



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R.MWONGO, J)

CIVIL APPEAL NO. 47 OF 2016

PETER NGIGI KURIA & ROSEMARY NGENDO KAMAU

(Suing as the legal representatives of the Estate

of JOAN WAMBUI NGIGI).....APPELLANTS

VERSUS

THOMAS ONDILI ODUOL.....1ST RESPONDENT

TIPSY MATHANI.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of SM Githinji CM (as he then was) delivered on 14th May 2013 in Naivasha CMCC No 416 of 2010)

JUDGMENT

Background

1. Upon hearing the evidence in this case in the lower court, the learned trial magistrate held as follows:

“In making a determination in this suit I have considered that the plaintiffs are the parents of the deceased. They were not at the scene of the accident and were only informed about it, after it had occurred and their daughter passed on. Apart from them, no any other witness was called on the plaintiff side. Their case as it is now does not disclose how the accident occurred and what actually caused. It was not disclosed whether police investigated, and what was there finding. There was no attempt at all to proof (sic) or established by way of evidence, the particulars of negligence disclosed under paragraph 5 of the plaint. The plaintiff’s had the honest to establish that as a result of the act or omission by the defendants, the accident occurred in which the deceased passed on. They may have established the damages but not the legal wrong on part of the defendants (Damnum sine injuria).

As a result of this, in law, the plaintiffs are not entitled in tort for the claimant for damages. The suit is therefore dismissed with costs to the defendants.”

2. The plaintiffs have appealed against this determination through an amended memorandum of appeal in the following grounds:

1. The Learned trial Magistrate erred in law and fact in failing to make an award of damages in favor of the appellant despite the fatal injuries pleaded as having been suffered by the deceased.

2. The Learned trial magistrate erred in fact and in law by finding that the evidence of the witnesses called by the appellants was not corroborated by that of an independent witness when the Appellants had indeed proved the elements of negligence as required by the law. The court imposed a higher degree of proof on the part of the appellants and thereby the court arrived at a wrong finding.

3. The Learned trial Magistrate erred in law and fact in that he failed to assess the general damages payable to the appellants if the suit had succeeded in spite of the submissions on the same by the appellants.

4. The Learned trial Magistrate erred in fact and in law in that he disregarded the appellant’s submissions and judicial

authorities both on liability and quantum of the damages with the resultant miscarriage of justice to the appellant.

5. The Learned trial magistrate erred in law and in fact by failing to evaluate the entire evidence on record and make a finding that the appellant had proved his case against the respondent on a balance of probabilities and thereby arrived on wrong findings on issues before the court.

6. The Learned trial magistrate erred in law and fact in failing to take cognizance of the *exparte* judgment entered against the 2nd defendant, whereas liability had been entered against him at 100 percent.

3. The appellants seek that the judgment be set aside and that the court do re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion. They seek judgment for the appellants against the respondents both on liability and quantum of damages as prayed, together with costs at appeal and in the lower court.

4. The brief facts of this case are that the deceased was involved in a fatal road traffic accident on 14 November 2008. The plaintiffs, the deceased's mother (PW1) and father (PW2) learnt about the accident when a traffic police officer called them using the deceased's telephone and informed them of the accident. The officer disclosed that the deceased had been admitted at Naivasha District Hospital. PW2 went to the hospital and was led to the mortuary where the deceased's body was.

5. On finding out that his daughter was dead, PW2 arranged for the transfer of the body to Chiromo Mortuary, Nairobi, as he lived in Ruiru. He also made burial arrangements at Langata Cemetery. PW2 testified that he obtained the police abstract from Naivasha police station, did a search and found out who the owner of the vehicle was and filed this suit.

6. At the hearing, the only evidence adduced for the plaintiffs was that of PW1 and PW2. The plaintiffs' evidence included eleven (11) exhibits which are not mentioned in the judgment. No evidence was, however, adduced at all on behalf of the defendants. In addition, the defence counsel did not show up at the hearing as a result of which the plaintiffs' were not cross-examined to test the veracity of their evidence.

7. **Section 78 (2) of the Civil Procedure Act** gives the appellate court the same powers requires it to perform as nearly as may be the same duties as are conferred and imposed on the lower court. The section provides as follows:

“Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein”

8. It is now established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in **Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR**, the court restated the duty of an appellate court as follows:

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123*, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....

.....From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally”

Re-evaluation and analysis of the evidence

9. The proceedings disclose that on 12th October, 2011, the court entered judgment against the 2nd defendant who had failed to enter appearance or file a defence. At the close of the trial and pursuant to **section 25 of the Civil Procedure Act**, on such judgment a decree should have followed. The section provides that:

“The court, after the case has been heard, shall pronounce judgment, and on such judgment in decree shall follow:

Provided that it shall not be necessary for the court to hear the case before pronouncing judgment –

(i) where the plaint is drawn claiming a liquidated demand, and either-

(a) the defendant has not entered such appearance as may be prescribed....

(b).....” (emphasis supplied).

