REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 335 OF 2016

MOSES WETANGULA.....1ST APPELLANT

ALVIN WETANGULA.....2ND APPELLANT

-VERSUS-

EUNICE TITIKA RENGETIANG.....RESPONDENT

(Formerly Milimani Commercial Courts CC 947 of 2014).

JUDGEMENT

INTRODUCTION

1. The Respondent filed Nairobi CC 947/2014 Milimani Commercial Courts as Administrator of Estate of Joseph Msobo Merisha against the Appellants as pleaded in the plaint, for General Damages under Fatal Accident Act and Land Reform Act and Special Damages in respect of a road traffic accident that occurred on 06/03/2011, involving motor vehicle KAX 170M and the deceased was a pedestrian along Ngong road.

2. The Plaintiff/Respondent blamed 2nd Respondent for causing the accident. Only Plaintiff/Respondent testified during trial. The trial court verdict was that;

?On Liability same was apportioned at a ratio of 70:30 in favour of the Plaintiff/Respondent.

?On Quantum the award was as follows;

- Loss of life - Kshs. 100,000/=.

- Pain and suffering - Kshs. 30,000/=.

- Loss of dependency - 18 x 12 x 10,000 x $^2/_3$ = Kshs.1,440,000/=.

- Special damages - Kshs. 1,400/=.

3. Being aggrieved by the above decision, the Appellants lodged an appeal and set out 4 grounds of appeal namely;

1) That the Honourable Learned Magistrate erred in law and fact in awarding general damages and special damages to the Respondents amounting to Kshs. 1,440,000/=.

2) That the Honourable Learned Magistrate erred in law and fact in using a multiplicand of Kshs. 10,000/= without appreciating the Defendant's evidence and submissions on record.

3) That the Honourable court awarded the deceased 18 years without appreciating the issues of facts raised by the Defendant in the submissions.

4) That the court failed to consider the totality of the evidence adduced and consequently arrived at an erroneous decision.

4. Parties agreed to file submissions but by the time this judgment was prepared (20/10/2018) only Appellant had filed the same.

APPELLANTS SUBMISSIONS

5. The Appellant submits that, the duty to establish the facts of the accident so as to prove negligence against the Appellant lays with the Respondent in accordance with the provisions of the Evidence Act. Section 107 of the Evidence Act states that;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he who asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

6. Hon. Mr. Kassan, Senior Principal Magistrate in his judgement (as at page 83 of the Record of Appeal) makes a finding that, ***"No witness came to testify as to what happened……."***

7. Section 108 of the Evidence Act states that;

> ***"the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

8. Appellant submits that the Plaintiff did not call any witness in support of the Plaintiff's case. The Plaintiff (deceased's wife) did not witness the accident.

9. Further, the Plaintiff did not call the police officer to come to court to state whether or not there was any eye witness in this case. Furthermore the Appellant's driver has never been charged with any traffic offence case despite the accident having been occurred on the 6th of March 2011. There is no proof whether any investigation has ever been done by the police.

10. Appellant rely on the decision of Justice Nyakundi in **Mbugu David & Anor –Vs- Joyce Gathoni Wathena & Anor [2016] eKLR** where the learned judge adopted the position in **Kiema Mutuku –Vs- Kenya Cargo Handling Services Ltd [1991] 1Kar 258** where the court held on this issue;

> ***"There is as yet no liability without fault in the legal system in Kenya and a Plaintiff must prove negligence against the Defendant where the claim is based on negligence."***

11. Further he cited J. Abuodha in **Patrick Nguthira Gichuki –Vs- David Denny [2013] eKLR** where the learned judge observed that;

> ***"It is a settled rule of evidence that a person who seeks from any court or tribunal a determination in his or her favor must provide that court with sufficient evidence to persuade such court or tribunal that whatever is being claimed more probably took place than not. It does not have to be proof beyond reasonable doubt as in criminal cases but it ought to be such proof that any reasonable person listening to the testimony or reviewing the evidence will be more included to reach the conclusion that the event being alleged indeed took place."***

12. The Appellants further submit that the Respondent did not establish the elements of negligence. These elements were enunciated in the famous case **Donoghue –Vs- Stevenson (1932) AFR 1**, that there be a duty of care to the Respondent by the Appellant, secondly, that that duty is breached, and thirdly that the Respondent suffered as a result of the greach of that duty.

13. The Appellants do not deny owing a duty of care to all other road users, however the Appellants humbly submit that the Respondent has failed to demonstrate breach of that duty and any nexus between the alleged breach and any injury suffered.

14. Appellant relies on **Statpack Industries –Vs- James Mbithi Munyao [2005] eKLR**, Honourable Justice Alnashir Visram, stated that;

> ***"Coming now to the more important issue of 'caution', it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence.***
>
> ***Any injury per se is not sufficient to hold someone liable for the same."***

15. The Appellants submit that the Respondent has not demonstrated that the negligence if there was any of the Appellant was in any way the cause of the fatal injuries suffered. Whereas the Appellants are seeking for the dismissal of this case, they wish to submit on quantum were the court to find them liable in any extent.

16. The testimony by the Respondent was that her husband had been discharged from the Kenya Armed Forces on or about 16th July, 2009 under medical grounds, this through a letter dated 18th July, 2009. Through a letter dated 15th March, 2010 to the deceased, it stated he will be earning a pension of Kshs. 8,536/= which was to be effected from the 1st November, 2009. **(As at pages 14-15 of the Record of Appeal)**. In the plaint she states that her family relied on Kshs. 8,536/= which was the monthly pension the deceased received from his former employer.

17. In paragraph 9 of the plaint, it states;

"At the time of his death, the deceased was a married man aged 42 years and a retired officer of the Kenya Defence Forces earning a monthly pension of Kshs. 8,536/= which he used to substantially contribute to the maintenance of his aforementioned Dependants……."

18. The Appellant submitted that evidence was produced before Trial Court on whether the deceased was employed or did any business after the year 2009 after he retired from the Kenya Armed Forces. It is therefore the Appellants submissions that the deceased and his family relied on the monthly pension he got form his former employer for up keep of his family.

19. During trial the Respondent testified that she continued to receive the deceased monthly pension even after his death. It is therefore apparent that the deceased family continued to receive the monthly pension of Kshs. 8,536/= even after the deceased death. The Respondent also confirmed under cross examination that they still receive the deceased's pension. **(At page 80 of the Record of Appeal).**

20. Based on the fact the deceased had already retired from the Kenya Armed Forces in the year 2009 and was earning a pension and no evidence was produced before this court to show that deceased was employed thereafter; we urge this court to award a globe award under this head.

21. In **Rishi Hauliers Limited –Vs- Josiah Boundi Onyancha [2015] eKLR;** Justice Majanja awarded a global amount of Kshs. 500,000/= where the deceased had already reached retirement age and where the court held;

"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.

In this regard I adopt the reasoning by Ringera J., in Mwanzia –Vs- Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J., in Albert Odawa –Vs- 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."

22. The same principle was adopted by Nambuye J., in **Mary Khayesi Awalo & Anor –Vs Mwilu Malungu & Anor ELD HCCC No. 19 of 1997[1999] eKLR** where she 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 lumpsum award instead of estimating his income in the absence of proper accounting books."

23. The Appellants submit to hold and award of **Kshs. 500,000/=** under this head subject to liability will be sufficient.

DUTY OF 1ST APPELLATE COURT

24. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

EVIDENCE TENDERED

25. The Plaintiff said she was wife to the deceased. She did not witness the accident. She said the deceased was walking on the road. She said her husband was a retired army officer. She said that no demand notice was issued nor a statutory notice.

26. On cross examination she stated that;

"I was told of the death on 06/03/2011 at 6.00 p.m. He died on a Saturday 06/03/2011. Accident occurred in the morning. There are other witnesses. I didn't witness the accident. He was walking on the road.

