Halanka v Mwai ((Suing as the Legal Representative of the Estate of Nahashon Mwai Kinyua - Deceased)) (Civil Appeal E006 of 2022) [2024] KEHC 4469 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4469 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E006 OF 2022

AK NDUNG'U, J

MAY 2, 2024

BETWEEN

KUNI HELE HALANKA ..... APPELLANT

AND

JOSEPH KINYUA MWAI ..... RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NAHASHON MWAI KINYUA - DECEASED)

(Appeal from original Decree passed on 13/04/2022 in Nanyuki CM Civil Case No. 73 of 2020 - HON. A. R Kithinji)

JUDGMENT

1. By way of a plaint dated 08/09/2020, the Respondent sued the Appellant seeking general damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages and interest. The Respondent averred that on or about 20/05/2020, the deceased was a pedestrian along Nanyuki-Matanya road when the motor vehicle registration number KCU 446H was negligently and recklessly driven at a high speed and as a result hit the deceased fatally injuring him. He blamed the Appellant for the occurrence of the accident.

2. The Appellant's defence dated 02/04/2019 vehemently denied the occurrence of the accident and it was averred that in any case if the accident occurred, the same was solely caused and/or substantially contributed by the negligence of the deceased.

3. The Respondent in seeking to prove his case called three (3) witnesses. The Appellant's case was closed without calling any witness but with the admission by consent of the statement of DWI together with a a copy of a Police Abstract and an investigation report. On liability, the trial court found wholly against the Appellant and made an award of a sum of Kshs.1,182,200/- in damages.

4. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 06/05/2022 raising 10 grounds of appeal challenging the trial magistrate's findings on liability and assessment of damages. The appeal was based on the following grounds;

    i. The trial magistrate failed to properly analyse the evidence on record thereby finding the Appellant 100% liable against the weight of evidence.

    ii. The learned magistrate erred by failing to put any weight on police abstract produced blaming the deceased for the accident.

    iii. The learned magistrate erred by not finding that the Respondent had not proved his case to the required standard.

    iv. The learned magistrate erred by disregarding the defence evidence particularly the investigation report and police abstract and failing to find that where police abstract is not challenged, its content cannot be rebutted later.

    v. The learned magistrate erred awarding damages which was manifestly excessive and outside the confines of reasonableness compared to cited authorities and did not commensurate with the nature and general circumspect of the case.

    vi. The learned magistrate erred by adopting a global award under loss of dependency without any basis instead of calculating the same using minimum wage and a reasonable multiplier and dependency ratio.

    vii. The learned magistrate disregarded the written submissions by the Appellant and proceeded to make a finding on issues that were not pleaded nor arose during the trial to the benefit of the Respondent.

    viii. The learned magistrate failed to appreciate the law and wrongly evaluated the evidence on record hence making a wrong conclusion.

    ix. Th learned magistrate erred by failing to give concise statement of the case, evidence adduced by parties, points of determination, decision and reasons of his judgment.

    x. The learned magistrate decision on liability was unjust, against the weight of evidence and was based on wrong principles of law.

5. The parties canvassed the appeal by way of written submissions. On his part, the Appellant submitted that it was PW1 evidence that he was not the investigating officer and he was not at the scene of the accident. He did not have the police file and the sketch map to give a comprehensive account on how the accident occurred and who was to blame. He confirmed that the Appellant was issued with a police abstract contents of which remained uncontroverted and which blamed the deceased for the accident. He further testified that the matter was pending investigation and confirmed that the Appellant's driver was never charged. PW2 testified that he did not witness the accident and was only informed of the deceased's demise.

6. On the evidence of PW3, the eye witness, he submitted that there was an incoherence in his testimony and his written statement in that he stated in the his statement that the deceased was ran over by rear tires whereas in his testimony, he said he was ran over by both front and rear tires; he stated on cross examination that the deceased was hit on the hip joint area and vehicle ran him over hip joint whereas the injuries listed in the post mortem differed; he conceded that he was fuelling his motorcycle and therefore it was impossible to have immediately witnessed the accident; he stated that he recorded his

statement with the police yet his name was not listed on the police abstract as one of the witnesses which was confirmed by the police that the names listed on the abstract were the only witnesses; that he testified that he has never testified in an accident case before.

