



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 61 OF 2019

JOSEPH MAINA KIMURA.....APPELLANT

VERSUS

ANN NKIROTE MWANIKI

(sued as the legal representative and administrator of the estate of

SILVAN MWANIKI NYAMBURANO- DECEASED).....RESPONDENT

(Being an appeal from the judgement of Hon. G.N. Wakahiu (Mr)

Chief Magistrate delivered on 15th May 2019

in Maua CMCC No.199 of 2017)

JUDGEMENT

1. The Appellant herein was sued by the Respondent in her capacity as the legal representative and Administratrix to the estate of Silvan Mwaniki Nyamburano who was a lawful pillion passenger on motorcycle Reg No.KMDN 798D which was being ridden along Mutuati-Kabachi Road on the 6th day of March 2015 when motor vehicle Reg No.KBL 169 A which was owned and was being driven by the Appellant was so negligently and carelessly driven ,managed and/or controlled thereby causing it to collide with the motorcycle in question and as a result the Plaintiff’s Husband suffered fatal injuries.

2. The Plaintiff therefore prayed that the court awards her damages for pain and suffering , loss of expectation of life, lost years and loss of dependency as well as special damages and costs of the suit.

3. The Appellant filed his statement of defence on 15/03/2018 denying the contents of the plaint and claimed that the rider of the motor cycle was negligent and contributed substantially to the occurrence of the accident and he urged that the suit be dismissed with cost to him.

4. Upon hearing the Respondent and her witnesses as well as the Appellant and his witnesses, the trial court found in favour of the Respondent and apportioned liability at 100%. The court issued a final award as follows;

(i) Damages for Pain and Suffering and loss of amenities....Kshs 2,952,000/=

(ii) Damages for loss of expectation of life.....Kshs. 30,000/=

(iii) Special Damages.....Kshs. 63,030/=

Total.....Kshs. 3,045,030/=

5. The Appellant was aggrieved by the aforesaid decision and filed his Memorandum of Appeal on 14th June 2019 raising six (6) grounds of Appeal seeking the liability to be apportioned afresh and the quantum to be reviewed downwards. The ground were enumerated as follows;

(i) That the trial Magistrate erred in law and in fact by finding the Appellant wholly liable for the road accident whereas

there was insufficient evidence on this aspect.

(ii) That the trial Magistrate erred in law by awarding Kshs. 2,952,000/= under loss of dependency which was an excessive and erroneous award without any proper basis.

(iii) That the trial Magistrate erred in law and in fact by failing to consider the vicissitudes and uncertainties of life and the current life expectancy rates in the country.

(iv) That the trial Magistrate erred in law and in fact by failing to consider the award under the Law Reform Act while making the award under the Fatal Accident's Act and therefore ending up at an excessive award that double benefited the estate of the deceased.

(v) That the trial Magistrate erred in law and in fact by failing to consider the submissions made by the Appellant before him and the authorities cited and further failed to apply the principle of *ratio decidendi* and stare decisis.

(vi) That the Judgement of the learned trial Magistrate is against the law and weight of the evidence on record.

6. This appeal was canvassed by way of written submission as directed by the court on 11th November 2019.

7. The Appellant submitted that there was compelling evidence that the motor cyclist left his lawful lane and rammmed into the Appellant's motor vehicle. He submitted that the proper award under this head would have been at the ration of 50:50%. He relied on the cited authorities of; **Stapack Industries versus James Mbithi Munyao [2005] eKLR, Amalgated Saw Mills Ltd v Stephen Muturinguru HCCA No. 75 of 2005.**

8. On loss of dependency it was his submission that the award issued by the trial court was excessive and proposed an award of Kshs. 300,000/= in this regard he relied on the cited authorities of:

i. **Kemfro Africa Ltd t/a Meru Express Service & another vs A.M. Lubia & Another (1982-1988) 1 KAR 727**, in which the principles guiding an appellate court in interfering with quantum of damages were laid down by the EACA

ii. **Kenya Power & Lighting Co. Ltd v Charles Obegi Ogeta (Suing as the Legal Representatives of the Estate of Esther Nyanchoka Obegi) [2016] eKLR**, (on the earnings of the deceased are not ascertainable)

iii. **Mwanzia Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another**, where Ringera J held that the multiplier approach to the assessment of general damages is not a principle of law or dogma and must be abandoned where **the facts do not facilitate its application.**

iv. **Mary Khayesi Awalo & Anor vs Mwilu Malungu & Anor [1999] eKLR**,

v. **Moses Mairua v Cyrus Maina Macharia (Suing as the Legal Representatives of the Estate of Mercy Nzulu Maina (deceased) [2016] eKLR**,

vi. **Moses Wetangula & Anor v Eunice Titika Rengetiang [2018] eKLR**,

vii. **Rishi Hauliers Limited vs Josiah Boundi Onyanacha.[2015]Eklr.**

9. The Appellant proposed that the in allowing the appeal aglobal sum of kshs 300,000 be awarded for loss of dependency and that liability be apportioned at the ratio of 50:50.

