Jekawa Agencies Limited v Macharia & another (Suing as the Legal Representative of the Estate of Elija Gachoka Macharia - Deceased) (Civil Appeal E044 of 2023) [2024] KEHC 3815 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E044 OF 2023

FROO OLEL, J

APRIL 12, 2024

BETWEEN

JEKAWA AGENCIES LIMITED .... APPELLANT

AND

ROBERT WACHIRA MACHARIA .... 1ST RESPONDENT

MARY WANJIKU MACHARIA .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIJA GACHOKA MACHARIA - DECEASED

(Appeal from the judgment of Honourable Martha Opanga SRM dated 21st February 2023, delivered in Kangundo CMCC no. E037 of 2020)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Honourable Martha Opanga SRM dated 21st February 2023, delivered in Kangundo CMCC no. E037 of 2020 where she awarded the Respondent a sum of Ksh.5,034,982.10/- made as follows

    a. Pain and suffering Ksh. 30,000/-

    b. Loss of expectation of life Ksh. 120,000/-

    c. Loss of dependency Ksh. 4,800,000/-

    d. Special damages Ksh.75,000/-

    e. Plus cost and interest which costs were assessed at ksh.227,522.00/-

B. The Pleadings

2. The Respondent had filed the primary suit as the legal beneficiaries of the estate of the late Elijah Gachoka Macharia and claimed damages under the *Law Reform Act*, Fatal Accident Act and Special damages as against the appellant. It was pleaded that on 25/3/2019 the 'deceased' was lawfully walking along Kangundo-Nairobi road when at Kamulu are the appellant motor vehicle Registration no. KCQ 788F (hereinafter referred to as the suit motor vehicle) was so negligently, carelessly and/or recklessly driven managed and/or controlled by the appellant's driver agent employee and /or servant that it was allowed to loss control veer off the road and violently collided with the 'deceased' thereby causing him fatal injuries. The Respondents particularized the negligence and/or carelessness alleged and thus sought for compensation as pleaded.

3. The appellant in response filed their statement of defence and stated that they were not liable for this accident either directly and/or vicariously and put the respondents to strict proof thereof. The appellant further denied owning the suit motor vehicle and/or the fact that an accident did occur on the material date as between the said suit motor vehicle and the deceased. In the alternative and without prejudice to the above the appellant did aver that if indeed an accident did occur then it was caused by the negligence of the deceased which negligence was particularized in the statement of defence. Further the appellant averred in the alternative that if the accident did occur, that it was inevitable and could not be reasonably avoided by any reasonable person acting in a reasonable manner expected under the said circumstances. The appellant therefore prayed that this suit be dismissed with costs.

C. Evidence at trial

4. PW1 Cpl Milton Omondi testified that he was a police officer based at KBC Matungulu traffic base. He had the police abstract with respect to an accident which occurred on 26/3/2019 at 2.00pm along Kangundo – Nairobi road at Athi bridge area. The said accident was reported under OB 23/26/3/2019. The accident involved motor vehicle registration no. KCQ 788F Isuzu canter which knocked the deceased and fatally injured him. The circumstances of the accident was that the deceased was run over by the rear tyre of the suit motor vehicle. He belied that the suit motor vehicle must have hit the pedestrian and run over him but the matter was still pending under investigations. In cross examination PW1 confirmed that he could not tell the point of impact and did not have the sketch drawings of the accident scene and he could not tell if anybody was charged with a traffic offence in relation to this accident. He relied on information obtained from the OB extract and police abstract.

5. PW5 Robert Wachira Macharia testified that the deceased was his brother and had died as a result of fatal injuries sustained arising from a road traffic accident which occurred on 26/3/2019. He relied on his sworn witness statement where he recalled being called by a police officer from Tala KCB police station informing him of the accident. He rushed to the police station and was informed that his brother had sustained fatal injuries and died. He proceeded to Kangundo level 4 hospital mortuary and positively identified his brother's body. The deceased died aged 43 years and earned ksh.40,000/- per month as a driver of a professor.

6. The deceased was survived by two dependents being his mother Mary Wanjiku Macharia aged 67 years and son Maxwell Macharia Gachoka aged 14 years who wholly depended on him for their upkeep. He later picked the police abstract form Tala KBC police station traffic base which confirmed that the deceased was knocked and fatally injured by the suit motor vehicle and also the said suit motor vehicle driver was to blame for causing the accident. A motor vehicle search from the registrar of motor vehicle also confirmed that the suit motor vehicle was registered in the name of the appellant company and were therefore liable to compensate the Respondents for the loss suffered.

7. In cross examination the PW2 reiterated that the owner of the suit motor vehicle was the appellant company but had nothing to show that the said company was related to Jekawa Agencies. He did not witness the accident and used ksh.79,090 as funeral expenses. He did not have any evidence to prove that the deceased used to earn ksh.40,000/- as a driver but as brothers they shared a lot and that was the basis of his information, based on the police abstract he blamed the driver of the suit motor vehicle for the accident which occurred.

8. PW3 Mary Wanjiku Macharia testified that the deceased was her 2nd born child and had died as a result of injuries sustained in a road traffic accident. She relied on her recorded witness statement where she stated that she had been called by PW2 on 26/3/2019 and was informed of the accident which had occurred and it resulted in the deceased sustaining fatal injuries. He was an energetic young man aged 42 years and was earning ksh.40,000/- monthly partly which he used to maintain her and her grandson Maxwell Macharia Gachoka (the deceased son). They had suffered as a result of his demise and prayed for compensation. In cross examination PW3 reiterated that they had depended on the deceased for upkeep which they lost as result of his death. She was the one taking care of the deceased son Maxwell Macharia Gathoko and depended on well-wishers and family and bursary to maintain the said child.

9. The appellant did not call any witness to testify on his behalf and proceed to close this case. The trial magistrate did consider the evidence adduced and submissions field and did enter judgment in favour of the respondent in the sum of ksh.4,920,090.00 plus costs and interest.

10. Being wholly aggrieved and dissatisfied by the judgment/decree issued, the appellant did prefer this appeal and raised fifteen (15) grounds of Appeal namely;

    a. The learned magistrate misdirected herself and erred both in law and in fact by holding that the Respondents had proved their case against the appellant on a balance of probabilities.

    b. The learned trial magistrate misdirected herself and erred both in law and in fact by holding the appellant 100% liable for the alleged accident the subject of this suit against the weight of the evidence and thus arrived at the erroneous finding on liability.

    c. The learned trial magistrate misdirected herself and erred both in law and in fact by holding the appellant 100% liable whereas evidence on record called for dismissal of the Respondents' entire suit against the appellant.

    d. The learned trail magistrate misdirected herself and erred in law and in fact by failing to find that the Respondents failed to discharge their duty of establishing negligence on the part of the Appellant and thus arrived at an erroneous finding on liability.

    e. The learned trial magistrate misdirected herself and erred in law and in fact by failing to find that the burden of proof was upon the Respondents to prove how the accident occurred and not on the appellant and thus arrived at an erroneous finding on liability.

    f. The learned trial magistrate misdirected himself and erred in law and in fact by awarding damages for loss of dependency that is so manifestly excessive as to be erroneous.

    g. The learned trial magistrate misdirected herself and erred in law and in fact by using an income of ksh.40,000/- which was totally unsupported by any evidence in awarding damages for loss of dependency that is so manifestly excessive as to be erroneous.

    h. The learned trial magistrate misdirected himself and erred both in law by considering facts outside the evidence adduced and hence awarded earnings of ksh.40,000/- not supported by any evidence and hence arrived at an erroneous award.

i. The learned trial magistrate misdirected herself and erred in law and in fact by awarding a dependency ration of 2/3 which was unsupported by evidence thus rendering the whole assessment of damages erroneous.

j. The learned trial magistrate misdirected herself and erred in law and in fact by finding that the respondents entirely depend on the deceased in awarding a dependent ration of 2/3.

k. The learned trial magistrate misdirected herself and averred in law and in fact in failing to find that the deceased was not married and hence apply a dependency ration of 1/3 instead of 2/3.

l. The learned trial magistrate misdirected herself and erred both in law and in fact by considering extraneous matters and going out of the ambit of the proceedings and evidence tendered before her and hence arrived at an erroneous decision on quantum.

m. The learned trial magistrate misdirected herself and averred both in law and in fact by a multiplier of 15 years for a person who died at the age of 43 years without considering the benefit of lump sum payment and hence arrived at an erroneous decision of quantum.

n. The learned trial magistrate misdirected herself and erred both in law and in fact by a multiplier of 15 years for a person who died at age of 43 years without considering the vicissitudes of life and hence arrived at an erroneous decision on quantum.

11. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect to quantum and liability be set aside and this court be pleased to reassess the proper damages payable to the Respondent.

D. Submissions

i. Appellant's Submissions

12. The appellant filed their submission dated 14th September 2023 and submitted that the Respondent had failed to prove that the appellant was negligent and thus 100% liable for causing this accident. There was no eye witness called to testify as to the how the accident occurred and the police abstract could not be used to prove liability of either party in absence of comprehensive investigations carried out. Reliance was placed on 2OS & CAO (suing as the legal representatives in the estate of SAO (deceased) versus Amollo Stephen (2019)eKLR. Further no evidence was lead to prove any of the particulars of negligence as particularized under paragraph 4 of the plaint. Reliance was placed on Kiema Mutuku versus Kenya Cargo Hauling Services Ltd 1991 as cited in the case of Eunice Wayua Munayo versus Mutilu Beatrice and 3 others (2017)eKLR, where it was held that there was no liability without fault and the plaintiff was duty bound to prove some negligence as against the defendant . If the court were to hold otherwise, then the appellant prayed that each party should carry equal burden in the ration of 50:50%.