7. That according to the investigation report produced by the Appellant, it indicated that the deceased was intoxicated hence he was to blame for the accident and this was buttressed by the police abstract and this evidence was not controverted by the Respondent. The evidence therefore absolved the Appellant of liability whatsoever. That there was no way a person would be ran over by rear tires of a motor vehicle unless that person threw himself on the way of the moving motor vehicle and supposing that the deceased was knocked off as PW3 alleged, the impact would have caused grievous injuries than those the deceased sustained. Therefore, the Respondent failed to prove liability on part of the Appellant. That though the Appellant had a duty of care to other road users, the deceased was equally under a duty of care to be cautious while using public road.

8. Further, two abstracts were produced which were conflicting and, in the event, it was then not clear on who was to blame for the accident due to conflicting evidence and the best approach was to apportion liability equally between the parties. Reliance was placed on the case of WK (minor suing through next friend and mother LK) v Ghalip Khan & Another (2011)eKLR and Haji vs Marair Freight agencies Ltd (1984) KLR 139. That there was no evidence attributing negligence on the Appellant's driver and the Respondent failed to prove that the accident ever occurred and having failed to prove their case, the trial court came into the aid of the Respondent by shifting the balance of proof on the Appellant.

9. As to quantum, he submitted that the deceased died on the spot thus the award under the loss of expectation of life and pain and suffering was therefore manifestly excessive considering the range of awards in similar cases. Considering that the deceased was encroaching to the Appellant's vehicle while drunk, connotes a behaviour that would have otherwise shortened the deceased's life expectation and therefore, the award was not justified. He proposed a sum of kshs.10,000/- for pain and suffering and Kshs.50,000/- for loss of expectation of life. On dependency, he submitted that dependency is a matter of fact and must be proved by evidence and reliance was placed on the case of Abdalla Rubeya Hemed vs Kayuma Mvurya & aonther (2017)eKLR and Rahab Wanjiru Nderitu vs Daniel Muteti & 4 others (2016)eKLR.

10. That the trial court adopted the lump sum approach which is only favourable in cases where the deceased person was very young despite the fact that there was evidence that the deceased was 39 years old and was a farmer and therefore, the court was well seized with sufficient details on deceased's earnings and number of years he was expected to have worked. In absence of prove of income, it was incumbent for the court to adopt the multiplier approach by adopting the minimum wage regulation approach or a conventional figure of Kshs.10,000/- to calculate the deceased's earnings. Further, PW1 did not prove that he solely depended on the deceased since he testified that he had other 11 children and did not have any document to prove that the deceased had any source of income.

11. He proposed a dependency ratio of 1/3 and a modest figure of Kshs.10,000/- since the deceased earnings were not known. On the multiplier, he submitted that the deceased was working in the informal sector which would have contributed in reducing his lifespan and he proposed a multiplier of 11 years. He therefore proposed a total sum of Kshs.550,550/- less 50% contribution leading to an amount of Kshs.275,275/- as compensation for the deceased's estate.

12. In rejoinder, the Respondent submission on the issue of abstract was that PW1 pointed out anomalies in the Appellant's abstract in that it showed that the deceased was to blame yet stating in the same abstract that the matter was under investigation.

13. The Appellant's abstract did not give reasons why the deceased was to blame and reliance was placed on the case of Techard Steam & Power Ltd v Mutio Muli & Mutua Ngao (2019)eKLR where the court held that negligence can be proved despite the fact that accident was not reported to the police and failure to call investigation officer is not fatal.

