Njeru v Wambugu & 3 others (Civil Appeal 71 of 2019)
[2024] KEHC 6674 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 71 OF 2019

DKN MAGARE, J

MAY 13, 2024

BETWEEN

PETER MWANIKI NJERU ..... APPELLANT

AND

SAMUEL KAGOYA WAMBUGU ..... 1ST RESPONDENT

TERESIA WANJIRU KARIUKI ..... 2ND RESPONDENT

JOSEPH NGUNJIRI KAGOYA AS ADMINISTRATORS OF THE ESTATE OF JOSEPH NGINJIRI KAGOYA (DECEASED) ..... 3RD RESPONDENT

ANTONY NJOROGE MWAURA ..... 4TH RESPONDENT

JUDGMENT

1. This is an appeal form the Judgment and decree of the Honourable Philip Mutua on 19/1/2019 in Nyeri CMCC 249 of 2018. The Appellant was the Defendant in the matter.

2. The Appellant filed 5 grounds of appeal. The grounds were as follows: -

    a. That the learned trial magistrate erred in law and in fact in believing the purported both eye witnesses as to what transpired on the material night, who did not even record statements with police for purposes of Nyeri Chief magistrate, Inquest Number 1 of 2019 which was still ongoing, and whose evidence amounted to quantity evidence, rather than quality evidence.

    b. That the learned trial magistrate erred in law and in fact in peremptorily dismissing the Appellant's credible defence that the deceased authored his very own misfortune, (volenti non fit injuria) by jaywalking while under the influence of alcohol.

    c. That the learned trial magistrate erred in law and in fact by entering judgment for the 1st – 3rd Respondents though the 1st Respondents name did not appear in the list of dependants in the

plaint, and most importantly, proceeding to casually award a whooping and unaffordable Kshs 6,102,102 as loss of dependency, whilst the deceased's wife, Teresia Wanjiru Kariuki, the 2nd respondent herein, did not testify despite filing a statement, shooting out crucial and weighty evidence on loss of dependency.

d. That the learned trial magistrate erred in law and in fact in not finding the 4th Respondent solely liable to fully indemnify the Appellant as the insured of the offending Motor vehicle registration marks, KAW 119T, who ignored the party notice issued, and despite the Appellant's case against him kind of proceed by way of formal proof, and thus grossly misdirected himself on rationale or the principle for taking out a policy of motor vehicle insurance.

e. That the learned trial magistrate erred in law and in fact by making awards for claims which were not pleaded properly, merely praying for "General damages under *Fatal Accidents* and *Law Reform Act*. Cost and Interests of this suit."

f. That the learned trial magistrate erred in law and in fact in rejecting the Appellants credible defence outright, and particularly that he telephoned his spouse, who rushed the deceased's to hospital.

3. Parties filed submissions.

Pleadings

4. The 1st and 2nd Respondents filed suit as administrators of the estate of the late Joseph Njunjiri Kagoye (Deceased). This was arising out the accident on 9/6/2018. This involved motor vehicle Registration No. KAW 119T.

5. The deceased left 3 dependants, that is a 30 year old wife and 2 minors sons aged 2-7 years. The deceased was aged 40 years and said to be a teacher.

6. The appellant filed defence on 5/10/2018 blaming the deceased, relying on the doctrine of *volenti non fit injuria*. The particulars of negligence are Hilarious. They are:-

a. Wobbling/Staggering on the road as he was heavily drunk at night

b. Say walking at night.

c. Courting injury

d. Volunteering to suffer.

7. They sought to John Antony Njoroge Mwaura the insured of the offending motor vehicle. Given that there was only one vehicle, involved that it is an admission that Motor Vehicle Registration No. KAW 119T was the offending motor vehicle KAW 119T.

8. The Applicant applied to join Anthony Njoroge Mwaura to the proceedings. There was a request for judgment against the third party.

Evidence

9. Samuel Kagoya Wambuigu testified and adopted his witness statement which basically confirmed that the deceased was married to Joseph to Teresia Wanjiku Kariuki. He testified that the deceased used to assist him financially about 10,000/=. PW3 was an eye witness. He stated that on Saturday at 9:00pm

at Abalaito Shopping Centre there was a vehicles coming at high speed and he had that it knocked a person beside the road.

10. PW2 PC Fatuma Mugedi produced the police abstract. PW4 recorded a statement on the occurrence of the accident. He stated that the vehicle moved from left to right where it hit the deceased.

11. Peter Mwamki Njeru testified for the defence. He stated that he had driven for 15 years. On 9/6/2018 he was driving from Nyeri side and was less than a kilometre from home. He said he saw a person in the middle of his lane and heard a bang on the wind screen. He was at low speed and the person appeared drunk.

12. He continued that some men came and recognised that the victim as their friend with who they were having alcohol. He stated that there were no skid marks on the record. It was his evidence that the suit Motor vehicle registration No. KAW 119T belonged to him. He stated that he applied emergency brakes in a bid to avoid the accident. He must have applied emergency brakes after he heard a bang on the windscreen.

13. The court made the following findings: -

    a. Liability 100%

    b. Pains and suffering 50,000/= Loss of expectation of life 150,000/=

    c. Loss of dependency Kshs 6,202,102/=

14. This provoked the Appeal. In this court the parties submitted orally before me. They blamed each other. The appellant prayed that I allow the Appeal. The Respondent prayed that I dismiss the appeal.