13. Further the appellant faulted the trial court for using multiplicand of ksh.40,000/- yet it was not proved that the deceased earned this amount of money. In this regard the court then ought to have adopted a global sum method of assessing damages and/or would have used the regulations of wages citation (general) (amendment) order, 2018 which came into force on 1st May 2018. Given that the 1st Respondent did produce the deceased driving license, the wages applicable ought then to have been ksh.13,431.30/-. The multiplier too ought to have been reduced to 10 years form 15 years. Guidance was placed on the case of Annah Mbinya Mbuvi and another vrs Elias Nyaga (alias Elias Mugendi Nyanga) 2017eKLR.

14. The appellant thus prayed that his appeal be allowed with costs.

ii. Respondents Submissions

15. The respondent did file their submissions dated 21st September 2023 where they rehashed that facts of the case and further submitted that they had through evidence presented proved their case and discharged the legal burden placed on them, however the evidential burden was on the appellant to disapprove or rebut the allegations made. They did not call any witness and the trial court could therefore not be faulted for believing the respondents case. Reliance was placed on Minalisa hotel Limited vrs Elizabeth Habin Telephone and another (suing as administrators and legal representatives of Francis Spinks Komora(deceased) 2021 eKLR, Dare versus Pulphem (1982) 148 CLR 658 Froom versus Butahn (1976) Q B 286.

16. On quantum awarded, it was proved that the deceased was 43 years of age and was in strong and Robust Health. He was a driver by occupation earning ksh.40,000/=. The award under *Law reform Act* and *fatal Accidents Act* was therefore proper. Reliance was placed on Muthiku Muciimi Nyaga (singing as Administrator of the Estate of James Githinji Muthika (deceased) versus Dubai Superhardware (2021) eKLR, Beatrice angui Thairu versus Hon. Ezekiel Baragetuny & anor Nairobi HCC no. 1638 of 1988(UR) & David Kimanthi Kaburi vrs Gerald Mworobia Murungi (suing as legal representative of the Estate of James Mwenda Mrorobia (deceased)(2004)eKLR.

17. Based on the facts of the cases as supported by various citation, it was the respondents submissions that the award of ksh.4,800,000/- under loss of dependency was sufficient and justifiable. The appeal therefore had no merit and the same ought to be dismissed with costs to the respondent.

Analysis and Determination

18. I have considered the entire proceedings of the trial court, the record of Appeal and the submissions of the parties herein. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor however the court will analyze the evidence before it and arrive at its own independent conclusion. I am guided by the case of Selle & Another Vs Associated Motor Boat Company Limited & others (1968) EA 123 where it was stated that;

> " 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 principals 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 conclusion 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 demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270.

19. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully

weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

20. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

I. Whether the trial court erred in finding the Appellant 100% liable

21. On the question of proof of liability, the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR did succinctly proffered that ;

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...",.

22. In this appeal, the Appellant has challenged both liability and quantum arrived at by the trial Magistrate and averred that the trial court erred in law and in fact in holding that the Appellant was 100% liable for the accident which occurred, yet this was against the weight of the evidence that was adduced during trial and thus the trial courts finding was erroneous. This court notes from the proceedings before the trial court, that the Appellant did not offer any evidence during trial to show any negligence on the part of the deceased.

23. The evidence presented was that the deceased was walking off the Kangundo- Nairobi road at Kamulu area, when he was knocked down by the suit motor vehicle. No evidence in rebuttal was adduced to show negligence on the part of the deceased to support a finding of contributory negligence. It remains basic law that the only forum where the respondent's evidence could have been challenged was at trial. Since the Appellant failed to call any witness the respondent's evidence remained uncontroverted and thus proved.

24. In Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi (Millimani)HCCC NO 834 OF 2002 Lessit J citing the case of Autar Singh Bahra & Another Vs Raju Govindji, HCCC NO 548 OF 1998 where it was appreciated that;

> " Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail."

25. In the case of Shaneebal Limited Vs County Government of Machakos (2018) eKlr , Odunga J relied on the case of Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi (Millimani) HCCS No 1243 OF 2001 where it was held that;

> " It is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged"

II. Whether Quantum Awarded was Excessive.

26. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu &Another (supra). Further the Court of Appeal in the case Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 Stated:

> " Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-
>
> 'An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 ..."

27. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate".

