



Buria & another (Both Suing as the Legal and Personal Representative of the Estate of Boniface Sangura Waswa- Deceased) v Simba Wa Yuda Investment & 2 others (Civil Appeal E091 of 2022) [2024] KEHC 8108 (KLR) (5 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E091 OF 2022
REA OUGO, J
JUNE 5, 2024**

BETWEEN

EMILY WAMBANI BURIA 1ST APPELLANT

TIMINA MUNYITE WANYAMA 2ND APPELLANT

**BOTH SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE
ESTATE OF BONIFACE SANGURA WASWA- DECEASED**

AND

SIMBA WA YUDA INVESTMENT 1ST RESPONDENT

WESTERN SHUTTLE SACCO 2ND RESPONDENT

BENSON ANDAJI ANDAYI 3RD RESPONDENT

*(An appeal from the judgment and decree of Hon. Getenga RM
delivered on 27/9/2022 in Bungoma CMCC No. 375 of 2021)*

JUDGMENT

1. Emily Wambani Buria (1st Appellant) and Timina Munyite Wanyama (2nd Appellant) filed suit against the 1st, 2nd, and 3rd respondents (the respondents) in the lower court in Civil Case No. 375 of 2021. In a plaint dated 8th March 2021, they filed suit against the respondents seeking general damages under the Fatal Accident Act and Law Reform Act, special damages plus costs of the suit, and interest at court rates.
2. It was alleged by the appellants that on 1/9/2021 at around 8.00 am the deceased Boniface Sangura Waswa was riding motorcycle registration no. KMFM 595J along Bungoma- Mumias road near Muikoma area when the respondents' driver agent, servant negligently recklessly and carelessly drove



motor vehicle registration number KBX 143T and as a result of which the said motor vehicle veered off the road and hit the said motor cycle run over him and consequently the deceased sustained fatal injuries.

3. At the time of his death the deceased was a butcher man fetching Kshs. 30,000/- per day. The deceased was 44 years old and left behind a family of two wives (the appellants) with children who were dependent on him. The appellants claimed that the deceased could have worked up to the age of 80 years.
4. The defendant did not enter an appearance after being served with the plaint and summons and on 24/5/2022 interlocutory judgment was entered against the respondents and the matter was set down for hearing for formal hearing.
5. In a judgment dated the 27th of September 2022 the trial court held that the appellants had not proved their case and their suit was dismissed with no order as to costs.
6. The said decision is the subject of this appeal. In a memorandum filed on the 11th of October 2022, the appellants set out the following grounds of appeal;
 - i. The trial court erred in law and fact in dismissing the appellant's suit which had been proved on the balance of probabilities.
 - ii. The trial court erred in law and fact in dismissing the appellant's suit on ground that the police abstract did not state who was to blame in the accident hence arriving at a wrong decision
 - iii. The trial court erred in law and fact in dismissing the appellants' suit when the appellant had invoked the doctrine of Res Ipsa Loquitor.
 - iv. That the trial court erred in law and fact in not appreciating the ingredients of the doctrine of Res Ipsa Loquitor hence arriving at a wrong decision.
 - v. The trial court erred in law and fact in law by raising the standard of proof in Civil claim from a balance of probabilities to proving beyond reasonable doubt.
 - vi. The trial magistrate erred in law and fact in dismissing the appellants' suit when the said suit was not defended hence no defence for rebuttal on the evidence raised hence arriving at a wrong decision.
 - vii. The trial magistrate erred in law and fact by awarding mearge award on general damages of Kshs. 3,000,000/= against overwhelming case-law cited.
 - viii. The trial magistrate erred in law and fact by picking a multiplicand of 12 years instead of 26 years hence arriving at a wrong decision.
 - ix. The trial magistrate erred in law and fact by awarding special damages of Kshs. 8,250/- when the appellants had proved a total special damage of Kshs. 377,800/- hence arriving at a wrong decision
7. The appellants seek that the following prayers; that the appeal be allowed, the decision of the lower court be reversed and an order be made that the appellant's proved liability at 100% against the defendants, the award of damages be enhanced as submitted and that cost of the appeal and costs of the lower court be awarded.
8. The appeal was canvassed by way of written submissions. I have carefully considered the said submissions. The appellant's counsel submitted as follows; no evidence rebutted the evidence of the



appellants. The appellants produced the post-mortem form, certificate of death, and police abstract which show that the accident occurred and the motor vehicle in question was KBX 143T. The appellants relied on the doctrine of Res Ipsa Loquitur. The trial court did not consider the doctrine and appreciate its significance in law. For this argument the appellants relied on the following cases of Douglas Mbae Mwamba & Another vs Peter Musyoka Ndeti; Joyce Mumbi Mugi vs The Cooperative Bank of Kenya Limited vs 2 Others CA No. 214 of 2004, Mary Ayo Wanyama & 2 Others vs Nairobi City Council CA No. 252 of 1998 the court in the latter decisions cited 2 cases (see Esther Mukulu Matheka vs. Merania Nduta Nairobi HCCC No. 3039 of 1995 and Esther Nduta Mwangi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007). Reliance was also made in the case of Public Trustee vs City Council of Nairobi [1965]EA &58 and Obed Elphas Njiru vs Barasa Abdalla Salim (2020) eKLR.