10. The Respondent submitted that the appeal was filed out of time and without leave of the court, the same having been filed 68 days after the delivery of the judgement. He relied on the provisions of **Section 79 of the Civil Procedure Act** and the case of **Patrick Kiruja Kithinji v Victor Mugaria Marete [2015] eKLR**

11. On liability he submitted that failure to include the Administrator of the now deceased motor vehicle as a party to the suit there was no way liability could be apportioned to him. He relied on the cited decision of **Mabeya J in Chuka Hcca No. 5 of 2016 Stellah Muthomi v Japhet Mutegi [2016] eKLR**. On quantum he stated that the trial Magistrate decision to use a multiplicand was the best approach. That the evidence as to earnings of the deceased was not contested and therefore the trial court arrives at the correct approach. He cited the following cases;

i. **Zipporah Wanjiru Kamau v James G. Wathigo & Anor [2005] eKLR.**

ii. **Tom Kignetich Cheruiyot & Anor v Attorney General & Anor [2009] eKLR**

iii. **James Ntiwiga Kanake & Another Vs Aileen Mukwanjeru Jediel [2016]eKLR.**

12. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123** as follows;

“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 conclusion. 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 Judges findings of fact if it appears either that he has clearly failed in 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 on the case generally.”

13. **Pw1 Anne Nkirote Mwaniki**, wife of the deceased testified that on 6/3/2015 she was called at Mutuari Road where she was informed that her husband was involved in a road traffic accident. That on arrival she found her husband had been taken to Methodist Hospital Mortuary. She reported the matter to Maua Police station and was issued with a police abstract. She blamed the driver of the motor vehicle and stated that he had been charged with the offence of dangerous driving in Tr Case No. 141 of 2015. It was also her testimony that the deceased left behind three children at the time of his death and was earning net salary of Kshs. 30,750/= and a gross salary of Kshs. 67,450.

14. **Pw2 Peter M’Arimba** testified that he was at the scene of the accident when he heard a loud bang and went to see what had happened. That the accident motor vehicle was avoiding potholes when it left its lane and went to the *boda boda* lane. That at the scene they found three people. He recognised the *boda boda* rider and the deceased herein. In cross-examination he stated that he got to know what had happened when he arrived at the scene. He stated that he never saw a reflective jacket at the scene. In re-examination he stated that the motor vehicle was supposed to be on the left lane and that they all rested on the left hand side.

15. **Dw1 PC David Omondi** testified that the motor vehicle was coming from Kabachi direction towards Mutuati. It failed to keep to its near side and had a head on collision with the motor cycle. He stated that he relied on the evidence of the witnesses. It was also his testimony that the pillion passengers did not have helmets and or reflective jackets. At the scene there were skid marks for the motor vehicle but not for the motor cycle. It was also his testimony that had the rider survived he would have charged him with the offence of Riding on a public road without a licence, without a reflective jacket or helmet and carrying excess pillion passengers.

16. **Dw2 Joseph Kimweya Maina** testified that on the material date he was approaching a sharp bend when he encountered the oncoming motor cycle. That on the road there were bushes and the road had potholes. That the motor cycle tried to move to his lane to avoid the potholes on its lane. At the time the motor cycle was at a high speed of approximately 50-60 km. The motor cycle had no headlights and he was only able to see the rider at a distance of 10-20 metres. That he reduced his speed and swerved to the right to evade the accident. That the rider also moved to his lane and they collided on left side of the road.

17. He stated that there were no people around the scene at the time. He dismissed the evidence of Pw2 and stated that it was only his vehicle and the motor cycle who were available at the time. That the scene was in an open space hence Pw2 was not present at the time.

18. Having considered the evidence of the Respondent and her witnesses as well as the evidence of the Appellant and his witnesses and having considered the submissions and the judgement in the lower court as well as the grounds of appeal and the submissions for and against the grounds of appeal I will first consider the objection raised by the Respondent herein in relation to filing the appeal out of time. This appeal was filed on 14th June 2019 sixty-eight days after delivery of the judgement in the lower court. The Appellant did not seek the leave of the court before filing the appeal out of time. An appeal from the subordinate court to the High Court is governed by **Section 79G of the Civil Procedure Act** which provides-

“Every appeal from a Subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time”.

19. In **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others [2011] eKLR**, a notice of appeal was served on the Respondents out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice... In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.” (emphasis Added)

20. In this case the appeal herein has already been admitted by the court. No objection had been raised while the court was issuing directions. The objection has been raised during the filing of submissions. Weighing the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the court strikes out I do find that at this stage of the proceedings it shall not be apt to strike out the appeal.

21. The first ground of Appeal relates to **liability**. The appellant herein faults the driver of the motor cycle for the accident. I have considered the evidence presented before the trial court and the decision of the trial Magistrate. Dw1 was clear that the driver of the motor vehicle was to blame for the accident. The evidence of the Appellant in the trial court also seems to be self-defeating. He testified that he moved to the direction of the motor cycle in order to avoid hitting the motor cyclist and his passengers.

