



Nyambane v Mbugua (Suing as the Administrator of the estate of Jackson Mbugua Ndung'u (Deceased) & 2 others (Civil Appeal 404 of 2019) [2022] KEHC 14092 (KLR) (Civ) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 404 OF 2019

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

ABEL ONGAGA NYAMBANE APPELLANT

AND

CHARLSE NDUNGU MBUGUA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JACKSON MBUGUA NDUNG'U (DECEASED)) ... 1ST RESPONDENT

OLIVIA OTIENO WANGUHU 2ND RESPONDENT

GLAXOSMITHKLINE LIMITED 3RD RESPONDENT

JUDGMENT

1. This court is faced with two appeals and a cross appeal. The first appeal No 371 of 2019 was instituted by the plaintiff *vide* a memorandum of appeal dated June 28, 2019 against the decision of Honourable Mrs AM Obura in CMCC No 4252 of 2017. It is premised on the grounds that the learned trial magistrate erred in law and fact in;
 - a. Failing to consider the issue of ownership of the motor vehicle, whether legal or beneficial, despite the fact that it had been framed as an issue for determination by the parties;
 - b. Finding that the 3rd respondent was solely to blame for the accident and consequently absolving the 1st and 2nd respondents of liability;
 - c. Holding that the 1st and 2nd respondents were not vicariously liable for the negligence of the 3rd respondent;



- d. Making a finding that the 1st respondent had not authorized the 3rd respondent to use the vehicle on the material day of the accident;
 - e. Dismissing the plaintiff's case against the 2nd respondent despite the fact that the 2nd respondent did not appear in court or adduce any evidence to defend the suit; and,
 - f. Failing to consider the evidence, relevant authorities and submissions by the appellant thus arriving at a wrong conclusion.
2. The appellant prays for orders that;
 - i. The appeal be allowed;
 - ii. The judgment and decree of June 21, 2019 be set aside on the issue of vicarious liability;
 - iii. The 1st and 2nd respondents be held vicariously liable for the negligence of the 3rd respondent the judgment of the lower court on quantum apply jointly and severally as against all the respondents; and,
 - iv. Such other orders as it may deem necessary.
 3. In opposition to the plaintiff's appeal, the 1st and 2nd respondents filed a cross-appeal dated July 10, 2019 and premised on the grounds that the learned magistrate erred in law and fact in;
 - i. Making an award on loss of dependency/lost years of Kshs 7,000,000 which award is inordinately high, excessive and above limits of already decided cases of similar nature;
 - ii. Failing to apply or applying wrong principles in assessment of damages to wit; general damages for loss of dependency/lost years at Kshs 7,000,000 and special damages at Kshs 128,010 which assessment when viewed against the evidence adduced is manifestly high as to amount to a miscarriage of justice;
 - iii. Failing to find that the appellant was not entitled to collect proceeds under the Law Reform Act including the award on lost years, pain and suffering and loss of expectation of life for lack of a full grant of letters of administration;
 - iv. Awarding special damages for legal costs for succession and traffic case;
 - v. Failing to take into consideration that the beneficiaries under the Fatal Accident Act and Law Reform Act were the same leading to double benefit for the same cause of action.
 4. The 1st and 2nd respondent in the cross-appeal seek for orders that;
 - i. The trial court's judgment on quantum and assessment of general damages be set aside;
 - ii. The award on lost years and special damages be reviewed by way of reassessment; and,
 - iii. Costs of the appeal to the 1st and 2nd respondent.
 5. The 3rd respondent on the other hand filed civil appeal No404 of 2019 *vide* a memorandum of appeal dated July 12, 2019 on grounds that the learned trial magistrate erred in law and fact in;
 - a. Filing to appreciate the fact the 1st respondent, the owner of the subject motor vehicle that caused the accident and wife to the appellant, was vicariously liable as consent to use the motor vehicle needed not to be express;