10. In the amended plaint, the only liquidated demand was for special damages of Kshs 46,400. In my view, the trial court was obliged to enter judgment for at least that liquidated amount even if nothing else was proved.

11. On the special damages, however, the plaintiffs were able to tender documentary evidence that, in my view, discharged the burden of proving them. PW2 produced Exhibits for grant of letters of administration (Exb 4) receipts relating to burial (Exb 5) and other receipts – obtaining records from registrar of motor vehicles. The learned trial magistrate did not deal with these receipts.

12. It is trite law that he who alleges must prove. Under **Section 107** of the **Evidence Act**, it is provided that:

“1) 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.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

13. In this case, the plaintiffs gave evidence which was not controverted. Although they were not eyewitnesses, they nevertheless availed documentary evidence seeking to prove their claims. In paragraph 6 of the plaint, they also relied on the doctrine of “*Res ipsa loquitur*” stating:

“In so far as applicable the plaintiffs shall rely on the doctrine of *Res ipsa loquitur* to prove the negligence of the defendant”

14. The learned trial magistrate did not take into account the aforesaid pleading or discuss the doctrine even though in the plaintiffs’ submissions filed on 5th February, 2013, the plaintiffs repeated their reliance on it.

15. PW2 testified that the deceased was killed in an accident, information he received from the traffic police. He produced a police abstract, Exhibit 2 which is dated 17th November, 2008 and shows as follows: the accident involved Joan Wamboi Ngige; it occurred on 14/11/2008; it involved vehicle registration No KAS 621Z, Mercedes Benz, owned by Thomas Ignatius Ondili; under persons injured, the name of the deceased is indicated and the nature of injury is indicated as fatal; in addition, the case was stated to be pending under investigations, although it was not indicated whether any person was to be charged. From this exhibit, the following can be ascertained, subject to contrary evidence: the occurrence of the accident, the identities of the persons and vehicle involved, the dates of the accident, and the nature of the injury as a fatality.

16. PW2 also produced Exhibit 3, which was the Death Certificate of the deceased. It indicates the date of death as 14th November, 2008 and the cause of death as “*Multiple injuries due to RTA*” (Road Traffic Accident). Although there is no indication that a postmortem was done, nevertheless the statutory document of record of the death indicates the cause of death. This document was admitted in the proceedings and its content has not been challenged. *Prima facie*, the Death Certificate documents the cause of death, which was not contested by the defendants.

Doctrine of Res ipsa loquitur

17. This doctrine, translated directly, means the thing speaks for itself. Under the common law of negligence, the *res ipsa loquitur* doctrine indicates that a breach of a party's duty of care may be inferred or presumed from the events that occurred. In other words, the negligence is so obvious that you can tell that someone had a negligent hand in what happened.

18. It is true that in the present case, there was no eyewitness of the accident. The Police abstract however shows that motor vehicle registration number KAS 621Z owned by the 1st defendant was involved in a fatal accident with the deceased. In the pleadings the plaintiffs assert that the vehicle was owned and or negligently driven by the defendants. Other than the 1st defendant's blanket denials in their defence, the only other evidence to be relied upon is that of the plaintiff. It does not prove the negligent acts asserted. However, it can be inferred from the police abstract and under the doctrine of *res ipsa loquitur* that the defendant's vehicle was responsible for the deceased's death. She did not die on account of anything but the accident. The certificate of death even contains such an assertion. In the absence of any other explanation, or evidence rebutting the same, the above doctrine does apply.

19. In other words, if one is responsible for or controls something, such as a property or vehicle that person is responsible for providing a reasonable amount of care to make sure that the vehicle or property is safe. When an accident happens, the question is whether the property owner breached his duty of care. However, with *res ipsa loquitur*, the breach is so apparent that there is a presumption of the breach of duty and the plaintiff does not need to provide extensive evidence, if any, of the breach. Thus, the negligence speaks for itself.

20. In **Nandwa v Kenya Kazi Limited [1988] eKLR** the Court of Appeal (Gachuhi J. A. as he then was) cited a portion of the judgment in the English case of **Barkway v South Wales Transport Company Limited [1956] 1 ALLER 392 at Page 393 B** on the nature and application of the doctrine of *res ipsa loquitur* as follows:-

“The application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.”

21. I find on the basis of the doctrine, that liability attached against the defendants. I also do appreciate the fact that determination of liability in road accidents cases is not a scientific affair as **Lord Reid** put more graphically in **Stapley v Gypsum Mines Ltd (2) (1953) AC 663 at pg 681** that:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of It is quite irrelevant in this connection in a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

The issue of Uncontroverted evidence

22. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

23. In the case of **Shaneebal Limited v County Government of Machakos [2018] eKLR**, Odunga, J, relied on the cases below in reaching his judgment. In **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

24. Similarly, in **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga v Nathaniel D. Schuller Civil Appeal No. 23 of 1997** held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

25. In **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000**, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR** stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

26. In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted. I would reverse the lower court’s determination and substitute with this court’s determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to damages.

27. In this regard, no evidence of apportionment of liability being available, 100% liability is attributed to the defendants jointly and severally.