He was found off the road. Ngong road. Body was on the road. I don't have notice given. No demand letter to defendant. No statutory notice against the insurance company. My husband was working with army.

He was retired under medical condition. He used to do business. He used to get pension. We still receive pension."

ISSUES, ANALYSIS AND DETERMINATION

27. After going through the evidence on record and pleadings plus the lower court submissions filed by the parties, I find issues are;

i. Whether the case on liability was established on balance of probabilities and if so what ratio?

ii. What is the quantum payable?

iii. What is the order as to costs?

28. The Respondent/Plaintiff submitted in lower court that the deceased died at the age of 42 years and was a retired officer of the Kenya Defence Forces earning a pension of Kshs. 8,536/=. Further, the deceased had a wife and four minor children and used a substantial part of his income for their benefit.

29. Therefore a dependency ration of $^{2}/_{3}$ would suffice as compensation.

30. Further, as the deceased had already retired and he would have earned the pension for the rest of his life, a multiplier of 18 years. The appellant relied on the following cases;

i. Esther Wambura Wamgugu -Vs- Joseph Mwangi Muhia [2009] eKLR delivered on 8th May 2009 by Honourable Justice Anyara Emukule.

ii. Rose Wanjiru -Vs- Vincent Sululu & Anorther [2010] eKLR delivered on 19th September 2010 by Honourable Justice A.O. Muchulule.

iii. Lydia Kerubo Otwori -Vs- Kipkebe Limited [2010] eKLR delivered on 2nd March 2010 by Honourable Justice D. Musinga (as he then was).

31. In summary the general damages was suggested as **18 x 12 x $^{2}/_{3}$ x 8,536 = 1,229,184/=**

32. The claim for special damages amounts to Kshs. 1,400/=, the copies of receipts in support of the claim for special damages are attached to the Plaintiff's copies of documents accompanying the plaint.

33. The Defendant/Appellant submitted in lower court that it not disputed the deceased died on the early morning of 6th March 2011 as a result of road traffic accident. The circumstances surrounding the accident are not clear as no evidence was presented to this court proving the same.

34. The Plaintiff stated she was not at the scene of the accident and could not tell the court what time the accident occurred. The Plaintiff neither called an eye witness nor a policeman to prove her case that the accident was caused by the negligence of the 2nd Defendant herein. Yet in her statement she makes reference to inspector Sang and inspector Imbusi whom she met at the police station and witnessed the accident.

35. The police abstract presented to this court by the Plaintiff indicates that the investigations surrounding the accident are still under investigations and the same did not state that the accident was caused by the 2nd Defendant. When the Plaintiff testified before this court she could not tell the court where the body of her husband was found after the accident. It is clear that the circumstances surrounding the accident are not clear.

36. The Defendants submitted that the deceased pedestrian and the 2nd Defendant owed a duty of care to one another as road users. The pedestrian in the very least also has to take care of his own safety while walking along the road. The Defendants submit in absence of clear evidence produced in court surrounding the circumstances of the accident liability should be apportioned in the ratio of 50:50%.

37. In **M'rarama M' nthieri –Vs- Luke Kiumbe Murith [2015] eKLR** on Justice Gikonyo upheld the decision of the trial court in apportioning liability in the ratio of 50:50%, where a pedestrian died as result of a road traffic accident and a vehicle. In upholding the said decision court held;

"I have carefully considered the judgment of the trial magistrate and he also considered the contradiction on the part of impact in the evidence of PW1 and PW3 as well as the duty of care on pedestrians walking along the road. The trial did not stop there.

He also took into account the speed of the vehicle at the time of the accident and related it to the circumstance of the accident; it was at night, raining and foggy day. And he concluded that the Respondent did not drive at reasonable speed given the circumstances. The totality the trial magistrate's overall impression of the entire circumstances of the accident and the final decision to apportion liability on the basis of 50:50% was based on the evidence tendered and cannot therefore, be faulted by this court."

