Njuca Consolidated Limited & another v Olang'o & another (Civil Appeal 186 of 2020) [2024] KEHC 8758 (KLR) (Civ) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8758 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 186 OF 2020

AC BETT, J

JULY 19, 2024

BETWEEN

NJUCA CONSOLIDATED LIMITED ..... 1ST APPELLANT

BONIFACE MODICK KHAGULA ..... 2ND APPELLANT

AND

CAROLINE AKINYI OLANG'O ..... 1ST RESPONDENT

MWANGO FRED EZRA ..... 2ND RESPONDENT

(An appeal from the Judgement and Decree of the Chief Magistrate's Court at Milimani of Hon. E.M. Kagoni (PM) delivered on 12th May 2020 in Milimani CMCC 5080 of 2017)

JUDGMENT

1. The respondents herein filed suit against the appellants following a road traffic accident on 28th October 2016 wherein the deceased who was a pedestrian was fatally injured by the appellant's motor vehicle registration number KCG 948Z along North Airport Road, Nairobi. It was the respondent's case that the 2nd defendant, who was a lawful driver of the said motor vehicle so dangerously, recklessly and negligently drove the said vehicle that is knocked down the deceased pedestrian as a result of which he sustained fatal injuries.

2. The appellants filed a defence denying the particulars of negligence attributed to the 2nd appellant and assigning the entire blame to the deceased for walking carelessly and recklessly, failing to keep any or proper look-out, walking without presence of mind and causing the accident.

3. The 1st respondent gave evidence then called one other witness. It was her testimony that at the time of his death, the deceased was a technician at Simba Colt Motors Limited earning a gross monthly salary of ksh.120,000/=. She stated that on the material date, she received a call from one Mr. Omweri who

informed her that he found the deceased having been run over by an unknown motor vehicle along the North-Airport Rod opposite Nakumatt Supermarket, Embakasi. On cross-examination, she said that the deceased died on the spot and there were no eyewitnesses to the accident.

4. PW 2 was a police officer based in Embakasi who produced an occurrence book regarding the road traffic accident in question. According to her, the motor vehicle that caused the accident did not stop after the accident but was later detained and the driver who was the 2nd appellant charged with the offence of causing death by dangerous driving.

5. On cross-examination, she stated that the body of the deceased had been removed from the scene when she went to draw the road view and that the accident occurred opposite Nakumatt. She said that there are no grills along the road and that the grills are 50 meters away from Nakumatt while a fly- over is 300meters from the opposite of Nakumatt.

6. In defence, the appellants called the 2nd appellant who stated that at the time of the accident, he was not the one driving the motor vehicle but was a passenger and the vehicle was being driven by his colleague James Owuor who went into hiding after the accident.

7. On cross-examination, the 2nd respondent conceded that he was the one authorized to drive the motor vehicle on that day and was arrested after 2 months although he had reported the accident at Ngong Police Station. On re-examination, the witness said that James Owuor was authorized to drive the motor vehicle and he was a co-driver.

8. At the conclusion of the trial, the trial court found the appellants 75% liable for the accident and awarded the respondents a total sum of ksh.7,388,060/= plus costs and interest.

9. Being aggrieved by the entire judgement and decree, the appellants filed an appeal in which they listed 8 grounds of appeal. They challenged the court's finding on liability and quantum. The appellants faulted the trial court for finding them liable in disregard of the fact that there was no eyewitness called by the respondents to support their case and no police investigations to the causation of the accident. The appellants contended further that the finding of vicarious liability against the appellants was erroneous in view of the evidence before the court that the driver at the time of the accident did not have the lawful authority of the 1st appellant.

10. On the second limb of its grounds of appeal, the appellants faulted the court for disregarding their authorities on quantum thereby awarding exorbitant and excessive damages. It was their case that the trial magistrate adopted an erroneous multiplicand and made excessive awards in all aspects. The appellants faulted the trial magistrate for awarding special damages in absence of proof.

11. Upon the directions of the court, the parties filed written submissions in respect of the appeal.

12. The appellants submitted that on liability there was concrete evidence adduced before the court that the deceased was crossing dangerously by jumping over a guard rail at a non-designated crossing point yet there was a foot bridge ahead of him which he could have used safely.

13. The trial court was further faulted for apportioning a higher liability to the appellants on the grounds that 2nd appellant was the one who should have been driving the offending motor vehicle instead of the driver who fled the scene of the accident. The appellants submitted that the court ought to have had a solid ratio decendi guided by the factor of causation.

14. On the issue of quantum, the appellants submitted that a sum of Ksh 50,000 /=was a reasonable award for pain and suffering. They also submitted that the magistrate's reliance on the gross basic pay of ksh.60,000/= was erroneous and the computation should have been less statutory deductions. They

also contended that a multiplier of 20 years for a 35 year old man was without basis or authority. The appellants submitted that a multiplier of 15 years should have been applied. As for the dependency ratio, it was their argument that it ought to have been at the ratio of 1/3 since the 1st respondent failed to prove that she was married to the deceased nor that the children belonged to the deceased.

15. In the alternative, the appellants urged the court to award a lump sum as held in Mary Khayesi Awalo And Another -vs- Mwilu Malungu And Another[1999] eKLR.

16. On their part, the respondents submitted that the trial court made the correct finding based on the evidence tendered by the plaintiff's witnesses and therefore the apportionment of liability at 75%:25% ought to stand. With respect to quantum of damages, it was submitted that the same was neither excess nor inordinate.

17. The respondents further submitted that a party entitled to sue under The *Fatal Accidents Act* still has a right to sue under the *law Reform Act* in respect of the same death and relied on Wachira Joseph And 2 Others v Hannah Wangui Mukami And Another [2021] eKLR and Hellen Waruguru Waweru v Kiarie Shoe Stores Limited [2015] eKLR.

18. On special damages, the respondents submitted that the same was specifically pleaded and proven and the appeal should be dismissed with costs.

19. This being a first appeal, this court is duty bound to re-evaluate and subject the evidence before the trial court to a fresh analysis so as to reach an independent decision as to whether or not to uphold the decision of the trial court.

20. In Selle v Associated Motorboat Co. [1968] EA 123 the court held as follows: -

> " The appellate court is not bound necessarily to accept the findings of the court below. An appeal from the trial court to the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate 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 the 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 inconsistent with the evidence of the case generally."

21. I am therefore cognizant of the fact that this court is called upon to exercise its appellate mandate with caution with the knowledge that it did not have the benefit of seeing and hearing the witnesses unlike the trial magistrate.

22. Having perused the Record of Appeal and the respective submissions, I find the following are the issues for determination.

    (1) Whether the Appellant's duly authorized driver was to blame for the accident.

    (2) Whether the trial court erred in making the apportionment of liability at 75%:25%.

    (3) Whether the award in quantum for damages was excess.

    (4) Whether the Respondent proved the special damages.

23. I have analyzed the evidence before me. The undisputed facts are the deceased was fatally injured by the 1st appellant's motor vehicle. What was in dispute was how the accident occurred, who was the driver of the subject's motor vehicle, and who was to blame for the accident.

24. There was no independent eyewitness to the accident. It did not help that the police did not tender any evidence as to any findings on their investigations taking into account the fact that the driver is said to have fled the scene immediately after the accident, and the police visited the scene only for purposes of drawing the road view long after the body of the deceased had been removed.

25. The court is only left to rely on the evidence of the 2nd appellant who was sued as the driver of the motor vehicle at the time of the accident a claim which was vehemently refuted by the 2nd appellant who claimed that he was a co-driver of the vehicle which was driven by a person who fled the scene immediately after the accident.

26. The question before this court is whether the respondents proved their case on a balance of probabilities:

Section 109 of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person."

27. The respondents laid down the case and pleaded particulars of negligence on the part of the driver of motor vehicle registration number KCG 984Z. According to PW 1, the 2nd respondent was to blame for the accident.

28. According to the 2nd appellant he was a passenger in the subject motor vehicle when upon reaching North Airport Road near City Cabanas a man suddenly jumped over the guard rail and started crossing the road thereby resulting in the accident. According to him, "we (sic) immediately proceeded and reported the case to the police."

29. I will proceed to analyze the 2nd appellant's evidence upon which the appeal is hinged. In the first instance, the evidence is at variance to the pleadings and more specifically to the particulars of negligence attributed to the deceased. Nowhere in those particulars is it alleged that the deceased jumped over the guard rail nor that he crossed the road hurriedly. Secondly, the 2nd appellant sought to attribute the accident to a third party who never gave evidence in the trial. None of the appellants adduced evidence to prove that there was indeed a driver other than the 2nd appellant in control of the subject motor vehicle on the date of the accident. In any event, it is clear from his evidence that the 2nd respondent was the authorized driver and if at all he chose to allow a third party to drive the subject motor vehicle in his stead, he is equally liable for the accident and by extension, so is his employer, the 1st respondent. The 2nd appellant's response in re-examination stated: - "The other man was authorized to drive. I was a co-driver". This was in total contradiction to the position he took earlier as well as to his response in cross -examination that he was the one authorized to drive the motor vehicle. Moreover, despite the 2nd appellant claiming that he reported the accident at Ngong Police Station, no effort was made to produce the occurrence book from the said station to confirm his assertion. Am therefore left with doubts as to whether the accident happened in the manner stated by the 2nd appellant whose evidence appears unreliable.

30. For the reasons cited above, I find that the appellants failed to discharge the burden of proof as required under Section 107 of The *Evidence Act*. On a balance of probabilities, I find that the 2nd appellant who

admitted that he was the authorized driver of the motor vehicle and had the work ticket that morning was the person in control of the motor vehicle at the time of the accident as an authorized agent of the 1st appellant.It may as well be that the 2nd appellant sought to blame his colleague in order to evade traffic charges.

31. I also find that the appellants failed to controvert the respondents' claims of negligence against the 2nd appellant. The 2nd appellant admitted that the deceased was hit but blamed him for jumping over the guard rail. According to PW 2, the accident occurred opposite Nakumatt and there are no grills along the road. Taking into account the entire circumstances of the case, I am inclined to believe the police evidence that there were no grills at the scene of the accident. However, there was a supermarket nearby.

32. In the case of Masembe v Sugar Corporation And Another [2002]2 EA 434, it was held: -

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it....A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.... Whereas a driver is not to foresee every extremity of folly which occurs off the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently."

33. I have considered the appellant's grounds of appeal. I have also considered the submissions and authorities cited in support thereby. I agree with the trial magistrate that the deceased did contribute to the accident. However, I am of the view that he should bear a higher degree of blame than that attributed to him by the trial magistrate. As a pedestrian, he owed a duty of care to himself and to other road users. More so because it was at night and there was no zebra crossing where he was hit but there was a fly-over 300 meters away. In the case of Jane Muthoni Mukabi And 4 Others v Philip Macharia Ndirangu And 4 Others [2020] eKLR where the deceased was knocked 20 meters away from the fly over, the court stated:

> " In the circumstances of this case, I think that the deceased and the 1st Appellant should be held equally liable consequently the order apportioning liability in the ratio of 70%:30% is set aside and is substituted with an order apportioning liability in the ratio 50%:50%."

34. Similarly, in the case of David Kimilu Mutinda -vs- Masinde Wamela Samuel [2021] eKLR where the deceased abruptly crossed the road where there was no zebra crossing, the court held that both the appellant and the respondent equally share liability.

35. Upon careful consideration of the evidence adduced, since it is not clear who was to blame for the accident, I am persuaded that both the deceased and the 1st appellant must bear an equal share of the blame for the accident. The order apportioning liability in the ratio 75%:25% is therefore set aside and substituted with an order apportioning liability in the ratio of 50%:50%. In making this determination, I am guided by the Court of Appeal case of Hussein Omar Farah v Lento Agencies [2006] eKLR where the court held: -

> " In our view, it is not reasonably possible to decide on the evidence who between the two was to blame for the accident. In this state of affairs, the question arises whether both drivers

should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers both should be held equally to blame."

36. On proof of dependency, I find that the appellants did not dispute the same. In any event, the 1st respondent produced a letter from their local Chief indicating she was the deceased's wife and that they had two children I therefore find that there was sufficient evidence on a balance of probabilities in proof of dependency.

37. I am now left with the issues of quantum of damages and special damages. On general damages for pain and suffering and loss of expectation of life. I find no ground to interfere with the trial magistrate's discretion as the two awards are reasonable and within the confines of the past awards.

38. With respect to special damages, the respondents claim Ksh 1,510/= for limited grant of letters of administration and Ksh 550/= was proven by way of receipts. The respondents claimed Ksh 66,500/= for funeral expenses. In a bid to prove the same she produced a document from Precious Funeral Services in which she was charged the said sum for a hearse. There is an indication that a deposit of Ksh 35,000/= was paid for transport from Nairobi City Mortuary to Rongo and balance was payable before the trip. The document is in the 1st Respondent's name and that of one George Ochieng who is described as a cousin. The 1st respondent signed the document. This evidence was not controverted by the appellants. It is this court's finding that the same was proven on a balance of probabilities.

39. On the loss of dependency, the Appellants' case was that the multiplier of 20 years was on the higher side, and they proposed a multiplier of 15 years instead. They placed their reliance on Ajiwa Shamji Company Ltd v Rehema Atieno Okoth [2015] eKLR and Oyugi Judith And Another v fredrick Odhiambo Ongong And 3 Others [2014] eKLR where the courts applied a multiplier of 16 years and 12 years respectively for deceased persons who were aged 31 years.

40. I have also considered the submissions by the respondents. Considering the evidence that was adduced in court the age of the deceased, the age of the dependents and the vicissitudes of life. I find that the trial magistrate did not err in adopting a multiplier of 20 years for a person who was aged 35 years and employed. In Francis Wainaina Kirungu v Elija Oketch Adellah [2015] eKLR, the court adopted a multiplier of 35 years for a deceased who was aged 28 years at the time of his death.

41. The appellants faulted the trial magistrate for applying a dependency ratio of 2/3 because there was no evidence of marriage nor a birth certificate on record. As earlier stated, I am satisfied that there was proof of dependency. The question that therefore remains is to determine whether the dependency ratio of 2/3 was in excess.

42. The deceased left behind an extremely young family. Although their confirmed relationship is sufficient proof of dependency, the respondent led no evidence whatsoever to prove that the deceased spent 2/3 of his earnings on his family. The extent of dependency was held to be a question of fact in Leornard Ekisa And Another v Major Birgen [2005] eKLR where Ringera J held:

> " There is no rule of law that 2/3 of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case. In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the expected, length of dependency vicissitudes of life and factor accelerated by payment in lump sum."

43. In her evidence, the 1st respondent described herself as an Accounts Assistant at Environmental and Combustion Consultants Limited. She must have been contributing to the family up-keep jointly with

the deceased. It was the 1st respondent's evidence that the deceased was based in Kisumu. Certainly, he was operating two households, the family home in Kitengela, and his house in Kisumu. He could not have been applying 2/3 of his salary to the family home as he also needed to meet his own needs at Kisumu.

44. The appellants urged the court to adopt a dependency ratio of 1/3. In the case of James Mutunga Mbinda v Stephen Mwarula Mulwa And Another (Suing as the legal representatives of the estate of Winfred Mbatha Mwalula) [2021] eKLR where the deceased was earning less than the surviving spouse who sued on behalf of her estate the court substituted the dependency ratio of 2/3 to 1/3. Having considered the circumstances in the present case vis-à-vis those in the aforesaid case, I am persuaded that the dependency ratio ought to be reduced. However, unlike in the above cited case, the children herein are at a very tender age. I have also taken cognizance of the fact that the money is being paid in lumpsum and if prudently invested, would yield handsome returns. A dependency ratio of 1/2 is more appropriate. I therefore review the dependency ratio downwards from 2/3 to 1/2.

45. In considering the award, the trial magistrate applied a multiplicand of ksh.60,000/=. This was in error as it reflected the gross earnings of the deceased. The court did not take the requisite statutory deductions into account. In the case of Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja deceased) v Kiarie Shoes Stores Ltd [2015] eKLR, the Court of Appeal held that the net income determined the multiplicand and it is only net of stationary deductions.

46. The deceased's pay slip that was produced reflected Paye deductions in the sum of ksh.29,122.40/ = NHIF deductions of ksh.1,700/= and NSSF deductions of ksh.200/=. The PAYE deduction was premised on one month's salary plus transfer allowance being ksh.60,000/=. The appellants made a simple calculation and submitted that ksh.41,278/= should be the net salary of the deceased.

47. I have carefully considered the appellant's proposal. From a salary of ksh.60,000/=, KRA would have deducted ksh.10,059.05/= after taking personal relief into account, Net pay would therefore have been ksh.48,040.95/=.

48. In the end, I find that for the reasons given herein, the appeal partially succeeds.

49. I therefore set aside the judgement of the lower court and instead enter judgement in favor of the Respondents as follows:-

    a. Liability 50%:50%.

    b. General damages under the *Law Reform Act*....ksh.50.000/=.

    c. Loss of expectation of life.....ksh.100,000/=.

    d. General damages under the *Fatal Accidents Act*.

    e. Loss of dependency.... ksh.48,040 x 12 x 20 = ksh.11,529,600/=.

    f. Special damages..... ksh.75,700/=

       Sub-total.....ksh.11,605,100/=

       Less 50% contribution ...ksh.5,802,550/=

       Total.....ksh.5,802,550/=

50. Taking into account the entire circumstances of the case, I order that each party bear its own costs of the appeal.

    It is so ordered.

Dated, Signed and Delivered Virtually at Kakamega this 19{{^th Day of July 2024.

A. C. BETT

JUDGE

In the presence of:

Muriuki holding brief for Mr. Goya for the appellants.

Ms. Ngigi for the respondents.