Kamande & another v Ngacha (Suing as the legal administrator of the Estate of Daniel Gatimu Njiraini) (Civil Appeal 29 of 2020) [2024] KEHC 4098 (KLR) (8 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4098 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 29 OF 2020

GL NZIOKA, J

APRIL 8, 2024

BETWEEN

GEORGE WAINAINA KAMANDE ..... 1ST APPELLANT

SHENGLI ENGINEERING CONSTRUCTION CO LTD ..... 2ND APPELLANT

AND

PERIS NYAWIRA NGACHA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF DANIEL GATIMU NJIRAINI) ..... RESPONDENT

(Being an appeal against the decision of. J. Karanja Senior Principal Magistrate (SPM) dated 17th September 2020 vide Civil Case No. 511 of 2015 at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. By a plaint dated, 12th August 2015 and amended on 27th June 2016, the plaintiff (herein "the respondent") sued the defendants (herein "the appellants") seeking for judgment for: -
    a. General damages under the Fatal Accident Act (Cap 32 Laws of Kenya).
    b. General damages under the *Law Reform Act* (Cap 261 Laws of Kenya)
    c. Special damages of Kshs. 280,560
    d. Costs of the suit and interest
2. The respondent's case was that, on the 23rd April 2014, the deceased was a lawful pedestrian walking off the road along Flyover-Njabini road when the 1st appellant negligently drove motor vehicle registration number KBY 679K causing it to lose control and knock down the deceased. That the deceased, passed on as a result of that accident.

3. The respondent blamed the 1st appellant for causing the accident, by driving the subject motor vehicle at a high speed, in a zig-zag manner, failing to slow down, brake or swerve to avoid the accident, driving on the wrong side of the road and/or failing to keep a proper lookout for other road users.

4. The respondent averred that, the 2nd appellant was vicariously liable for the negligence of the 1st appellant.

5. However, by an amended statement of defence dated, 4th August 2016, the appellants denied liability and averred that, no accident occurred and neither did the deceased pass on as a result thereof. That, if an accident occurred at all, then on a without prejudice basis, the same was solely or substantially contributed to by the negligence on the part of the deceased.

6. Further, the deceased failed to keep a proper look out for road users, have sufficient regard to his own safety, exposed himself to the risk which he knew or ought to have known, hence the principle of volenti non-fit injuria.

7. However, the respondent filed a reply to defence dated 21st September 2015 and amended on 18th August 2016, reiterating the averments in the plaint and refuting all the particulars of negligence attributed to the deceased.

8. The case proceeded to full hearing. The respondent's case was supported by the evidence of; Peris Nyawira Ngacha, the wife of the deceased. She testified that, the deceased was a registered engineer employed as an inspector of works by the 2nd appellant. That, he was earning a salary of Kshs. 55,462 per month. Further he was thirty-nine (39) years old and together they had three (3) children.

9. She further testified that, the driver of the motor vehicle, who is the 1st appellant was charged vide a traffic case No. 8 of 2014, found guilty, convicted and fined Kshs. 100,000 in default to serve one (1) year imprisonment.

10. She averred that, as a result of the death of her husband she, and her children lost support. That she claims for the same plus Kshs 280,000 spent on the funeral. However, she acknowledged receipt of; Kshs. 3,000,0000 paid to her as workman's compensation but stated that, it was not enough.

11. The defence case was supported by the evidence of Jenaide Wangari Wangui, a Human Resource Assistant Manager of the 2nd appellant's company. She conceded that an accident occurred on 23rd April 2014, while the company was constructing the Njabini-Mugumu Road, C 68.

12. That it involved a company truck and employee. That the deceased told the truck driver to reverse, and when he did, he felt something on the tyre and when he opened the door and checked, he saw a human body. That, according to the driver whether he moved forward or backword he could not save the deceased's life.

13. That, she went to the scene and one could not look at it twice, as the place was bloody with the deceased's body parts all over. That, the deceased was a material's engineer and the accident occurred when he was on duty. That subsequently, the family was paid compensation of Kshs, 3,600,000.

14. In cross-examination she confirmed that the driver was charged and convicted, and fined as stated herein.

15. At the conclusion of the case, the trial court, vide a judgment dated 17th September 2020, held that, both parties contributed to the accident and apportioned liability in the ratio of 90:10% in favour of the respondent as against the appellants.

