Buyala v Amwayi ((Suing as the Legal Representatives in the Estate of Shem Kokonya - Deceased)) (Civil Appeal 63 of 2022) [2024] KEHC 618 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 63 OF 2022

PJO OTIENO, J

JANUARY 19, 2024

BETWEEN

MICHAEL UKWALA BUYALA ..... APPELLANT

AND

FLOICE OCHIEKA AMWAYI ..... RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVES IN THE ESTATE OF SHEM KOKONYA - DECEASED)

(Being an appeal from the judgment and decree of Hon. B.Ojoo SPM in Butere PMC Case No. 4 OF 2019)

JUDGMENT

Background of the litigation and Appeal

1. The Respondent by way of a plaint dated 15th February, 2019 sued the Appellant at the Principal Magistrate's Court in Butere, for general damages, special damages, interest and cost of the suit in relation to the death of Victor Atubwa(Deceased) who succumbed to injuries after allegedly being hit by the Appellant's Motor Vehicle Registration Number KBX xxxE on the 13th day of October, 2017 while riding his motorcycle registration number KMDK xxxQ along Khumusalaba - Stendikisa road. The suit was brought by the respondent in her capacity as the personal representative of the estate of the deceased having been issued with a grant of letter of administration ad litem

2. It was the pleading by the respondent, as plaintiff then, that while the deceased was lawfully on the said road riding his motorcycle reg. No KMDK xxxQ, the appellant now and defendant at trial, so negligently drove and controlled the offending motor vehicle that permitted it to veer of the road and fatal hit the deceased. The particulars of negligence were duly set out as well as the heads of special damages without the particular sum. There was also a list of six people named as dependants.

3. All the allegations in the plaint, save for the description of the appellant and jurisdiction of the court, were denied and the respondent put to very strict proof. There was also an alternative plea that if any accident ever occurred as pleaded, then the same was caused by the negligence of the deceased. The particulars of the deceased's negligence were given to include, failing to heed the presence of the motor vehicle on the road, riding without safety gear and disobeying the traffic rules and regulations applicable on the road, driving in the middle of the road and failing to keep the cyclist path. It was added that if the accident ever occurred then the same was inevitable and not out of negligence of the appellant. It was thus the prayer of the appellant that the claim be dismissed.

4. At the hearing, the respondent called two witnesses, the plaintiff and a police officer while the appellant gave evidence by self and also called a police office. In a reserved judgment delivered on 18th August, 2019, the trial court apportioned liability equally between the parties then made an award of damages as follows: -Pain and suffering Kshs.20,000/-Loss of expectation of life Kshs.150,000/-Loss of dependency Kshs.2,000,000/-Special damages Kshs.75,485/-Grand Total Kshs.2,245,485/-Less 50% contribution Kshs.1,122,742.50Total award Kshs.1,122,742.50Costs of the suit and interest at courts rates."

5. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 12th September, 2022 and proffered four grounds of appeal. The four grounds fault the judgment for failure; to dismiss the claim, holding the appellant liable at 50%, in failing to consider the submissions offered on both liability and quantum of damages and in applying erroneous principles on assessment of damages and thereby arriving at an erroneous decision. The appellant thus prays that the decision of the trial court be set aside and and substituted with an order dismissing the suit and in the alternative but without prejudice, the damages awarded be re-assessed downwards and that he be awarded the cost of this appeal.

6. After the appeal was admitted to hearing, the court directed that the appeal be canvassed by way of written submissions and each party has filed their respective submissions. The respondent was first to file written submissions on the 18.1.2023 while the appellant did so on the 15.2.2023

7. The appellant identifies two issues for determination to be; whether the trial magistrate erred in law and in fact in holding that the respondent had discharged her burden of proof and found the appellant 50% liable for the accident; and whether the general damages of Kshs.160,000/- awarded by the trial court were excessive in the circumstances.

8. On whether the trial magistrate erred in law and in fact in holding that the respondent had discharged her burden of proof and found the appellant 50% liable for the accident, the appellant submits that it was the testimony of PW2 CPL Daniel Kemboi that the deceased was to blame for the accident for failing to give way by entering the road abruptly. It is pointed out that the evidence by Pw2 and the two defence witnesses show that the appellant was travelling from Standkisa towards Khumusalaba when the deceased who was travelling from the opposite direction made an abrupt turn and encroached on his lane hence the accident. It is further submitted that the events leading to the accident were acknowledged by the trial magistrate in her own judgment and it was wrong for her to find the appellant 50% liable for the sole reason of not having seen the deceased approaching from a distance yet the appellant only noticed the motorcyclist 20 meters ahead on the opposite direction and he allover sudden made a right turn making the appellant swerve on the left to avoid a head on collision. He argues that the appellant is entirely to blame for the accident.

9. On whether the general damages awarded by the trial magistrate were excessive in the circumstances, the appellant submits that the award of Kshs. 150,000/-for loss of expectation of life was excessive since the deceased was 49 years old. He argues that an amount of Kshs.50,000/- would have been

appropriate. There was reliance on the case of *Midland Media Limited & another v Pauline Naukot Aule (Suing as the Legal Representative of the Estate of the Late Esinyon Esokon Ekai)* (2020) eKLR to support the reduction of the sum awarded. The appellant also argues that global approach adopted by the trial magistrate for loss of dependency was not reasonable since the earnings of the deceased or how much he spent on his family was not established as set out in *Bor v Onduu* (1988-1992) KAR 299 which is cited in the case of *Roger Dainty v Mwinyi Omar Haji & another* (2004) eKLR. He adds that the amount he proposed in the lower court being a sum of Kshs.328,900.32, subject to liability, would be appropriate in the circumstances.

10. Even though parties appeared before court and assured it that both had filed submissions on the appeal and sought a judgment date, the submission by the respondent have no bearing on the appeal but on the application for stay. That failure by the respondent alone does not hamstring the court from executing the mandate to re-examine afresh the entire record with a view to reaching its own independent conclusions.

Issues, Analysis and Determination

11. The court has duly considered the grounds of appeal, the proceedings of the lower court and the submissions filed and discerns the only issues for determination to be whether the trial court erred in apportioning liability at the ratio of 50:50 and if the damages awarded by the trial court were inordinately high in the circumstances as to merit interference on appeal.

12. It was the position of the court in *Khambi and Another vs. Mahithi and Another* [1968] EA 70 that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous.

13. In this instance, it is not in dispute that an accident occurred on 13th October, 2017 in which the appellant driving his motor vehicle registration KBX xxxE fatally collided with the deceased who was riding motorcycle registration number KMDK xxxQ. What is in question is who is to blame for the accident and in what extent?

14. It is trite law that he who asserts must prove and the evidentiary burden is cast upon any party who wishes the court to believe the existence of any fact to exist in his favour. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR the court was held: -

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

15. The appellant contends that the deceased is to blame for the accident and places reliance on the testimony of PW2, No. 63496 Corporal Daniel Kemboi and DW2 George Owuori both of whom produced the police abstract and other police records. Both blamed the deceased for having caused the accident by suddenly turning onto the way and path of the appellant. That evidence as well as the evidence of the appellant who was the only eye witness wholly controvert the respondent's allegation of negligence against the appellant. What is more, in her evidence the respondent confirmed having not

witnessed the accidents. The summary of her evidence is captured in the record of cross examination when the respondent told the court: -

> " My husband was not a licensed motorcycle rider. The negligence of the driver that I allege is based on the police investigation. The police did not tell me that the driver was at fault. The sketch maps prove my case. I cannot speak to the particulars of the driver's negligence."

16. Having reviewed the evidence and in apportioning liability at the ration of 50:50, the trial court noted and delivered itself thus: -

> " I therefore do not agree that the evidence of PW2 and DW2 alone can be conclusive as to who was to blame for the accident nor can it be said to be binding on the court. .... having seen the deceased approaching in his direction at a distance, as a careful and diligent driver, it behooved the defendant to keep a proper lookout and maneuver his motor vehicle to bring it to a halt and move it out of the way to avoid the collision with the deceased's motor cycle."

17. It is difficult to agree with the holding of the trial court in that the court was bound to decide the matter based on the evidence led on the pleadings filed. In the plaint, the appellant was blamed for among other over speeding and failing to take appropriate precautions to avoid the accident. It was the duty of the appellant to prove her case based on such pleadings. In her witness statement she asserted that the deceased was hit from behind yet in cross examination she was unable to attribute any negligence on the appellant. In addition, her own witness, PW2 did more damage than good to her case.

