Kamau & another v Kyalo & another (Civil Appeal E834 of 2022) [2025] KEHC 2491 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 2491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E834 OF 2022

JN NJAGI, J

JANUARY 23, 2025

BETWEEN

KELVIN KIAMA KAMAU .... 1ST APPELLANT

SPECTRUM UNIVERSAL LIMITED .... 2ND APPELLANT

AND

EVERLYNE MBITHE KYALO .... 1ST RESPONDENT

PIUS MUTUNGA MWANZIA (SUING AS THE LEGAL ADMINISTRATOR OF THE LATE PETER WAMBUA MUTUNGA) .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon S. N. Muchungi, SRM, in Milimani CMCC No. E12953 of 2021 delivered on 16/9/2022)

JUDGMENT

1. The respondents herein brought suit against the appellants after their kin was killed in a road traffic accident involving a motor vehicle belonging to the 2nd appellant and which was being driven by the 1st appellant at the time of the accident. The respondents blamed the 1st appellant for negligently driving the motor vehicle and fatally knocked down the deceased. The appellants denied the claim and blamed the deceased for carelessly walking on the road. The trial court upon hearing the case found the deceased and the 1st appellant equally to blame for causing the accident and apportioned liability in the ratio of 50:50. She awarded damages as follows:

   a. Pain and suffering Kshs. 80,000/=

   b. Loss of Expectation of Life Kshs. 100,000/=

   c. Loss of Dependency Kshs. 3,686,304/=

d. Special Damages Kshs. 110,550/=

e. Costs of the suit and interest.

3. The appellants being dissatisfied with the judgment, instituted the instant appeal vide a memorandum of appeal dated 13th October 2022 based on the following grounds: -

1. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.

2. That the learned trial magistrate erred in law and in fact in failing to attach due weight to the appellant`s evidence and submissions.

3. That the learned trial magistrate erred in law and in fact in apportionment of liability contrary to the evidence adduced in Court.

4. That the learned trial magistrate erred in law and in fact in assessing and awarding general damages and special damages wherein the respondent failed to prove his case.

5. The said award in the circumstances is so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the respondents.

6. The said award is all together disproportionate and not in line with other comparable awards made in respect of similar injuries.

7. That the learned trial magistrate erred in law and in fact by giving a very high award in quantum contrary the evidence in court.

8. That the learned trial magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of damages sue in particular case and was manifestly excessive.

9. That the learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unstainable in law.

4. The Appellants proposed that this court allows the appeal and sets aside the decision of the learned magistrate with costs.

5. The respondents on the other hand filed a cross-appeal through a memorandum of cross-appeal dated 11th November 2022 on the following grounds;

1. The learned magistrate erred in law and fact by misapprehending the fact that the appellants did not prove that deceased jumped into the road in an attempt to commit suicide.

2. The learned magistrate erred in law and fact in finding that the deceased was partially liable and apportioned liability on 50/50 basis and there was no proof that the deceased was liable for the occurrence of the accident.

3. The learned magistrate erred in law and fact by failing to appreciate the fact that the respondents proved that the accident happened and burden shifted to the appellants who did not discharge it.

4. The learned magistrate erred in law and descended into the arena of the disputants by propagating only the narrative of the appellants as though she spoke for them.

5. The learned magistrate erred in law by failing to appreciate the testimonies of parties in apportionment of liability.

6. The respondents asked this court to allow the cross-appeal, the appellants be held 100% liable for the said accident and award the respondents the full amount of Kshs. 3, 866, 308/= as general damages together with costs.

7. This Court directed that the appeal and the cross-appeal be canvassed by way of written submissions.

Appellants' Submissions

8. The Appellants submitted through their counsel that an allegation based on the tort of negligence must abide by the standards in Treadsetters Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR where Ibrahim J. (as he then was) cited Charlesworth & Percy on Negligence, 9th Edition at P.387 that:

> "In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

9. The appellants also relied on the case of Christine Kalama vs. Jane Wanja Njeru & another (2021) eKLR where Nyakundi J. quoted the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 where it was held that:

> "The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

10. It was submitted that the 1st appellant did not owe the deceased a duty of care as the 1st appellant was driving along Outering road, noting to be mindful of all road users when the deceased jumped from the overpass to the underpass where the 1st appellant was driving and landed on the motor vehicle.

11. The appellants further made reference to the post-mortem report dated 19th September 2021 issued to Mama Lucy Mortuary by Buruburu Police Station which stated that on 18th September 2021 the deceased person aged 32 years old died as a result of jumping from service lane.

12. The appellants submitted that the learned magistrate erred by relying on a notice of intended prosecution which was never enforced as the appellants were never charged in any court of law. That the police abstract issued by the police indicated that the incident was still pending investigation and therefore the reliance on the notice of intended prosecution amounted to condemning the appellants unheard.

13. It was submitted that the appellants called a total of three witnesses who were eye witnesses to the accident who testified that they saw the deceased jumping into the motor vehicle which testimony the learned magistrate ignored. The appellants argued that the testimonies of the said witnesses were direct and conclusive and in accordance with section 62 and 63(b) of the *Evidence Act*.

14. The appellants submitted that the respondents had failed to call any witnesses to testify as to the accident. The accident was only proved through police abstract which provided that the matter was still under investigations but nothing to indicate the negligence, carelessness and/or recklessness of the appellants.

15. It was further submitted that the pleadings as drafted by the respondents did not meet the bar of the res ipsa loquitor doctrine. Reliance was placed in the case Benter Atieno Obonyo vs. Ann Nganga & another (2021) eKLR to buttress this point.

16. On quantum, the appellants urged the court to award a sum of Ksh.10,000/= for pain and suffering as the deceased died on the spot. They relied on the cases of Sammy Kuria Ndungi vs. Ruth Kamene Kilonzo & another (2020) eKLR and Moses Koome Mithika & another vs. Doreen Gatwiri & another (suing as the legal representative and administrator of the estate of Phineas Murithi (deceased) (2020) eKLR where a similar sum was awarded for deaths occurring immediately after the accident.

17. On loss of expectation of life, the appellants submitted that the award of Ksh.100,000/= was excessive and urged the court to award Ksh.50,000/= wherein they placed reliance on the case of Hassan Farid & another v Singiyian Ene Leepa & 9 others (2018) eKLR.

Respondents' submissions

18. The respondents submitted that they had in their case proved that the deceased was hit by the 1st appellant. That the 1st appellant in his witness statement made a specific allegation that the deceased jumped from the overpass onto the motor vehicle but the appellants did not prove that allegation. There was then no basis for the trial court in apportioning liability.

19. It was submitted that the police abstract only indicated that the deceased was knocked down while in the service lane of the underpass and there was no mention that he jumped from the overpass. The appellants ought to have proved this fact which they failed to do. Consequently, the respondents submitted that they had proved that the 1st appellant was liable for causing the accident and the death of the deceased and therefore the apportionment of liability should be set aside.

20. The respondents submitted that the 1st appellant failed to act safely and responsibly while driving and failed to control his motor vehicle to avoid hitting the deceased. That any reasonable person would in the circumstances assume that the 1st appellant could not have been driving reasonably.

21. On quantum the respondents submitted that an award of damages is discretionary and that this court can only interfere with the award of the trial court if it was so manifestly high or low. The respondents made reference to the case of Elizabeth Gathoni Thuku (suing as the legal representative of the estate of Charles Gitonga Wathuta) v Peter Kamau Maina & another (2021)eKLR and the Court of Appeal decision in the case of Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 (2004) 2 KLR 55 in support of this position.

22. It was submitted that the trial court applied the correct legal principles in award of Ksh. 80,000/= for pain and suffering considering that the deceased suffered multiple injuries. The respondents submitted that the award of Ksh.100,000/= loss of expectation of life was proper as the deceased was in good health at the time of the accident. The appellant relied on Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe (deceased)) v Rueben Muriuki Kahuha & others (2015) eKLR in which the award of Ksh.100,000/= was upheld under this head.

23. It was submitted that the award of Ksh. 3,686,304/= as damages under the *Fatal Accidents Act* was not disputed by the appellants.

Analysis and Determination

24. This being a first appeal, the court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusions. The Court must take great exception with respect to the fact that it has neither

seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made 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 E.A.C.A. 270).

25. I have duly considered the pleadings, the evidence adduced before the trial court and the submissions for the counsels representing the parties. The appellant challenges the judgment both on the finding on liability and on the assessment of damages. The issues for determination are thus the following: -

    1. Whether the trial court erred in its apportioning of liability in the ratio of 50:50

    2. Whether the assessment of the award was erroneous.

    Liability

26. While the Appellants submitted that the deceased ought to have been held wholly liable for the accident, the respondents on the other hand submitted that it is the appellants who ought to have been found 100% liable for occasioning the accident.

