Kimoja & another v Kofa & another (Civil Appeal E075 of 2022)
[2025] KEHC 2287 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2287 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E075 OF 2022

JK NG'ARNG'AR, J

FEBRUARY 20, 2025

BETWEEN

ALPHONCE KIMOJA ..... 1ST APPELLANT

FREDRICK MBURU ..... 2ND APPELLANT

AND

RAJAB MACHAFU KOFA ..... 1ST RESPONDENT

JOSEPH KARISA KAJIDO ..... 2ND RESPONDENT

(Being an appeal against the Judgment and decree of the Hon. J. M. Nyariki (RM) delivered on 26th April 2022 in Mombasa Chief Magistrate's Court Civil Suit No. 609 of 2020, Leah Koshi Mchawala, Naomi Mupah Rai, Saumu Mwavuo (Legal representatives of the estate of Rajab Machafu Kofa) v Joseph Karisa Kajido, Alphonce Kimoja and Fredrick Mburu)

JUDGMENT

1. The background of the appeal is that vide a plaint dated 10th June 2020, the Plaintiffs/Respondents averred that at all material times to the suit, the 1st Defendant was the registered and/or beneficial owner and/or the insured of motor vehicle registration number KTWB 580V while the 2nd Defendant was the registered and/or beneficial owner and/or the insured of motor vehicle registration number KAS 361M while the 3rd Defendant was employed as a driver by the 2nd Defendant.

2. The Plaintiffs/Respondents stated that on or about the 10th day of May 2019, the deceased was lawfully riding motor cycle registration number KMEN 787G from Lights to Mishomoroni and upon reaching Mina Love, the 1st Defendant, his authorized driver, servant and/or agent so negligently and carelessly drove the Defendant's motor vehicle registration number KTWB 580V and permitted the vehicle to overspeed, hit and knock him from behind therefore causing him to fall off the motorcycle onto the road wherein he was run over by the 3rd Defendant who was carelessly driving the 2nd Defendant's

motor vehicle registration number KAS 361M as a direct result whereof he was fatally injured for which he held the 1st, 2nd and 3rd Defendants liable and vicariously liable.

3. The Plaintiff/Respondents prayed in the plaint for damages against the Defendants jointly and severally for general damages, special damages of 70,050.00, costs of the suit and interest at court rates on general damages, special damages and costs at court rates.

4. The suit was heard in the trial court and judgment delivered on 26th April 2022 where the court apportioned the Plaintiffs liability at 60:40 as against the 2nd and 3rd Defendants, and that in the absence of evidence to the contrary, the 2nd Defendant was held vicariously liable for the acts of the 3rd Defendant. On general damages, the trial court awarded Kshs. 20,000 for pain and suffering, Kshs. 120,000 for loss of expectation of life, Kshs. 2,171,664 for loss of dependency, and for special damages, the court awarded Kshs. 14,100. That considering the liability apportioned, the Plaintiffs were awarded a total sum of Kshs. 930,305.60 against the 2nd Defendant.

5. Being dissatisfied, the 2nd and 3rd Defendants/Appellants appealed against the judgment and decree through the Memorandum of Appeal dated 30th May 2022 on grounds that the learned trial magistrate erred in law and in fact by apportioning liability at 60:40 as against the Appellants despite the existence of contrary evidence, in disregarding the testimony of PW3, police officer, and relying on the evidence of legal representative witnesses who were not eye witnesses to the accident and/or events subsequent, by using the wrong multiplicand including the deceased persons as dependants while calculating the award for dependency thus conclusively erring in awarding general damages such that were inordinately high, by failing to appreciate the Appellants' submissions and the authorities quoted therein, and that the judgment was against the evidence offered before the court.

6. The Appellants prayed for orders that the appeal be allowed, that the appellate court do set aside the learned trial magistrate's judgment delivered on 26th April 2022 and quantum and replace it with its own assessment, and that costs of this appeal be borne by the Respondents.

7. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 3rd June 2024 argued that the police abstract provided indicated that the matter was pending investigation. That PW3 and confirmed that he was neither the investigating officer nor visited the scene of the accident. That he stated the rider who was the deceased hit a tuktuk registration number KTWB 58 and was thrown to the right side where the matatu ran over him. The Appellants stated that this was contrary to what the Plaintiff pleaded as they had indicated that the deceased was hit by a tuktuk from the rear, an impact that caused the rider to be thrown in front of the matatu. That the police abstract did not blame anyone and that the investigating officer was not brought to testify and clarify what happened.

8. The Appellants argued that motor vehicle Registration number KAS 361M was on the right lane, in motion and it was not possible that the driver would have foreseen someone being thrown at his path so as to avoid the said accident. The Appellants maintained that he who alleges must prove and that the Plaintiffs failed to prove their case on a balance of probability as they failed to prove particulars of negligence on the part of the Appellants. That motor vehicle inspection report was not produced to clarify the point of impact yet the trial court proceeded to rule that the 2nd Respondent who never entered appearance or give evidence was to blame. That no eye witness was also called to testify. To support their case, the Appellants cited David Kajogi M'Mugaa v Francis Muthoni, Margaret Kannes Muyanga v Jamal Abdulkarim Musa (2020) eKLR and Fredrick Wichenje Ikutwa v Florence Mwikali.

9. The Respondents in their submissions dated 24th May 2024 argued on the presumption of negligence against the 3rd Respondent that a collision on a highway between two motor vehicles invites

a presumption of negligence against both drivers unless they attend court and discharge the presumption. That none of the Defendants in the suit proffered any evidence. The Respondents relied on the case of Welch v Standard Bank limited (1970) EA 115, Lakhamshi v Attorney General (1971) EA, Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd (1984) eKLR, Nadwa v Kenya Kazi Ltd (1988) eKLR, and Joshua Mulinge Itumo (suingfor and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) v Bash Hauliers Limited & another (2021) eKLR. The Respondents submitted that the presumption of negligence as against the Appellants was therefore not dispelled. That from the unchallenged evidence before the court, the trial court properly apportioned liability.

