Roy Hauliers Limited v Kirugumi (Suing as the administrator of the Estate of Paul Wachira Wangai - Deceased) (Civil Appeal 6 of 2018) [2024] KEHC 5961 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL 6 OF 2018

JN NJAGI, J

MAY 23, 2024

BETWEEN

ROY HAULIERS LIMITED ..... APPELLANT

AND

JOHN WANGAI KIRUGUMI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF PAUL WACHIRA WANGAI - DECEASED) ..... RESPONDENT

(Being an appeal from judgement and decree of Hon. L. K. Mutai, Chief Magistrate, in Nanyuki CM`s Court Civil Case No.102 of 2015 delivered on 23/5/2018)

JUDGMENT

1. The respondent brought suit against the appellant in his capacity as the administrator of the estate of the deceased herein seeking for compensation in general and special damages under the *Law Reform Act* and *Fatal Accidents Act* after the deceased was killed in a road traffic accident involving the motor cycle he was riding registration number KG 4818 and the 1st Appellant`s motor vehicle registration number KAY 568/ZC6546 trailer that at the time of the accident was being driven by a driver of the appellant.

2. The appellant denied the claim. After a full trial, the magistrate found the appellant`s driver to have been 60% liable for causing the accident and the deceased 40% liable. The magistrate thereupon assessed damages and awarded a global lumpsum of Ksh.1,000,000/= for loss of dependency. The appellant was aggrieved by the finding on liability and on the award on quantum and filed the instant appeal.

3. The grounds of appeal are that:

    1. That the learned magistrate erred in apportioning liability in the ratio of 40%:60% against the Appellant in total disregard of the evidence adduced in court thereby arriving at a wrong conclusion.

2. The Learned magistrate erred by holding the 1st Defendant 60% liable while there was no basis for such finding.

3. The Learned Magistrate erred by awarding manifestly excessive damages and which was not commensurate with the loss sustained.

4. The magistrate erred by ignoring evidence tendered while making an award on loss of dependency.

5. The magistrate erred by awarding a global figure of Kshs.1,000,000/- on dependency which had no basis.

6. The learned magistrate erred by ignoring guiding principles in the assessment of damages.

7. The learned magistrate erred by ignoring the Defendant's evidence, submissions and authorities cited.

4. The appeal was canvassed by way of written submissions.

Appellant`s Submissions

5. The appellant submitted that the only eye-witness account was the one given by the driver of the trailer, DW2. That his evidence was not contradicted.

6. It was submitted that the trial magistrate did not lay basis on why she found the appellant 60% liable for the accident yet all the evidence pointed at the deceased as being sorely liable for the accident. That the sketch plan appeared to exonerate the driver of the trailer of causing the accident. That an inquest was done which exonerated the driver of the trailer. That though evidence was tendered that the accident occurred on the middle of the road, the driver of the trailer explained that he moved towards his right in an attempt to give room to the cyclist to pass by his left side as the cyclist had moved to the extreme left of the appellant`s driver.

7. It was submitted that the particulars of negligence pleaded were not proved. That there cannot be liability without fault as stated in the case of South Nyanza Co. Ltd v Mary Akelo Deda Kisii HCCA No. 324 of 2004. The appellant urged the court to find the deceased to have been sorely responsible for the accident.

Respondent`s submissions

8. The respondent submitted that there was undisputed fact that the accident occurred on the middle line. That considering the fact that the point of impact was on the middle of the road, the trial magistrate was correct in making a finding that both parties were at fault. The respondent referred to the case of Equator Distributors v Joel Muriu & 3 others (2018) eKLR where the crash had occurred in the middle of the road and the court found that both drivers were equally at fault.

9. It was submitted that no inquest was held and as such the magistrate could not determine that it is the rider who was to blame for causing the accident. The respondent urged the court to uphold the finding of the magistrate on liability.

Analysis and Determination

10. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its own conclusion. This duty was well articulated by the Court of Appeal

in Selle & Another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123 where the Court stated thus:

> " 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 demeanor of a witness is and inconsistent with the evidence in the case generally."

11. The issues for determination in this appeal are on liability and quantum.

Liability

12. The question is whether the trial magistrate was right in apportioning liability in the ratio of 40:60 in favour of the respondent.

13. The Respondent did not call an eye witness to the accident. He however called a traffic police officer from Naromoru traffic base, PW2, who produced the police abstract and the sketch plan as exhibits. It was the evidence of the police officer that the police abstract indicated that the matter was under investigation. Further that the sketch plan indicated that the point of impact was on the yellow line and thus the same exonerated the driver. That an inquest was carried out that blamed the rider for causing the accident.