38. The Plaintiffs seek general damages both under the Fatal Accidents Act and the Law Reform Act. The testimony presented by the Plaintiff in the trial court was that her husband had been discharged from the Kenya Armed Forces on or about 16th July, 2009 under medical grounds, this through a letter dated 18th July, 2009.

39. Through a letter dated 15th March, 2010 to the deceased, it stated he will be earning a pension of Kshs. 8,536/= which was to be effected from the 1st November, 2009. In the Plaintiff's plaint she states that her family relied on Kshs. 8,536/= which was the monthly pension the deceased received from his former employer.

40. In paragraph 9 of the plaint, it states;

> ***"At the time of his death, the deceased was a married man aged 42 years and a retired officer of the Kenya Defence Forces earning a monthly pension of Kshs. 8,536/= which he used to substantially contribute to the maintenance of his aforementioned dependants…"***

41. No evidence was produced before the trial court on whether the deceased was employed or did any business after the year 2009 after he retired from the Kenya Armed Forces.

42. It is therefore the Defendants submissions that the deceased and his family relied on the monthly pension he got from his former employer for up keep of his family. During trial Plaintiff testified that she continued to receive the deceased monthly pension even after his death.

43. It therefore apparent that the deceased family continued to receive the monthly pension of Kshs. 8,536/= even after the deceased death.

44. Based on the fact the deceased had already retired from the Kenya Armed Forces in the year 2009 and was earning a pension and no evidence was produced before the court to show that deceased was employed thereafter; Respondent urged this court to award a global award under this head.

45. In **Rishi Hauliears Limited –Vs- Josiah Boundi Onyancha [2015] eKLR**; Justice Majanja awarded a global amount of Kshs. 500,000/= where the deceased had already reached retirement age and where the court held;

> **"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. In this regard I adopt the reasoning by Ringera J., in Mwanzia –Vs- Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J., in Albert Odawa –Vs- Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view;**
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> > ***"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."***

46. The same principle was adopted by Nambuye J., in **Mary Khayesi Awalo & Another –Vs- Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** where she 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."***

47. The Defendants submitted for court to make award of Kshs. 500,000/= under this head subject to liability. It is a cardinal rule that special damages must be pleaded and strictly proved. The Plaintiff pleaded special damages of Kshs. 1,400/= but failed to produce receipts in support of the same. The Defendants submit that the claim under this head fails as it does not meet the required threshold.

48. On liability the courts that the deceased was a pedestrian who was knocked by a motor vehicle. There was no eye witness but the police abstract indicate that the investigations are still pending.

49. No evidence was tendered to show between m/v driver and the deceased who was more culpable for the occurrence of the accident. Am persuaded by the authority of **M'rarama M' nthieri -Vs- Luke Kiumbe Murith [2015] eKLR and hold that the two sides were to blame equally thus liability apportioned at 50%; 50%.**

50. On quantum, the trial court applied a multiplicand of Kshs. 10,000/=. This was based on the fact the deceased had already retired from the Kenya Armed Forces in the year 2009 and was earning a pension and no evidence was produced before the court to show that deceased was employed thereafter.

51. The is being urged to rely on case of **Mary Khayesi Awalo & Another** Supra, where 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."***

52. The court is persuaded in the circumstances of this case and do hold and award a global award of Kshs. 500,000/= under this head subject

to liability will be sufficient.

53. As for special damages, Kshs. 1,400/=, same was proved via copies of receipts attached to documents attached to the plant. These were produced among the PEX1 to 16 by the Respondent during trial.

54. Thus the court makes the following orders;

1. **The appeal succeeds partially as follows;**

    - **Liability apportionment is adjusted as 50%; 50% between the parties herein.**

    - **The estate of deceased is awarded a global award of Kshs. 500,000/=.**

    - **Special damages Kshs. 1,400/=.**

    - **Total Kshs. 501,400/=.**

    - **Less 50% balance <u>Kshs. 250,700/=.</u>**

2. **Parties bear their own costs.**

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

……

C. KARIUKI

JUDGE