10. The Respondents submitted on actual unchallenged evidence of negligence against the Appellants that the accusation against the Appellants remained unchallenged by citing the cases of Chrsipine Otieno Caleb v Attorlley General (2014) eKLR and D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati (2014) eKLR, and prayed that the appeal be dismissed.

11. The role of the first appellate court is to reexamine and reevaluate evidence to come up with its own findings was set out in Selle vs. Associated Motor Boat Co. (1968) E.A 123 as follows: -

> " ... 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 ..."

12. I have considered the Record of Appeal dated 26th February 2024 and submissions by the parties. The issues for determination are: -

    a. Whether the court arrived at its determination on the basis of the evidence presented

    b. Whether the Appellants' submissions and authorities were considered by court

    c. Whether liability was correctly apportioned

    d. Whether proper multiplicand was applied in calculating the award for dependency

13. It is the view of this court that the first three issues, whether the court arrived at its determination on the basis of the evidence presented, whether the Appellant's submissions and authorities were considered by court and whether liability was correctly apportioned, are intertwined. I will therefore consider them together.

14. The Appellants submitted that the police abstract indicated that the matter was pending investigations and that PW3 testified and confirmed that he was neither the investigating officer nor visited the scene of the accident. That the rider who was the deceased hit a tuktuk registration number KTWB 580V and was thrown to the right side where the matatu ran over him. That circumstances of the accident were not brought out clearly noting that the police abstract did not blame anyone and that the investigating officer was not brought to testify. The Appellants stated that motor vehicle KAS 361M was in its rightful lane and in motion and it was not possible that the driver would have foreseen someone being thrown at his path so as to avoid the accident. That he who alleges must prove and that the Plaintiffs failed to prove their case on a balance of probability as they failed to prove the particulars of negligence on the part of the Appellants.

15. The Respondents blamed the drivers of both motor vehicles for causing the collision and fatal injuries to the deceased as well as owners of the motor vehicles vicariously for negligence of their drivers. That at the hearing, the Appellants chose to close their case without calling any witnesses and that collision on a highway between two motor vehicles invites a presumption of negligence against both drivers unless

they attend court and discharge the presumption. That however, none of the Defendants in the suit proffered any evidence.

16. The trial court in its judgment considered the evidence of PW3, PC David Mutisya who on cross examination stated that he was not the investigating officer and that the police abstract showed the matter was pending investigations. The court noted that the rider hit a tuktuk registration KTWB 580V driven by Joseph Karisa and was thrown to the right side where the matatu ran over him. The court further noted that the witness referred to the occurrence book which bore more accurate information and stated that it was the deceased who hit the tuktuk. That on reexamination, the witness stated that PW1 and PW2 who were the 1st and 3rd Plaintiffs, none of whom witnessed the accident. The trial court further held that the 2nd and 3rd Defendants did not call any witness and that they closed their case after the Plaintiffs closed theirs. The court exonerated the 1st Defendant from liability because he was hit by the deceased from behind, and that the 2nd and 3rd Defendants owed duty of care to other road users.

17. The trial court further held that while PW3 blamed the matatu driver for not observing the 50 km/h speed limit, he did not inform court the speed in which the 3rd Defendant was driving at. That if indeed there were bumps it then would not have been possible for the 3rd Defendant to overspeed. The trial court concluded that both the deceased and the 3rd Defendant approached each other leading to the accident. Liability was then apportioned at the ratio of 60:40 against the Appellants with the sum total amount awarded to the Respondents being Kshs. 930,305.60.

18. I find that the trial court correctly considered the pleadings and evidence tendered in proof thereof, including submissions before arriving at its determination.

19. The Appellants in the grounds of appeal stated that the trial magistrate erred in law and in fact by using the wrong multiplicand including the deceased person's dependants while calculating the award for dependency thus conclusively erring in awarding general damages such that were inordinately low. However, this issue was not submitted on by the parties but this court will analyse the issue for the interest of justice.

20. In the case of Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988, the court held as follows: -

'The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

21. The trial court in its judgment held that the Plaintiffs proved dependency on the deceased. That the Plaintiffs proposed a ratio of 1/3 while the Defendants proposed 2/3 ratio. The trial court then adopted the 2/3 ratio proposed by the Defendants. The court stated that the deceased was working as a boda boda rider earning Kshs. 3,000 per day but in the absence of proof of actual earning, the court adopted the minimum wage of Kshs. 13,572.90 per month. According to the trial court, the death certificate showed the deceased was 37 years old at the time of his death. That the Plaintiffs proposed a multiplier of 23 years while the Defendants proposed 10 years. That given the circumstances and vagaries of

life, the trial court adopted a multiplier of 20 years. The computation adopted by the trial court was therefore at 20 x 12 x 13,572.90 x 2/3 = Kshs. 2,171,664.

22. On the role of an appellate court on reassessment of damages, the court in Francis K. Righa v Mary Njeri (Suing as Legal Representative of the Estate of James Kariuki Nganga (2021) eKLR held as follows: -

> " ... that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge's findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived as is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision ..."

23. This court has reevaluated the evidence tendered in respect to the award under loss of dependency and established that the multiplicand adopted by the trial court in computation of the award was fair. This court therefore has no basis to interfere with the same.

24. In the circumstances, I find this appeal unmerited and dismiss it with costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellants

..... Advocate for the Respondents

Court Assistant – Shitemi