Mtolo & another (Suing as the Administrators of the Estate of Naomi Njeri Wangui - Deceased) v Gathotho (Civil Appeal 90 of 2019) [2024] KEHC 7837 (KLR) (Civ) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7837 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 90 OF 2019

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

MARY WANGUI MTOLO ..... 1ST APPELLANT

FLORENCE WANJIRU WANGUI ..... 2ND APPELLANT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF NAOMI NJERI WANGUI - DECEASED

AND

ELIJAH GATHOTHO ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S.G Gitonga, RM dated 31st January 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 3301 of 2014)

JUDGMENT

Introduction and Background

1. The Appellants challenge the findings on liability and quantum of damages by the Subordinate Court in a judgment dated 31.01.2019 stemming from a suit in respect of an accident that occurred on 05.04.2012 along Jogoo Road, Nairobi involving the Respondent's motor vehicle KBK K ("the motor vehicle") and Naomi Njeri Wangui ("the Deceased"). In their plaint, the Appellants, as legal representatives of the Deceased, claimed that on the material day, the Deceased was walking lawfully along the said Jogoo Road, when by reason of negligence on the part of the Respondent, he caused his motor vehicle to hit the Deceased occasioning her injuries which later on 01.07.2012 turned out to be fatal and as such, they held the Respondent wholly liable for the accident. The Appellants sought general damages under the *Fatal Accidents Act* (Chapter 32 of the Laws of Kenya) and the *Law Reform*

Act (Chapter 26 of the Laws of Kenya), special damages of Kshs. 40,200.00, interest and costs of the suit.

2. The Respondent urged the court to dismiss the case. He admitted the occurrence of the accident but denied that it occurred in the manner pleaded by the Appellants or that he was negligent in the manner that he was driving the motor vehicle. That the accident was wholly and or substantially contributed to by the Deceased's negligence for dashing into the road while drunk. The Respondent further averred that the accident occurred due to circumstances that were beyond his control despite the exercise of due care, diligence and skill. The Respondent thus denied the alleged injuries, loss and damages claimed by the Appellants.

3. At the hearing one of the Appellants, who is also the Deceased's sister, Florence Wanjiku Wambui (PW 1) and Dr. Cyprianus Okoth Okere (PW 2), a doctor, testified on behalf of the Appellants. The Respondent (DW 1) testified on his own behalf and called his wife Winnie Njeri Kamau (DW 2) as his witness. The trial court rendered its judgment on 31.01.2019. On liability, it found inter alia that owing to the fact that the accident happened in the early hours of the morning and based on the medical report from Metropolitan Hospital produced by the Respondent, the Deceased contributed to accident as she was drunk and as such, she did not take reasonable care while crossing the road. The trial magistrate therefore held that both parties were to blame for causing the accident and were therefore liable and in the circumstances apportioned liability in the ratio of 70:30 in favour of the Appellants and against the Respondent.

4. On quantum of damages, the trial court awarded Kshs. 100,000.00 as damages for pain and suffering after noting that the Deceased died 3 months after the accident. On loss of expectation of life, the trial court noted that the Deceased was 26 years at the time of her death and that there was no evidence that she suffered from any ailment that would have shortened her life and as such awarded Kshs. 100,000.00 agreed upon by the parties. On loss of dependency, the Subordinate court noted that the Deceased was 26 years at the time of her death and that in as much as it was stated that she used to wash clothes to earn a living earning Kshs. 8,600.00 every month, no such evidence was presented. As such, the trial court relied on the Regulation of Wages (General Amendment) Order, 2011 and adopted the basic minimum monthly wage for a general labourer being Kshs. 7,586.00. On the multiplier, it held that the Deceased was unlikely to have lived and worked up to the retirement age of 60 years therefore a multiplier of 30 years was appropriate. On the dependency ratio, the subordinate court applied a dependency ratio of 1/3 since the Deceased had no dependent children. In conclusion, the court awarded Kshs. 910,320.00 made up as follows; Kshs. 7,586.00 x 30 x 12 x 1/3. The court awarded Kshs. 40,200.00 as special damages.

5. The total award of Kshs. 1,150,520.00 was subjected to the 30% liability contribution, making a net award of Kshs. 805,364.00. This decision by the subordinate court forms the basis of the instant appeal which the Appellants have grounded in the memorandum of appeal dated 19.02.2019. The appeal has been canvassed by way of written submissions which are on record and which I shall make relevant references to in my analysis and determination below.

Analysis and Determination

6. In determining this appeal, I am cognizant of the role of this court as a first appellate court which is to re-evaluate and re-assess the evidence before the court of first instance. At the same time, I have kept in mind the fact that the trial court interacted first hand with the parties (see Selle v. Associated Motor Boat Co. [1968] EA 123).

7. The Appellants are aggrieved with the Subordinate Court's findings on both liability and quantum. On liability, they fault the trial court for finding that the Deceased contributed to the accident and thus apportioned a contribution of 30%. A finding on liability is dependent on the facts and evidence available and in assessing liability, the court considers causation and blameworthiness. This was held by the Court of Appeal in Isabella Wanjiru Karanja v Washington Malele [1983] eKLR where it was stated:

> There are two elements in the assessment of liability, namely causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. I would not disagree with the learned judge's finding that the appellant's speed was excessive in the circumstances, but the failure to keep a proper look out would seem to be the predominant factor.

8. DW 1 and DW 2 were the only people who were present when the accident happened. DW 1 stated that the accident happened as the Deceased was crossing the road and that she was drunk. He blamed the Deceased for heedlessly attempting to cross a busy road without due regard of other road users. DW 2 also stated that she was a passenger in the motor vehicle when she saw a body flying on the windscreen. To support the averment that the Deceased was drunk at the time, the Respondent produced a referral letter from Metropolitan Hospital which hospital was first to receive the Deceased after the accident. It was noted in the report that the Deceased had the smell of alcohol in her breath. With this, it cannot be stated that DW 1's evidence was farfetched when he stated that the Deceased was drunk while she crossed the road and I find that it was indeed probable that she was drunk at the time she was crossing the road. The subordinate court was therefore correct in finding the same.

9. Assuming that the Deceased was not drunk, it was not controverted that she was crossing the road in the wee hours of the morning so it must have been dark as it was just before the crack of dawn. There was no evidence to suggest that there were street lightings or a zebra crossing at the scene where the accident occurred. It is therefore evident that the Deceased did not observe the Kerb rule before she crossed the road and she did not first ascertain that it was safe to cross the said road, before she did. Furthermore, assuming the Respondent was driving at a speed limit that was higher and above the law as submitted by the Appellants, if the Deceased had not made a decision to cross the said road in an undesignated and dark spot and while intoxicated, most probably she would still be alive today.

10. From the totality of the evidence, the Deceased cannot be said to be totally blameless for the accident hence the apportionment of liability was appropriate and consistent with similar findings of the court on matters dealing with almost similar circumstances (see Mary Wanguii Kimani (Suing as Personal Representative of the Estate of James Kinuthia Kimani-Deceased) v Gilgil Telecommunication Industries Ltd & another [2007] eKLR). This ground of appeal by the Appellants therefore fails.

11. On quantum, the Appellants are aggrieved with the awards under the heads of pain and suffering and loss of dependency more so on the multiplier and dependency ratio applied. On pain and suffering, the Appellants had sought a sum of Kshs. 500,000.00 for reasons that the Deceased died after 3 months from the date of accident and "…. underwent pain and suffered dehumanizing conditions on account of disability due to injuries sustained…" In awarding the sum of Kshs. 100,000.00, the learned magistrate stated she was guided by the court's decision in E M K & another v E O O [2018] eKLR where it was held that the conventional award for pain and suffering ranges from Kshs 10,000.00 to Kshs 100,000.00 with higher damages being awarded if the pain and suffering was prolonged before death.

12. The assessment of damages is within the discretion of the trial court and an appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (See Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR, Peter M. Kariuki v Attorney General [2014] eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5). While the authorities generally refer to a conventional award, each case must be considered on its own terms. In this case, the Deceased died 3 months from the date of the accident hence a higher award was appropriate. I would award Kshs. 200,000.00.

13. On the multiplier applied, the Appellants submit that the Deceased died at the age of 26 years, led a healthy life and would a full life of 70 years. They urge the court to enhance the multiplier to 34 years. As stated, the subordinate court in awarding a multiplier of 30 years noted the parties' proposals for 34 and 20 years respectively and held that due to the preponderances of life, the Deceased was unlikely to have lived and worked up to the retirement age of 60 years. I do not find any error of principle in this award as the Subordinate Court considered the parties' proposals and the preponderances of life, which is what courts generally consider in coming up with the applicable multiplier. The court cannot disturb the decision of the trial court just because it has an opinion that a higher multiplier was more appropriate in the circumstances (see Jeremiah Njuguna & another v Anagleta J. Yator & Edel J. Biwott (suing as the administratix of the estate of the late Paul K. Kiplagat) ELD HCCA No. 119 of 2008 [2016] eKLR). In any event, I find that the multiplier of 30 years adopted by the trial court was appropriate in circumstances and was not inordinately low so as to invite the court's interference. This ground of appeal fails.

14. On the dependency ratio, the Appellant faults the subordinate court's application of a ratio of 1/3 as opposed to 2/3. They submit that the evidence of the existence and/or survival of the Deceased by the mother was not controverted and that the evidence of the Chief's letter was also not controverted and proved the existence of the children who were dependants of the Deceased. The trial court found that the birth certificates produced by the Appellants to be those of Deceased's children were found to be not genuine as per the Respondent's report from the department of immigration and registration of persons. Dependency is a matter of fact and is proved through evidence. While I agree with the trial court that the evidence of the birth certificates produced was not controverted and that they were not genuine, it is not the law that only documentary evidence such as birth certificates can prove birth or maternity (see K J B v Antonella Cantalluppi [2015] eKLR). Indeed, there was other evidence, including the Chief's letter and the testimony of PW 1 which stated that the Deceased had 3 children and that they were her dependants. This evidence was not controverted. I agree with the Appellants that they ought to have been factored and weighed in by the trial magistrate in applying the appropriate dependency ratio. Had the trial court done so, it would have applied a ratio of 2/3 and not 1/3.

15. The Appellants urge the court to award a further Kshs. 5,000,000.00 it had sought for the injuries sustained by the Deceased prior to her death. A further amount cannot be granted as the court has already made an award under the heading of pain and suffering under the *Law Reform Act*. Further, this plea was not in the memorandum of appeal.

Disposition

16. The appeal is allowed to extent that the dependency ratio of 1/3 is substituted with that of 2/3. The Appellant is also awarded Kshs. 200,000.00 for pain and suffering. The gross sum payable under the head of loss of dependency is thus computed as Kshs. 7,586.00 x 30 years x 12 months x 2/3 = Kshs. 1,820,640.00 together with Kshs. 200,000.00. Judgment is entered for the Appellants who will

now be entitled to a net award of Kshs. 2,020,640.00 less 30% contribution making a total of Kshs. 1,414,448.00.

17. The Respondent shall pay costs assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROB THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE