Nthiga & another v Lemparatosori (Suing on behalf of the Estate of Joseph Lemparasoroi (Deceased)) (Civil Appeal 498 of 2016) [2022] KEHC 16408 (KLR) (Civ) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16408 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 498 OF 2016

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

PAUL MWANIKI NTHIGA ..... 1ST APPELLANT

STRATEGIC MOBILE LIMITED ..... 2ND APPELLANT

AND

JANE LEMPARATOSORI ..... RESPONDENT

SUING ON BEHALF OF THE ESTATE OF JOSEPH LEMPARASOROI (DECEASED)

(Being an appeal from the Judgment and Decree of Hon. R. Ngetich (Mrs) Chief Magistrate in Milimani CMCC No. 7665 of 2009 delivered on 30th day of June 2016)

JUDGMENT

1. The late Joseph Lemparasoroiwas involved in a fatal road accident on the 4th November 206 along Thika road at Ruaraka GSU headquarters at 10.00p.m. The deceased was a police inspector and was crossing the road when he was involved in the accident with motor vehicle registration number KAQ 33D, Toyota saloon. His widow filed a civil suit before the Milimani Chief Magistrate's Court and was awarded a total of Kshs 3,828,85 as damages. The appellants are dissatisfied with the trial court's findings and have brought this appeal on the following grounds:-

    i. The learned trial Magistrate misdirected herself and erred both in law and in fact by holding the respondent had proved her case against the appellants on a balance of probabilities.

ii. The learned trial Magistrate misdirected herself and erred both in law and in fact by holding the appellant 100% liable for the alleged accident the subject of this suit against the weight of the evidence and thus arrived at an erroneous finding on liability.

iii. The learned trial Magistrate misdirected herself and erred both in law and in fact by holding the appellant 100% liable whereas evidence on record called for dismissal of the respondent's entire suit against the appellants.

iv. The learned trial Magistrate misdirected herself and erred in law and in fact by failing to find that the appellant failed to discharge her duty of establishing a cause of action against the appellants and thus arrived at an erroneous finding on liability.

v. The learned trial Magistrate misdirected herself and erred in law and in fact by shifting the burden of proof to the appellants as to how the accident occurred and thus arrived at an erroneous finding on liability.

vi. The learned trial Magistrate misdirected herself and erred in law and in fact by awarding damages for loss of dependency that are so manifestly excessive thus rendering the whole assessment erroneous.

vii. The learned trial Magistrate erred in law and in fact by awarding damages under the law reform yet no letters of administration were procured or produced in evidence thus rendering the whole assessment of damages erroneous.

viii. The learned trial Magistrate misdirected herself and erred in law and in fact by shifting the burden of indemnity to an entity which is not a party to the suit and thus rendering the whole finding on liability erroneous.

ix. That the learned trial Magistrate misdirected himself and erred in law and in fact by totally ignoring the appellants' submissions on both liability and quantum and hence did not write a considered judgment on liability and quantum.

x. That the learned trial Magistrate misdirected himself and erred in law and in fact by totally ignoring the appellants' submissions and authorities cited and provided and hence did not write a considered judgment on liability and quantum.

xi. The learned trial Magistrate erred in law and in fact by failing to uphold precedent and the doctrine of *stare decisis*.

2. Parties agreed to determine the appeal by way of written submissions but only counsel for the appellants complied. Counsel contend that the appeal is on both liability and quantum. It is submitted that the trial court shifted the burden of proof to the appellants. The suit against the insurance company (Lion of Kenya Insurance Co Ltd) was withdrawn by the respondent yet the trial court found against the company. The trial court held that the 2nd defendant was to be indemnified by the first defendant yet the suit against the first defendant had been withdrawn.

3. It was further submitted that the trial court erred by finding that the appellants were 100% liable. PW1 did not witness the accident and no other person testified. The respondent did not testify on how the accident occurred. She only blamed the 2nd defendant for the accident. Counsel relies on the case of *Yusuf Abdala v Mombasa Liners Limited* (2004) eKLR where the court held:-

> " This is a civil suit in tort. The basis of such a case is that the defendants by the negligent acts caused a wrong to occur, to which the said wrong has caused injuries to a claimant. There

would be a need by the claimant to prove such negligence on the part of the defendant. In this case, the plaintiff required to bring an eye witness to describe what actually occurred during the said accident. Such eye witness could be fellow passengers in the bus or the persons in the lorry vehicle which was allegedly to have collided into. If the plaintiff could have shown, through that evidence, that the defendants agents and or driver was reckless and careless in his driving despite there being an obstruction allegedly on the road, it is this evidence the court would require. The investigating officer, who investigated the case did not attend court. The witness who did, claimed that there was a recommendation that inquest be held, which inquest had not been done. If the investigating officer had attended he would have reconstituted the scene of the accident and confirmed to this court whether indeed there had been an obstruction on the road for the defendant to have avoided. The defence was that of an act of God. What requires to have been done by the plaintiff was to establish that the accident was not an act of God nor was it inevitable. This again would have been done by eye witnesses describing how the accident actually occurred. Due to lack of these crucial evidence I wish to rely on the case of:- *Mary Oyo Wanyama & Others vs Nairobi City Council* CA 252/98, Gicheru, Tunoi, Lakha, J

4. Counsel further submitted that the investigation officer was not called to testify. Damages were awarded under the *Law Reform Act* yet no letters of administration were produced. Counsel further contend that the plaintiff's suit was time barred. The awarded damages for loss of dependency is manifestly excessive rendering the whole assessment of damages erroneous. The deceased's net salary was Kshs 20,347/95 yet the trial court adopted a multiplicand of Kshs 29,921/75. Counsel is of the view that a multiplier of ten (10) years would have been ideal as opposed to that of fifteen (15) years adopted by the trial court.

