Samwel v Chumba &another (Suing as the legal representatives of the Late John Charia) (Civil Appeal E084 of 2022) [2025] KEHC 3194 (KLR) (21 January 2025) (Judgment)

Neutral citation: [2025] KEHC 3194 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E084 OF 2022

GL NZIOKA, J

JANUARY 21, 2025

BETWEEN

KAMAU KURIA SAMWEL ..... APPELLANT

AND

ELIUD KIPCHIRCHIR CHUMBA AND ANNE CHEROTICH (SUING AS THE LEGAL REPRESENTATIVES OF THE LATE JOHN CHARIA) .... RESPONDENT

(Being an Appeal from the decision of Honourable Y. M. BARASA Senior Resident Magistrate delivered on 21st day of October, 2022 vide Naivasha CMCC N0. 669 of 2019)

JUDGMENT

1. The plaintiffs (herein "the respondents") commenced the suit herein vide a plaint dated; 6th September 2019, seeking for judgment against the defendant (herein "the appellant") for the following orders; -

    a. Damages under Fatal Accident Act (Cap 32 of the Laws of Kenya) for the benefit of the Estate of the deceased, Damages under *Law Reform Act*. (Cap 20 of the Laws of Kenya) and Special damages;

    b. Costs of this suit;

    c. Interest on (a) above from the date of judgement and on specials from the date of filing of this suit

2. The respondents' case is that on 11th June, 2019 or thereabout the late Isaac Kipkirui Ngetich was lawfully travelling in motor vehicle registration No. KCC 790X owned and/or insured by the appellant.

3. That, the appellant by himself, servant, agent and /or employee was negligent in the manner he drove, managed and /or controlled the subject vehicle and as a result, the vehicle was involved in an accident that caused the death of the decease.

4. The respondent averred that the deceased was twenty-six (26) years old and in good health, andthat he was survived by his wife, Anne Cherotich, and the son Daniel Kiplagat Kirui. Further that, he was a general worker at Simba Cement at the time of his death earning Ksh. 10,000 per month.

5. However, the appellant filed a statement of defence dated 5th November 2019 and denied that; he was the owner and/or driver of the subject vehicle, that an accident occurred, and that the deceased was a lawful passenger in the subject vehicle.

6. The appellant denied the particulars of negligence attributed to him and blamed the driver of motor vehicle registration No. KBQ 790X for negligently driving, managing and/or controlling the said vehicle.

7. That further and in the alternative and without prejudice to the foregoing, the appellant blamed the deceased for solely causing and/or substantially contributing to the cause of the accident and the fatal injuries he sustained.

8. The matter proceeded to full hearing. The respondents' case was supported by the evidence of (PW3) David Chege a boda boda rider and eye witness to the accident. He testified that on the date of the accident he was travelling from Nakuru to Naivasha. That near Gilgil the subject vehicle, which was ahead of him, overtook another motor vehicle and collided with motor vehicle registration No. KBQ 411N. That he went to help and found two (2) people had died.

9. In addition, (PW2) No. 76934 PC Rodgers Wafula attached to the traffic department at Naivasha Police Station testified that, the appellant was driving the subject vehicle from Nakuru to Naivasha and had four (4) passengers. That, on reaching near the Great Rift area, he attempted to leave his lane but noticed an oncoming vehicle and tried to return to his lane but collided with motor vehicle registration KBQ 411N. And two of the passengers in the appellant's vehicle died.

10. That after investigations were concluded, the appellant was blamed for causing the accident and was charged accordingly. PW2 produced the police abstract (P.exhibit 4) and the police file (P.exhibit 10) in evidence

11. The wife of the deceased (PW1) Anne Cherotich gave evidence that the deceased was twenty-six (26) years old at the time of his death and was employed at Simba Cement as a general worker earning Kshs. 20,000 per month. That, they were blessed with one child.

12. Further that the deceased used to cater for the for the family and since his death she has been unable to cater to do so hence this suit for compensation.

13. However, the appellant closed his case without calling any witnesses.

14. The parties filled their respectivesubmissions and after considering the evidence and submissions tendered the trial court delivered a judgment dated; 21st October 2022 and held that the respondents had proved that the appellant was the registered owner of the subject vehicle which left its lane and caused the accident. Consequently, the appellant was held 100% liable for causing the accident.

15. As a result, the trial court awarded the respondents Kshs. 50,000 for pain and suffering, on the ground that the deceased died on the spot and Ksh. 100,000 for loss of expectation of life.

16. On loss of dependency under the Fatal Accident Act, the trial court stated that the deceased had no history of ailments and could have worked for the next thirty-four (34) years until the retirement age of sixty (60) years.

17. Further, the deceased was married with a wife and one (1) child and therefore a dependency ratio on 2/3 is applicable. On the multiplicand, the trial court stated that the respondents had failed to give any evidence of income and therefore the best practice was to adopt the minimum wage of the deceased at the time of death, which in the year 2019, was Kshs. 6,896.00

18. As regards special damages the trial court observed that the respondents produced receipts totalling Kshs. 50,650 and awarded the same.