16. Pursuant thereto, the trial court awarded damages as follows:

Pain and suffering ----------Kshs. 50,000.00

Loss of expectation of life ----------Kshs. 100,000.00

Loss of Dependency ----------Kshs. 6,932.70. 00

Special damages----------Kshs. 265,510.00

Sub total award ----------Kshs. 7, 348 246.00

Less 10% contribution----------(Kshs 734,824.60)

Less compensation awarded under

Work Injury Benefit Act----------Kshs. 3,360,000.00

Total sum payable:---------- Kshs. 3, 253, 421.40

17. However, the appellants are aggrieved by the decision of the trial court and appeals against it on the following grounds: -

    a. That the learned trial magistrate erred both in law and in fact by finding the appellants 90% liable despite noting that the deceased was the orchestrator of his own misfortune when he instructed the 1st appellant to reverse while the deceased was on a call in blatant disregard to his own personal safety.

    b. That the learned trial magistrate erred both in law and in fact by proceeding to find that the deceased was earning Kshs 55,462 when indeed there was no evidence to support such income.

    c. That the learned trial magistrate erred both in law and fact by entering judgment against the appellants by awarding the respondent a sum of Kshs 7,348,000 as general damages, which award was manifestly excessive and outside the confines of reasonableness compared to the cited authorities.

    d. That the learned trial magistrate erred both in law and in fact by failing to hold that the respondent had sufficiently been compensated under Work Injury Benefit Act in the sum of Kshs 3,360.000 and that such an award by the directorate of occupational safety was never objected to and/or appealed against.

    e. That the learned trial magistrate erred both in law and in fact by failing to hold that the respondent was sufficiently compensated and that the respondent's case amounted to double compensation and unjust enrichment

    f. The learned trial magistrate erred both in law and in fact by disregarding the written submissions filed by the appellants.

    g. That the appellants will upon receipt of the typed and certified proceedings and judgment in Naivasha Chief Magistrate's Civil Case Number 511 of 2015 Peris Nyawira Ngacha (Suing as the legal administrator of the Estate Daniel Gatimu Njirani –vs-s George Wainaina Kamande & Another) seek leave if necessary to file further and/or supplementary Memorandum of Appeal so as to include other grounds that may become apparent therein.

18. The appellant prays for the following orders: -

    a. That his appeal be allowed and the lower court judgment be set aside

    b. In the alternative the lower court's award be reduced.

c. Costs in this court and the lower court be for the appellants.

19. The appeal was disposed of by the parties filing of submission. The appellants in their submissions dated; 5th December 2022, argued that the deceased was an employee of the 2nd appellant and died in the course of his duties. Therefore, the respondent cannot claim for damages under the *Work Injury Benefits Act*, 2007, the *Law Reform Act* and the Fatal Accident Act simultaneously.

20. That, *Work Injury Benefits Act* provides for the legislative framework within which the respondent ought to have sought redress. They cited the preamble of the *Work Injury Benefits Act* which states that, the "Act" provides for compensation to employees for work related injuries and diseases contracted in the course of their employment. Further, Part IV (four) of the Act that lays out the procedure once there has been an industrial accident.

21. The appellants submitted that, in accordance with the provisions of the Work Injury Benefit Act, the 2nd appellant reported the accident to the Directorate of Occupational Safety which in turn tabulated compensation of; Kshs. 3,360,000 as payable to the deceased family and which was duly paid. That, the respondent never appealed and/or objected to the decision of the Director under section 51 of the Work Injury Benefit Act, which provides avenues of appeal, connoting that she was satisfied with the compensation and in the circumstances she ought to be estopped from filing any further claims unless appealed to the Employment and Labour Relations Court.

22. The appellants argued that, the lower court lacked jurisdiction to entertain the respondent's claim as the Employment and Labour Relations Court has the exclusive original and appellate jurisdiction over all disputes relating to employment under Article 162 (2) (a) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*. Reliance was placed on the case Attorney General vs Law Society of Kenya & Central Organisation of Trade Unions [2017] eKLR.

23. Further, that the respondent contravened the provisions of section 2(3)(b) of the *Law Reform Act* and section 3 of the *Fatal Accidents Act* as the suit was filed thirteen (13) months from the time the court granted the Grant of Letter of Administration Ad Litem.

24. Furthermore, the trial court erred in adopting a multiplicand of Kshs. 55,462 as the deceased monthly income without evidence of the same. That, the respondent did not prove the deceased's monthly income but relied on an acknowledgment note whose authenticity is uncertain. That, the said sum of Kshs. 55,462 was supposedly the gross income of the deceased and not the net income thus the award on dependency was manifestly high.

25. However, the respondent in her submissions dated 21st November 2022 argued that, no evidence was adduced to show that the deceased was the author of his misfortune. That, the appellant failed to call the driver and/or the 1st appellant to testify. Further, the evidence of defence witness one, was pure hearsay as she did not witness the accident.

26. That to the contrary, the respondent produced proceedings of the traffic case that indicated that the 1st appellant was charged, tried and found guilty of causing death by dangerous driving which is prima facie evidence that the 1st appellant is guilty and liable for the deceased death.

27. On the issue of quantum, the respondent cited the case of Bhutt vs Khan [1978] eKLR where the Court of Appeal set out the principles an appellate court should considered in interfering with an award of damages awarded by a trial court being that, the award is inordinately high or low so as to represent an erroneous estimate, or that the judge proceeded on the wrong principles, or misapprehend the evidence in some material respect to arrive at an inordinately high or low figure.

28. That further in regards to damages under the *Law Reform Act*, the respondent relied on the case of; West Kenya Sugar Co Ltd vs Philip Sumba Julaya (suing as the Administrator and personal representative of the Estate of James Julaya Samba (2019) eKLR where the court stated that damages for pain and suffering are recoverable where the deceased suffered as a result of injuries for a period before his death.

29. Further, that the deceased's estate is entitled to be compensated for loss of life expectation diminished as a result of injuries sustained in an accident though both awards shall be minimal where death was immediately after the accident.

30. The respondent submitted that, the deceased suffered severe pain before his death based on the injuries sustained as tabulated on page 66 of the Record of Appeal. Further, the deceased died at the age of thirty-nine (39) years old when at his prime and therefore the trial court's award of damages of Kshs, 50,000 and Kshs. 100,000 are not inordinately high to warrant this court to disturb them.

31. Furthermore, the trial Magistrate applied the correct principles while calculating loss of expectation of life by using Kshs, 55,462 that was the deceased earnings and which was also used to calculate the award under the Work Injury Benefit Act.

32. That, there was no double compensation as the trial Magistrate took note of the sum of Kshs. 3,360,000 compensated under the Work Injury Benefit Act and deducted it from the final award. In any event, the *Fatal Accidents Act* and the *Law Reform Act* provides for compensation and the respondent having stated that she was not satisfied with the award under the Work Injury Benefit Act and moved to the court was acting within her constitutional right.

33. At the conclusion of the argument of the parties I have considered the appeal in light of the materials before the court. Indeed, the role of the appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

34. The court thus observed: -

> "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 principles 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. 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 demeanour of a witness is inconsistent with the evidence in the case generally."

35. To revert back to the matter herein, I note that in arriving at the liability ratio, the trial court stated as follows: -

> "The 1st defendant was found guilty of causing death by dangerous driving and the 2nd defendant is vicariously liable by virtue of being the 1st defendant's employer. For purposes of liability in this suit however, the finding of guilt in the criminal trial does not automatically translate to a finding of total culpability in this civil suit. From the evidence of DW1, the deceased told the tipper driver to reverse and but was said to have been making

a phone call at the time. He ought to have been more cautious and to have been aware of the reversing truck. In the circumstances, he ought to bear some responsibility."

36. It is clear from the aforesaid that, the evidence relied on by the trial court to apportion liability on the part of the deceased was based on what DW1 testified. However, it was hearsay. She was not at the scene of the accident. The driver who allegedly told her that, the deceased was on call did not testify.

37. To the contrary, that driver was tried and found guilty of causing the deceased death, convicted and fined. It therefore follows that, the conviction placed total blame on him. I have indeed perused the proceedings in the traffic case and at page 30 therefore the court stated as follows:

> " The evidence before the court is clear that accused was under instructions to offload A.C to vapour machine which was not seen by the scene visiting officer. Accused was to be guided because there were several people who were spreading material on the road. He had to follow signals or controllers to ensure safety. He chose to reverse the subject motor vehicle without anybody giving him (sic) directions. Indeed, it has been admitted accused reversed for over 100 meters which was dangerous in the circumstances. In fact, to reverse for such a long distance in my view amounts to an extremely reckless act on the part of any driver. It is this reckless act which was the direct and approximate cause of the death of the deceased."

38. Based on the evidence adduced in the trial court on the circumstances under which the accident occurred and in particular the findings of the traffic court, this court is of the opinion that the appellants should have been held 100% liable. However, there is no cross appeal and therefore will leave the finding of the trial court on liability as it is.

