Gichunge v Kairu & another ((Suing as the Legal Representatives of Dennis Mutugi Gitari – Deceased)) (Civil Appeal E014 of 2022) [2024] KEHC 1449 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1449 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E014 OF 2022

LW GITARI, J

FEBRUARY 15, 2024

BETWEEN

SAMMY MUTWIRI GICHUNGE .... APPELLANT

AND

MAKENA KAIRU & SAMWEL GITARI .... RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVES OF DENNIS MUTUGI GITARI – DECEASED)

JUDGMENT

1. Before this court is the Appellant's appeal against the decision of the learned trial magistrate that was rendered on 15th September, 2021 in Chuka CMCC No. 190 of 2019 (Dinah Makena Kairu & Samuel Gitaari (Suing as legal representatives to the estate of the late Dennis Mutugi Gitaari v. Samwel Mutwiri Gichunge).

2. The suit before the lower court was in respect to a personal injury claim following a road traffic accident that occurred on 25th December, 2018 where one Dennis Mutugi Gitari (deceased) was the rider of motor cycle registration number KMEM 621R and collided with motor vehicle registration number KBT 398V.

   Judgment was entered for the respondent against the appellant as follows:-

   i. Liability – 100%;

   ii. General damages for pain and suffering – Kshs. 50,000/=;

   iii. General damages for loss of expectation of life – Kshs. 100,000/=;

   iv. General damages for loss of dependency – Kshs. 3,600,000/=;

   v. Special damages/funeral expenses – Kshs. 70,550/=;

Less double entitlement - Kshs. 100,000/=;

Total Kshs – 3,720,550/=

vi. Plus costs and interests

The appellant was dissatisfied with the Judgment of the trial magistrate and proceeded to file this appeal.

3. As per the Memorandum of Appeal dated 24th June, 2022, the Appellant preferred this appeal based on the following grounds:

   i. That the Learned Trial Magistrate erred in over relying on the evidence of the Respondent which was not corroborated misdirected himself in making a finding against the appellant.

   ii. That the Learned Magistrate's judgment be rendered/ delivered per incuriam.

   iii. That the Learned Trial Magistrate erred in awarding 100,000/- as damages for loss of expectation of life an amount which is excessive in the circumstance.

   iv. That the Learned Trial Magistrate erred in awarding Kshs. 70,550 for special damages that were not pleaded and proven to the required standard.

   v. That the Learned Trial Magistrate erred in applying a multiplicand Kshs. 20,000 which figure was not proved to the required standard.

   vi. That the Learned Trial Magistrate erred in holding that the Respondent had proven its case.

   vii. That the Learned Trial Magistrate erred in fact and in law by failing to appreciate the evidence tendered by the appellant with regard to the quantum of damages and liability.

   viii. That the Learned Trial Magistrate erred in fact and law in holding that the Respondent is entitled to the reliefs sought.

   ix. That the Learned Trial Magistrate erred in fact and law by failing to appreciate the scarcity of evidence tendered by the Respondent with regard to liability and quantum of damages.

   x. That the Learned Trial Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for defendant/Appellant and to case precedents of senior courts before it.

   xi. That the Learned Trial Magistrate erred in finding that the issues raised by the Appellant in his statements of defence had not been proved.

   xii. That the Learned Trial Magistrate erred in holding the Appellant to be 100% liable for the accident when there was no sufficient evidence to support that finding.

   xiii. That the Learned Trial Magistrate erred in law and fact by awarding costs to the respondent.

4. The Appellant thus urged this Court to allow this appeal by finding that the award of Kshs. 3,720,550 is unlawful and hence set aside the impugned judgment and substitute the same with a proper finding.