- b. Finding and awarding general damages that were so excessive as to amount to abuse of discretion;
 - c. In finding and holding that the appellant was 100% liable for the loss sustained by the 1st respondent without considering the appellant's evidence to the effect that the deceased was drunk and thus contributorily negligent in the circumstance;
 - d. Applying wrong principles in exonerating the 2nd and 3rd respondents from liability;
 - e. Upholding the evidence tendered on behalf of the 2nd respondent in respect of the claim filed and ignoring the law on this subject tendered by the appellant;
 - f. Totally ignoring the evidence, law and submissions put in by the appellant thereby arriving at a wrong decision on both liability and quantum of damages;
 - g. Failing to apportion liability between the defendants; and,
 - h. Applying the wrong principles in exceptions on the principle of vicarious liability.
6. The 3rd respondent prayed for orders that;
- i. The appeal be allowed;
 - ii. The judgment and decree made on June 21, 2019 in the subordinate court CMCC 4252 of 2017 be set aside wholly;
 - iii. Any orders upon such terms as this court deems fair and just
 - iv. Costs of the appeal.
7. A brief history of this matter indicates that the plaintiff and the appellant in appeal No 317 instituted a suit at the trial court *vide* a plaint dated May 23, 2017 against the 1st 2nd and 3rd respondents for a fatal accident alleged to have been caused by the 3rd respondent. The 1st and 2nd respondent were sued in their capacity as registered owners of the accident motor vehicle. The plaintiff prayed for special and general damages.
8. The respondents on the other side filed their defenses and denied their involvement in the accident. The 2nd respondent denied liability and stated that he owned the motor vehicle by virtue of being financier and a beneficial owner.
9. The 2nd respondent on the other hand claimed that she had not authorized the 3rd respondent to use her motor-vehicle hence cannot be held vicariously liable. The suit proceeded to full trial wherein the plaintiff called one witness and the defendants called three witnesses. The trial court after hearing all the witnesses and considering evidence on record delivered its judgment on June 21, 2019 in favour of the plaintiff for Kshs 7,000,000 in general damages and Kshs 127,400 in special damages.
10. Being aggrieved by this decision, the plaintiff and 3rd defendant filed their respective appeals consolidated herein whereas the 2nd defendant filed a cross-appeal.
11. The appeals and the cross appeal were canvassed by way of written submissions. I have considered both the appeals and records as consolidated, the cross-appeal and the submissions by the plaintiff and the 3rd defendant. The 1st and 2nd respondent despite filing a cross-appeal did not file their written submissions.



12. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of *Selle v Associated motor Boat Co & others* [1968] EA 123 where it was stated as follows:
 - a. “An appeal to this court from a trial by the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)”.
13. I will begin with the plaintiff’s appeal. The 3rd respondent who is the appellant in the appeal No 404 does not oppose the plaintiff’s appeal.
14. The first prayer is on the issue that the question of ownership was not addressed by the trial court. The trial court at paragraph 21 of the judgment addressed the issue while referring to the testimony of the DW2 who stated on oath that she owns the moto vehicle and that the 2nd defendant was merely a financier. At page 25 of the plaintiff’s record of appeal is a copy of record showing the 1st and 2nd defendant as co-owners.
15. The 1st defendant testified that she had bought the motor vehicle financed by her employer the 2nd defendant. This testimony was not rebutted. It is clear thus that the 2nd defendant was merely a financier and derived no beneficial value from the motor vehicle. I do not agree with the plaintiff that the question of ownership was not addressed by the trial court.
16. Secondly the plaintiff claims that the trial court erred in holding the 3rd respondent solely responsible for the accident and failing to hold the 1st and 2nd defendants vicariously liable for the negligence of the 3rd defendant. In holding the 3rd defendant wholly liable, the trial court held that he had been found guilty in Traffic Court in TR 7442 of 2012: R v Abel Ongaga Nyambane for dangerous driving which decision he had not appealed.
17. The trial court further found that the 3rd defendant gave conflicting information in the traffic case and in the civil case hence he could not be believed.
18. It is the 3rd defendant’s testimony that the deceased was in company of other friends and were staggering hence his conclusion that they were drunk. He however did not prove that the deceased and his friends were drunk. In the traffic case, it was found that the 3rd respondent was driving in high speed and he swerved off the road hence hitting the deceased. He has not appealed the traffic case decision and hence it is evidence of this court as per section 47A of the *Evidence Act* cap 80 Laws of Kenya as rightly held by the trial court.
19. On the question of vicarious liability, I am persuaded by the decision of the Court of Appeal in *John Nderi Wamugi v Rubesh Okumu Otiangala & others* [2015] eKLR where it was held that:

“Vicarious liability is not pegged on legal ownership but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor.”



20. The Court of Appeal in *John Nderi* (supra) went further to define vicarious liability by quoting the *Black's Law Dictionary* as follow:

“Black's Law Dictionary, 9th edition at page 998 defines vicarious liability in the following words:

“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”

21. The court in *Tabitha Ndubi Kinyua v Francis Mutua Mbuvi & another* [2007] eKLR cited with approval the unreported case of *Kibet Arap Metto & another v Phillip Kibanguru & 3 others* CA civil appeal No 120 of 2000 (Nakuru) (unreported) where the Court of Appeal held at page 5 that:

“We think that *Morgan v Launchbury & others* [1972] 2 ALLER 606 is in all fours with the matter now before us. In this case the house of Lords held: -

‘In order to fix liability on the car for the negligence of the driver, it is necessary to show either that the driver was the owner’s servant or at the material time the driver was acting on the owner’s behalf as his agent.