27. The respondents pleaded in their plaint that the deceased was at the material time a lawful pedestrian along Outer Ring Road when the 1st appellant drove motor vehicle registration No. KDC 793 W so carelessly, negligently and recklessly and caused it to lose control, veer off the road and thus hitting the deceased which occasioned him fatal injuries. It was thus averred that the appellants were wholly to blame and liable for causing the accident. Particulars of negligence were stated in the plaint.

28. The appellants on their part denied being liable for occasioning the accident and pleaded in their statement of defence that the deceased was solely to blame for the cause of the alleged accident through his own negligence and or carelessness. The appellants particularized the negligence of the deceased as including: walking in a zig-zag manner on the road; crossing the road at an undesignated area; failing to take proper look out before crossing the road and running onto the road.

29. The respondents called two witnesses in the case, the 2nd respondent (PW1) and a police officer PW2. The 2nd respondent testified that the deceased was his son but that he did not witness the accident. The police officer PW2 on his part stated that the scene of the accident was visited by another officer called Cpl Kirui and a police abstract was issued by the then DTO called Njoka. He, PW2, produced the police abstract as exhibit. The same showed that the accident was pending investigation.

30. The appellants called 3 witnesses in the case. The 1st appellant, DW1, testified that he was on the material day driving from Kitengela on his way home at Kiamumbi. He was accompanied by 3 friends. That at 7.30 pm they joined Outering road from Mombasa road. That as they approached the Donholm underpass he was driving on the outer lane of the highway when suddenly something fell on the windscreen, hit the bonnet of the motor vehicle and eventually fell onto the road. He stopped to check what had happened and found that a man had fallen from the overpass and onto the motor vehicle. A large mob of people started to come to the place. They felt unsafe and drove to Buruburu police station where they made a report. He blamed the deceased for causing the accident.

31. Lorna Mburu DW2 testified that she was at the material time in the vehicle that was being driven by the 1st appellant, DW1. They were coming from Kitengela. That when they were approaching Donholm underpass, she suddenly heard a loud bang from the top of the motor vehicle. She checked and noticed that the windscreen was shattered. They stopped and alighted from the motor vehicle and found a man having fallen from the overpass and onto the motor vehicle. A large mob was coming from the overpass and they felt unsafe. They drove to Buruburu police station and reported the incident. She blamed the deceased for causing the accident.

32. Regina Wangui Wanjiru DW3 told the trial court that she was at the material time in the 1st appellant`s motor vehicle. That as they approached the Donholm underpass she heard a loud bang from the top of the motor vehicle and glass from the windscreen entered her eyes. They stopped and her colleagues went to check what had happened. Her colleagues then returned into the vehicle and informed her that a man had fallen from the overpass onto the motor vehicle. They drove to Buruburu police station where they reported the incident.

33. The trial magistrate in her judgment stated that the 1st respondent, PW1, did not witness the accident though he pleaded that the motor vehicle veered off the road and hit the deceased. That the police officer PW2 is not the one who investigated the case and could not tell who was to blame for causing the accident. The magistrate further stated that the P3 form indicated that the deceased jumped into the road from the service lane and was hit by the vehicle. That the appellants on the other hand advanced the version that the deceased fell from the overpass onto the vehicle. The trial magistrate considered all this evidence and found that the parties gave contradictory versions of how the accident occurred without any evidence to corroborate the opposing evidence. That the court was unable to solely lay blame on either party. The court accordingly apportioned liability equally between the two parties.

34. I have on my part considered the evidence adduced before the trial court as well as the pleadings filed by the parties. Though the appellants pleaded that the deceased was hit by the motor vehicle when the motor vehicle veered off the road, he did not adduce any evidence to that effect and neither did he call any eye witness to the accident. The particulars of negligence attributed to the driver of the motor vehicle to the effect that he drove the motor vehicle without due care and attention; failed to keep proper look out; failing to control the motor vehicle; driving the motor vehicle at excessive speed, etc, were thus not proved.

35. The appellants on the other hand pleaded in their statement of defence that the deceased was solely to blame for causing the accident through his own negligence by walking in a zig-zag manner on the road; crossing the road at an undesignated area; failing to take proper look out before crossing the road and running onto the road. It is clear that the appellants pleaded that the deceased was hit by the motor vehicle as a result of his own negligence as he crossed the road. Nowhere in the statement of defence did the appellants plead, as stated in their evidence in court, that the deceased fell from the overpass onto the motor vehicle on the underpass below. It is then clear that the appellants adopted a different defence from what was pleaded in their statement of defence. It is to be noted that the statement of defence was drafted on 17th December 2021 while the statements for the appellants` witnesses were dated 18th March 2022. Since the statements gave a different version of how the accident took place from what was stated in the written statement of defence, the version in the witness statements can only have been an afterthought and a crafted story. There is simply no way that the appellants could have failed to state in their written statement of defence, if that was actually the cause of the accident, that the deceased jumped from the overpass.