5. This is a first appeal and the court has to evaluate the evidence afresh before drawing its own conclusion. The record of the trial court shows that only the respondent testified. The appellants closed their case without calling any witness. PW1 Jane Lemparasoroi is the deceased's widow. She was at Ruaraka when she was informed about the accident. She went to Kenyatta National Hospital where her husband had been taken after the accident. She saw him at the capacity section but he passed on shortly. They had five (5) children together who were all minors. All of them were depending on the deceased. The body was taken to Chiromo mortuary and later buried. The demand was a police inspector earning Kshs.35,350/=.

6. On the issue of liability, counsel for the appellant contend that the trial court shifted the burden of proof to the appellants. The respondent at paragraph seven (7) of her witness statement stated that she blamed the owner of the vehicle for the accident. Parties agreed to produce the police abstract by consent. The police abstract indicates that driver of accident vehicle, Paul Mwaniki Nthiga was charged with causing death by dangerous driving vide traffic case No Nairobi 8437/2006 but was acquitted under section 215 of the Criminal Procedure Code. PC Edward Odhiambo visited the scene. His statement is part of the documents on record. He drew a sketch plan of the scene but the same is not on record. His statement indicate that the skid marks and the vehicles windscreen was shattered.

7. The trial court held the appellant 100% liable since the defence did not call any evidence. Before the trial court counsel for the respondent mainly relied on the pleaded doctrine of *res ipso loquitor*. Counsel

referred to the case of *Abdul Kadir Ezmi V Lydia Kambura Mwongera*(2009) eKLR where the court of appeal held:-

> " Each case must however be decided on the basis of its own peculiar facts, as indeed those were decided. The case here is that the respondent was a passenger in the appellant's vehicle. In this case the plaintiff relied upon the doctrine of *res ipsa loquitur* (the thing speaks for itself).
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> The doctrine of *res ipsa loquitur* provides that in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a *prima facie* case. As *Blacks' Law Dictionary* 8th Edn. At p. 1336 says -
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> "the phrase *'res ipsa loquitur'* is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's *prima facie* case, and present a question of fact, for a defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury (or court), in light of common sense and experience, inferring that the accident was probably the result of the defendant's negligence, in the absence of an explanation or other evidence which the jury/or court believes"
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> Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, and includes any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except conduct that is intentionally, or want only disregardful of others' rights. The term denotes culpable carelessness..."

8. The accident driver was acquitted by the traffic court. There were several attempts made by the defence to bring the proceedings of the traffic case before the trial court but that did not happen. There is information on record that the accident vehicle was damaged on the windscreen and left side of the bonnet. The deceased was crossing the road at around 10.00p.m.

9. The plaintiff blamed the appellants for the occurrence of the accident. She was not at the scene. The evidence on record could not have enabled the trial court quantify liability. The trial court equally blamed the appellants for the occurrence of the accident. There were skid marks at the scene as per the statement of PC Edward Odhiambo. The plaintiff relied on the doctrine of *res ipso loquitor*. The defendants had a duty to negate the plaintiff's claim that the driver of the accident vehicle was to blame.

10. It is evident that the driver did not see the deceased and tried to stop the vehicle. That can be the duty logical explanation for the skid marks. I do find that the appellants were correctly held 100% liable by the trial court.

11. Counsel for the appellant further contend that the respondent's suit was time barred. The record shows that the suit was filed about one day after the expiry of the three (3) years limitation period. An application to enlarge time was filed and was initially dismissed for having been filed *ex-parte*. A second application was filed and granted in a ruling delivered on June 9, 2011. The application was heard inter partes. The trial court dealt with the issue of limitation at the preliminary stage and cannot be faulted for having not referred to it in its judgment. The respondent's suit was admitted out of time.

12. The last issue relates to quantum. The deceased's payslips were produced. The payslip for April 2016 shows that his gross pay was Kshs 34,425/=. The income tax liability was Kshs 4,483/=. The trial court correctly noted that the other deductions were personal. These include Kshs 5,000/= Sacco

contributions, Kshs 4,165/= Sacco loan repayment. There is a rent deduction of Kshs 8,000/= which forms part of the deceased's earnings.

13. I do find that the trial court correctly adopted a multiplier of 15 years' since the deceased was around 40 years as per the death certificate. He would have worked for another twenty (20) years before reaching the age of 60. A fifteen (15) year multiplier is reasonable,

14. The trial court awarded Kshs 3,590,000/= for loss of dependency and used a multiplicand of Kshs 29,921/75 after deducting Kshs 4,503/25 from the gross earnings. The court also adopted a 2/3 dependency ratio which in my view is reasonable noting that he had a wife and five children to take care of.

15. Before the trial court counsel for the appellants offered to settle loss of dependency at Kshs 813,920/= made up of a monthly income of Kshs 20,37/95 and multiplier of ten (10) years. The computation by the trial court cannot be held to be inordinately excessive. Although the beneficiaries are being paid in lump sum, there is also equally the other fact that the deceased's salary was expected to rise, he was also expecting to be promoted, sent on other errands where he would have been paid allowances amongst other normal work expectations.

16. Counsel for the appellant did not raise the issue of letters of administration before the trial court. The submissions dated February 23, 2016 do not capture this issue. The trial court did not dwell on it. Although the appeal is by way of a retrial, it would be unfair to introduce issues that were never dealt with by the court whose decision is the subject of the appeal. The respondent is described as "suing on behalf of the estate of Joseph Lemparasoroi" on the amended plaint dated July 6, 2011. The deceased had children who are entitled to damages for loss of dependency under the *Fatal Accidents Act*.

17. In the end, I do find that the appeal lacks merit, it is hereby ordered dismissed with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent