Tabitha v Ngonyo (Suing as the administrators of the Estate of Sofia Sidi Kahindi) & 2 others (Civil Appeal E019 of 2020) [2022] KEHC 3171 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3171 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E019 OF 2020

RN NYAKUNDI, J

JUNE 24, 2022

CORAM: HON. JUSTICE R.NYAKUNDI

M/S MURIMI, NDUMIA, MBAGO & MUCHELA ADVOCATES FOR THE APPELLANT

M/S SIMIYU OPONDO KIRANGA ADVOCATES FOR THE RESPONDENT

BETWEEN

AWINO LINDA TABITHA .... APPELLANT

AND

OMAR NGONYO MWAMBEGU MAUA OMAR NGONYO (SUING AS THE ADMINISTRATORS OF THE ESTATE OF SOFIA SIDI KAHINDI) .... 1ST RESPONDENT

ALI MWENYA .... 2ND RESPONDENT

WATU CREDIT .... 3RD RESPONDENT

(Being an Appeal from the Judgment/Decree by S.D. Sitati – Resident Magistrate delivered on the 23rd November, 2020 in Kilifi PMcc No.383 of 2019 at Malindi)

JUDGMENT

1. The matter before court consists of an Appeal filed by the Appellant Awino Linda Tabitha against the Judgment of His Honour Mr S.D. Sitati, then Resident Magistrate at Kilifi Law Courts delivered on November 23, 2020 in respect of a claim for negligence and breach of duty of care under vicarious liability and subsequent award of damages.
2. The claim was brought by Omar Ngonyo Mwambegu and Maua Omar Ngonyo suing as the administrators of the Estate of Sofia Sidi Kahindi in respect of the Fatal injuries she sustained when an accident ensued on June 19, 2019 along Kilifi – Malindi Road involving collision of motor cycle

registration number KMEN 339L registered in the names of Watu credit and Ali Mwenya, whereas motor vehicle registration number KCM 356M was registered in the name of the Appellant.

3. During the hearing of the consolidated suits in SPMCC No 381 of 2019 and 383 of 2019, the learned trial magistrate made a finding on liability apportioned as follows 70% be distributed jointly and severally between the plaintiff and 2nd respondent to this appeal whilst 30% was against the Appellant Awino Linda Tabitha. It is also indicative of the judgment that total damages awarded was Kshs 3,010,084/80 payable as follows. The 2nd and 3rd respondents to shoulder Kshs 2,107, 059/36 and the Appellant to bear the burden of Kshs 903,025/44 by an Appeal preferred by Awino Linda, Tabitha the Appellant, she was aggrieved with the judgment based on the following grounds; -

4. In Kilifi SPMCC No 381 of 2019 being the lead file liability was apprehended as follows; -

    1. That the learned trial magistrate erred in law and in fact and misdirected himself in finding the appellant 30% liable notwithstanding the evidence on record to the contrary.

    2. That the learned trial magistrate erred in law and in fact in failing to properly analyse the evidence before him which clearly established that the rider of motor cycle registration number KMEN 339L was substantially to blame for the subject accident by venturing into the road unclear of vehicle traffic thereby causing the subject accident.

    3. That the learned trial magistrate erred in law and in fact in exonerating the 1st respondents from liability despite the deceased having willingly boarded an overloaded motor cycle.

    4. That the learned trial magistrate erred and misdirected himself in law by assessing damages that was manifestly excessive and incomparable to the current judicial awards for analogous circumstances.

    5. That the learned trial magistrate erred and misdirected himself in law by assessing damages that was manifestly excessive and incomparable to the current judicial awards for analogous circumstances.

    6. That the learned trial magistrate erred in law in failing to appreciate the applicable principles in assessment of damages under the *Fatal Accidents Act* and the *Law Reform Act*.

    7. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the parties.