19. In conclusion the trial court made its finding on quantum as follows:

    a. Pain and suffering –Ksh. 50,000

    b. Loss of expectation –Ksh. 100,000

    c. Loss of dependency – Ksh. 1,875,712

    d. Total Kshs. 2,025,712

    e. Special damages - Ksh. 50,560

    f. The plaintiff is awarded costs of the suit plus interest.

20. However, the appellant is aggrieved by the decision of the trial court, and appeals against it on the grounds that:-

    a. The learned trial Magistrate erred in fact and law and reached a verdict that is wholly against the weight of the law and the evidence presented before the court.

    b. The learned trial Magistrate erred in law and fact by disregarding the written submissions as filed by the appellant.

    c. The learned trial Magistrate erred in Law and fact in general damages for loss of dependency to the Respondent for a sum of Kshs. 1,875,712. which figure is so inordinately high as to amount to an erroneous estimate and an error of principle taking into account the age of the deceased and vicissitudes of life.

    d. The learned trial Magistrate erred in law and in fact by adopting a multiplier of 34 years for the deceased, and failed to appreciate and be guided by the prevailing range of comparable awards.

    e. The learned trial Magistrate erred in Law and fact in arriving at a decision that is wholly against the weight of the evidence and the Law, by finding that the appellant was 100% liable for the accident.

    f. The learned trial Magistrate erred in law by failing to take into account matters he ought to have taken into account while assessing the quantum of general damages awarded to the Respondents.

    g. The whole judgment on quantum of damages and liability was against the evidence produced before the court amounting to a miscarriage of justice.

21. As a result, the appellant prays for the follows orders:

    a. That the judgment and decree of the lower court be set aside.

    b. That this honourable court be pleased to assess downwards the quantum that maybe awarded to the respondent and have the finding on liability reviewed based on evidence before the court.

c. Costs of this appeal be paid by respondents.

d. Any other relief as the court may find and just to grant

22. The appeal was disposed of by way of written submissions. The appellant in submissions dated 13th October 2023, reiterated his submissions in the trial court that the respondents' witnesses did not prove the particulars of negligence. That, (PW2) PC Rodgers Wafula in cross-examination confirmed that the point of impact of the accident was on the left side facing Naivasha which was the lawful lane of the subject vehicle. Further, the evidence of (PW3) David Chege on how the accident occurred contradicted the evidence of (PW2) Wafula in relation to the point of impact.

23. Furthermore, no evidence was tendered to prove investigations were complete and any charges had been preferred against the appellant's driver. Nevertheless, even if the driver was convicted it would not have been sufficient to hold him culpable for causing the accident as held by the High Court in the case of HCCA 116 of 2013 Lilian Biriri & Another vs Ambrose Leamon.

24. On the quantum, the appellant submitted that the trial court considered extraneous matters with no plausible explanation in adopting a multiplier of thirty-four (34) years for the deceased who was twenty-six (26) years old at the time of his death. That, the trial court did not take consider the vicissitudes and uncertainties of life and as a consequence, the general award for loss of dependency of Kshs. 1,875,712 was exorbitant and not commensurate with other awards. He urged the court to reduce the award to Kshs. 1,000,000 which is fair and reasonable and allow the appeal with costs.

25. However, the respondent in response submissions dated 9th October 2022, argued that the evidence on how the accident occurred was uncontroverted and cited the case of, Ngigi Kuria & another vs Thomas Ondili Oduol & another [2019] eKLR where the High Court stated that, if a party fails to call evidence in support of its case, its pleadings are mere statements of facts, and that the evidence adduced by the other party remains unchallenged.

26. Further, reliance was placed on the case of John Wainaina Kagwe vs Hussein Dairy Limited [2013] eKLR where the respondent did not tender any evidence and the Court of Appeal held the defence was mere allegations, and the responses evidence in cross examination cannot have built its defence.

27. The respondents argued that, the mere fact that the police abstract did not apportion liability did not mean that both parties were to share blame equally. That causation is an issue of fact to be proved through evidence on a balance of probability.

28. On quantum, the respondents quoted the case of, Kenya Power Lighting Company Ltd & another vs Zakayo Saitoti Naingola & another [2008] eKLR where the High Court stated that damages should not be inordinately low or high, they are meant to compensate party for loss suffered and not enrich it, past decisions should be mere guides with each case depends on its own facts, and that where past awards are considered inflation should be taken into account as well as the purchasing power of Kenyans at the time of judgment.

29. The respondent submitted that, the trial court was justified in adopting a multiplicand of thirty-four (34) years as the deceased was in informal employment and was not subject to the official retirement age of sixty (60) years. That, in the case of; Violet Jeptum Rahedi vs Albert Kubai Mbogori (2013) eKLR the High Court stated that a private business cannot be limited by the formal retirement age.

30. The respondents relied on the case of Julian Njeri Muriithi vs Veronica Njeri Karanja & another [2015] eKLR where the High Court adopted a multiplier of thirty (30) years for the deceased who was thirty (30) years old at the time of his death and was a businessman stating that the deceased would have carried on his business into his late 70's.