5. This being a first appeal, the duty of this Court is now well settled. A first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses and therefore should make due allowance in that respect. More particularly, this Court is not bound to follow the findings of the trial court on fact if it appears that the trial court clearly failed on some point to take account of particular circumstances or probabilities that were

material in the estimation of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. [See: Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123]

See also China Zhongxing Construction Company Ltd –v-Ann Akuru Sophia (2020) eKLR Mwenge, J where he embarked on illustrating this decision and Peter-v-Sunday Post Limited (1958) EA where he stated that:

From these cases, the appropriate standard of review to be established can be stated in three complementary principles:-

> “ 1) That on first appeal the court is under a duty to re-consider and re-evaluate the evidence on record and draw its own conclusion;
>
> That in re-considering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it, and
>
> That it is not open to the appellate court to review the findings of a trial court simply because it would result it were hearing the matter for the first time. Thus this court can only interfere with an award of damages if as stated by Law J.A in the case of But –v-Khan (1977) KAR 1, the aggrieved party satisfies one of two conditions:
>
> 1. That the trial court took into account irrelevant factors or left out relevant factors when assessing damages.”

Thus this court has a duty to re-consider the evidence before the trial court, re-evaluate it and draw its own conclusion. The only limitation is that it should always leave room for the fact it has neither seen nor heard the witnesses and leave room for that.

6. The record shows that 3 (three) witnesses testified in support of the claim by the Respondents. PW1 was PC Simon Otuoma, a police officer attached at Ikala Police Station on traffic duties. It was his testimony that the subject road traffic accident occurred on 25th December, 2018 along Chuka-Embu road at Kirege area and involved motor vehicle registration number KBT 398V and motor cycle registration number KMEM 621R. That as a result of the said accident, the deceased was fatally injured. PW1 produced as P. Exhibit 1 the police abstract in respect of the accident.

7. PW2 was Dinah Makena, the widow to the deceased. She relied on her statement dated 16th December, 2019 as her evidence in chief and produced as exhibits copies of the documents in her list of documents. PW2 then stated that her claim was for compensation and costs.

8. PW3 was Loyford Munene. He alleged that he was an eyewitness to the accident in question and relied on his statement dated 30th September, 2020 as his evidence in chief.

9. For the defence case, no evidence was adduced and subsequently, the trial court proceeded to give its judgment in the matter.

10. This appeal was then canvassed by way of written submissions.

The Submissions

11. The Respondent filed their written submission on 3rd July, 2023. It was the Respondent’s submission that the instant appeal challenges the finding of the trial court on both liability and quantum.

12. On the issue of liability, it is the Respondent's submission that the appeal should fail in this respect as the Appellant failed to tender any evidence before the trial court and that further, the Appellant failed to attend court at the hearing of the case to challenge the evidence of the Respondents. Relying on the case of Lake Flowers -vs- Cilla Frankline Ngonga and Another [2008] eKLR and Rosemary Mwasya v Steve Tito Mwasya and another (2018) eKLR, it was the Respondents' submission that in the circumstances, the Appellant should not blame the trial court.

13. On the issue of quantum, it was the Respondents' submission that the Respondents' statement dated 16th December, 2019 was adopted as their evidence in chief and that the same was not challenged or controverted. That the trial court was alive to the fact that in the informal sector in which the deceased was in, records were kept but that did not mean that the deceased was not earning. In this regard, the referred to the holdings in the cases of Jacob Agiya Maruja and Another -vs- Simeon Abeyo Civil Appeal No. 107 of 2002 (2005) e KLR and Mombasa CACA No. 317 of 2003 Checkers Trading Ltd & Another v Fatuma Kimanthi (Suing as the Legal Representative of the Estate of Hamed Suleiman Kimathi – deceased).

14. On the award of special damages, it was the Respondents' submission that this court should take judicial notice that the same was not pleaded specifically.

15. In light of the above submissions, the Respondents urged this Court to dismiss the instant appeal with costs.

16. On the part of the Appellant, his written submissions were filed on 29th September, 2023. The same were wrongfully titled "Plaintiff's/Respondent's Written Submissions on the Appeal dated 24th June, 2022". For avoidance of doubt and to set the record straight, a quick perusal of the written submissions filed on 29th September, 2023 refer to the Appellant's submissions who was the Defendant before the trial court.