Simply illustrated, the doctrine enunciated above may be stated as follows: where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B’s negligence in the operation of the vehicle’.”

22. The 1st defendant testified that she had not authorized the 3rd defendant to use her vehicle while the 3rd defendant claim that he had been using the vehicle and required no express consent. The foregoing decisions indicate that there has to be express or implied permission and the use must be beneficial to the owner. In the instant case, the 3rd defendant used the 1st defendant's motor vehicle for his own benefit and no gain was derived by the 1st defendant for her benefit regardless of whether there was express or implied permission. The fact that the 3rd defendant lied to the 1st defendant on what happened is a clear indicator that there was no permission to use and that the use was not in any way for the benefit of the 1st defendant. In this regard, I uphold the decision of the trial court to the effect that the 1st defendant could not be held vicariously liable for the actions of the 3rd defendant.

23. I do not wish to belabor on the question of whether the 2nd defendant was a vicariously liable. It was neither in control or possession of the said motor vehicle. It did not derive any beneficial value nor did it have control of how the 1st defendant operated or used the motor vehicle. No agency relationship of any kind was created hence vicarious liability cannot lie. I am, therefore, inclined to agree with the trial court in dismissing the plaintiff's case against the 2nd respondent.

24. Lastly the plaintiff alleges that the trial magistrate did not consider the plaintiff's evidence, relevant authorities and submissions hence arriving at a wrong conclusion. Nothing can be further from the truth. The judgment of the trial court at paragraph 8 clearly shows that the trial court considered all the evidence and documents on record together with the submissions by the respective parties and the same have been referred to in the whole judgment. The plaintiff is lying to this court.

25. Owing to the foregoing, the plaintiff's appeal is lacking in merit and is hereby dismissed entirely with costs to the 1st and 2nd respondents.



26. I now turn to the 3rd defendant’s appeal and the 1st defendant’s cross-appeal. I have already dealt with the issue of liability in the plaintiff’s appeal. The issues remaining for determination are on quantum, whether the plaintiff was entitled to damages under the Law Reform Act and the Fatal Accidents Act for want of a full grant, and whether the plaintiff was entitled to an award of damages under the Law Reform Act and the Fatal Accidents Act despite having a limited grant and not a full grant.
27. On the question of duplication of the awards, I am persuaded by the decision of the Court of Appeal in Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & Another [supra] which has guided that what the court is required to do is to take into account the award under Law Reform Act and not necessarily to deduct the same from the award under the Fatal Accidents Act, as follows:
- “ 6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.
 7. The Law Reform Act (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.
 8. The words “to be taken into account” and “to be deducted” are two different things. The words used in section 4(2) of the Fatal Accidents Act are “taken into account”. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”
28. It is clear then that the award made by the trial court under the Fatal Accident Act and the Law Reforms Act does not amount to duplication of awards. It is well entrenched in law as clarified by the court of appeal in the decision above.
29. As to whether the plaintiff was entitled to damages under the Law Reform Act and the Fatal Accidents Act, the Court of Appeal in Joel Muga Opija v East African Sea Food Limited [2013] Eklr it had this to say with respect to the power of a limited grant ad litem;
- “We will consider the issue of status first. The main reason why the learned judge sustained the respondent’s arguments on this issue is that the form used and its contents limited the appellants to “collect, get and receive” the estate and doing such things as may be necessary for the preservation of the same until further presentation be granted. She rightly in our view considered that as a very limited grant which did not authorize the respondent to institute or defend any claims on behalf of the estate of the deceased. Mr Okoth responds to that by submitting that at the relevant time when the accident happened that Form P & A 47 was the form used for purposes of instituting and defending claims such as was made in this case. He says that the separate forms now in use came into use much later. The accident took place on June 16, 2001. That is not in dispute. The deceased died on that same day according to the evidence which includes certificate of death produced as exhibit. Section



67 (1) of the Law of Succession was clear that no presentation, other than a limited grant for collection and presentation of assets, could be made until there had been published notice of the application for the grant. Form 47 used here was undoubtedly that for limited grant and ideally was not a suitable form for grant that would authorize a person to sue or to defend a suit on behalf of the estate of a deceased person. However, rule 70 of the Probate and Administration Rules states:

“The forms set out in the first schedule with such adaptations additions and amendments as may be necessary, shall, when appropriate be used in all proceedings under these rules.

Provided that the Chief Justice may by notice in the gazette vary the forms and prescribe such other or additional forms as he thinks fit.”

A look at the first schedule indicates that form 47 is one of such forms which could be used with variations as appropriate. Thus before the Chief Justice gazette a varied form, applicants could use form 47 as appropriate for all proceedings under the rules. This continued till legal notice No 39 was introduced under the Probate and Administration (Amendment of the fifth schedule Rules) 2003, and a proper form was introduced. This was long after the death of the deceased and indeed after the appellant had applied for letters of administration under the old provisions.

