Njehu v Gathumbi & 3 others (Civil Appeal E105 & E115 of 2022 (Consolidated)) [2024] KEHC 8470 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8470 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E105 & E115 OF 2022 (CONSOLIDATED)

JM NANG'EA, J

JULY 10, 2024

BETWEEN

JOSEPH MBUGUA NJEHU ..... APPELLANT

AND

LEAH NYAKIO GATHUMBI ..... 1ST RESPONDENT

JOHN KARIUKI IRUNGU (SUING AS DEPENDANTS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF GEORGE KINYANJUI GITHEGI (DECEASED) ..... 2ND RESPONDENT

ANCHOR HOLDING LIMITED ..... 3RD RESPONDENT

SARAH AZANZI OMONDI ..... 4TH RESPONDENT

(Being an appeal from the Judgement of the Resident Magistrate's Court at Kikuyu (Hon. L.K Nyabando) delivered on 4th May 2022 in Kikuyu CMCC NO. 192 OF 2018)

JUDGMENT

1. By order of my Sister Hon. Justice Rachael Ng'etich issued on 17/11/2022, this appeal and Kiambu High Court Civil Appeal No. E 115 of 2022 were consolidated. It was further directed that the proceedings in the consolidated appeals would be recorded in Civil Appeal No. E105 OF 2022.

2. The appellant herein is challenging the said learned Trial magistrate's judgement in which she apportioned liability in the suit in the ratio of 20% against the 1st and 2nd defendants who are the 3rd and 4th respondents herein and 80% against the appellant. The trial court subsequently awarded the 1st and 2nd respondents, who were the plaintiffs in the suit, general and special damages of Ksh.2,758, 082 together with the costs of the suit and interest.

3. The summary of the case before the trial court is that the 1st and 2nd respondents sued the 3rd and 4th respondents as well as the appellant jointly and severally for general damages, special damages, the costs of the suit and interest following a road traffic accident that occurred on 26th December 2013 in which the above named George Kinyanjui Githegi ("hereinafter referred to as ''the deceased") died. The appellant was accused of negligently driving motor vehicle registration number KBM 490 Z as a result of which it lost control and rammed into another motor vehicle registration number KBL 661 K driven by the 4th respondent thereby occasioning fatal injuries to the deceased who was a pedestrian.

4. The 3rd and 4th respondents filed a joint defence traversing all the material particulars of the suit putting the 1st and 2nd respondents to strict proof. In the alternative, they attribute any accident that may be proven to have occurred to negligent driving of the appellant's motor vehicle registration number KBM 490 Z. In a separate defence the appellant similarly denied liability for the claim and in turn blame the occurrence of the accident on negligence of the 3rd and 4th respondents. After a full hearing judgement as stated above was rendered.

5. The appellant's Grounds of Appeal as stated in his Memorandum of Appeal filed on 25th May 2022 may be condensed as hereunder:

    a. That the learned trial magistrate improperly assumed jurisdiction to hear and determine the suit despite it being statute barred and no satisfactory explanation having been given for delay to bring the suit within the period prescribed by the law.

    b. That the learned trial magistrate failed to consider and appreciate the appellant's evidence resulting in an erroneous decision on the appellant's liability for the claim and the quantum of damages awardable.

    c. That the learned trial magistrate's judgement on both liability and quantum of damages is otherwise against the weight of the evidence.

6. The appellant therefore prays for setting aside of the lower court's judgement, the costs of this appeal and any other relief the court may deem fit to grant.

7. The parties filed written submissions vide the court's efiling platform which I have perused against the record of this appeal.

8. The appeal is on both liability for the claim and the quantum of damages awarded. It is trite law that the appellate court can only interfere with the finding and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of Selle V. Associated Motor Boat Co. (1968) EA 123.

9. The court will first determine the question of jurisdiction. The suit is founded on tort. By dint of section 4 (2) of the *Limitation of Actions Act*, such action '' may not be brought after the end of three years from the date on which the cause of action accrued." The cause of action herein arose on 26th December 2013 when the deceased died in the road accident subject of the suit in the lower court and the suit was instituted on 5th July 2018, about five years after the cause of action accrued.

10. It is, however, common ground that the 1st and 2nd respondents did seek and obtained leave to file suit out of time vide an ex parte Originating Summons (' the O S") dated 20th March 2018 filed in the lower court. As is his right, the appellant challenged the grant of leave in his defence and during hearing

of the suit. The trial court correctly guided itself that it had jurisdiction to confirm or vacate the ex parte order depending on evidence proffered by the parties at the hearing of the suit.

11. Section 27 of the *Limitation of Actions Act* provides that section 4 (2) of the Act supra ''does not afford a defence to an action founded on tort where;

    a. The action is for damages for negligence; nuisance or breach of duty (whether the duty exists by virtue of contract or written law or independent of a contract or written law; and

    b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

    c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

    d. The requirements of subsection (2) are fulfilled in relation to the cause of action.

12. The elements stated under (a), (b) and (c) above are obviously present in the suit and appear undisputed. Determination of the issue of whether the 1st and 2nd respondents were properly granted leave to bring the suit out of time therefore turns on the question of whether the requirements of Section 27 (2) of the Act were fulfilled in relation to the cause of action. That enactment stipulates that the requirements of the ''subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –

    a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than year before the end of that period; and

    b. in either case, was a date not earlier than one year before the date on which the action was brought.''

13. Section 30 of the same Act defines ''material facts'' relating to the relevant cause of action as—

    a. The fact that personal injuries resulting from the negligence, nuisance or breach of duty constitute that cause of action;

    b. The nature or extent of the personal injuries resulting from that cause of action.

    c. The fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

14. Under section 30 (2) of the Act, ''material facts are of a decisive character only if a reasonable person knowing those facts and having sought appropriate advice would regard those facts as showing that an action would (apart from expiration of the limitation period) have a reasonable prospect of success and result in an award of damages sufficient to justify the bringing of an action.''

15. The appellant contends that the 1st and 2nd respondents did not comply with the conditions precedent to grant of leave to file suit out of time as shown above. The 1st respondent's explanation in the trial court for delay to file the suit is not clearly recorded in the proceedings. She is recorded as stating: '' we filed it and it got lost in the High Court''(sic). ..... '' There was an issue at the High Court. I filed a miscellaneous at Kikuyu Law Courts (Sic).

    I was seeking extension of time''.

16. The 1st respondent is further recorded as stating thus:'' I did not come on time as I was taking care of the children. It was a sudden death.

The delay was brought by the issue of the High Court. I don't know whether my advocate wrote a letter to the Deputy Registrar on the issue of the lost file."

17. The appellant understood the 1st and 2nd respondents to be explaining that a Succession file in which they had sought Grant of Letters Administration Ad Litem to enable them file the suit on behalf of the deceased's estate had gone missing, hence the delay to lodge the suit. Indeed this is the reason given in the 1st and 2nd respondents' O S for leave to file suit out of time. The Record of Appeal contains the Grant of Letters of Administration Ad Litem which indicates that it was issued on 16th December 2016 paving the way for filing of the suit on 5th July 2018, about 1 ½ years later. The appellant, however, faults the 1st and 2nd respondents arguing that there is no evidence of the said Succession file having gone missing and further that no effort is shown to have been made to trace the file or otherwise prosecute the matter. According to the appellant, there are therefore no material facts of a decisive character the 1st and 2nd respondents were unaware of which caused the delay to bring the suit within time.

18. The learned trial magistrate did not consider and satisfy herself that the 1st and 2nd respondents fulfilled the mandatory requirements of section 27 (2) of the *Limitation of Actions Act* set out supra before upholding the ex parte leave to file the suit out of time. There is also no evidence that the said Succession file had in fact gone missing from the concerned court and, in any event, it is not demonstrated that efforts to trace it, as by means of correspondences with the court, were expended as observed by the appellant. Whereas in my view it would have been a material fact of a decisive character if the 1st and 2nd respondents were indeed ignorant as to if and when the court issued the Grant of Letters of Administration Ad Litem because of the said missing court file, their evidence in the lower court does not, however, show when they finally learnt of issuance of the Grant. The O.S seeking leave to file suit out of time does not also state the date on which the 1st and 2nd respondents got to know that the Grant had been issued.

19. It would in the circumstances be logical to assume that the 1st and 2nd respondents learnt of issuance of the Grant of Letters of Administration Ad Litem on 16th December 2016 when the same purports to have been issued. The 1st and 2nd respondents then waited for about 1 ½ years to file the suit on 5th July 2018 contrary to section 27 (2) (b) of the *Limitation of Actions Act*.

20. The court accordingly finds that the trial court improperly entertained the suit it being statute barred. The court lacked jurisdiction and should not therefore have heard the suit on merits. This appeal is therefore for dismissal and Ground (a) of the Memorandum of Appeal succeeds.

21. For completeness of the decision for purposes of any second appeal, however, the court will determine the other contested issues of causation of the accident and quantum of damages awardable had the 1st and 2nd respondents shown that the trial court had jurisdiction.

22. The appellant denies blameworthiness for accident that caused the deceased's demise. The lower court apportioned liability for the accident against him at 80% with the 3rd and 4th respondents adjudged to shoulder 20% responsibility. As pointed out by the appellant, the 1st and 2nd respondents did not call any eye witness to the occurrence of the accident. Nevertheless, the trial magistrate noted as follows: "From the evidence on record it is clear that the 3rd defendant (read, the appellant) hit the 2nd defendant (read, the 4th respondent) which resulted in her hitting the pedestrian (read, the deceased)". The trial court further observed that the accident could have been easily avoided " had both drivers (read the appellant and the 4th respondent) been on the lookout and exercised some due care for the safety of other road users."

23. Neither PW1 (the 1st respondent) nor PW2 (the accident investigating officer) witnessed the accident. Moreover, the 4th respondent was declared as an unreliable witness for giving inconsistent testimony as to how the accident occurred in a related Traffic Case No. TCR 51 2014 (Kikuyu Law Courts) forming the record of this appeal in which he was charged inter alia with causing the deceased's death by dangerous driving. PW2 did not also testify to drawing any rough and /or fair sketch plans of the scene of the accident to illustrate the circumstances in which the accident occurred. There is therefore no factual basis on which to rely on either of the accounts of the two witnesses, PW2 and the 4th respondent.

24. From the record, the appellant and the 4th respondent blame each other for the collision of their vehicles leading to the deceased's fatal injuries. In the case of Easy Coach Limited & another V. Gideon Otieno Oulu (2021) eKLR cited in the appellant's submissions inter alia, the court apportioned liability equally in similar circumstances where the only evidence on liability is the rival allegations of the parties. The same position has been underscored in an earlier decision in Matunda Fruits Bus Ltd V. Moses Wangila & another (2018) eKLR among many other superior courts' decisions.

25. For the foregoing reasons, I would find the appellant on one hand and the the 3rd and 4th respondents on the other, equally to blame for occurrence of the accident and consequent death of the deceased. The appellant's other contention that the learned trial magistrate wrongly decided the case without the advantage of watching the demeanour of the witnesses is disregarded as the court had jurisdiction to take over proceedings commenced by another court and render a decision without recalling witnesses.

26. Turning to the issue of the quantum of damages, the appellant contends that the 1st and 2nd respondents neither proved the fact of dependency nor the deceased's occupation and/or income for the purpose of assessing loss of dependency. The 1st and 2nd respondents' birth certificates have not been exhibited to show their relationship to and therefore dependency upon the deceased as pointed out by the appellant. A Chief's letter dated 10/01/2014 was, however, tendered and purports to indicate that the 1st and 2nd respondents were the deceased's children which evidence has not been discredited. The court accordingly finds that the 1st and 2nd respondents proved their dependency on the deceased during his lifetime.

27. Concerning the multiplicand adopted, there is no evidence proving that the deceased was a carpenter as well as his earnings. The trial court thought it fit to apply the wages of an Artisan Grade iii under the Regulation of Wages (General) (Amendment Order, 2017), being Ksh.29,942.35 per month . The appellant is of the view that in the circumstances the wages of a general labourer or unskilled employee under the Regulation of Wages (General) (Amendment) Order, 2013 that came into force on 1st May 2013 would be the correct applicable law, the deceased having died on 26th December 2013. It is therefore suggested that the proper multiplicand should be Ksh.5,218 per month stipulated in this law.

28. There is indeed no corroborative evidence that the deceased was a carpenter and what his earnings were. I thus agree with the appellant's submissions that the proper multiplicand is the wages of a general labourer/unskilled employee should the court adopt this method of assessing damages. Of course it is now trite that this is not the only method of assessing such damages. The global/ lump sum approach may also be employed in similar circumstances.

29. In the premises, I am persuaded by the appellant's submissions and adopt the multiplicand of Ksh.5,218.

30. The appellant does not seem to dispute the multiplier of 15 years the trial court adopted and the court will not therefore disturb this finding.

31. The award for loss of dependency therefore works out as follows:(5,218 x12x 15 x 2/3 = 626,160).

32. The trial court's awards for pain and suffering as well as loss of expectation of life under the *Law Reform Act* do not appear to be challenged and I would not therefore disturb the awards.

33. Turning to special damages, the appellant challenges payment receipts produced by the 1st and 2nd respondents on the ground that stamp duty payable thereon was not made good. Section 19 (1) of the *Stamp Duty Act* provides inter alia that ''no instrument chargeable with stamp duty shall be received in evidence '' in proceedings such as the subject of this appeal ''unless such instrument is duly stamped". A perusal of the exhibited receipts in support of special damages of Ksh.45,000 indeed confirms absence of evidence of payment of stamp duty. The legal position, however, is that a party intending to produce such unstamped receipts should be given an opportunity to pay the stamp duty and is not barred from tendering the receipts unless an offered chance is not utilized (see the Court of Appeal case of Paul N. Njoroge V. Abdul Sabuni Sabonyo (2015) relied upon in the 1st and 2nd respondents' submissions). The record does not show that the 1st and 2nd respondents were given time to pay any applicable stamp duty. The 1st and 2nd respondents were therefore entitled to the sum of Ksh. 15,000 in special damages as granted in the lower court.

34. In the result, this appeal succeeds as follows:

    a. The trial court's judgement on liability and quantum of damages is set aside and substituted with an order striking out the suit with costs for being time barred.

    b. In the event that I am wrong in striking out the suit, I would apportion liability between the appellant on one hand and the 3rd and 4th respondents on the other at 50% each.

    c. I would further substitute the sum of Ksh.2, 633,082 the lower court granted to the 1st and 2nd respondents for loss of dependency with an award of Ksh.626,160, were the suit not found to be time barred, to be liquidated by the appellant and the 3rd & 4th respondents according to their adjudged contribution.

    d. The awards under the *Law Reform Act* for pain and suffering as well as loss of expectation of life would remain as assessed by the trial court.

    e. The appeal on special damages claim would fail.

    f. As the appellant succeeded, I would grant him the costs of the appeal to be borne by the 1st and 2nd respondents.

    Judgement accordingly.

J. M. NANG'EA

JUDGE

Judgement delivered virtually this 10th day of July 2024

In the presence of :

The Appellant's Advocate,.....

The 1st and 2nd respondents' Advocate,.....

The 3rd and 4th respondents' Advocate,.....

The Court Assistant, ...