Mwangi (Legal administrator of the Estate of the Late Patrick M Kimemia) v Kiruthi (Civil Appeal E051 of 2021) [2024] KEHC 3075 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E051 OF 2021

HM NYAGA, J

MARCH 13, 2024

BETWEEN

JOYCE W MWANGI (LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE PATRICK M KIMEMIA) ..... APPELLANT

AND

NATHANIEL WAMUHUYU KIRUTHI ..... RESPONDENT

(Being an appeal arising from the Judgment and Decree of Hon. E. Soita – RM in Molo Chief Magistrate's Court Civil Case No. 60 of 2019 delivered on 12th April, 2021)

JUDGMENT

1. This appeal arises from the judgment and decree passed by the Resident Magistrate Hon. Soita on 12th April, 2021in Molo Chief Magistrate's Court Civil Suit No. 60 of 2019.

2. The Memorandum of Appeal filed on 27thMay, 2021by the firm of Mboga G.G & Co. Advocates on behalf of the appellant Joyce W. Mwangi sets out five grounds of appeal namely that: -

   The Learned Trial Magistrate;

   i. erred in law and fact in dismissing the Appellant's claim while there was plausible and/or credible evidence tendered before him showing that the Respondent was to blame for the subject accident

   ii. erred in law in failing to make a determination on all issues in dispute between the parties arising from the pleadings and submissions and particularly that the subject accident occurred as a result of the Respondent's negligence as per the admission by the Respondent.

iii. erred in failing to appreciate the significance of the various facts that emerged from the evidence of the plaintiff's witness; to consider or properly consider all the evidence before him and more particularly take cognizance of the Respondent's own admission of culpability when testifying; & to make any or proper findings on the aspect of quantum of damages on the evidence before him.

iv. erred in failing to consider or properly consider the written submissions filed by Counsel for the plaintiff/Appellant.

v. erred in law and in fact in reaching findings not supported by and contrary to the evidence before the Court.

3. It was the appellant's prayer that the Appeal be allowed, the said judgment of the subordinate Court be set aside and the Respondent be held 100% to blame for the subject accident and damages be issued appropriately and for costs of this Appeal and the lower Court to be awarded to her.

4. The appellant's claim in the lower court was in the plaint dated 26th February, 2019. It arose from a road traffic accident which occurred on 2nd July, 2017 along Tupoti-Tipis Murram Road when the deceased herein was off the road. It was alleged that the Defendant/respondent or his agent, servant or employee so negligently drove, controlled and or managed the Motor Vehicle registration number KCG 944 Q as a result of which it lost control and hit the deceased, thereby occasioning him fatal injuries. The Appellant/plaintiff sought general damages under the Fatal Accident Act and damages under the *Law Reform Act*, special damages and costs and interests of the suit.

5. The particulars of negligence pleaded were that the motor vehicle Registration Number KCG 944 Q was driven at a manifestly excessive speed in the circumstances, without due care and attention, the driver failed to brake, slow down, stop, swerve or in any other way applicable control the said motor vehicle so as to avoid the subject accident, generally causing the subject accident by driving carelessly, generally contributing to the subject accident and failing to keep distance. The appellant had also pleaded Res Ipsa Loquitor.

6. It was the appellant's case that following the death of the deceased his estate suffered loss and damage.

7. The defendant/respondent vide his defence dated 5th October, 2019 denied the claim and the particulars of negligence and put plaintiff/appellant to strict proof. In the alternative the defendant/respondent averred that the accident was contributed wholly and substantially by the negligence of the deceased. The defendant/respondent set out the particulars of negligence on the part of the deceased as: failing to take reasonable measures expected of a prudent pedestrian to avert the occurrence of the accident; exposing himself to danger and/or injury, which he knew or ought to have known in the circumstances, failing to have due regard to his own safety while on the highway, suddenly appearing in the path of the subject Motor Vehicle, Encroaching onto the lawful part of the subject Motor Vehicle, engaging himself in his own frolics while on the highway, failing to adhere to the provisions of the *Traffic Act*, being generally negligent and Res Ipsa Loquitor.

8. On 7th December, 2020, the matter was heard. The Appellant and the Respondent testified in support of their respective cases.

9. The trial court after considering the evidence on record delivered its judgment on 12th April, 2021 dismissing the Appellant's suit for reasons that she had not proved negligence on the part of the defendant on a balance of probability.

10. The Appeal was canvassed through written submissions. The Appellant filed her submissions on 28th November, 2023 whereas the Respondent filed his on 29th November, 2023.

Appellant's submissions

11. The Appellant submitted that based on the evidence which was tendered before the trial court, the accident was caused by the sole mistake of the driver of the subject Motor vehicle who was driving on the wrong lane.

12. It was the Appellant's submissions that DW1 confirmed in his testimony that he saw the deceased on the right side of the road as he drove before the accident occurred.

13. She argued that the fact that the respondent confirmed to have seen the deceased ahead of him heading to the right side of the road before the accident occurred shows that it was the driver of the subject motor vehicle that went to where the deceased was and he did not exercise due care to avoid the accident.

14. She contended that what only remained unclear was the exact place where the deceased was found since DW1 contradicted himself by stating that he had passed the deceased by the time the accident happened claiming that he slipped yet he did not see him slip.

15. The Appellant cited the cases of Oluoch Eric Gogo vs Universal Corporation Limited [2015] eKLR for the proposition that the duty of the first appellate court is to approach the whole evidence on record afresh and with an open mind.

16. She also placed reliance on the case of Rentco East Africa Limited vs Dominic Mutua Ngonzi [2021] eKLR where the court cited the case of Khambi and Another vs Mahithi and Another [1968] EA 70, where it was held that:

> "It is well settled 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, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

17. In light of the above cases, the Appellant submitted that the trial court erred in dismissing her case while there was plausible and/or credible evidence tendered before it showing the Respondent was to blame for the subject accident.

18. On quantum, the appellant submitted that the trial court erred in failing to make a finding on quantum contrary to provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010 on the contents of judgment.

19. The appellant cited the cases of Joseph Kamau vs Health Service Board P.C.E.A. Kikuyu Hospital [2019] eKLR & Ceasar Karanja Justin vs Joseph Ndungu Karimi [2017] eKLR where it was held that the law enjoins courts that dismiss an action for damages to assess damages they would have awarded had the suit succeeded.

20. The Appellant thus proposed damages to be awarded as follows;

21. For loss of dependency, the Appellant submitted that the deceased was in good health prior to his death and a causal worker earning at least Kshs. 10,000/= per month.

22. She submitted that no proof of earnings was produced under this limb. Citing the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the court held that documentary evidence was not the only evidence to prove an individual's earnings, she urged this court to apply Kshs. 10,000/= as the deceased's monthly income.

23. On multiplier, the Appellant proposed a multiplier of 31 years for reasons that the deceased was 29 years old and he was expected to work given he was not restricted by the official retirement age of 60 years.

24. On dependency ratio, the appellant urged the court to apply a ratio of 2/3 for reasons that his parents and siblings depended on him at the time of his death.

25. She thus proposed a sum of Kshs. 2,480,000/= under this head to be arrived as follows;

    Kshs. 10,000/= x 2/3 x 31 x 12 = Kshs. 2,480,000/=

26. Under the head of pain and suffering, the appellant submitted that the deceased died a few hours after the occurrence of the accident and as such he must have undergone extreme pain and suffering. In support of her submissions, the Appellant relied on the case of Francis Wainaina Kirungu (suing As Personal Representative of the estate of John Karanja Wainaina) Deceased vs Elijah Oketch Adellah [2015] eKLR where the high court on appeal upheld the sum of Kshs. 50,000/= under this head, and contended that considering the inflation and age of this authority a sum of Kshs. 100,000/= would suffice.

27. For loss of expectation of life, the appellant proposed Kshs. 350,000/=.

28. In regards to special damages, the Appellant prayed for Kshs.550/=

29. She also prayed for costs of the Appeal and the lower court's costs and interest.

Respondent's Submissions

30. On Liability, the Respondent submitted that as a general rule, the burden of proof is on the plaintiff to prove his case to the required standards, failing which the suit will warrant an automatic dismissal. He argued that the plaintiff is required to prove negligence as against the Defendant and also establish the causal link between the Defendant's negligence and his injury if it is established that the alleged accident did occur. In support of this position, the Respondent relied on Section 107 of the *Evidence Act* and the cases of Kiema Mutuku vs Kenya Cargo Handling Service Ltd (1991) KAR 464, Wareham t/a A.F. Wareham & 2 Others vs Kenya Post Office Savings Bank [2004] 2 KLR 91, Joyce Njeri & another vs Chovu Zaganya & Another [2017] eKLR & Yussuf Abdallah vs Mombasa Liners Limited [2004] eKLR.

31. The respondent argued that PW1 who was the sole witness confirmed that she did not witness the accident and as such her testimony was purely hearsay with no probative value, and could not establish the chain of events.