14. It is contended that from the Appellant's submissions, there is an indication that they were not sure who was to blame for the accident since at one point the deceased was blamed for the accident and at another point denied the occurrence of the accident and who was to blame. On the allegation that the deceased was intoxicated, he submitted that the same was not pleaded by the Appellant in their defence and thus, the same should be disregarded as it is settled law that parties are bound by their pleadings. On the private investigation report produced by the Appellant, it was submitted that the allegation that the deceased was intoxicated was based on hearsay since they were not at the scene of the accident. Further, the Appellant failed to call the makers of the said report.

15. Further, the allegation by DW1 that the motor vehicle was been driven at a speed of 40km/hr beats logic how a low impact accident could have caused multiple fractures on deceased's head, spine and abdomen. DW1 also failed to explain the steps he took to avoid the accident. DW1 corroborated the statement of PW3 testimony that the vehicle was been driven at high speed and never took any step to avoid the accident.

16. On damages, it was submitted that it has been appreciated that in an African setting, it is expected that an adult child will assist his aged parents and his family. Reliance was placed on the cases of Kenya Breweries Ltd vs Saro (1981) KLR 408 and Hassan v Nathan Mwangi Kamau Transporters & 5 others (1986) KLR 457. The Respondent testified that the deceased was his first born son and he relied on him for his sustenance because all his daughters were married and his other sons did not work. Reliance was placed on the case of Frankiline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (2020) eKLR where it was held that where the salary of the deceased is not proved, a global sum approach or minimum wage are appropriate in assessing the loss of dependency. On pain and suffering, he urged the court to uphold- the award of Kshs.50,000/- since as per the injuries in the post mortem report, it was clear that the deceased experienced immense pain and suffering. On loss of expectation of life, Kshs.80,000/- was sufficient since there was no evidence that the deceased was of ill health and Appellant has not advanced a good reason for interference with the same.

17. It is the duty of a first appellate court to subject the whole of the evidence adduced at trial to a fresh and exhaustive scrutiny and make its own findings bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others {1968} EA 123 and in Peters v Sunday Post Limited {1958} E.A.

18. In consonance with that duty, I have perused and considered the evidence adduced at the trial court. In so doing, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the learned submissions by counsel and the case law cited.

19. Two salient issues emerge viz;

    a. Who was liable for the accident.

    b. Whether sufficient ground is laid for this court to interfere with the assessment of damages.

20. The evidence before the trial court was as follows; PW1, PC Boniface Mwangi from Nanyuki police station produced the police abstract prepared on 23/05/2020 as Pexhibit6. He confirmed that the accident occurred along Nanyuki-Matanya road on 20/05/2020 and the deceased was fatally injured.

On cross examination, he testified that he was not the investigating officer. He also confirmed that the Defendant's abstracts emanated from their station. That the Defendant's abstract indicated that the deceased was to blame but results showed pending under investigations. That he could not tell whether investigations were concluded and could not tell who was to blame. On re-examination, he testified that results of investigations were to be indicated on section 7 of the abstract.

21. PW2 the deceased's father adopted his statement and produced the plaintiff's documents. He testified that the deceased was 39 years old and he was a farmer. He was earning about Kshs.30,000/- per month and would support them in buying food and medicine. He was spending about Kshs.2,000/-. On cross examination, he testified that the deceased was the first born son and he was in horticultural farming. He had hired land where he was farming tomatoes, French beans and onions. He had no documents to prove deceased's earnings. He stated that his daughters were married and his other sons were doing casual jobs.

22. PW3 Gabriel Macharia Muthee testified that on the material day, he was fuelling his motor bike when he saw the motor vehicle KCU 446H which lost control and hit the deceased who fell on the side of the road. The driver was overspeeding and the deceased was on the side of the road when he was hit. The deceased did not throw himself to the vehicle. On cross examination, he testified that the accident happened at around 6:30 pm and the deceased was on the other side of the road standing on a culvert. That the vehicle swerved and hit him off the road. He was hit on the right side and the vehicle run over him. He was hit on the hips. He denied that the deceased was drunk. He confirmed that his name was not on the abstract as a witness.