14. The appellant on the other hand called the driver of his motor vehicle, DW2 as a witness in the case. It was the evidence of the said witness that on the material day, he was driving to Nairobi from Isiolo. That as he headed towards Naromoru, he saw a motor cycle coming from the opposite direction. That as they by passed each other the motor cyclist left its lane and encroached into the motor vehicle`s lane. He, DW2, swerved slightly to his right side to allow the rider to pass on his extreme left. That the rider then attempted to return to his right lane but then the motor cycle hit DW 2`s vehicle on the front right headlamp. The cyclist fell on his side of the road. He blamed the motor cycle rider for causing the accident.

15. The appellant argued that an inquest was conducted that exonerated the driver from liability and found that the rider was found culpable for causing the accident. The respondent argued that no inquest was conducted and as such the deceased could not have been found liable for causing the accident.

16. A ruling in the inquest file was produced in court as an exhibit. I have gone through the said ruling. I have noted that no inquest was held on the matter. What seems to have happened is that the investigating officer compiled an inquest file in which he recommended that the file be closed as it seemed that the motor cyclist was the one to blame for causing the accident. The magistrate perused the investigation file and agreed with the recommendations of the investigating officer and thereupon closed the inquest file. I do not think that it was proper for the trial court in the civil case to go by the recommendations in the inquest file since there were no witnesses called when the inquest file was closed. In any case the investigating officer was not called to defend his position as to why he recommended for the file to be closed.

17. The trial magistrate in this matter apportioned liability between the parties in the ratio of 40:60. It is trite law that where a court has used its discretion to apportion liability, an appeal court should not

interfere with the apportionment except in exceptional circumstances. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

18. In the premises, this court can only interfere with the apportionment if it is shown that there was an error in principle or the apportionment was manifestly erroneous.

19. In apportioning liability between the parties, the trial court stated as follows:

> It is undisputed that the accident occurred. It was head on collision. The investigating officer testimony that the point of impact was in the middle of the road on the defendant`s side. The defendant further testified how he tried to avoid colliding with the deceased. Having said that, I find that the deceased contributed 40% to the accident and consequently enter judgment on liability at 40:60 in favour of the plaintiff.

20. It is clear from the above paragraph that the trial magistrate did not give a plausible reason why she reached a conclusion that the driver of the motor vehicle was more to blame for occasioning the accident than the cyclist. She stated that the collision occurred on the middle of the road on the side of the appellant`s driver and that the appellant`s driver tried to avoid the accident yet she found the said driver 60% liable for the accident. Was the court then right in holding the appellant 60% liable for the accident?

21. I have re-evaluated the evidence adduced before the trial court. Both parties were in agreement that the point of impact was on the middle of the road. In Hussein Omar Farah -Vs- Lento Agencies [2006] eKLR, the Court of Appeal held that where there is no concrete evidence to determine as to who is to blame between two drivers, then both should be held equally to blame.

22. The driver of the appellant`s motor vehicle, DW2, explained that the reason he swerved to his right is because the rider of the motor vehicle had encroached into his extreme left and he therefore swerved to the right to give him room to pass on the extreme left but then the rider swerved back in attempt to get to his rightful lane.

23. The rider of the motor cycle is not there to give his side of the story. What is however clear is that the point of impact was on the middle line. The sketch plan indicated that the lane that was occupied by the motor cyclist measured 3.3m. In that case, it is clear that the motor cycle rider had left the whole of his lane to his left and collided with the trailer on the yellow line on the middle of the road. DW2 explained that the motor cyclist had encroached into the trailer`s lane. That the rider had moved to the extreme left of DW2. That he, DW2, moved towards the middle lane to give the motor cycle rider room to pass on his extreme left.

24. The evidence of the driver of the trailer, DW2, that the motor cyclist had encroached into his lane was not controverted. It is clear from the evidence that the motor cyclist had left the whole of his lane to his left when he collided with the trailer on the middle line. In the circumstances of this case, it is my considered view that the motor cyclist was more to blame for causing the accident than the trailer`s driver. I therefore do not agree with the apportionment of liability on the part the driver of the trailer at 60% and that of the cyclist at 40%. Being the one who left the whole of his lane to his left and collided with the trailer on the middle of the road, the deceased bore the larger liability in causing the accident.

In my view the apportionment of liability by the trial court was manifestly erroneous. I accordingly set aside the apportionment of liability by the trial court and apportion the same in the ratio of 60% on the part of the motor cyclist and 40% on the part of the appellant`s driver.

Quantum

25. The appellant in the cause of their submissions abandoned the appeal on the awards under the *Law Reform Act*. The appeal on quantum is on the award on loss of dependency.

26. It was the evidence of the respondent PW1 that the deceased was working as a casual labourer for a person called Paul Kaniaru for a monthly salary of Ksh.5200/=. That the deceased was giving him Ksh.1,700/= per month for sustenance. That he was also operating a motor cycle. That he had a driving licence as he had given him money to obtain one.