32. The respondent further submitted that the Appellant having failed to prove negligence at the trial stage and the appellate stage as against him, then the appeal herein is without any merit both on liability and on quantum.

33. The respondent urged the court to dismiss the appeal with costs to him.

Analysis & Determination

34. From the pleadings, the evidence and submissions, these issues arise for determination:

    i. Whether the appellant proved liability to the desired threshold.

    ii. Whether the trial court ought to have quantified the damages.

35. This being a first appeal, this court has a duty to re-evaluate the case, and come up with its own conclusion as was held in Jabane vs Olenja, [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs Sunday Post [1958] E.A. 424.

36. In Henderson vs Henry E Jenkins & Sons [1970] AC 282 at 301 Lord Pearson at letter D stated:

> " In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.
>
> But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

37. The standard of proof in civil cases is on a balance of probability. The balance of probability was defined in the case of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

38. In Miller vs Minister Of Pensions 1947 ALL E.R 372, Lord Denning puts this standard in the following terms: -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

39. In James Muniu Mucheru vs National Bank of Kenya LTD C.A Civil Appeal No 365 of 2017 [2019 eKLR, the Court stated as follows: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

40. In the instant case, only the Appellant and the Respondent testified in support of their respective cases.

41. The Appellant testified that her son was knocked by the subject motor vehicle and was taken to Nakuru PGH. She confirmed she did not witness the accident.

42. The Respondent testified that he was driving the subject Motor Vehicle on a murram road from Tupoti heading to Tipis when he saw a person walking. He said while passing him, he went to the right hand side on the wall and climbed it but he fell down on the road and entered in between the wheels. It was his testimony that the deceased was stepped on by the rear wheel after he slipped and fell. He said he could not have avoided the accident as he fell when he had passed. He said the vehicle did not sway or slip on any side and that he found the deceased under the vehicle.

43. Section 107 states;

> 1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
>
> Section 109 further provides that:
>
> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person."

44. In East Produce Kenya Limited vs Christopher Astiado Osiro [2006] eKLR, the court stated that he who alleges negligence bears the burden of proof.

45. In the case of Kiema Mutuku vs Kenya Cargo Hauling Services Ltd (supra) the court held that;

> " there is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence"

46. It was thus upon the appellant to discharge the burden of proof of negligence against the respondent

47. From the evidence adduced there is no contention that an accident occurred. The evidence of the Appellant confirmed that the deceased died as a result of a road traffic accident but did not prove the circumstances under which the accident occurred. The respondent challenged the Appellant's claim and it was his defence that the deceased climbed a wall on the right side of the road, slipped and fell down on the road. The Appellant chose not to avail the police officer who visited the scene to shed light on how the accident occurred and did not state whether there was a challenge in availing such an officer. What the Appellants wants this court to do is to solely interrogate the evidence of the respondent then determine who was liable for the accident. This court cannot do that as the onus was on her to prove her case to the required standard but she failed to do so. With the evidence tendered it is difficult to ascertain who was on the wrong or contributed to the accident. The appellant did not call evidence to prove the particulars of negligence leveled against the respondent. The fact that the accident occurred involving the motor vehicle that was being driven by the respondent does not translate into the Respondent being culpable. I therefore find the Appellant did not discharge the burden of proof and I uphold the finding of the lower court on liability.

Issue No.2

48. The trial court after dismissing the Appellant's suit failed to quantify damages. It is now trite law that a trial court is under a duty to assess the general damages awardable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa vs Bhogals Garage Ltd CA No. 124 of 1993 reported in [1993] KLR 448 where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment.

49. Similarly, in the case of Matiya Byabaloma & Others vs Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138 where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.

50. In this case the plaintiff prayed for damages under fatal accident act and under the *law reform Act*, and special damages. I have duly considered the submissions of the Appellants in this regard.

51. It is trite law that the assessment of general damages is at the discretion of the trial court.

52. Under the head of pain and suffering, the Appellant has proposed a sum of Kshs. 100,000/=.

53. In Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " 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 award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

54. In Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

55. Similar emphasis was placed in Civil Case No. 56 of 2014 Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another [2016] eKLR where Hon. P. Nyamweya observed: -

> " As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason." (emphasis mine).

56. In light of the above authorities, I find the sum proposed by the Appellant is reasonable and I adopt it.

57. Under the head of loss of expectation of life, the Appellant has proposed a sum of Kshs. 350,000/=. She did not refer me to any authorities in support of this position.

58. In the case of Moses Akumba & Another vs Hellen Karisa Thoya [2017] eKLR, Chitembwe J. held that an award of Kshs. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high.