39. As regards quantum, I note that in awarding the damages, the trial court stated that as follows: -:

> " The deceased was aged 39 as indicated in the death certificate. For loss of expectation of life, the deceased was a resident engineer working for the 2nd defendant and he was earning Kshs. 55,462 per month. The multiplier suggested by the plaintiffs was 24. This would give the deceased a working life of up to 63. This is on the higher side bearing in mind life's uncertainties and I would reduce this to 16. The deceased was a family man with 3 children and dependency ratio of 2/3 shall be applied. Loss of dependency is therefore calculated thus: Kshs. 54,162 x 12 x 16 x 2/3 = Kshs. 6,932,736"

40. The argument by the appellants is that, the figure of Kshs 55,462 applied as monthly salary of the deceased was not proved. Secondly, the award of Kshs 7,348,000 is high and excessive, in view of the fact that, the plaintiff had already been compensated with a sum of Kshs 3,360,00, as such the award made amounted to double compensation and unjust enrichment.

41. In response, the wife of the respondent produced a receipt showing the amount of money the deceased was earning. She testified that she did not get his payslip. Further she conceded that she signed the compensation acknowledgment.

42. I have perused the compensation acknowledgement and note that a total sum of Kshs 3,360,000 was made vide four different cheques of Kshs 840,000 each. However, the document does not show the amount of money the deceased was earning per month.

43. However, defence witness one, testified on the earning of the deceased and stated that: "I think he was earning Kshs. 46,000 per month. He was 34 years old. He was earning Kshs 56,000." But the defence did not produce any document in support thereof. The defence witness further testified in

cross-examination that, the payslips of the deceased were considered when workman's compensation was calculated.

44. Be that as it were, the question remains how much was the deceased earning? How much was his gross salary and how much was net salary? Who was to prove all these issues? According to section 107 of the *Evidence Act*, it was the respondent. But that was not done. Therefore, the sum of; Kshs 55,462, applied was not substantiated as the learned trial Magistrate did not address the same.

45. In the given circumstances the court should have applied the principle of a global sum, as the deceased was a professional engineer and the issue of minimum wage does not apply and would not be just and fair in the given circumstances.

46. It also suffices to note that, the other argument advanced the appellant is that the respondent had already been compensated and therefore the figure of; Kshs 3,253,421.40 awarded was high in view of the sum of Kshs. 3,600,000 already paid.

47. In my considered opinion compensation principles are settled. The Court of Appeal in the case of; Coastal Kenya Enterprises Limited v Muchiri (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment) held as follows: -

> " In making these awards we identify ourselves with the words of Potter, JA in Rahima Tayab & Others vs Anna Mary Kinanu [1983] KLR 114; where it was held while relying on the oft-cited case of H West and Son Ltd vs Shephard [1964] AC 326 at 345 that:
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> 'Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional."

48. In conclusion I find as follows, the amount of Kshs 55,462 should not have been applied in calculating loss of dependency and global figure should have been applied and taking into account the amount already awarded a reasonable figure of; Kshs 2,200,000 would have been appropriate less 10% to Kshs 2,000,000. The figure awarded has taken into account the inflation factors occasioned by the prolonged period the matter has been in court. Indeed, had the respondent been paid the amount awarded herein in the year 2020, it would have been of greater value.

49. As regards the other sums, awarded of; Kshs 50,000 and Kshs 100,000 for pain and suffering, and loss of expectation of life respectively, does not seem to be in issue. Neither have the appellants raised any issue with the amount awarded as special damages.

50. Therefore. I set aside the judgment of the trial court on quantum only as it relates to the amount awarded for loss of dependency and substitute it in the net sum of Kshs 2,000,000 and enter judgment as follows:

    a. Liability 90:10in favour of and as against the defendants

    b. Pain and suffering---------- Kshs 50,000

    c. Loss of expectation of life---------- Kshs 100,000

    d. Loss of dependency----------Kshs 1, 980, 000

e. Special damages----------Kshs. 265,510.00

f. Total amount----------Kshs 2, 245, 510.50

g. The plaintiff shall also have costs and interest from the date of judgment in the trial court

51. The issue of lack of jurisdiction by the trial court cannot be entertained at appeal stage.

52. It is so ordered

DATED DELIVERED AND SIGNED THIS 8TH DAY OF APRIL 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Alusa for the Appellant

Mr Owuor for the respondent

Ms Ogutu: Court Assistant