Damages

Proof of age by parents of deceased

28. On the age and status of the deceased, PW1, her mother, testified that she was about 29years old, was a business lady hawking clothes, and had a daughter aged 7years – Jane Ngendo – who now lived with them. This evidence was uncontroverted. The deceased’s age was confirmed by the Death Certificate which shows she was 29 years old.

29. A similar situation faced Muchemi J in the case of **Gachoki Gathuri (suing as legal Rep. of the estate of James Kinyua Gachoki (Deceased) v John Ndiga Njagi Timothy & 2 others [2015] eKLR**. The court there held as follows:

“The appellant’s statement contained evidence that the deceased was aged 29 years. The appellant is the father of the deceased who is presumed to know the age of his son. This presumption can only be rebutted by other evidence. The respondents did not file any witness statement and in their submissions, they did not dispute the age of the deceased even in their submissions.....

The appellant’s evidence as to deceased’s age was corroborated by the death certificate of the deceased which gave his age as 29 years. The magistrate did not analyze the evidence before him as borne by the record. It is my considered opinion that the evidence on record was sufficient proof of age.”

Income of the deceased

30. There was no evidence as to the income of the deceased. However, that is not an uncommon scenario in Kenya where numerous people work in small businesses or live under subsistence in very hard circumstances. It would be inhumane to lock these people out of compensation simply because they do not have administrative systems or record maintenance procedures. Accordingly our courts have come up with innovative ways to make provision for such situations.

31. In **Jacob Ayiga Maruja & Another -vs-Simeon Obayo [2005] eKLR**, this Court held:

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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.”

32. In **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where Asike-Makhandia J (as he then was) stated:

“In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005”

33. Majanja, J. had a slightly different approach in **Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR** where he stated and expounded as below:

“Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the magistrate to rely on “municipal rates.” The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J., in Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J., in Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

34. The same principle was adopted in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where Nambuye J., stated that:

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 lumpsum award instead of estimating his income in the absence of proper accounting books.”

35. I agree with the approaches taken by the courts in the cases I have cited above. I would award damages as follows.

36. Pain and suffering: There was evidence that the deceased died instantly. I would award Kshs 5,000/= as prayed.

37. On loss of expectation of life: The plaintiffs claimed Kshs 100,000/=. The numerous authorities give awards ranging between 10,000/= to 100,000/= as pointed out by Emukule J in **Benedeta Wanjiku Kimani vs Changwon Chekoi & Another [2013] eKLR** where he stated as follows:

“In common law jurisprudence of which Kenya is part, the courts have enrolled the 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 continual sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently the basis of the increased has basically been based upon the increase of life expectancy from 15 years to run 60 years currently, that life itself was until cut short by the accident ...something to the estate”

38. Similarly, Mativo J in **David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR**, arrived at the same conclusion when he stated:

As for loss of life expectation, my review of authorities shows that the first time an award of Ksh. 100,000/= was made by Kenyan courts was by Justice Apaloo, then a Judge of the Court of Appeal in1986. Many years later our courts are still awarding the same amount which for a long time has been taken as a conventional sum. In my view, time has come for our courts to consider inflation and adjust damages under the said head upwards. The learned magistrate awarded Ksh. 100,000/= under the said head. I find no reason to fault the said award.

I would award the amount of Kshs 100,000/= under this head.

39. On damages under the **Fatal Accidents Act**: The plaintiff alleged income of Kshs 30,000/= and a multiplier of 18 years. However, there was no proof of the amount of income earned. In the absence of such proof, and in light of the authorities earlier cited, I would make an award on the basis of the minimum wage under the **Regulation of Wages (General) (Amendment) Order 2006 LN 38 of 12/5/2006** which was in place in 2008, The minimum wage for a general labourer was 4,792/=per month operating in areas outside Nairobi, Mombasa and Kisumu regions but within municipalities. There was no evidence as to where she did carried out her business. The deceased would presumably have worked for herself until the age of about 60, giving 30 years as a multiplier. She had a 7 year old child dependent upon her, giving a 2/3 dependency ratio. Thus the calculation would be as follows:

$$4,792 \times 12 \times 30 \times \frac{2}{3} = 1,150,080$$

Disposition

40. In summary, the appeal succeeds, and the trial court's decision is overturned.

41. Judgment is entered against the respondents jointly and severally in the following terms:

a) Pain and suffering	Kshs	5,000/=
b) Loss of expectation of life	Kshs	100,000/=
c) Loss of income	Kshs	1,150,080/=
d) Special damages	Kshs	<u>46,500/=</u>
Total	Kshs	<u>1,296,580/=</u>

42. Interest at court rates shall accrue on the special damages (item d, herein) from the date of filing suit, and on the other damages (items a, b and c, herein) from the date hereof.

43. The respondents shall bear the costs of the appeal.

Orders accordingly.

Dated and Delivered at Naivasha this 28th Day of February, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ngunjiri holding brief for Maina for the Appellants
2. No Representation for the Respondents
3. Court Clerk - Quinter Ogutu