59. In Omar Sharif & 2 others vs Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR, the court found an award of Kshs. 100,000 as reasonable and not excessive and upheld the same.

60. In Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) vs Mogogosiek Tea Factory Co. Ltd & Another [2018] eKLR an award of Kshs. 200,000/= was made.

61. In West Kenya Sugar Co. Limited vs Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR, the court held that an award of Kshs 200,000 was not excessive.

62. In Patrick Kariuki Muiruri & 3 Others vs Attorney General [2018] eKLR Sergon J. made an award of Kshs. 200,000/= under this heading.

63. In view of the foregoing, I find the sum proposed by the Appellant to be inordinately high, and I award Kshs. 200,000/= under this head.

64. Under the limb of Loss of Dependency, the Appellant prayed for a total sum of Kshs. 2,480,000/=

65. It is trite that dependency is a question of fact to be established in each case.

66. The formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependents. See the Court of Appeal for Eastern Africa in Radhakrishen M. Khemaney v. Mrs Lachaba Murlidhar (1958) E.A. 268, 269

Multilpicand

67. It was the Appellant's case that the deceased was a causal laborer earning at least Kshs. 10,000/= per month. However, no proof of earnings was produced. This Court should therefore refer to the statutory regulations on Basic Minimum Wages for the relevant year in accordance with Section 60 (1) (a) of the *Evidence Act*. The Regulation Of Wages (General) (Amendment) Order, 2017, which is applicable for the present case where the accident occurred on 2nd July,2017, provides for a basic minimum wage of Kshs. 6,896.15 for a general laborer under column four. The deceased was a resident of Mau Narok according to his death certificate and therefore the said column is applicable. Under this head, I will adopt the said figure of Kshs. 6,896.15.

Multiplier

68. The deceased was 29 years old at the time of his death.

69. In the case of Roger Dainty vs Mwinyi Omar Haji & another (2004) eKLR, the Court of Appeal held that: -

> " To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life."

70. I have looked at the multipliers adopted in cases similar to this case. In David Kimathi Kaburu vs Gerald Mwobobia Murungi (2014) eKLR the court used a multiplier of 30 years for a 28 years old deceased.

71. In Nelson Ndawa Kioko & Anor. vs Mombasa Liners & Anor (2012) eKLR the Court adopted a multiplier of 18 years for a 31 year old deceased.

72. In light of the above cases, I find the multiplier of 31 years proposed by the Appellant to be reasonable.

Dependency Ratio

73. The Appellant urged this court to use the ratio of 2/3 since the deceased supported his parents and siblings prior to his death. However, during hearing the Appellant neither stated the same nor adduced evidence in support of this position.

74. The deceased herein was unmarried with no children.

75. In the case of Alice O. Alukwe Vs Akamba Public Road Services Ltd (2013) eKLR, the court used a dependency ratio of 1/2 on an unmarried lady aged 24 years. In Lucy Wambui Kihoro (Suing as Personal Representative of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR, the Court similarly used a dependency ratio of ½ on an unmarried son aged 30 years.

76. Mayfair Holdings Limited v Christine Rutto (suing on her own behalf and on behalf of the Dependants of the estate of Christopher Kibitok, Deceased) [2020] eKLR the court applied dependency ratio of 1/3 after finding there was no proof of dependency.

77. Considering the circumstances of this case, I will adopt a dependency ratio of 1/3.

78. The total sum I would have awarded on the limb of loss of dependency is Kshs. 855,122.6/= i.e. (Kshs. 6,896.15. x 1/3 x 31 x 12 = Kshs. 855,122.6/=)

79. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. (See Capital Fish Limited vs Kenya Power and Lighting Company Limited [2016] eKLR.

80. In Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, ((KSM Civil Appeal No 179 of 1995,), the court stated:

> " It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."

81. The Appellant pleaded for a total sum of Kshs. 85,550/=. During hearing she only produced a receipt of Kshs. 550/= for motor vehicle search. She has prayed for the said sum herein. I would have awarded the same.

82. In the end, this appeal fails and only succeeds on ground 3 of the Memorandum of Appeal as regards the trial Magistrate's failure to quantify the damages that would have been payable to the appellant had the case been determined in her favour against the Respondent.

83. I uphold the decision of the trial magistrate dismissing the appellant's suit in the Molo Chief Magistrate's Court Civil Case No. 60 of 2019.

84. I shall not interfere with the trial Court's discretion on costs of the suit below and uphold the same. The respondent shall also have costs of this appeal.

85. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU 13TH DAY OF MARCH, 2024.

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H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

Mr. Mboga for Appellant

Mr. Odoyo for Respondent