17. On the issue of liability, it is the Appellant's submission that the police abstract produced before the trial court in evidences that even at the time of trial, the police investigations into the accident were still pending. That as such, no proof was adduced on who was to be blamed for the accident. It was therefore the Appellant's submission that liability should thus be apportioned at 50:50. To buttress this position, the Appellant relied on the case of Hussein Omar Farah v Lento Agencies [2006] eKLR where the Court of Appeal observed 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. "

18. The Appellant further relied on the case of Patrick Muhia Giathi v. Joseph Kingiri Mwangi & Another [2020] eKLR where Justice D. S. Majanja held as follows:

> " 8. The appellant advanced the argument that the police abstract supported its case as it stated that the driver of motor vehicle registration number KBH 542S was to blame. The question then is whether the contents of a police abstract constitute proof of negligence. As the name suggests, a police abstract is an abstract or summary of information contained in the police record. It contains factual matter like the parties involved in an accident, the date and time of accident, whether a party has been charged, person injured and

such information. A statement contained therein that a party is to blame is a statement of opinion as it is based on the writer's perception of a certain set of facts. It is therefore inadmissible unless it is admitted under section 48 of the *Evidence Act*. Moreover, the set of facts which it is based on must be proved. In other words, the appellant through PW 2 did not show or establish any facts upon which the court could conclude that indeed the respondents were to blame.

9. Finally, the appellant did not lay before the court any fact which would prima facie lead to an inference of negligence. For example, PW2 did not produce any sketch plans, he did not tell the court the relative position of the vehicles where the accident took place, the nature and extent of damage on both vehicles and any other facts upon which the court could infer negligence."

19. In respect to the testimony of PW3 who claims to have been an eyewitness of the accident, it was the Appellant's submission that the account given by PW3 raises concerns regarding its conspicuous absence from the police abstract which does not give an account of him as a witness. That moreover, the Respondents were in contravention of the procedural safeguards entrenched in Section 77 of the *Evidence Act* as they allegedly failed to serve the statement of PW3 on the Appellant.

20. It was the Appellant's submission that the said omission not only constituted a procedural oversight but it was also a transgression of the Appellant's right to confront adverse witnesses as expressly provided for under Section 77(2)(a) of the *Evidence Act*. Relying on the case of Katana & another v. Republic (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR), it was the Appelant's submission that the statement of PW3 should be expunged from the record for being introduced belatedly. The Appellant thus reiterated its earlier submission that the assessment of liability at 50:50 would be just in the circumstances of this case.

21. On the assessment of quantum of damages, the Appellant submitted as follow under the following heads:

    i. On the award for loss of expectation of life, the Applicant opted to abandon this ground of appeal on account that the assessment by the trial court under this head was fair and well apportioned.

    ii. On the award of special damages, it was the Appellant's submission that while the special damages ought to be pleaded and proved, the trial court erred in awarding Kshs. 70,550 as special damages whereas only Kshs. 20,000/= had been pleaded under this head.

    iii. On the award for loss of dependency, the Appellant submitted that standard applied by the trial magistrate against the weight of the evidence was manifestly high and inordinate. That since the deceased is alleged to have been a farmer who was 26 years old and whose wages was not ascertained, applying the multiplicand of Kshs. 15,000/= and a multiplier of 30 years would be sacrificing justice at the altar of the multiplicand rule. In this regard, the Appellant relied on the case of Marko Mwenda v. Bernard Mugambi & Another NBI HCCC No. 2343 of 1993 where it was held by Ringera, J. (as he then was) that:

        "The multiplier approach is just a method of assessing damage not a principle of Law or 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 age of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of

the dependency are known or knowable without undue speculation. Where that is not possible, to insert on the multiplier approach would be to sacrifice justice on the altar of methodology, sometimes a Court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

22. It was thus the Appellant's submission that this Court should revise the use of the multiplier approach as there was scarcity of evidence to support such an approach in this case. According to the Appellant, the global sum approach should have been used in the circumstances. The Appellant thus invited this court to consider that the sum of Kshs. 1 Million that was settled as a condition for stay pending appeal was a reasonable sum to compensate the Respondent under this head. To buttress this proposal, the Appellant relied on the following authorities:

    i. Stanwel Holdings Ltd & Another v. Rachel Haluku Emanuel & Another [2020] eKLR where the court reversed a decision that strictly applied the multiplier approach and damages for loss of dependency was assessed at Kshs. 3,600,000/= (2/3 x 30 x 12 x Kshs. 15,000/=) and in its place awarded a global sum of Kshs. 1 Million. In this case, the deceased was a 23-year-old farmer.