22. In **Stellah Muthoni v Japhet Mutegi [2016] eKLR Mabeya J** held as follows;

“Having failed to join the motor cyclist, the Respondent was not entitled to any relief of contribution against a motor cyclist whom he had not joined in the suit. In any event, he had offered no iota of evidence to prove any of the particulars of negligence set out in the statement of defence to shift the blame from himself. So long as there was no evidence led on those particulars, they remained just that, mere allegations of no probative value. Accordingly, the trial court erred in holding that the mere existence of allegations of negligence in the defence against the motor cyclist bound the court to rule against the motor cyclist. Further, since the motorcyclist was never joined as a party, no orders or reliefs could be made against him.”

23. The court in **Stellah Muthoni (Supra)** also referred to the cited case of **Ntulele Estate Transporters Ltd & Anor .v. Patrick Omutanyi Mukolwe (supra)**, the court faced with a similar situation held:-

"Secondly, having failed to join the estate of the motorcyclist as a party to the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings. In the case of Benson Charles Ochieng & Anor .v. Patricia Otieno HCCA 69 of 2010 (UR) the court held:-

"The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party into the proceedings.

Mutatis Mutandis, in the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to contribution of negligence fail."

24. Grounds two to four relate to **quantum of damages**. The general principal guiding an Appellate Court is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment was based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**). The deceased herein was aged 61 years at the time of his demise. He left behind a widow aged 52 years, son aged 26 years, two daughters aged 24 years and 19 years respectively. The trial Magistrate considered the earnings of the deceased, pegged on the net salary of Ksh 30,750/= and used a multiplicand of 12 years. It was his decision that the deceased may have lived to 75 years of age.

25. Pw1 produced the deceased person's payslip for the month of October 2013. At the time the deceased was aged 59 years old. At the time of his death the deceased was aged 61 years old. Pw1 stated that the deceased was "a retired Administration Police Officer. He was earning a net salary of 30,750/=. As at the time of his death He had not been paid his pension. By the time the deceased's wife was testifying she had also not accessed the deceased person's pension. It is unfortunate that the deceased died before being paid his pension two years after retirement but the spouse and his children are entitled to the lump sum payment as well as monthly payments of the pension due to the deceased up to the time of his death and the spouse is entitled to monthly payments as per the Pensions Act subsequent to such death of the pensioner.

26. The trial Magistrate therefore fell into error when he purported to rely on the deceased person's payslip for the year 2013 when he had already retired and there was no evidence that he was engaged in any form of employment and/or any income post his retirement period.

27. In **John Wamae & 2 Others V Jane Kitiku Nziva & Anor [2017] eKLR** the court reversed a multiplier of nine years for a person aged 61 years adopted by the trial court and awarded a global sum of Kshs. 400, 000/=. The court however took into consideration that previously and in the case of **Sokoo Plywood Ltd & Anor vs Njenga Wainania [2017] eKLR** the court used a multiplier of 10 years for the deceased then aged 60 years. In **Rahab Wanjiku Gitonga vs Almas Mungai** the court used a multiplier of 8 years.

28. In **Moses Wetangula & Another v Eunice Titika Rengetiang [2018] eKLR** the court adopted a global sum of Kshs. 500, 000/= for a 42 year old retired officer of the Kenya Defence force earing a pension of Kshs. 8,536/=. There was no evidence that the deceased was employed thereafter. The court also relied on the cited case of **Mary Khaesi & Anor vs Mwilu Mwalungu & Another Eld HCCC No. 19 of 1997 [1999] eklr** where the court stated as follows;

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

29. In **Rishi Hauliers Limited v Josiah Boundi Onyanacha [2015] eKLR Majanja J** held as follows;

“In the instant case the learned magistrate used the multiplier approach to assess damages. No documentary evidence was produced to support the earnings to show for example that the deceased was earning a pension. The respondent did not provide any basis establishing how much the deceased earned from his income. The amount of Kshs. 50,000/- proposed by the respondent lacked any factual basis as was the sum of Kshs. 3,000/ proposed by the appellant. This is not to say that the

deceased never earned any income.....This was a proper case for the court to have awarded a global sum in view of the age of the deceased and the scanty evidence provided by the respondent.’’

30. In consideration of the authorities cited above and in the absence of proof that the deceased was earning any income immediately prior to his death, it would be safe to award general damages as a global sum rather than using a multiplier and multiplicand approach as that would be mere guess work based on no tangible evidence. Taking into account the vicissitudes and uncertainties of life and the current life expectancy rates in the country I do find that a sum of Kshs. 800,000/= would be justifiable in the circumstances. The global award should take care of general damages for loss of expectation of life and loss of dependency. The claim for Special damages was not challenged and I therefore do not wish to disturb the same.

31. For the avoidance of doubt the trial court’s decision is disturbed as follows;

(i) General damages for loss of dependency

and loss of expectation of life-global sum ofKshs 800,000/=

(ii) Special Damages.....Kshs. 63,030/=

Total.....Kshs. 863,030/=

32. The appeal therefore partly succeeds. Each party shall bear their own costs of the appeal.

HON.ANNE ADWERA ONGINJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.ANNE ADWERA ONGINJO

JUDGE