9. It was further submitted that the trial court erred in law in dismissing the appellants' case on the ground that negligence against the respondents was not proved. The appellants argued negligence was proved against the defendant.
10. The appellants further submitted they were entitled to Kshs.1,500,000/- for pain and suffering but the trial magistrate awarded Kshs. 50,000/-. The appellants relied on the case of Daniel Kuria Nganga vs Nairobi City Council. On Loss of Earnings, it was submitted that the deceased was earning Kshs. 30,000/- per month and that as a butcher he could have worked up to the age of 70 years and that it was not necessary that he was to retire at 60 years. Since the deceased died at the age of 44 assumed he would have worked up to 70 years the lost years were 26 and the court should adopt a multiplier of 26 years.
11. At the trial Emily Wambani Buna testified that she is the deceased's wife and is a farmer. The 2nd appellant is her co-wife. She was testifying on her behalf as she was unwell. She adopted her statement and that of the 2nd appellant as her evidence in chief plus the documents listed dated 8/12/21. She further testified that the deceased was their husband. He was 44 years old when he died. He worked as a butchery attendant and was earning Kshs. 30,000/-. He would have worked up to the age of 80 years. they have children. She was 36 when the deceased died and so was her co-wife. Both of them have not remarried. She lost consortium she has no intention of remarrying.
12. The trial magistrate held that there was no evidence led on liability. Order 10 rule 6 states as follows on interlocutory judgment;
 6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

Analysis And Determination

13. I have considered the evidence adduced at the subordinate court, the written submissions, and the law. After the defendant was served with the summons to enter an appearance the defendant did not enter an appearance. Thereafter the appellant set down the matter for hearing. This was a formal proof hearing. From the evidence, there is a police abstract that was produced which indicates that there was an accident on 1/9/2021 and that the defendant's vehicle was involved in the accident. This is proof of an accident. No evidence was adduced to prove otherwise. I therefore find that the trial magistrate erred in holding that there was evidence adduced on how the accident in quo occurred given the fact negligence was imputed on the part of the respondent. Further in McGregor on Damages by Harvey



McGregory Nineteenth Edition on “ Basic Pecuniary Losses: The Normal Measure of Damages at paragraphs 4-051, it stated as follows;

“Somewhat similar is the case of personal injuries, the basic pecuniary loss may be said to be the claimant's loss of earnings or, more strictly, a sum representing a loss of future earning capacity.”

14. The appellants' claim as per their plaint was for general damages and special damages. It was not a claim for pecuniary damages. My understanding of Order 10 Rule 6 of the Civil Procedure Rules is that once interlocutory judgment was entered it was upon the appellants to set down the matter for hearing on their claim on general damages. This was done. There was sufficient proof that the respondent's vehicle was involved in the accident. I therefore find that the trial court erred in her decision that the appellant had failed to adduce evidence on who was to blame for the accident. I find that there was sufficient evidence to prove liability on the party of the respondent and that once the court entered interlocutory judgment the trial court was to proceed to assess damages and award if proved. I set aside the order of dismissal and find that the appellant had a claim which was proved on a balance of probabilities.

15. I now turn to consider the award of damages. The appellants have in this appeal challenged the award on general damages arguing that it was too low. In *Kemfro Africa Limited t/a Meru Express Services (1976) & another vs. Lubia & Anor. (No. 2) [1985]* eKLR the Court of Appeal enunciated principles for setting aside or interfering with the award of damages. It was stated:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.”

16. The trial magistrate in her judgment held that had the appellants been successful in their claim, she would have awarded damages as follows:

- a. Pain and Suffering Kshs. 50,000/-
 - b. Loss of expectation of life Kshs 100,000/-
 - c. Loss of dependency Kshs 2,880,000/- (30x12x12x2/3)
 - d. Special damages Kshs 8,250/-
- Total Kshs 3,038,250/-

17. The appellants on quantum argue that on the head pain and suffering, they were entitled to Kshs 1,500,000/- and cited the case of *Daniel Kuria Nganga v Nairobi City Council*. According to the plaint, and the deceased's death certificate, the deceased in this case died on the spot in the Musikoma area but must have suffered some pain before his death. In the case of *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No 68 of 2015 [2016]* eKLR the award of Kshs 50,000/- was upheld for a deceased who died immediately after the accident. The court stated:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring



immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”

18. Therefore, in the circumstances I find the award of Kshs 50,000/- under this head to have been reasonable.
19. On loss of earnings, it was submitted that the deceased was earning Kshs 30,000/- per month as a butcher and that he could have worked till the age of 70 years, therefore the trial magistrate ought to have applied 26 years as the multiplier. The trial magistrate in her judgment adopted the multiplier of 12 years without giving any reason.
20. In this case, the death certificate reveals that the deceased was 44 years old at the time of death and had two wives and 9 children. Emily Wambani Buna (Pw1) who was one of the deceased’s wives testified that he was a butchery attendant earning Kshs 30,000/- per month. According to the Petty Cash Voucher from Bidii Butchery, Pexh 15, he was being paid Kshs 30,000/-. In this case, the appellants argue that the deceased could have worked until the age of 70 years. However, the deceased was an employee of Bidiui Butchery and therefore would have worked until 60 which is the retirement age. However, considering the uncertainties of life, I find no reason to disturb the learned trial magistrate choice of multiplier. The deceased had 9 children out of his marriage and two wives, the appropriate ratio was 2/3 is in order. In the end, the damages for lost of dependency are now calculated as follows: Kshs. 30,000/- x 2/3 x 12 x 12 = Kshs. 2,880,000/-.
21. The appellant abandoned his appeal on special damages as he made no submissions on that head.
22. Consequently, having considered the appeal in its entirety, I hereby enter judgment in favour of the appellant in the following terms:
 - a. Pain and Suffering Kshs. 50,000/-
 - b. Loss of expectation of life Kshs 100,000/-
 - c. Loss of dependency Kshs 2,880,000/-
 - d. Special damages Kshs 8,250/-Total Kshs 3,038,250/-
23. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 5TH DAY OF JUNE 2024

R.E. OUGO

JUDGE

In the presence of:

Mr. R. Wamalwa -For the Appellants

Respondent - Absent

Wilkister/ Diana -C/A