18. The second reason it is difficult to agree with the trial court is that if one discounts the evidence of PW2 and DW2, then one is left with the evidence of appellant and that of the respondent. While the evidence of the respondent had no probative value for having departed from the pleadings, that by the appellant was explicit that the deceased crossed onto his path and way, he swerved to the extreme left to avoid collision but the deceased followed him there hitting himself on the front right of the motor vehicle. In the assessment of the court, that account show that the appellant did all he could to avoid the accident and had thus sufficiently proved his defence of inevitable accident. To the contrary, there was no evidence to prove the case that the deceased was hit on his lane off the road as pleaded or from behind as asserted in the witness statement. In short, the respondent abandoned his case in the plaint and sought to a totally different case without seeking to amend the plaint. That was wholly inadmissible and could not amount to a proof on a balance of probabilities. The court finds that the case was never proved against the appellant and that the finding by the trial court was a perversion of the evidence on record which should not be allowed to stand. It is set aside and, in its place, substituted an order that the suit against the appellant is dismissed with costs

19. On whether the assessment was appropriate, the general rule is that assessment of damages lies in the discretion of the trial court and an appellate court will only interfere with the award of damages where it is inordinately high or low as to represent an erroneous estimate. This was the holding of the court in *Butt v Khan* (1977) I KAR where it was held that: -

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

20. This position has been reiterated innumerable times but the superior court of Kenya and stand as a trite position of the law. One only need to cite the Court of Appeal in *Hellen Waruguru Waweru (Suing as*

the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited [2015] eKLR where it was held: -

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or law as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure, which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages."

21. The appellant contends that the amount awarded under the head of loss of dependency and loss of expectation of life was excessive.

22. The trial court awarded the respondent a sum of Kshs.150,000/- under the head loss of expectation of life. The appellant argues that this amount was high and that a sum of Kshs.50,000/- is appropriate in the circumstances. The conventional award for loss of expectation of life is Kshs.100,000/= as was observed by the court in *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR where it was held as follows: -

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/= while for pain and suffering the awards range from Kshs.10,000/= to Kshs.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

23. That decision is not cast in stone and merely persuasive upon this court. It takes a very strong case for the court to substitute its discretion for that of the trier of fact. I find no compelling reason to interfere in the circumstances of this case.

24. On the award of general damages under the head loss of dependency, there are two schools of thought on how to calculate damages in respect thereto. One school advocates for tabulation using the multiplier, the multiplicand and the dependency ratio while the other school advocates for a global award. Both are indeed at the choice of the trial court for it is known that there is no magic in the multiplier approach. The aim of the court is to do justice by awarding a sum that compensates the victim rather than enrich her and merely punishing the tortfeasor.

25. According to the witness statement of Floice Ochieka Amwayi, the deceased was a boda boda rider while in cross examination she said the deceased was a trader in omena and cabbage who would make about Kshs.3,000 per day but she conceded having no proof of such income. It was thus not clear how much the deceased earned on a monthly basis and in such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* [2020] eKLR where the court that where there is no satisfactory proof of the monthly income by salary proved or employment, so that it is not possible to determine the multiplicand, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is

advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. It said: -

> " The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

26. Guided by the above decision and others not cited here, it is the view of the court that the global award approach adopted by the trial court was the best approach in this case as it could not ascertain the exact income that the deceased was earning.

27. It is also noted that in making an award of Kshs.2,000,000/- for general damages under the head loss of dependency, the trial court was guided by the decisions in *Isaack Abdikari, Abdile & another v Rose Kinanu Muchai (Legal representative of the Estate of Paul Rufus Muguongo* (2016) eKLR where the deceased was aged 45 years and *David Mbuba & another v Victoria Mwongeli Kimwali & another* (2018) eKLR where the deceased was aged 46 years and in which the courts awarded a global sum of Kshs.1,200,000/- and Kshs.2,380,000/-. It is therefore the court's finding that the award for loss of dependency is within an acceptable range hence there cannot be a justifiable basis to disturb it.

28. Accordingly, and for the reasons set out above, this appeal succeeds in that the judgment on liability is set aside but the court upholds the assessment of damages due had the suit succeeded. In terms of the principle of law that costs follow the events, the appellant shall get the costs of this appeal as well as the costs before the trial court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JANUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Court Assistant: Polycap

No appearance for parties