23. The defence did not call any witness. They informed the court that they were to call one witness, the defendant, but they adopted his statement and the defence documents by consent.

24. The question of liability is hotly contested. The Appellant's contention is that the trial court disregarded the defence exhibits and more specifically the police abstract and the investigation report produced which blamed the deceased for the accident. He further stated that the abstract was not controverted by the Respondent.

25. I have considered the evidence adduced before the trial court. It is noteworthy that the Appellant did not call any witness to explain how the accident occurred unlike the Respondent who called an eye witness, PW3. Nevertheless, the statement of the Appellant was adopted by consent. In his statement filed in the lower court, he stated that he was driving on the said road at a speed of 40km/h when he came across a crowd of people staggering on the verge of the road. That after passing them, it transpired to him that one of the persons threw himself into the rear of his motor vehicle causing the alleged fatal injuries. That it later transpired that the deceased and his companions were drunk.

26. On the other hand, the private investigation report filed by the Appellant at page two indicated that the Appellant was involved in an accident after a drunkard staggered and fell on the tarmac and then the vehicle rear left tyre ran over him.

27. It is trite law that whoever alleges proves. Section 107 of the *evidence Act* provides;

> ''whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.''

28. The record show that the Respondent tendered evidence which included the evidence of PW3, an eye witness, who testified that the subject vehicle was speeding and it hit the deceased who was off the road. The Respondent discharged the burden of proof.

29. The Appellant did not call a witness but relied on the statement of the driver, a police abstract and an investigation report. The evidence of the driver was in my view of great and particular importance as a rebuttal to the evidence of PW3, the eye witness. The witness statement by the driver even though admitted in evidence, is reduced in value and weight by the fact that the Respondent had no opportunity to test its veracity in cross-examination. Warsame J (as he then was) in Theodore Otieno Kambogo vs Norwegian People's Aid Nairobi, Milimani HCCC No. 774 of 2000 stated;

> " The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the weight and value of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same".

30. Further, the documentary evidence admitted in evidence for the Appellant is not helpful to the Appellant's cause. The police abstract is self- defeatist. It contains contradictory information lending credence to the narrative that it could have been doctored. On the one hand, it indicates that the accident was under investigation while on the other, it indicates the pedestrian was to blame. The maker was not called to explain the anomaly. It is therefore an unreliable document.

31. In terms of the place of a police abstract as evidence in a matter relating to a road traffic accident, the abstract is just a document to show that indeed an accident occurred and does not prevent the court from considering other available evidence as was held in Catherine Mbithe Ngina v Silker Agencies Limited [2021] eKLR where it was stated thus;

> " I must point out however, that the contents of the police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made. It is prima facie evidence of the occurrence of the accident and the particulars of those involved. It can however be rebutted. It was therefore held in Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR:
>
> > "A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

32. The Investigation report too is of no evidential value. The content of the report, that is, the alleged drunk status of the deceased was not pleaded. It is an established legal principle that parties are bound by their pleadings. In Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & Others [2017] eKLR the Supreme Court stated:

> ''In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....''

In any event, the maker of the report was not called to substantiate the findings contained therein.

33. The resultant effect of the above is that the Respondents evidence on causation remains unrebutted. Prove in civil cases is on a balance of probability. In the instant case, my finding is that the Respondent

established liability at 100% against the Appellant and I find no fault in the trial court's findings on liability.

34. On quantum of damages, the Appellant took issue with award on pain and suffering, loss of expectation of life and award on dependency. The principles upon which an appellate court would disturb an award for damages were laid down in Butt -vs- Khan 1977 1 KAR as follows;

> " An appellate court will not disturb an award for damages unless it is 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 on some material respect and so arrived at a figure which was rather inordinately high or low."

35. It therefore follows that for this court to interfere with an award of damages made by the trial court, the above principles must be demonstrated.