    ii. Gilbert Kimatare Nairi & Another (Suing as the personal representative of the estate of Jackline Sein Lemaiyan (Deceased) v. Civiscope Limited [2021] eKLR where the deceased was a 31-year-old farmer and the court upheld the trial court's approach on an award of a global figure of Kshs. 600,000/=.

    iii. Ann Kanja Kithinji (Suing as the legal representative of the estate of Patrick Koome (deceased) & 2 Others v. Jacob Kinari & Another [2018] eKLR where the court awarded a global sum of Kshs. 800,000/= in the instance of a 36-year-old deceased person who was a farmer.

    iv. Frankline Kimathi Baariu & Another v. Philip Akungu Mitu Mborothi (Suing as the Administrator and Personal Representative of Antony Mwiti Gakungu (deceased) [2020] eKLR where the court awarded a global sum of Kshs. 1,300,000/= to the estate of a deceased person aged 36 years and who left behind 2 young children.

    v. Dorah Hellen Akinyi Oloo & Anor (Suing as the Legal Representatives of the Estate of Jack Opiyo Gitau – Deceased) v. Simon Gakahu Murimi & 2 Others [2020] eKLR where the court upheld a global sum of Kshs. 1,200,000/-.

Issues for Determination

23. I have considered the grounds of appeal, the record of appeal as well as the submissions put forth by the parties. The main issues that arise for determination by this Court in this appeal are:

    i. Whether the trial court was correct to find the Appellant 100% liable;

    ii. Whether the trial court erred in its award of KShs. 70,550/= as special damages;

    iii. Whether the trial court erred in using the multiplier approach in its assessment of damages under the head of loss of dependency and if so,

    iv. Who should bear the costs of this appeal?

Analysis

a. On Liability

24. As per the joint statement of the Respondents dated 16th December, 2019, the deceased was on the material day riding his motorcycle registration number KMEM 621R along the Embu-Chuka road headed toward Embu when at Kirege area motor vehicle registration number KBT 393V which was coming from Embu veered to the climbing lane, lost control, and knocked and fatally injured the deceased. That the accident was subsequently reported at Chuka Police Station and a post mortem examination was done.

25. PW3 testified as an eyewitness. As per his witness statement dated 30th September, 2020 which he adopted as his evidence in chief, PW3 was walking back home on the material day at around 0230 Hours along the Meru-Nairobi highway. He was on the left side of the road facing the Embu direction. The deceased, who was allegedly PW3's friend, then passed PW3 at a place called QPawa as he was riding his motorcycle coming from Chuka direction heading towards Embu. According to PW3, there was a lorry registration number KBT 398V coming from the Embu direction at a high speed. The said lorry then lost control, veered off its rightful path and onto the lane of oncoming vehicle. Thereafter, the lorry hit the deceased's motorcycle and injured him. The deceased succumbed shortly thereafter as he was being rushed to hospital.

26. According to the Appellant, the evidence of PW3 should be expunged from the record as the Appellant was never served with the witness statement of PW3. To buttress this position, the Appellant relies on the provisions of Section 77 of the *Evidence Act* which have no bearing to the said allegations raised by him as the said provision of the law is in relation to procedural safeguards as relates to the production of reports by government analysts and geologists.

    The appellant has challenged the finding on liability based on the evidence of PW3 as they were never served with his statement and that PW3 is peculiarly missing from the witnesses listed on the police abstract.

    The respondent had filed a list of documents dated 16/12/2019 and PW3 was not listed as a witness. The statement of PW3 was filed in court on 2/12/2020. There is no evidence to show that leave to file the statement was obtained. Order 3 rule 2(c) of the Civil Procedure Rules provides as follows:-

    > 2. All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—
    >
    > (c) written statements signed by the witnesses excluding expert witnesses;"

27. In my view, the Appellant had an opportunity to attend court during the hearing of the matter to rebut the evidence of the Respondents but failed to do so. The evidence of PW3 was admitted to the record of court uncontroverted and as such, I agree with the submissions of the Respondents that the trial court cannot be faulted for relying on the evidence that was properly placed before it. In the circumstances, and considering the evidence on record, it is my view that the trial magistrate correctly found the Appellant to be wholly liable for the accident. This ground of appeal therefore fails.

