Ndeto v Ndambuki & another (Civil Appeal 70 (E070) of 2017)
[2024] KEHC 9316 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 70 (E070) OF 2017

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

STANSLOUS NZUKI NDETO ..... APPELLANT

AND

HENRY NZAU NDAMBUKI ..... 1ST RESPONDENT

JOSEPH KYALO KIOKO ..... 2ND RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Machakos (Y. Shikanda, PM.) delivered on 24th April, 2017 in CMCC No. 611 of 2005)

JUDGMENT

1. The appellant was the plaintiff in Machakos CMCC No. 611 of 2005. By further amended plaint dated 6th March, 2015 and filed on 13th March, 2015, the respondents were sued as the beneficial owner and driver respectively of motor vehicle registration number KYL 824. The 3rd defendant, not party to these proceedings, was sued as its registered owner. The appellant averred that on 15th April, 2004, the deceased was standing on the side of the Nairobi-Mombasa highway when the 2nd respondent drove the suit vehicle so carelessly and negligently thereby hitting the deceased. As a result of the accident, the deceased sustained fatal injuries. The appellant continued that the deceased was 25 years old at the time of his death. He was a mechanic earning Kshs. 4,000.00 monthly out of which ¾ of the said salary was used to sustain his dependents namely his father and siblings. For those reasons, the appellant prayed for general damages, special damages of Kshs. 12,150.00 costs and interest of the suit.

2. By judgment of the trial court dated 24th April, 2017, the appellant was found to have failed to prove his case on a balance of probabilities. Resultantly, the same was dismissed with costs to the respondents. The appellant is aggrieved with those findings. He filed a memorandum of appeal dated 22nd May, 2017. The appellant raised four grounds challenging those findings which grounds can be summarized as follows: the learned magistrate erred in finding that he had not proved his case on

a balance of probabilities yet the respondents, had, during cross examination, admitted liability; the learned magistrate applied the wrong principles in determining liability and decided the case without considering the weight of the evidence. It is for those reasons that the appellant urged this court to allow the appeal, set aside the judgment of 24th April, 2017, substitute the same in his favor and award costs.

3. The appeal was directed to be disposed of by way of written submissions. The parties herein filed elaborate and comprehensive submissions which this court has taken into account. The respondents filed their written submissions dated 16th May, 2024 while the appellant submitted in writing on 4th April, 2024. I have also considered the record of appeal, examined the evidence and analyzed the law. This being a first appeal, I am reminded of my primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. [See *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR].

4. On 8th February, 2016, judgement was entered as prayed in the sum of Kshs. 12,150.00, general damages with costs and interest subject to formal proof as the 3rd defendant failed to enter appearance and file her statement of defence. Thereafter, PW1 the appellant testified that the deceased, Mutiso Nzuki, who was his son, died on 15th April, 2004. He was not married at the time of his death and furthermore didn't have any children. His death certificate was produced and marked PExh.1.

5. According to the appellant, the deceased was knocked down at Kapiti plains along the Nairobi-Mombasa Highway. He did not witness the accident but however testified that the deceased's aunt was informed of the accident by the owner of the suit vehicle. The deceased died on the spot. He relied on the police abstract indicating that motor vehicle registration number KYL 824 was involved in the accident. According to the motor vehicle search [PExh.3], the said motor vehicle was owned by the 3rd defendant while the police abstract indicated that the vehicle belonged to the 1st respondent. It was also indicated that the driver of the motor vehicle was the 2nd respondent.

6. In seeking compensation for the wrongful death, the appellant took out a grant of representation that was marked PExh.4 and the deceased's employment certificate working at Mbando Engineering College [PExh.5]. PW1 testified that the deceased earned Kshs. 10,000.00 monthly out of which Kshs. 5,000.00 would be sent to him. PW1 continued that he suffered following the deceased death. He added that he incurred funeral expenses to bury the deceased but could not quantify the amount. He however informed the court that he expended a sum of Kshs. 12,000.00. PW1 blamed the respondents for causing the accident. He was informed by the 1st respondent that another motor vehicle rammed into him hence the accident. Finally, the 1st respondent employed the deceased at all material times to the suit.

7. PW2 PC Benjamin Kiamiyo testified that they received a report concerning an accident that occurred at Kapiti plains on 15th April, 2004 at Machakos Traffic Base. CPL Isuga and PC Yusuf received the report and visited the accident scene. The report indicated that the accident involved two motor vehicles namely KAG 560Z and KYL 824. KAG 560Z was stationery at the time of the accident. According to PW2, the deceased was a turn boy crushed between the two motor vehicles. The drivers of the two vehicles was charged with causing death by dangerous driving and obstruction in Machakos Traffic case no. 10 of 2004 and Machakos Traffic case no. 11 of 2004. He produced the police abstract that was marked PExh.2.

8. On the part of the respondents, DW1 the 1st respondent testified that on that fateful day, he was traveling along the Nairobi – Mombasa Highway aboard as a passenger. On reaching Kapiti plains, motor vehicle registration no. KAG 560Z sustained a double puncture. They were on the left lane. He

thus called for another vehicle to come and rescue them since he was transporting tomatoes. Heeding to the call, motor vehicle KYL 824 was driven to them as they erected warning signs and placed leaves on the road. KYL 824 safely reached the scene where it similarly parked on the left lane. DW1 gained access to it and slept.

9. While asleep, DW1 heard a sound and saw full lights of an oncoming motor vehicle. The vehicle was coming from the opposite direction. The said lorry rammed into the left side of motor vehicle registration number KYL 824 whose parking lights were switched on but the engine had been turned off. The accident caused damage to the said motor vehicle. When he was removed from the wreckage following the accident, DW1 noticed that three young men were injured and one person succumbed to the injuries.

10. DW1 confirmed that the deceased, the person who had succumbed to the injuries sustained in the course of the accident, was his employee working as a mechanic. He would pay him Kshs. 5,000.00 monthly. He stated that the two drivers, who are his employees, were charged with traffic offences but later acquitted. DW1 confirmed that indeed the deceased died as a result of the accident whom he had traveled with on that fateful day. He could not tell where the deceased had positioned himself as at the time of the accident. However, DW1 blamed the driver of the other lorry for causing the accident. He added that indeed the deceased's estate ought to be compensated.

11. DW2 the 2nd respondent driver and employee of the 1st respondent in respect to motor vehicle registration number KYL 824 testified that once the puncture occurred, he was sent by the 1st respondent to offload the tomatoes from KAG 560Z. He testified that on reaching the scene, he parked behind the other vehicle to commence the offloading process. His evidence was that he placed hazard lights. At about 11 pm, motor vehicle registration number KAH 865, driven at a high speed, lost control and swerved to the left and right sides of the road. On seeing this, DW2 alerted his colleagues and they escaped for safety. The vehicle then veered off the road towards the direction of the other two motor vehicles were parked and smashed into KYL 824 resultantly hitting bystanders. Due to the accident, motor vehicles registration numbers KAG 560Z and KYL 824 got extensive damage causing the deceased to die on the spot. He however could not establish how the deceased died. DW2 blamed KAH 865 for casing the accident. DW2 continued that he was charged in court with the offence of causing obstruction but was acquitted.

12. It is not disputed that the deceased Mutiso Nzuki died as a result of a road traffic accident that occurred on 15th April, 2004. This can be determined from his death certificate as well as the police abstract. Similarly confirming that the deceased died on that day as a result of the accident were DW1 and DW2. Who then was liable to blame for the accident?

13. It cannot be gainsaid that the deceased died as a result of a collision of motor vehicles involved. I cannot therefore find him culpable for causing the accident especially because the eye witnesses DW1 and DW2 could not place the deceased person's exact location at the time of the accident. He was also not in control of the movement and inertia of the vehicle involved in the accident. It is also apparent that he did not cause any obstruction to the drivers as to be blamed for the accident. PW2 informed the court that based on the report tabled by his colleagues, the accident involved KAG 560Z, which was stationary at the time and KYL 824. It was their findings that the deceased was crushed between the two motor vehicles.

14. DW1 and DW2 however gave different narratives on the circumstances of the accident. It was their evidence that during the offloading of tomatoes from KAG 560Z, the motor vehicle that suffered a puncture, and KYL 824, the said vehicles were parked on the left side of the road. According to the witnesses, hazards and warnings signs were in place. Suddenly, an oncoming vehicle, identified by DW3

as motor vehicle registration number KAH 865 veered of the right side of the road and smashed the two vehicles on the left side of the road.

15. My concern with the evidence of the respondents was that it was not substantiated. Firstly, they did not produce an inspection report to demonstrate the extent of damage allegedly caused by a third party. How then was this court able to ascertain that indeed the said motor vehicle had been hit by another vehicle? Secondly, no third party proceedings were taken out against the identified third party. If indeed their allegations were verifiable, in my view, nothing precluded the respondents from taking out third party proceedings against those that they blamed.

16. The conclusion that I arrive at from the evidence before me is that the deceased died as a result of a collision between motor vehicle registration numbers KAG 560Z and KYL 824. It must have been that motor vehicle registration number KYL 824, was driven at a high speed, negligently and without any regard for other road users and ultimately rammed into the stationery vehicle. The respondents however worked in cahoots to try and defeat the cause by stating that it was not them but the third party liable for the accident. It is no wonder the drivers of the two motor vehicles involved therein were charged with traffic offences. I therefore find that the respondents, together with the 3rd defendant, the registered owner of the said vehicle namely KYL 824, were liable in negligence for causing the accident.

17. Looking at the trial magistrate's analysis of the evidence, I respectfully disagree with the same and the ultimate conclusion. It is trite law that the evidentiary burden of proof always shifts and is never static. Critically, since the respondents had blamed a third party as the appellant had blamed them, the burden shifted to the respondents to establish that they were not liable in negligence. This is because not only were preliminary findings made against them as to prefer charges on the drivers but also, the they failed to disprove the allegations preferred by the appellant.

18. The totality of the evidence asserted that indeed the appellant's claim was merited. The motor vehicle search was illustrious that motor vehicle registration number KYL 824 belonged to the 3rd defendant. No evidence disproved this. Since interlocutory judgment was entered against her, the same shall stand as valid. Consequently, I interfere with the findings of the trial magistrate and enter a finding of 100% liability jointly against the respondents in favor of the appellant.

19. On quantum, the Court of Appeal in *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, urged courts to jealously guard against that interference with an award of the trial court. The court pronounced itself as follows:

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairri*e [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A 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 either inordinately high or low."

20. The trial court on general damages for pain and suffering stated that it would have awarded Kshs. 20,000.00 based on the fact that the deceased died on the spot, the authorities cited as well as the vagaries of inflation. I agree with the trial court's assessment and award the appellant Kshs. 20,000.000 for pain and suffering. On damages for loss of expectation of life, the trial court stated that it would have awarded a sum of Kshs. 100,000.00 which this court agrees. This is because as a matter of principle, nominal damages are awarded if the death immediately followed after the accident. Such damages, are intended to compensate the fact of suffering and pain owning to the injuries sustained before the deceased's death.

21. On damages for loss of dependency, this court takes into account the award of damages under the *Law Reform Act* to award damages under the *Fatal Accidents Act*. On damages under this head, courts are implored to take either one of these two approaches: the multiplier approach or the global sum approach. In determining which of the two approaches best fits the facts and circumstances of the dispute, the Court of Appeal in *Board of Governors of Kangubiri Girls High School& Another vs. Jane Wanjiku* [2014] eKLR pronounced itself as follows:

> "The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason... 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 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."

22. In this case, this court finds that the multiplier approach is applicable. Thus, according to the plaint, the deceased earned a sum of Kshs. 4,000.00. During his testimony, the appellant pleaded that the deceased earned Kshs. 10,000.00. Those sums, of Kshs. 4,000.00 and Kshs. 10,000.00 were not substantiated to the required standard. Having established as much, it is apparent that the appellant did not establish how much the deceased was earning. However, DW1 in his testimony, confirmed that the deceased was in his employ and was earning Kshs. 5,000.00 monthly as a mechanic. I would therefore adopt Kshs. 5,000.00 as the multiplicand. That evidence was certain and in exactitude established the deceased's earnings on a balance of probabilities. In this case, there was no need to produce documentary evidence when DW1's own testimony was that was the amount that was paid. As held by the Court of Appeal in the case of *Jacob Ayiga Maruja & another vs. Simeane Obayo* [2005] eKLR:

> "We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

23. The deceased died aged 25 years. The trial court indicated that it would have adopted a multiplier of 29 years. The trial court took into account the decision of the court in Alexander Okinda Anangwe (suing as the administrator of the estate of *Patricia Kezia Anangwe deceased) vs. Reuben Muriuki Kahuka & others* [2015] eKLR where the court adopted a multiplier of 32 years. In my view, a multiplier of 32 years was relevant to the facts and circumstances and I hereby adopt the same.

24. Regarding the dependency ratio, the trial court found that the deceased was unmarried and had no children at the time of his death. Since the siblings and number thereof had not been established, the learned magistrate applied a 1/3 dependency ratio as it was only proved insofar as the deceased assisted the father in his upkeep. I agree with that analysis and conclusion thereof. In total thus, I award loss of dependency as follows: 5,000 × 32 × 12 × 1/3 = Kshs. 640,000.00.

25. Regarding special damages, it is trite law that special damages can only be granted once pleaded and proved. While the appellant testified that he expended Kshs. 12,000.00 towards funeral expenses, the same could not be quantified. In fact, the appellant did not provide or furnish any receipt in support of the claim for special damages in the sum of Kshs. 12,150.00. The award on special damages therefore lacks merit and is hereby dismissed.

26. The upshot of the foregoing analysis is that the appeal herein is merited. The findings of the learned magistrate dated 24th April, 2017 are hereby set aside and substituted with the following orders:

    i. The respondents are hereby found 100% liable in negligence in favor of the appellant;

    ii. The award on general damages is hereby entered as follows:

        a. Pain and suffering: Kshs. 20,000.00;

        b. Loss of expectation of life: Kshs. 100,000.00;

        c. Lost years: Kshs. 640,000.00

        Total: Kshs. 760,000.00.

    iii. The appellant shall have costs at the trial and costs of this appeal.

    It is so ordered

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Appellant

Omukombe Advocate for the Respondent

Court Assistant – Samuel Shitemi

Further Order;

30 days stay is granted.