Kibugu & another (Suing as the Administrators of the Estate of Crispin Ndiritu - Deceased) v Mwangi & another (Civil Appeal E039 of 2021) [2024] KEHC 9907 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9907 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E039 OF 2021

DKN MAGARE, J

JULY 25, 2024

BETWEEN

SAMUEL NDIRANGU KIBUGU .... 1ST APPELLANT

JANE MUTHONI NDIRITU MWARIA .... 2ND APPELLANT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF CRISPIN NDIRITU - DECEASED

AND

VINCENT NJUGUNA MWANGI .... 1ST RESPONDENT

SAMUEL CHEGE NDIRITU .... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the decision of Hon. H. Adika (PM) in Nyeri CMCC No. 17 of 2019, given on 19/7/2021. The Appellants were the plaintiffs. They raised 4 grounds of appeal:-

    a. That Honourable learned trial magistrate erred in law and fact for considering irrelevant matters and against the weight of the evidence on record in arriving at the said decision in favour of the respondent as against the Appellants.

    b. The Honourable learned trial magistrate erred in law and in fact in dismissing the appellant's suit against the weight of the evidence.

    c. The Honourable learned trial magistrate erred in law and fact in dismissing the evidence by the appellants' witnesses as against the respondent's witness who were contradictory and unreliable.

d. That the Honourable learned trial magistrate erred both in law and fact in failing to consider or even adequately adopt and appreciate the written submissions of the appellant and the authorities annexed there in support of the appellant's case.

2. The 4 grounds raise only one issue namely, the court erred in dismissing the case.

Pleadings

3. The Appellants filed suit as father and mother and brought the suit on behalf of themselves and the estate of the late Chrispin Ndiritu. They pleaded that the deceased was riding a motorcycle Registration No. KMDD 072E when the Respondents caused an accident involving motor vehicle Registration No. KBL 152X.

4. The Appellants were said to be the only dependents aged 60 and 53. The deceased was aged 26 years earning 30,000/= per month. Special damages of Kshs. 110,550/= was pleaded. The Appellants were said to have been appointed administrators in the estate of the late deceased vide Nyeri CMCC 49/2018. This was on 28/5/2018.

5. The 1st defendant filed defence denying being the beneficial owner of the said motor vehicle. He blamed motorcycle Registration No. KMDD 072E. He set out 10 particulars of negligence.

6. The 1st Appellant testified on 10/2/2020. He stated that his son earned 1,000/= - 1,200/= per day. He stated that he paid the advocate 80,000/=. He blamed motor vehicle Registration KBL 152X. He stated that he was not at the scene of the accident.

7. PW2 stated that on 9/1/2018 he was driving along Nyeri-Kieni road and accident occurred. There were pot holes. The driver was on the right side. The motor cycle was on its right side (pun not intended). The motor vehicle swerved to the left and landed in a ditch. He stated that the vehicle hit the motor cycle. He blamed the motor vehicle.

8. DW1 stated that the abstract indicated that the deceased was to blame. On cross examination he stated that the rider was sudden and he could not avoid the accident. The motor cycle hit the side and went over the roof. He stated that he was driving slowly but the road was in a bad shape. He stated that he did not try to avoid the pot holes. He stated that the motor cycle could avoid the pot holes. He stated that he saw the motor cycle suddenly. He was never blamed for the accident.

9. DW2 stated that the road had no pot holes. The witness was obviously lying as DW1 had already corroborated PW2's evidence that there were pot holes. He stated when he was at the corner he found an accident. He stated that the vehicle was at high speed. This is a useless witness. He was able to see an accident though he found an accident! He stated that a motor cycle had just overtaken him and hit motor vehicle Registration No. KBL 152X.

10. The court dismissed the matter. PW3 stated that the accident was reported. The motor cycle was blamed. The court after finding the Appellant liable dismissed the case and suggested quantum as follows:

i. Loss of expectation of life – 150,000/=

ii. Pain and suffering – 50,000/=

iii. Loss of dependency – 1,320,000/=

iv. Specials – 110,500/=

Analysis

11. It is important to note that the special damages must be strictly proved. A sum of 110,500/= was not proved. Legal fees is not a special damage but party and party. Only a sum of Kshs. 1,540/= is payable for Ad litem. Whichever the end, the specials that were proved were:550/= - Service30,000/= - Funeral expenses1,540/= - Ad litem

12. On quantum, in David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
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> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

13. 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.

14. This was aptly stated in the case of Peters vs 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…"

15. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- 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 differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

16. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

17. The main issue is occurrence of the accident. The police used evidence of DW1 and DW2 to blame the deceased. The witnesses were not at the scene. The conclusion by the police was thus baseless. It is therefore imperative for the court to analyze the empirical evidence and come up with the most probable scenario.

18. The second witness lied on the state of the road. He said that there were no potholes when it was common ground that there were pot holes. His evidence is therefore not credible. The driver stated that he saw the motor bike suddenly. Ipso facto, he could not tell that it was at high speed. He stated that he swerved to the left and landed in the ditch. The deceased was in middle of the road. Ipso facto, there was a movement that resulted in the landing in the ditch. The point of impact was the middle of the road. Why then could the motor vehicle be hit on the right side? The other issue is why will a vehicle driven slowly land in a ditch, when hit by a motor cycle?

19. The reality was that the motor vehicle Registration No. KBL 152X was at high speed and on the wrong lane. When it met a motor cycle, which was also on high speed, attempted to move out. Due to the high speed and potholes KBL 152X lost control and landed in a ditch. It must be recalled that the deceased did not record a statement.

20. Consequently the police evidence was skewed towards the defence. Further this relied on a bogus witness DW2. Though the Respondent was largely to blame, the rider had his own negligence. In the circumstances I find that the Appellant was 30% liable while the Respondent was 70% liable. Therefore I set aside judgment on liability and enter judgment as follows:

    a. The Appellant was 30% liable.

    b. The Respondent was 70% liable.

21. Quantum had already been assessed except special damages which the court cannot adopt a wrong approach. The Appellant has been substantially successful. They shall have costs of 65,000/=.

Determination

22. The Appeal is allowed in the following terms:-

    a. Liability 70:30 in favour of the Appellant against the Respondent.

    b. General damages for loss of dependency – Kshs. 1,320,000/=

    c. Pain and suffering – Kshs. 50,000/=

d. Loss of expectation of life – Kshs. 150,000/=

Sub total - Kshs. 1,520,000/=

Less 30% - Kshs. 456,000/=

- Kshs. 1,064,000/=

Add specials - Kshs. 32,040/=

Total - Kshs. 1,096,040/=

e. Costs of Kshs. 65,000/=

f. The Appellant shall have costs in the court below.

g. Stay of execution for 30 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JULY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mwaura for the Appellant

Muriuki for the Respondent

Court Assistant – Jedidah