Chemengen v Cheptot (Suing as the legal representative of the Estate of Mecca Jepkemei Too) (Civil Appeal 34 of 2021) [2022] KEHC 9902 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 9902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CIVIL APPEAL 34 OF 2021

RN NYAKUNDI, J

JULY 22, 2022

BETWEEN

SOPHIA CHEMENGEN ..... APPELLANT

AND

IBRAHIM SALIM CHEPTOT ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MECCA JEPKEMEI TOO

JUDGMENT

1. The respondent instituted a suit against the appellant vide a plaint dated July 4, 2016. The respondent claimed that on January 21, 2016, the deceased was traveling as a pedestrian along Kabiyet – Mosoriot road at Kabiyet centre when the defendant, her driver, servants or agents negligently drove motor vehicle registration number KBJ 631Y that she knocked down the deceased and she succumbed to the injuries and died hence the appellant was to be held vicariously liable.

2. The matter proceeded to full hearing and on June 10, 2016 the trial court found that the appellant was 100% liable. the respondent was awarded kshs. 1,620,000/- in damages. the appellant being aggrieved with the decision of the court instituted the present appeal vide a memorandum of Appeal dated February 24, 2020 wherein he had 11 grounds of appeal as follows;

    a. The learned magistrate erred in law and in fact in pronouncing judgment in favour of the respondent on liability despite the fact that liability was not proved on a balance of probability.

    b. The learned magistrate erred in law and in fact in pronouncing judgment in favour of the respondent on liability despite the fact that the respondent had not proven his case on a balance of probabilities.

c. The learned magistrate erred in law and in fact by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereof she reached the wrong decision by holding the appellant 100% liable for the accident.

d. The learned magistrate erred in law and in fact by finding the appellant liable despite the fact that the respondent did not prove fault on the part of the appellant.

e. The learned magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors and thereby arrived at an erroneous finding on liability.

f. The learned magistrate erred in law and in fact by failing to properly and exhaustively evaluate the evidence on record hence she arrived at wrong inferences and conclusions.

g. The learned magistrate misapprehended the evidence on record, the consequence of which she arrived at an erroneous decision.

h. The learned magistrate erred in law and in fact by making an award for general damages which is so inordinately high as to amount to a wholly erroneous estimate of the damage allegedly suffered by the respondent.

i. The learned magistrate erred in law and in fact by taking into account irrelevant factors and thus making erroneous finding on quantum of damages,

j. The learned magistrate erred in law and in fact by proceeding to pronounce judgment in factor of the respondent and in total disregard of the appellant's submissions.

k. The judgment of the learned magistrate is in the circumstances unfair and unjust.

3. The grounds of appeal are, to my dismay, a regurgitation for similar grounds which is repetitive and unnecessary on the part of the appellant. a clear reading of the same reveals that in essence the grounds could have been stated in 4 or less grounds. That notwithstanding, the same shall be condensed into the issues for determination.

Appellant's Case

4. The appellant filed submissions on January 12, 2022. She contended that the evidence adduced at the trial court did not prove the appellant was entirely to blame for the accident. She stated that PW1 testified that he saw a lorry with full lights and the lady was knocked away from the road whereas DW1 testified that the lady was talking to someone in a probox where he hooted and she did not hear leading to the circumstance of the accident. Counsel for the appellant cited the case of *Mohammed Athman Kombo v Mua Mohammed* (2019) eKLR on the issue of the high court reviewing evidence on appeal.

5. The appellants'' case is that in a claim for negligence it was incumbent upon the respondent to show that the appellant was in breach of a duty owed to the deceased. further, that it was upon the respondent to prove that the vehicle was driven negligently for it to cause the accident and the death. Learned counsel for the appellant cited section 107 and 108 of the *Evidence act* and cited the case of *Evans Otieno Nyakwama vs Cleophas Bwana Ongaro* (2015) eKLR in support of the submission. he further submitted that the trial magistrate erred in purporting to shift the burden of proof to the appellant before considering whether the respondent had discharged his burden of proof.

6. Learned counsel for the appellant maintained that the respondent did not prove his case on a balance of probabilities and the evidence of PW2 had no probative value as it contained allegations without proof. The abstract produced in court was not conclusive proof of causation of the accident and PW1 was not

the investigating officer and therefore he had no capacity to produce the abstract. He cited the case of *Kennedy Nyagoya vs Bash Hauliers* (2016) which addressed the same issue. The appellant contended that there was no charge sheet produced to prove that there were criminal proceedings against the appellant and that the respondent did not provide sufficient evidence to prove the appellant was to blame for the accident.

7. Learned counsel for the appellant submitted that the accused died the next day and therefore an award of kshs. 100,000/ as opposed to the minimum of kshs. 10,000/- was too high for pain and suffering. Further, that PW1 and PW2 did not give any evidence that the deceased was ever received by any hospital therefore she died immediately and her pain was not prolonged. He cited the case of *Hyder Musili 7 Another vs China Wu Yi Limited & Another* (2017) eKLR. he also relied on the case of *Eldoret Express Company Limited vs William Kirui* (2014) eKLR and the case of *Kamunya vs Kibe* (2004) eKLR to buttress his submissions.

8. On the issue of loss of expectation of life, it is the appellant's case that the award of kshs. 100,000/- is excessive and an award of kshs. 80,000/- would suffice as the deceased was aged 43 at the time of her death. he cited the case of *Charles Masoso Barasa & Another vs Chepkoech Rotich & Another* (2014) eKLR to support this submission.

9. The appellant's submission on the issue of loss of dependency is that the award of kshs. 1,360,000/- is excessive as dependency was not fully proved. He cited the case s of *Kenya Wildlife Services vs Geoffrey Gichuru Mwaura* (2018) eKLR and *Multiple Hauliers Co. Limited vs David Lusa* (2021) eKLR to support this submission. He faulted the multiplier applied by the court as the income of the deceased had not been proven.

10. While citing the case of *Kemfro T/a Meru Express Service Gathogo Kanini vs A.M Lubia* C.A 21 of 1994 (1882), counsel for the appellant submitted that the respondent was awarded by the trial court both damages under the *Law Reform Act* and the fatal Accident Act which was an error as it is a clear judicial principle that dependants wo had succeeded in both should not benefit twice as the same would amount to double compensation.

11. On special damages the appellant postured that the respondent did not prove how he spent money using evidence for him to be awarded kshs. 50,000/-. He had not even claimed the same on the plaint therefore the trial court erred by awarding special damages that had not been prayed in the plaint.

12. The appellant asked that the appeal be allowed as it was evident that the trial court had relied on irrelevant factors and erred in its judgment.

Respondent's Case

13. The respondent filed submissions dated February 21, 2022. It is the Respondent's case that the appellant has not adduced any evidence to enable this court to interfere with the awards granted under loss of dependency, pain and suffering, and loss of expectation of life. He cited the decisions in *Lucy Wambui Kohoro vs Elizabeth Njeri Obuong* (2015) eKLR and Civil Appeal No. 113 of 2012, *Makana Makonye Monyanche vs Hellen Nyangena* (2014) eKLR on the issue of double compensation. He also cited the case of *James Chelagat Bor vs Andrew Otieno Onduu* (1988-92) 2KAR 288; (1990-1994) EA 47 to buttress his submissions.

14. On special damages, the respondent cited the case of *JNK (Suing as the legal representative of the estate of KMM(Deceased) vs Chairman Board of Governors (...) Boys High School* and the case of *Capital Fish Kenya Limited vs The Kenya Power and Lighting Company* (2016) eKLR and submitted that he is entitled to the award granted under special damages.

15. The respondent maintained that the appellant was 100% liable for the death of the deceased. the documents produced as evidence as well as the testimony of PW2 affirm the appellant's liability/ when DW1 was cross examined it was clear that the driver did not act in any way to prevent the accident and it was apparent that he was driving the vehicle at excessive speed. The appellant failed to rebut the evidence of the respondent. The appellant further owed the respondent a statutory duty of care while in control of the vehicle on the said road. It is evident that the appellant failed to prove the case against the respondent. the appeal ought to be dismissed.

16. From the foregoing I deduce the following central issues capable of determining this appeal.

    a. Whether the trial court erred on its finding on liability

    b. Whether the award for damages was excessive

Whether the trial Court erred on its finding on liability

17. The essential element of negligence connotes the plaintiff to demonstrate through evidence a nexus between the harm caused and causation in *Snell –v Farrel*(1990) 2 SCR 311 the court stated as follows on the primary test for causation in negligence that " The 'but for' test recognizes that compensation for negligent conduct should only be made 'where a substantial connection between the injury and defendant's conduct' is present. It ensures that a defendant will not be held liable for the plaintiffs injuries where they 'may very well be due to factors unconnected to the defendant and not the fault of anyone"

18. With regard to memorandum of appeal the appellant is aggrieved that the respondents evidence fell short of the standard of proof on a balance of probabilities as required by law. It is trite that negligence denotes the following elements;

    a) That the defendant owed a duty of care to the plaintiff.

    b) That the defendant breached that duty of care.

    c) That the breach caused the plaintiff to suffer damages which are recoverable at law.

    d) That the injury complained of as a result of the breach was reasonably foresable.

19. What emerges from the testimony of PW 2 is that the accident was wholly caused by the negligent acts of the driver, agent or servant in control of motor vehicle registration KBJ 631 Y. That is what the statement by Clerk and Lindsell, expounds as follows that "As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see *Clerk & Lindsell*, op. cit., para. 8- 149; see also, *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in every case must be 'what is a reasonable inference from the known facts?' (Clerk & Lindsell, op. cit., para. 8-150)."

20. The import I see from the extract of the memorandum of appeal and submissions by the appellant is the nuance that the acts and omissions were substantially caused by the respondent meaning an element of contributory negligence. In Charlesworth and Percy on negligence twelfth edition 2010 at page 228 the learned authors stated as follows

> " The phrase "contributory negligence" is probably now too firmly established to be disregard, but unless properly understood is apt to be misleading. It implies solely to the conduct of a claimant. It means that there has been some act or omission on the

claimant's part which has materially contributed to the damage caused and is of such a nature that it may properly be described as negligence. For these purposes "negligence" is used in the sense of careless conduct rather than in its sense of breach of duty. It means "negligence materially contributing to the injury.' The word "contributory" being regarded "as expressing something which is a direct cause of the accident'. It connotes a failure by the claimant to use reasonable care for the safety of either himself or his property, so that to some extent, he becomes blameworthy as the "author of his own wrong". The difference in the meaning of "negligence" when applied to a claimant, on the one hand, and to a defendant, on the other, was pointed out by Lord Simon."

21. In the instant appeal it is clear from PW 2 (Michael Kipkemboi's) evidence that while at the scene he saw a lorry with full lights and at the same time there two ladies who stood next to him. He managed to run out the danger zone but the deceased who happened to be pregnant was hit by the same vehicle away from the road. PW 2 did continue to state that the deceased was ran over by the motor vehicle registration number KBJ 631 Y. He went on to say that as an experienced driver the motor vehicle he saw was being driven at high speed hence the loss of control to occasion a collation with the deceased. I note: "That the fact that the plaintiff may have taken a risk does not amount to contributory negligence if the need to take the risk was created by the negligence or breach of statutory duty of the defendant and a reasonably prudent man or woman in the plaintiff's position would have acted as she did." See *Charlesworth and Percy on negligence* twelfth edition 2010 at paragraph 4-06 page 229.

22. In a tactical rebuttal David Metto who testified as DW 1 denied that he created any acts of negligence or duty of care to create a risk and a dilemma which successfully led to the harm suffered by the plaintiff/respondent. In the same text by Charlesworth and Percy supra at page 231 it was observed that the burden of proofing contributory negligence is on the defendant. That is to say "That in order to establish the defence of contributory negligence, the defendant must prove first, that the plaintiff failed to take 'ordinary care of himself' or in other words, such care as a reasonable man would take for his own safety, and, secondly that his failure to take care was a contributory cause of the accident." See also "*Embu Road Services V Riimi* (1968) EA22 and *25 Mzuri Muhhidin V Nazzar Bin Seif* (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962"

23. With the above observations in mind it is not lost that the courts decision in every civil claim will depend on whether the party concerned satisfied the criteria on the burden and standard of proof imposed on him or her in the quest to secure judgment in his or her favour. It can be seen from the impugned judgment and the evidence that essentially the proximate cause of the alleged accident was the appellant driver notwithstanding his testimony at the trial. What one must discern from all these surrounding circumstances the assertion by the appellant agent driver or servant failed to assert the facts as their existed during the accident. Thus by virtue of the proven evidence while I can appreciate the dilemma faced by the appellant I cannot help but to rule in favour of the respondent. The trial court was correct in its finding on liability and I find no reason to vary the decision. What that means is that the appeal on liability fails.

Whether the award for damages was excessive

24. In *Butt v. Khan* Civil Appeal No. 40 of 1997 the principles on which an appellate court will disturb an award of damages was settled as follows: -

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material

respect, and so arrive at a figure which was either inordinately high or low." See also Kemfro Africa Ltd and Another vs A.M. Lubia & Another [1982-1988]"

25. The appellant disputed the award for pain and suffering on the grounds that there were no damages prayed by the plaintiff under this head. I however note that the respondent prayed for general damages under the *Fatal Accidents Act* and the *Law Reform Act* under which the awards for pain and suffering, loss of expectation and loss of dependency fall.

Pain & Suffering

26. In the case of *Sukari Industries Limited V Clyde Machimbo Juma* Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. held that:

> "''On the first issue, I hold that it 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."

27. Taking into account inflation and the fact that she was run over by a lorry, I find that the award was not unreasonable and find no reason to disturb the same.

Loss of Expectation of Life

28. It is trite that loss of expectation of life under the *Law Reform Act* is often awarded at a conventional sum of kshs. 100,000/-. In *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR the court held;

> "In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering ..... determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Shs 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case, the conventional figure for loss of expectation of life is Shs 100,000/= and I award the said.

29. I am further persuaded by the decision of *Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) v Reuben Muriuki Kahuha, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu* [2015] eKLR where Ougo J awarded a sum of Kshs 100,000/= for loss of expectation of life.

30. I find no reason advanced by the appellant to invoke this court's power to disturb this award.

Loss of Dependency

31. The trial court in calculating the loss of dependency relied on the fact that the deceased was doing volunteer work. The appellant's case is that the income of the deceased was not proven.

32. PW1 testified that the deceased was a housewife and a counsellor and she never earned any salary or wage. In *Miriam Moraa v JOO & another (Suing as the legal representative of the estate of VNO)* [2021] eKLR the court held;

> "''The Appellant submitted that there was no evidence that the deceased earned Kshs. 10,000/= per month. The Respondent on the other hand submitted that the deceased's wife testified that he earned 15,000/=. Other than the oral testimony of PW1, no evidence of proof of earnings of the deceased was provided. Some efforts towards this was necessary. However, I do not mean that only documentary evidence should prove earnings, for it is possible for one to hold a paid job or earn from an employment without formal documentation particularly in the informal sector and employment."

33. In Jacob Ayiga Maruya & Another V. Simeon Obaya [2005] eKLR the Court of Appeal faced with lack of documentary evidence on the earning of the deceased, held as follows: -

> "We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail."

34. In the premises I find that the trial court did not err in its finding on loss of dependency. The deceased must have been contributing to the family in some way taking into account the size of the family her and her husband were taking care of. In *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased)* [2020] eKLR the court held;

> "Simply, the formula for dependency, therefore, 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.

35. The deceased was 43 years of age at the time of death and I find that the multiplier of 17 years was reasonable. I also find no reason to disturb the estimated income. Given the size of the family, the dependency ration was reasonable in the circumstances.

36. In the premises I find no reason to disturb the award under this head.

Special Damages

37. It is trite that special damages must be specifically pleaded and proven. the respondent produced an invoice for kshs. 500 paid for the vehicle search. As for funeral expenses, the court of appeal in the case

of *Jacob Ayiga Maruja & Another –v- Simeon Obayo* (2005) eKLR awarded the plaintiff Kshs. 60,000/= for funeral expenses and held thus.

> " We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs. 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Kshs. 60,000/= we have awarded herein apply strictly to the circumstances of this case."

38. I am further persuaded by the case of *Peter Ngari Njeru v Alchanger Njue Kithogo & Josphat Njue (Suing as Legal Representatives of Eugenio Muchori Njue – Deceased)* [2019] eKLR where the court held;

> " ''It is trite law that funeral expenses may be awarded where a claim has been made based on the fact that burials attract certain expenses born by the relatives of the deceased. However, such expenses must not be specifically pleaded like is the case with special damages''

39. I therefore find no reason to disturb the award under this head.

40. In the result I do not accept as was submitted by the appellant that there was misapprehension of the facts and the law by the learned trial magistrate. Therefore, the appellant was vicariously liable for the negligence of the driver to call upon the court to assess damages for the fatal injuries suffered by the victim of the accident. For all these reasons I am of the opinion that the appeal fails in its entirety with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 22ND DAY OF JULY, 2022.

.....

R. NYAKUNDI

JUDGE

(kalyacounsel@gmail.com)