of loss of dependency where the minor was aged 14 years.

62. In the case of *Kenya Power & Lighting Company Limited v MA (suing as the legal representative of S O-Deceased)* [2019] eKLR the court awarded a global sum of Kshs. 400,000 where the deceased minor was 2 years old.

63. In the case of *SMK v Josphat Nkari Makaga* [2017] eKLR the court on appeal awarded damages for loss of dependency to the tune of Kshs. 800,000 where the deceased was 6 years at time of death.

64. the aforementioned authorities into consideration, I am persuaded that an award of Kshs 1,000,000 would be sufficient for loss of dependency.

65. The special damages were uncontested. I shall not interfere with the award made by the trial court.

66. The effect of all the above is that the instant appeal is partially successful and the trial court's award is set aside as follows;

    Loss of expectation of life – Kshs 100,000

    Pain and suffering – Kshs 15,000

    Loss of dependency – Kshs 1,000,000

    Special damages – Kshs 119,380

    Total Kshs 1,234,380

67. In the end, I allow this appeal in terms of quantum of damages only as above stated. The appeal against liability is dismissed.

68. As the appellant has only succeeded halfway, I order that each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 25TH DAY OF MAY, 2022

R.E. ABURILI

JUDGE