Submissions on Appeal

8. The Appellant counsel perspective on behalf of the Applicant learned counsel for the Appellant relied on his written submissions to agitate for the judgment of the trial court to be overturned. His account is clear, that the mechanism applied by the learned trial magistrate to apportion liability was entirely not supported with any iota of evidence. Learned counsel maintained that the evidence adduced from the key identifiable witnesses on the part of the claimant failed to discharge. The burden of proof on a balance of probabilities to proof contributory negligence at a ratio of 70;30% to against the application.

9. Learned counsel submitted that the evidence on the accident was plagued with numerous inconsistencies which went to the root of the findings on liability of the accident. Learned counsel submitted and asked that the court findings on liability be varied and set aside entirely for non-proof of the issue as required under the law. Learned counsel further urged the Court to evaluate the threshold evidence of the claimant's case which also comprised the input from the police officer who blamed the accident upon the motor cycle rider for breach of duty of care.

10. On quantum based on the evidence and the principles on judicial precedents that is *Tobias Odoyo Oburu v Ruth Moraa Oigo [2018] KEHC 5562 (KLR)* and *Charity Mapenzi v National Water Conservation Pipeline Corporation* (HCCC No 400 of 2002 *[2005] KEHC 2246 (KLR)*, learned counsel submitted that it is clear from the judgment the focus on assessment of damages proceeded on wrong principles. He argued and submitted for the award of damages using the multiplier (multiplicand) of 28 years be set aside and substantiated with a more appropriate multiplier of between the range of 13 – 16 years.

11. The Respondent's case on Appeal learned counsel for the respondent submitted and urged this court not to interfere with the judgment for reasons that there is no merit from the grounds advanced by the Appellant. This he argued is borne out of the probative evidence and the principles in the cases of *Peters v Sunday Post Ltd* [1958] EA 424 and *Nkube v Nyamuro* [1983] eKLR. The respondent counsel submitted and urged the court to disallow the Appeal.

Determination

12. The Questions for this Court is whether the decision by the Learned trial magistrate on liability and quantum can be rationally supported judiciously for it to be affirmed. That jurisdiction on appeal is grounded within the principles expressly stated in *Peters v Sundays Post Ltd* [1958] EA 429.

13. It is also trite that the High Court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principles in reaching the findings he/she did" see *BM v Joseph Omkoba Nyamuro* [1983] KLR 403; *[1983] KEHC 47 (KLR)* on the issue of liability to this appeal, it relates with the collision of the two motor vehicles on 19th June, 2019. The aftermath of which the deceased suffered fatal injuries.

14. In the case of *Nance v British Columbia Electric Railway Co Ltd* [1951] 2 ALL ER 448. The Court observed that is generally speaking when two parties are so moving in relation to one another so as to involve risk of collision, each does to the other a duty to move with due care and this is true whether they are both in control of vehicles or both proceedings on foot, or whether, one is a foot and the other controlling a moving vehicle.

15. As reiterated by Lord Wright in *Logically Iron Coat Co Ltd v Mcmillan* c [1934] AC 1. In service legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

16. From the provisions of the *Traffic Act* a statutory duty is imposed to all drivers in our roads and high ways to exercise reasonable care as to move around to ensure the safety of other road users in *Baker v Market Heinborough Industrial Co-operative Society Ltd* [1953] I WLR 1472. Lord Denning said that "Everyday proof of collision is need to be sufficient to call on the defendant for an answer. Never do they both escape liability......"

17. The critical quantum to ask is whether on the totality of the evidence the duty of the driver of motor rider registration number KMEN 339L and motor vehicle registration No. KCM 356M kept a good look out to avoid creating a potential danger to accession injury to Sophia Sidi, herein, the deceased in making this determination the Court applies the principal in *Uddin v Associated Portland Cement Manufacturers Ltd* [1965] 2 ALL ER that the question of proportion is one of fact, opinion and degree. The onus of proving contributory negligence is on the defendant to the claim.

18. In the case at bar the analysis of the findings on liability are traceable to the record. The SPMCC No. 381 of 2019,in that suit the 1st and 2nd defendants bore the greater responsibility for the accident, whereas the Appellant was found liable at a ratio of 30%. On my part having construed the evidence and reasoning of the learned trial magistrate. I find it impermissible on the findings of fact made as to apportionment on liability. The principles set out by the trial court, in the course of its adjudication of the matter though well considered, given the unique circumstances of the case failed to rationally justify the apportionment of ratios on liability.

19. Therefore, an argument by the Appellant for this Court to consider a departure from those findings of fact grounded on the availed evidence makes sense. The trial court apparently took into account the various inconsistencies as highlighted in the findings on contributory negligence. For this court to reverse the decision on liability, it has to bear in mind that on appeal assessment of the credibility, and demeanor of witnesses evaluation is never one of the parameters. In my view I tend to differ with the findings made by the trial court given the circumstances surrounding the occurrence of the accident. It is not clearly manifested from the evidence how the factorial of 70% and 30% was sufficiently arrived at by the learned trial magistrate. The narrative gives rise to various probabilities unlikely to apportion greater responsibilities on breach of the duty of care between one party against the other. From the record and analysis of the evidence am more persuaded by the principles in *Barclay – Steward Limited & Another v Waiyaki* [1982-88] 1 KAR 1118, this court held; -

> " The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr Cottle was driving on this correct side where the Range Rover crushed it. The collision is a fact. It is, however, nor reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame."

20. In addition, Section 109 of the *Evidence Act* (Cap 80) also provides for the proof of particular fact;

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. Further under Section 107 (1) of the *Evidence Act* (Cap 80) provides on the burden of proof 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?"

21. As this Appeal stands on the issue of liability, it is my view that there is no concrete evidence to arrive at contributory negligence apportioned at 70%:30%. As such in absence of such evidence I hold both drivers to be equally to blame for the accident.

22. Secondly on damages Appellant counsel that the learned trial magistrate did not consider the submissions and case law on the multiplier/multiplicand model. He therefore urged the Court to find that the multiplier adopted occasioned excessively high damages for the respondent. In adherence to past judicial precedents, referencing on the cases of Tobias Adoyo and Charity Mapenzi, learned counsel submitted for the award of damages to be reviewed by adopting a multiplier of 16 years and not 28 as alluded to in the impugned judgement. It is now trite law as expounded in *Idi Ayub Shabani v City Council of Nairobi* CA No 52 of 1984 [1985]1 KAR *Kemfro & Another v A.M.Lubia & another* CA No.34 of 1982 [1987] KLR " that to justify aver sung the trial magistrate decision on the question of the amount of damages, it will be necessary that this court should be convinced either that the magistrate acted on some wrong principle of law, or that the amount awarded was so extremely high or

so very small as to make it, in the judgment of this court an entity erroneous estimate of the damages to which the plaintiffs/respondent is entitled in law occasions meriting appellant intervention would include when a trial magistrate failed to analyze properly, the entirety of the material evidence.

23. In this case at bar the Appellant counsel argues and submits that he is unhappy with the formulae for multiplier of 28 years for a deceased person stated to be 37 years at the time of the incident. It was his contention that may be the trial court should have settled for a multiplier of the 16 years as a fair and proportionate multiplier. In my view I tend to differ with that line of submissions as from the outset there is extreme difficulty in fixing the amount of damages with precision on past judicial precedents. Although, the basic principles' on which damage awards are made are defined and comparatively easy to state, their application will consistency remains the most difficult task for trial courts. The rationale being that the net benefit of any award of damages is governed by the judicial discretion of the session magistrate judge with the scope and adjudicatory guidelines. The court is more after than not persuaded by the unique elements of each case and which vary so infinitely from other cases clustered as past comparative judicial precedents. The reality is that there must always be an element of arbitrary in any award, and the award, in part must be appreciated is a matter of estimate and even speculation or conjecture. The reason for an oversight on appeal is to avoid a random assessment out of the air, which bears no resemblance with the settled principles. There has been a tendency since *Benham v Gambling* [1941] AC 161 which emphasized that such awards in accident claims must be kept to a minimum. However, the exact boundary line between a fair compensation to the claimant and the relative minimum continue to pause a challenge to the trier of facts. Therefore, before a party delves into challenging an award on appeal, the measure of that grievance ought to be tested with the principle on *Butt v Khan* [1981] KLR on the other hand in which the Court held interalia that;-