36. It is trite that parties are bound by their pleadings and any evidence that is at variance with the pleadings goes to no issue. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows on the issue:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded………In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
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> 15. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition:
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> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

37. The evidence of the appellants` witnesses that the cause of the accident was as a result of the deceased jumping from the overpass went to no issue as the same was not pleaded.

38. The respondents pleaded that the cause of the accident was the motor vehicle veering off the road and knocking down the deceased but they never adduced evidence to proof that. On the other hand, the appellants pleaded that the accident occurred as the deceased crossed the road but they never adduced evidence to proof that. The net effect is that neither party was able to establish the fault of the other.

39. It is trite that where liability is not clear, both parties are to bear liability equally. This was the holding of the Court of Appeal in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR, where it was stated that:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our

jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

40. In the present case, there are two conflicting pleadings as to how the accident in question occurred. Each party insists that the other was to blame. None was however able to establish the fault of the other. This being the case, it is my finding that both parties were equally to blame for occasioning the accident. Accordingly, the trial court was correct in apportioning liability at the ratio 50:50. Both the appeal and cross-appeal on liability have no basis.

Quantum

41. The principles under which an appellate court may disturb an award of damages made by a lower court are well established. The same were espoused by the Court of Appeal in the case of Arrow Car Ltd vs. Elijah Shamalla Bimomo & 2 Others (2004) eKLR where it was held thus: -

> "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 Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ..."

42. The deceased in this case died on the spot and the trial court awarded Ksh. 80,000/= for pain and suffering. The appellant submitted that the award was excessive and proposed Ksh.10,000/=. The respondent on the other hand supported the award and submitted that the deceased suffered serious injuries.

43. In the case of Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] eKLR, Mativo, J upheld an award of Ksh. 50,000/= where the deceased was said to have died on the spot. In Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR), Sewe J. reduced an award of Ksh.150,000,/= to Ksh.50,000/= for instant death. In Electrical Link Eastafrica Ltd & another v Munyao & another (Suing as the Next of Kin to and on Behalf of the Estate of) David Munyao - Deceased) (Civil Appeal 471 of 2015) [2023] KEHC 18114 (KLR) (Civ) (16 May 2023) (Judgment), this court upheld an award of Ksh.50,000/ for instant death. In view of these authorities, I find the award of Ksh.80,000/= for death occurring on the spot to have been on the higher side. The same is reduced to Ksh.50,000/=.

44. The conventional award for loss of expectation of life is Ksh.100,000/=. For example, in Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe (deceased)) v Rueben Muriuki Kahuha & others (2015) eKLR, a similar amount was awarded for loss of expectation of life. I find the award to have been proper.

45. On loss of dependency, the trial court considered that the deceased died at the age of 32 and applied a multiplier of 20 years. It considered that he had a family and used a dependency ratio of 2/3. It considered that the deceased worked as a driver but the respondents did not produce any documents to prove his earnings. The court thereupon applied the Government Minimum statutory wages guidelines of a driver in Nairobi of Ksh.23,039/=. The court awarded loss of dependency as hereunder:

    23,039.40 x 12 x 20 x2/3 =3,866,304.

46. The court further awarded Ksh.110,550/= in special damages as pleaded in the plaint.

47. The appellants did not make any submissions on the loss of dependency and on the award of special damages. The reasons for the appeal on the two heads were therefore not substantiated. I have considered the reasons given by the trial court in making the awards in the two heads and I find no fault in the awards. The awards are thereby upheld.

Disposition

48. The result of the appeal is therefore as follows:

    1. The finding of the trial court on liability is upheld and consequently the appeal and cross-appeal on liability are dismissed.

    2. The award on pain and suffering is found to be excessive and is hereby reduced to Ksh.50,000/=. The rest of the appellant`s appeal on quantum of damages is dismissed.

    3. The respondent`s cross-appeal on quantum of damages is dismissed.

    4. Each party to bear its own costs to the appeal and cross-appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 23RD JANUARY 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Kwamboka for Appellants

Mr. Kibathi for Respondents

Court Assistant -