28. Similarly, in Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

29. The Appellant faulted the trial Magistrates finding on quantum on the basis that no proof was presented to show that the deceased was earning a sum of Kshs.40,000/= monthly, while working as a driver of a lecturer and further PW3 did not demonstrate that the deceased used to give her between Kshs.20,000/= to Kshs.30,000/= monthly to maintains his family. In absence of such evidence, it was submitted that the court should have adopted the global award approach or used, the Regulations of wages citation (General),(Amendment) order, 2018, which placed a drivers wages at Kshs 13,431,30/=. The appellant relied on Annah Mbinya Mbuvi & Another Vs Elias Nyaga (Alias Elias Mugendi Nyanga),(2017).

30. In support of quantum award the Respondents urged the court not to interfere with the same as it was proved that the deceased died aged 43 years, he was strong and of roboust health, and was a driver by profession earning a monthly income of Ksh.40,000/=. The trial court was therefore right to rely on the *law reform Act*, and the *Fatal Accidents Act* in arriving at the quantum of Kshs.5,025,090/=. Reliance was placed on the case of Muthike Muciimi Nyaga (suing as Adminsitrator of the Estate of James Githinji Muthike (Deceased) Vs Dubai Superhardware (2021) eKlr & Beatrice Wangui Thairu Vs Hon Ezekiel Barngetung & Another, Nairobi HCC No 1638 of 1998 (UR).

31. The trial court did find that the deceased was 43 years of age at the time of his death and worked as a driver earning Kshs.40,000/=, and from his earning, he used to take care of his son aged 15 years, together with his mother and brother. The trial court proceeded to assess loss of dependency as 40,000/= x 2/3 x 12 x 15=Kshs.4,800,000/=, which she found to be reasonable. During cross examination PW2 did stated that "The deceased earned about Kshs.40,000/=. I have nothing to show for it but we shared a lot with him. He drove for a lecturer. I don't know his name." PW3 on her part in cross examination also admitted that admitted that, " I have my witness statement. I signed it. My son earned Kshs.40,000/=. I didn't include it in my statement."

32. Based on the evidence adduced, it is obvious that the respondents did not prove that the deceased was earning Kshs.40,000/= monthly as a driver of the "unknown lecturer" and the trial court therefore fell in error in using the sum of Ksh.40,000/= as the Multiplicand, when there was no basis to support the same. This court therefore has to relook at the award on loss of dependency and find an appropriate award. The Court of Appeal in Chunibhai J. Patel and Another vs. P. F. Hayes and Others [1957] EA 748, 749, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

> " The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. "(Emphasis added)".

33. Where no evidence is lead to prove multiplicand, the court can use the global award method in determining the level of dependency, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case. In the alternative where it is proved that the deceased was in gainful employment, recognized under the Minimum wage Act, then the court is also at liberty to use "The Regulations of wages citation, (General)(Amendment) Order" to determine the minimum wage applicable to the deceased depending on the kind of work he/she was engaged in.

34. While the respondents did not prove that the deceased earned Kshs.40,000/= monthly, PW2 did produce his driving license as an Exhibit, and on balance of probability did prove that he may have been earning a leaving as a driver. The accident occurred on 26th March 2019, and specifically using the Regulation of wages citation, (General), (Amendment) order, 2018, which came into force on 1st May 2018 the minimum wage for a driver as applied would have been Ksh.13,431.30/=. Given that the deceased was also taking care of his young son and mother the dependency ration applied of 2/3 was appropriate. At 43years the multiplier used of 15 years too is appropriate given the vicissitude and uncertainties of life. The respondents should thus have been awarded as sum of Ksh.13,413.30/= x 2/3 x 12 x 15=1,609,596/=.

Disposition

35. Having exhaustively analyzed all the issues raised in this appeal I find that it partially succeeds on the issue of quantum. I do set aside the finding by the trial court on loss of dependency in the judgment dated 21st February 2023 by Hon Martha Opanga (SRM) In Kangundo CMCC No E037 of 2020 and substitute the same with a finding that the respondent is entitle to an award of Kshs.1,609,596/=.

36. The final award for this claim with therefore be as follows;

    a. Liability 100% as against the Appellant

    b. Pain & suffering Kshs.30,000/=.

    c. Loss of expectation of life Kshs.120,000/=

    d. Loss of dependency Kshs.1,609,596/=

    e. Special Damages Kshs.75,090/=

    Total Kshs.1,834,686/= plus costs and Interest.

37. The appellant is warded costs of this Appeal which is determined at Kshs.180,000/=.

38. It is so ordered.

JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 12TH DAY OF APRIL, 2024.

In the presence of: -

Mr Mugwa for Appellant

Ms Mulondo for Respondent

Sam Court Assistant