31. On the multiplicand, the respondents submitted that the decision of the trial court to adopt the minimum wage of Kshs, 6896 as per the wage order of 2019 was reasonable and sound. They urged the court to uphold the trial court judgment and dismiss the appeal with costs.

32. Having considered the appeal in light of the materials placed before the court, I note that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

33. The Court of Appeal thus observed: -

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 make 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 demeanour of a witness is inconsistent with the evidence in the case generally."

34. On the issue of liability, I note that the plaintiffs/respondents led evidence on how the accident occurred including the evidence of the eye witness and the officer who produced the police abstract. The defendant did not rebut that evidence as they did not adduce any evidence.

35. The law is settled that any pleadings not supported by evidence remain mere allegations and the respondent having adduced evidence of an eye witness on how the accident occurred, the trial court was well guided in its finding of the defendants being 100% liable for causing the accident.

36. As regards quantum, the law is settled that the appellate court will not interfere with the decision of the trial court on the same unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.

37. Furthermore, the Court of Appeal in Loice Wanjiku Kagunda vs. Julius Gachau Mwangi *CA 142/2003* (unreported) stated that: -

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."

38. In this instant matter, I note (PW3) the eye witness testified that the deceased died on the spot therefore an award of Kshs 50,000 for pain and suffering is inordinately high. I therefore set it aside and substitute with a figure of Kshs 10,000.

39. On the claim of loss of expectation of life, I note that the appellant proposed a sum of; Kshs 80,000. However, I uphold the Kshs 100,000 awarded as the conventional figure is Kshs 100,000 as evidenced by the decision in Kiilu v Namurwa & another (Suing as the administrators of the Estate of Gladys Nasimiyu Maasika - Deceased) & 2 others [2024] KEHC 16032 (KLR) where the Court stated that: -

> " However, conventionally, Courts have awarded Kshs. 100,000/- for loss of expectation of life bearing in mind the award on loss of dependency. The award of Kshs. 200,000/- was, therefore, on the higher side for purposes of this suit. The sum is hereby reviewed downwards to Kshs. 100,000/=."

40. On the loss of dependency, I find that there is no evidence of the deceased monthly income stated to be Kshs 10,000. Consequently, the court was well guided to rely on monthly wages as per the Regulation of Wages (General) (amendment) Order 2018.

41. However, I note that the trial court adopted a figure of Kshs. 6,896. without an explanation as to whether that is the figure in the subject Regulation and for which worker. I further note that the appellant proposed the minimum wage of Kshs. 6,736.30 as per the Regulation of Wages (Agricultural Industry) (Amendment) Order 2018.

42. However, there is no evidence that the deceased worked in the Agricultural Industry as such the applicable minimum wage for a general labourer as per Regulation of Wages (General) (amendment) Order 2018 is Kshs. 7,240.95 and that is applicable.

43. The court further notes that at the time of death, the deceased was aged twenty-six (26) years old, guided by retirement age of sixty (60) years, he still had thirty-four (34) years. However, based on vagaries and vicissitudes of life, he could have worked for over or below sixty (60) years. I find that, the thirty-four (34) years applied did not take into account eventualities in life of which allowance needs to be given.

44. The court takes judicial notice, that the work of a casual labourer is quite extraneous and hard and therefore drains one quite a lot, I adopt thirty-two (32) years as the applicable number of years

45. As regards the dependency ratio, the respondents produced a letter from the chief and Letters of Grant of Administration to support the pleading that the deceased was married and had issue of the marriage.

46. However, whereas the grant gives the widow locus standi hence concrete evidence of her relationship with the deceased there is no evidence of deceased's child. Nothing would have been easier than produce a birth certificate as evidence thereof. The burden of proof in all cases lies on the accuser and/or complainant/plaintiff/the person alleging. Though the appellant did not testify it was upon the respondents to prove their case.

47. It suffices to note that the evidence of the widow of the deceased does not even mention the name of the deceased's child. All she stated is that "we were blessed with one child". She went on to state that both depended on the deceased and that; "life has become difficult. I am not able to cater for the family."

48. In cross-examination she maintained that she is relying on the chief's letter to prove they had a child aged five (5) years. However, I find that, the chief's letter cannot be proof the said child's existence and/or being a child of the deceased.

49. In the given circumstances the ratio of 2/3 is not tenable. I am inclined to set it aside and substitute it with a dependency ratio of 1/3. The resultant calculation of loss of dependency is as follows; 7240.95x12x32x1/3 = 926.841.60

50. On Special damages, the trial court states that, the amount proved by receipts is Kshs 50,650 and therefore this court has no reason to interfere.

51. In conclusion the final award on quantum is as follows

    a. Pain and suffering ----------Kshs 10,000

    b. Loss of expectation of life ----------Kshs 100,000

    c. Loss of dependency ----------Kshs 926,841.60

    d. Special damages ---------- Kshs 50,650

    Total sum----------Kshs 1,087,491.60

    Interest on above sum from date of judgment in trial court to payment in full is awarded to the respondent.

52. It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 21ST DAY OF JANUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Wangai H/B for Ms. Muchemi for the appellant

Ms. Kiberenge for the respondents

Mr. Komen: court assistant