We think that had the attention of the learned judge of the High Court been drawn to the above, and to the fact that the learned magistrate had in a ruling allowed the use of form for filing the case, she would have come to the same conclusion she came to in her judgment. We are persuaded that that ground was well taken.”

30. The court in *Priscilla Njeri Wamiti and 2 others v Shiku John Company Ltd* [2017] e KLR interpreted the above decision of the Court of Appeal, which interpretation I fully associate with, and held that;

“That decision of the Court of Appeal in my view sufficiently responds to appellants’ ground of appeal on *locus standi*. A party can where the limited grant so authorizes file suit or defend suit on behalf of a deceased person. This is so since legal notice No 39 of 2002 authorized the limited letters of administration ad litem to file suit. The appellants had obtained limited letters of administration ad litem. That letter as per legal notice No 39 of 2002 authorized appellant to file their suit.”

31. Similarly, in *Lucy Nyokabi Mukura (Suing as the personal representative of the Estate of Simon Bara v David Mugo Kihara* [2019] Eklr the court observed that the Court of Appeal in *Joel Muga Opija v East African Sea Food Limited* [supra] meant that the limited grant ad litem was sufficient to grant locus. It was held that;

“The Court of Appeal endorsed albeit implicitly in that decision, that after the legal notice No 39 of 2003, form 47 “A” of the first schedule was the grant for use by parties desirous of filing of defending suits on behalf of deceased persons. The Court of Appeal decision in *Joel Muga* in my view leaves no doubt that all that a claimant suing under the *Law Reform Act* on behalf of a deceased person required to acquire locus standi was a limited grant ad litem and not a full grant as held in *Lydia Ntembi’s* case. In the circumstances, I am persuaded that the decision of the trial court on that question was erroneous and would allow the first and second grounds of appeal.”

32. I am therefore satisfied that the plaintiff had the requisite *locus standi* by virtue of having acquired a limited grant ad litem. The defendants’ claim on this aspect cannot be sustained.



33. On quantum, I need not over-emphasize the duty of a first appellate court. A first appellate court would not easily interfere with the trial courts' discretion on this issue unless it is found that the trial court applied wrong principles in arriving at the finding as was stated by the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia* 91985) 1 KAR 727:

“....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

34. *Ukari Industries Limited v Clyde Machimbo Juma* Homa Bay HCCA No 38 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 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 the head is unreasonable.”

35. The trial magistrate awarded the plaintiff general and special damages as follows;

Pain and suffering.....Kshs 80,000
Loss of expectation of life.....Kshs 100,000
Loss of dependency/lost years.....Kshs 7,000,000
Special damagesKshs 128,010

36. On pain and suffering, it was stated that the deceased was rushed to St. Francis Community Hospital for treatment where he died while receiving treatment. A certificate of death attached and a report by St. Francis hospital is prove enough. An award under this head is usually within the range of Kshs 10,000 to 100,000 depending on whether the death was instant or prolonged. This is captured well in *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, where the court observed: -

“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 awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

37. In the instant case, the deceased suffered some pain after the accident before his demise while receiving treatment. I find the trial court's award of Kshs 80,000 reasonable and within range. The same is upheld.



38. On loss of expectation of life, the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another* [supra] has agreed with the trial court's view. The trial court's award under this head is well within the acceptable range, the same is upheld.
39. For loss of dependency/lost years the defendants have urged this court to reconsider the same as it is excessive. For awards under this head, courts are called to consider similar decisions and not to engage in the business of unjustly enriching a party at the expense of others.
40. In *Cyrus Amenya Kenani v GW (suing as the Legal Administrators of the Estate of the late AM (deceased))* [2021] eKLR there was an award of Kshs 1,064,000 for a deceased minor who was aged 12 years.
41. Similarly, in *Alice O Alukwe v Akamba Public Road Services Ltd & 3 others* (2013) eKLR Nakuru HCC No 26 of 2005, the court upheld an award of Kshs 2,128,000/= by the trial court for a 24-year deceased.
42. In the instant case, evidence was submitted to prove that the deceased was a bright university student in his final year. Owing to the above similar decisions, an award of the trial court for Kshs 7,000,000 is excessive and the same is set aside. A global sum of Kshs 2,500,000 is fair in the circumstances.
43. On special damages, it is trite law that the same must be specifically pleaded and proofed. The trial court correctly awarded what was pleaded and proved and the same cannot be disturbed.
44. Owing to the foregoing, the appeal fails and the cross-appeal succeeds. Damages under the head of loss of dependency/lost years of Kshs 7,000,000 by the trial court is hereby set aside and substituted with Kshs 2,500,000.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

..... for the 3rd Respondent