On Special Damages

28. It is now firmly established that special damages must both be pleaded and proved, before they can be awarded by the court. In Hahn vs. Singh Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – as he then was, emphasized that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

29. The rationale for requiring a party to plead and prove special damages was given by the Court in Jackson Mwabili vs. Peterson Mateli [2020] eKLR, as follows;

> " ....the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing." (Emphasis supplied)

30. In this case, the particulars of special damages were pleaded under paragraph 7 of the Respondents' Plaint dated 16th December, 2019 as follows:

    i. Legal fees incurred towards procuring letters of Administration .... Kshs. 20,000/=;

    ii. Search for m/v KBT 398V .... Kshs. 550/=;

    iii. Registration of demand .... Kshs. 100/=.

31. Subsequently, Paragraph 8 of the Plaint read as follows:

> " 8. That the deceased was buried according to the African customs and the representatives spent heavily however due to the fact that they were bereaved, did not concern themselves with records, thus the pray for reasonable funeral expenses pursuant to Section 6 of the *Fatal Accidents Act*."

32. Under Paragraph 11 of the aforesaid Plaint, the Respondents did not indicate the total amount of special damages that they were claiming but instead prayed for "Special damages aforesaid". This prayer referred to the specials particularized at Paragraph 7 and those inferred at Paragraph 8.

33. Section 6 of the *Fatal Accidents Act* states:

> " In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought."

34. In my view, the prayer for an award of special damages for funeral expenses cannot succeed as the same was not specifically pleaded. The only specials that were specifically pleaded and proved as those particularized under paragraph 7 of the Plaint which amount to Kshs. 20,650/=. In the circumstances,

it is my view that this ground of appeal succeeds. The award of Kshs. 70,550/= as special damages should be set aside and substituted with an award of KShs. 20,650/=.

b. On Loss of Dependency

35. The Appellant faulted the trial magistrate for adopting the multiplier approach instead of the global approach in assessment of the damages awarded to the Respondent.

36. It is trite that an appellate court will only interfere with the award of the trial court if it is inordinately so high or low as to represent an entirely erroneous estimate or it is based on some wrong legal principle or on a misapprehension of the evidence. (See: Kemfro Africa Limited t/a "Meru Express Services (1976)" another Vs Lubia & another (NO.2) [1985] eKLR)

37. The same position was held by the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

38. The Appellant in this case has faulted the trial magistrate for adopting the multiplier approach instead of the global approach in assessment of the damages awarded to the Respondent under the head of loss of dependency.

39. I am guided by the case of Marko Mwenda (supra) cited by the Appellant where the court held that the multiplier is just a method of assessing damages. It is a useful method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency can be ascertained.

40. In this case, it was pleaded that the deceased was a farmer and aged 26 years old. This was confirmed by the deceased's death certificate serial number 0744935 and the same has not been controverted.

41. It was further pleaded and confirmed by the chief's introductory letter dated 17th January, 2019 that the deceased was survived by the following dependants:

    i. Dinah Makena Kairu – Widow

    ii. Samuel Gitari Kamongo – Father

    iii. Shemeth Favour – Daughter (5 Years)

    iv. Kellen Kaari Samuel - Mother

42. It was the in the discretion of the learned magistrate to either adopt the multiplier approach or the global sum approach. In my view, all the relevant factors were available for the trial court to assess the damages under this head using the multiplier approach. As such, the trial magistrate did not misdirect himself as it was well within his discretion to chose which approach to adopt. In the circumstances, it is my view that this ground should fail as the use of the multiplicand of Kshs. 15,000/= and a multiplier of 30 years were reasonable given the circumstances of this case.

Conclusion

43. From the foregoing analysis, it is my view that the instant appeal succeeds only to the extent that:

i. The award of Kshs. 70,550/= as special damages be set aside and substituted with an award of KShs. 20,650/=.

ii. All other findings by the trial court on the award of damages are upheld.

iii. Costs of 20% to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF FEBRUARY 2024.

L.W. GITARI

JUDGE

15/2/2024

Mr. Mutegi for Appellant

Mr. Ogweno for Respondent

The Judgment has been read out in open court.

L.W. GITARI

JUDGE