27. The trial magistrate in opting to award a global sum of Ksh.1,000,000/= for loss of dependency stated that though the respondent pleaded and testified that the deceased was earning Ksh.5,200/= a month, there was no documentary evidence produced in support of the same. The magistrate cited the case of Mary Khavesi Awalo & another v Mwilu Malungu & another (1999) eKLR where the court disregarded the multiplier approach for an employed person and stated that where there are no proper records of determining a deceased`s earnings, the court will opt for a lumpsum approach instead of estimating his income.

28. The appellant took issue with the award by the trial court on loss of dependency on the ground that there was uncontroverted evidence by the deceased`s father that the deceased was earning Ksh.5200/= per month as a gardener. That the same was pleaded in the plaint. Further that the deceased`s father testified that the deceased used to give him Ksh.1700/= for sustenance. That the evidence was not contested by the defence.

29. The appellant submitted that the level of dependency is a matter of fact which was proved and there was no reason for the trial court to reject that evidence when it was not contested by the defence. It was submitted that the trial court had cited the case of Jacob Ayiga Marula v Simeone Obayo (2005) eKLR where it was held that earnings need not be proved by documentary proof. Therefore, that it begs the question why the magistrate rejected the respondent`s oral evidence on the deceased`s earnings and level of dependency. The appellant urged the court to set aside the award of the trial court and use the multiplier approach in making the award. They urged the court to use a multiplicand of Ksh.5,200/= and a multiplier of 15 years.

30. The respondent on the other hand submitted that where there are no records to prove earnings the court ought to be guided by the minimum wage provided in law. That the applicable wage in this case was Ksh.10,107.10. That the deceased died at the age of 28 and a multiplier of 32 would be reasonable.

31. The respondent submitted in the alternative that they found no fault with the global award approach adopted by the trial magistrate. That in a case like the present one where there are no documents supporting earnings, a court is at liberty to follow that approach.

32. I have considered the submissions on loss of dependency. The principles under which an appellate court may interfere with an award of damages made by a lower court are settled. In Butt V Khan (1981) KLR 349 it was held that:

> " 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 inordinately high or low."

33. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate 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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 factor 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."

34. The appellant in this matter argued that the trial magistrate applied the wrong principles of law by using the global method of approach in making the award on loss of dependency instead of the multiplier method of approach which was pleaded by the respondent.

35. I have perused the plaint. The respondent pleaded that the deceased was a "motor cycle rider and earning an average income of Ksh.5,200/= per month at least 1/3 of that income spent to support his parents."

36. The plaintiff however in his witness statement stated that the deceased used to stay with one Paul Kimunyi Kaniaru where he was assisting him with various chores around his home and he used to earn Ksh.5,200/= per month which he would send him Ksh.1,700/= per month. This is the evidence that the respondent adopted when he testified in court. It is then apparent that the respondent in his evidence in court departed from what was pleaded that the deceased was a motor cycle rider.

37. It is trite law that parties are bound by their pleadings. In Independent Electoral and Boundaries Commission Vs Stephen Mutinda Mule & 3 Others [2014] eKLR the court held;

> " ....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averment of the pleadings goes to no issue and must be disregarded....In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."

38. The respondent in this matter pleaded that the deceased was self- employed but in his evidence in court stated that he was in salaried employment. The evidence that the deceased was employed as a casual labourer goes to no issue as this was not pleaded in the plaint. The end result is that it was not proved as to what the deceased was doing to earn a living. That being the case there was no basis of using the multiplier approach in making the award of damages. Ringera J. (as he then was) in Kwanzia v Ngalah Rubia and another as cited in Albert Odawa Vs Gichimu Gichenji, NKU HCCA No. 15 of 2003 (2007) eKLR, explained the concept of multiplier method of approach 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 facts do not facilitate its application. It is

plain that it is a useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency 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"

39. In Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)), [2016] eKLR where Ngaah J. stated thus:

> "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."

40. It is my finding that the trial court had the discretion to use the global method of approach in awarding the damages once it found no evidence to prove the earnings of the deceased.

41. The magistrate awarded a global sum of Ksh.1,000,000/= for loss of dependency. The deceased herein died at the age of 28 years. He was unmarried. The respondent gave evidence that the deceased was supporting his parents. In the case of Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another [2020] eKLR, Nyakundi J. reduced a global award of Ksh.2,000,000/= to Ksh.1,000,000/= for a deceased who died at the age of 23 and was married with 2 children. I do not find the award of Ksh.1,000,000/= to be excessive. I therefore decline to interfere with the award.

42. The upshot is that the appeal succeeds only on liability which is apportioned as follows:

Appellant – to bear 40%

Respondent – to bear 60%

43. The appeal on loss of dependency is dismissed. I order each party to bear its own costs to the appeal.

Written and signed by:

J. N. NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NANYUKI THIS 23RD DAY OF MAY 2024

By:

A K NDUNGU

JUDGE

In the presence of:

.....for Applicant

.....for Respondent

Court Assistant - .....

30 days Right of Appeal.