Analysis

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

16. This was aptly stated in the case of *Peters v Sunday Post Limited* [1958] EA 424 where, the court of Appeal therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

18. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

19. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

20. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019] eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

21. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

22. The foregoing was settled in the cases of *Butter v Butter Civil Appeal No. 43 of 1983* [1984] KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

23. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

24. The court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

25. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

26. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

27. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

28. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

29. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different."

30. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

31. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred."

32. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the judges of Appeal held that:

> " Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

33. The matter presents 2 unique problems. The place of 2/3 as a dependency ratio. Secondly the question of liability is absence of direct evidence.

Liability

34. Both sides gave skewed and self-serving evidence. It is not clear on how the accident occurred. It is granted that both driver and eye witnesses gives a contradictions story. I do not believe that there were emergency brakes applied in the absence of skid marks. Absence of skid marks is not evidence of low speed but lack of braking.

35. The driver testified that he saw the deceased in the middle of the road, then heard a bang and applied emergency brakes. There was no need for such. In any case a distance of about 50 metres is sufficient for a person with average skill to brake. The only explanation for failure to stop in the circumstances, is high speed. The driver was thus reckless in driving at high speed.

36. On the other hand, the deceased crossed the road when it was not safe. There was no sketch plans to show that the accident occurred on the road. When evidence is of this nature, an order that the documents itself is to find that both are equally to blame in the case of in the case of *Mombasa Maize Millers & another v Elius Kinyua Gicovi* [2021] eKLR, justice Nyakundi stated as follows:-

> " While distilling the record on contributory negligence, the question is not whether the plaintiff or the defendant was negligent but it is on the circumstances of the case who bears the greatest responsibility. They shared responsibility for the damage is clearly set out in the Judgment of the Learned trial Magistrate. There is no prima facie evidence that there was want of care on the part of the motor vehicle in which the respondent was on board as a fare paying passenger. In Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, the Court held as follows:
>
> "In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In *Nance v British Columbia Electric Rly* [1951] AC 601, at page 611, Lord Simon said:

"……When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

37. In the case of *Francis Karanja Kimani v Wells Fargo Limited* [2020] eKLR, Nyakundi J stated as follows: -

> " The fact that there was no sketch plan or that the police abstract did not lay blame upon the respondent as the accident was still under investigation did not in my considered view provide a rebuttal to the eye witness account. Only evidence from the respondent on causation and blameworthiness could have rebutted that evidence yet no such evidence was adduced. Secondly, the trial Magistrate relied on submissions to come to the conclusion that the deceased "may have wandered into the road." She was clearly wrong. Submissions are not evidence just like averments in a pleading are mere allegations unless and until proved through evidence.
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> In the case of *Daniel Toroitich Arap Moi & another v Mwangi Stephen Muriithi & another* [2014] eKLR the Court of Appeal made it clear that: -
>
> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

38. I have no idea where parties got a feeling that oral evidence is secondary evidence. It is the duty of defence advocates to break the witnesses whom the think are fictitious. A mere fact that they never recorded the statements with police is not sufficient. The court cannot dismiss cogent evidence on basis of speculation.

39. The evidence available was that both sides were equally to blame. The Appellant drove recklessly while the deceased was reckless to his own safety. If either was careful, this matter will never have arisen.

40. I therefore set aside the finding on liability and substitute the same with 50:50 liability between the Deceased (plaintiff and the Appellant. Though the 4th Respondent did not enter appearance. The liability attaching to the Appellant attaches accordingly to him.

41. On pain and suffering the deceased did not die immediately. An award of Kshs 50,000/= is sufficient.

42. One of expectation of life, the deceased was 40 years. His life ahead of him. A sum of 150,000/= is proper. I therefore dismiss the Appeal. Appeal on pain and suffering and loss of expectation of life. In *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another* [2021] eKLR, the court awarded 100,000/- for a deceased who died 30 minutes later. It stated as doth: -

> " The court heard that the deceased died after 30 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of *Mercy*

Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed: -

> "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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

43. On loss of dependency I note the court award Kshs 6,102,102 this was on the basis of the salary. However, there was no evidence that he was married. The 1st Respondent stated so. However, the person who was married was either absent or not married. She did not testify. There is thus no evidence that the deceased was married.

44. The Deceased had no children. The Respondent was being supported with Kshs 10,000/=. However, he was not a listed dependent. There was to be consequences. The only proved Dependants were the two children aged 7 and 7 years. The court found that they will have been dependant for 15 years. I agree with the court. I could have awarded more but that was the discretion of the court. I therefore adopt as the dependency ratio. On the multiplicand the basic salary was 47,896. The court issued a figure of 50,850.85. This was erroneous.

45. Gross salary included work related allowances that are not spent on the family. An amount 47,800/= less its taxes, and others deductions will survive. A sum of Kshs 37,000/= will suffice. This works out follows: -

    37,000x12x15x 2/3= 4,440,000

46. This amount shall be subjected to the requisite liability. In the circumstances I allow the appeal with costs.

Determination

47. The upshot of the foregoing I enter judgment for the plaintiff against the defendant for: -

    a. Liability 50:50

    b. Loss of expectation of life 150,000/=

    c. Pain and suffering 50,000

    d. Loss of dependency 4,440,000

    e. Less 50% contribution Total 2, 320,000/=

       Sum due Ksh. 2, 320,000/=

    f. The Appellant will have costs of Kshs 222,000/= for the Appeal.

    g. The Respondent will have costs of the suit in the lower court.

    h. 30 days stay of execution.

    i. Right of appeal, 14 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 13TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH ONLINE TEAMS PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of-

Mr. Muhoho for the Respondent

No appearance for the Appellant

Brian - Court Assistant.