> " The difficult task of compensation is essentially a matter of opinion of judgement and of judicial discretion gained over time through experience."
>
> "In that sphere, an appeals court ought to be slow to proceed and dismiss an award merely because it does not correspond with a figure of its own assessment."

24. The set of facts and the reality facing the court in assessment of damages revolve around a reasonable expectation of the claimant deriving pecuniary advantage from the deceased's remaining alive, which has been deprived by his or her death. In determining this all circumstances of the case and all the contingencies and uncertainties that may arise must be taken into account. The advantage may be actual or prospective. On reflection the trial court must satisfy itself that there has been a loss of a sensible and applicable pecuniary benefit. Its eminently settled that as a helpful guide, the quantum of damages under the *Fatal Accidents Act* must reflect the following criteria. First if the deceased had lived, what otherwise would have been his or her annual income, second, what money's out of his or her annual earning or prospective earnings would he or she have contributed to the dependants and, third, what portion of any additional savings he or she would or might not have accumulated or would probably have accrued to them either on his intestacy or under his or her will.

25. In this appeal I have the anxieties about the stance of the appellant, that the sum awarded was excessively high, hence an erroneous of the estimate further, it was not supported by any evidence or past awards. I have taken the time to review the record and the impugned judgment, the award made is indicative of the following; The amount of wages and earning capacity of the deceased, an estimate of how much was required or expected for her own personal and living expenses. The datum or basic figure turned into a lump sum taken together with a number of years purchase. It is also crystal clear that the trial court took into account of uncertainties and vicissitudes of life. Although the quantum awarded is expressed solely in monetary terms, the Dependants to the Estate more specifically children have inherent expectation

of maintenance, educational, personal comforts, conveniences of life, security, health and protection of a father or mothers home for the advancement of right to life under Article 26 of *the Constitution*.

26. In this respect, the yard - stick of past judicial decisions adopted by individual Courts vary greatly. It is an approach which is not scientific. I observe that an appeal, the measures of interference are subject to the deceased's age, expectation of life, state of health, occupation, probable expectation and duration of his or her earning capacity. The possibility of his or her life being prematurely determined by a laters wrongful act, the joint expectation of life of the deceased and the claimant, and all other probabilities (See *Baker v Dalglesa* [1921] 3 KB 485 *Beven on negligence 4th Edition*, PP 261-262 *Heatley v Steel Company of Wales Ltd* 1917 AG 108, *Nance v British Columbia Electric Railway & Co Ltd* [1951] AC 601.

27. According to the Learned trial magistrate for the purposes of determining the multiplier to be applied to the case, he put into consideration all those factors illuminated in the above authorities. From a close scrutiny of the various judgements of the superior courts, it can safely be held that an order to compute the fair compensation by the Learned Trial Magistrate took into account a basic figure indicative of the annual loss to the dependants from the premature death of the deceased. This amount was worked out on the basis of minimum wage or earning capacity of the deceased and the entire relevant data regarding the future prospects in incremental earnings, as the case may be of the deceased during her life time. In my considered view, the method, adopted in the impugned decision cannot be faulted. There are no defects, by way of misapprehension of the evidence and the law on the part of the learned trial magistrate to merit interference with quantum. As a consequence, having interfered with liability this appeal partially succeeds with both parties bearing the costs of the Appeal.

RULING READ, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF JUNE,2022.

R.NYAKUNDI

JUDGE

This Judgment is dispatched electronically to the respective emails of the advocates in the matter.