36. On pain and suffering the trial court awarded a sum of Kshs.50,000/-. In doing so, the magistrate considered the fact that the deceased died on the spot but from the injuries sustained, it could not be gainsaid that he did not experience immense pain prior to his death. The trial magistrate relied on the case of Sukari Industries Ltd vs Clyde Machimbo Juma (2016)eKLR.

37. The Appellant proposed an award of Kshs.10,000/- under this head.

38. I have had recourse to case law and the general trend is that where death is instant, nominal damages are awarded. Where death is after some considerable time courts have awarded damages between Kshs 50,000 and Ksh 100,000. (See Retco East Africa Limited v Josephine Kwamboka Nyachaki & another [2021] eKLR).

39. In the instant case, death was instant. In my view and within the principles in Butt -vs- Khan, I find the award of Kshs. 50,000 on pain and suffering inordinately high. It is my finding that a sum of Kshs. 20,000 would suffice under this head.

40. On loss of expectation of life, the Appellant proposed a sum of Kshs.50,000/- on account that the deceased was the one who encroached the Appellant's vehicle while drunk thus his behavior connotes a behavior that would have otherwise shortened his life. Under this head, the trial court awarded a sum of Kshs.80,000/-.

41. From precedent, an award under this sub head is normally conventional, and in the bracket of Kshs.60,000/= to 200,000/=. Some of the comparable cases are as follows;

> In Kenya Wildlife Services Vs. Geoffrey Gichuru Mwaura (2018) eKLR, a sum of Kshs.150,000/= was granted. In Wembo & 2 others Vs. TKK (2017) eKLR, a sum of Kshs.100,000/= was awarded. The court in Easy Coach Bus Services Ltd & another Vs. Henry Charles Tsuma & another (2019) eKLR, a sum of Kshs.80,000/= was awarded.

42. It is therefore my view that a sum of Kshs.80,000/- was reasonable under this head.

43. On loss of dependency, the Appellant faulted the trial magistrate for adopting a lump sum approach instead of the multiplicand approach. He submitted that the lump sum approach is used in cases where the deceased person was very young. That there was evidence that the deceased was 39 years old and was a farmer and therefore, the court was well seized with sufficient details on deceased's earnings and number of years he was expected to have worked. In absence of prove of income, it was incumbent for the court to adopt the multiplier approach by adopting the minimum wage regulation approach or a conventional figure of Kshs.10,000/- to calculate the deceased's earnings.

44. Further, PW1 did not prove that he solely depended on the deceased since he testified that he had other 11 children and did not have any document to prove that the deceased had any source of income. He proposed a dependency ratio of 1/3 and a modest figure of Kshs.10,000/- since the deceased earnings were not known.

45. While awarding damages under this head, the trial magistrate considered the fact that there was no proof of the deceased income and it was said that he was a famer and therefore, the minimum wage approach could not be applied. Being guided by authorities in his judgment, the trial magistrate found the lump sum approach to be suitable and awarded the Respondent a sum of Kshs.1,000,000/-.

46. There was no evidence that the Appellant was employed. PW2 stated that the Appellant was a farmer. He had leased out land where he practiced farming. Therefore, the minimum wage was not applicable in this case.

47. PW2 claimed that the Appellant was making Kshs.30,000/- monthly out of his farming venture. No proof was tendered however to that fact. Where there is no proof of salary the court in In Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR stated that;

> " In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency."

48. Mwanzia Ngalali v Mutua Kenya Bus Ltd cited in Albert Odawa v Gichumu Githenji [2007] eKLR, where the court stated as follows-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

49. In Moses Mairua Muchiri v Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court stated as follows-

> " It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, 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."

50. Guided by the above authorities, I find that the trial court adopted the correct principles in making an award under this this head and there are no cogent grounds upon which this court can interfere with the same.

51. With the result that the appeal herein fails and is dismissed save for the success in respect of damages for pain and suffering whereby the award by the trial court is set aside and substituted thereof with an award of Kshs 20,000. The Respondent shall have the costs of the appeal and in the court below.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF MAY 2024.

A.K. NDUNG'U

JUDGE