



Omariba v Njoki & another (Suing as administrators in the Estate of Alex Chau Ndung’u (Deceased) (Civil Appeal E182 of 2022) [2024] KEHC 7864 (KLR) (Civ) (1 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E182 OF 2022

WM MUSYOKA, J

JULY 1, 2024

BETWEEN

CLIFFORD OTUNDO OMARIBA APPELLANT

AND

JUDY MUTHONI NJOKI & DENNIS NDUNG’U CHAU (SUING AS ADMINISTRATORS IN THE ESTATE OF ALEX CHAU NDUNG’U (DECEASED) RESPONDENT

(Appeal from judgment and decree of Hon. AN Ogonda, Senior Resident Magistrate, SRM, in Milimani CMCCC No. E5198 of 2020, of 28th February 2022)

JUDGMENT

1. The appellant had been sued by the respondents, at the primary court, for compensation arising out of the death of Alex Chau Ndung’u, to be referred hereafter as the deceased, following a road traffic accident on 3rd April 2018, along Naivasha-Nairobi road. The deceased was a pedestrian on the said road, and was knocked down by motor vehicle registration mark and number KAJ 225G, said to have belonged to the appellant, and liability was attributed on the appellant on account of negligence. The appellant filed a defence, denying the accident, and everything else pleaded in the plaint, and, in the alternative pleading contribution on the part of the deceased.
2. A trial was conducted. 2 witnesses testified for the respondents, while the appellant testified in his case. Judgment was delivered on 28th February 2022. On liability, the court held the appellant 60% liable and the deceased 40%. On quantum, the court awarded Kshs. 20,000.00 for pain and suffering and Kshs. 150,000.00 for loss of expectation of life; Kshs. 800,000.00 for loss of dependency; and Kshs. 36,450.00 being special damages. Upon subjecting the total judgment award to contribution, the amount came to Kshs. 603,870.00.



3. The appellant was aggrieved, hence the instant appeal. The appeal has raised several grounds: awarding general damages at Kshs. 970,000.00; the amount of general damages awarded was excessive; assessment of liability; limitation of actions; failing to dismiss the suit; the award of special damages; and not considering evidence from the appellant.
4. On 12th June 2023, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions.
5. The appellant has argued on only 2 grounds: liability and limitation of actions. On liability he submits that the accident did not occur at the middle of the road, going by his testimony at the trial, and that the trial court should have found the deceased wholly liable for the accident, or as bearing a higher contribution than that assessed. On limitation, it is submitted that the suit was filed outside the permitted limitation period, and no evidence was adduced to demonstrate that the respondents had obtained leave to file the suit out of time, and, even if they had, a proper case had not been made out for grant of leave.
6. On their part, the respondents submit on the 2 grounds argued by the appellant: on liability and limitation of actions. On liability, the respondents submit that they presented 2 witnesses on liability, a police officer and the 1st respondent, who they state was together with the deceased at the material time. On limitation of actions, they submit that they obtained leave in Originating Summons No. 307 of 2020, and the trial court was satisfied that leave had been obtained.
7. The appeal herein is brought at the instance of the appellant. He has reduced his grounds to 2, going by his submissions, and I shall confine determination of this appeal to the 2 grounds, on the presumption that, by submitting only on the 2, the appellant has abandoned the other grounds.
8. On liability, the appellant testified. He described how the accident happened. The 1st respondent also testified, she said she was with the deceased, and witnessed what happened. It is not disputed, from the facts, that the collision happened on the road. The appellant testified that the deceased was crossing the road, and that he saw him, but he could do nothing to prevent the collision, for there was a lorry on the other lane, and so he could not swerve in that direction, and on the other side there was a cliff. He blamed the deceased, saying that he was staggering. There was mention of a zebra crossing, by the 1st respondent, but I note that the police evidence made no mention of it.
9. So, what do I make of it, based on the testimonies of the appellant and the 2 witnesses presented by the respondents? The key witness here was the appellant, for there some cloud of uncertainty as to whether the 1st respondent was at the scene. The appellant said that he saw the deceased crossing the road, but he could not avoid him, for he, the appellant, could not leave his lane, by way of swerving, as there was a lorry on the other lane, and a cliff on the other side. The impression he gave was that his hands were tied. There was nothing he could do. He said he saw the deceased 25 metres away, and initially he did not notice that there were people on the road until the lorry, that was overtaking him, hooted at them.
10. Was the deceased to blame? The appellant testified that he was staggering, while crossing the road. A stagger by a pedestrian would only be relevant where the pedestrian is walking along the road, either towards or in the same direction with the driver, and he staggers into the path of the driver. In this case, the deceased was crossing the road. He was in front of the appellant, and whether there was a zebra crossing or not, once he saw him, the appellant was bound to give way to him, by way of applying brakes, to stop his car, or to slow it down, to give time to the pedestrian to cross. Whether the deceased was staggering or not, would have been irrelevant, in the circumstances. The appellant did not say that the deceased suddenly jumped into the road, or run into the road suddenly, and so he had no chance to take evasive action. I note from his witness statement that the appellant alleges that the deceased had



effectively crossed the road, but then staggered back into his lane. Well, in his sworn testimony in court, he did not allude to the deceased staggering back onto the road, but about the deceased staggering on the road.

11. My conclusion is that the appellant was to blame, for hitting a pedestrian who was crossing the road. In his own words, he could not see clearly, and only became aware that pedestrians were crossing the road when a lorry, which was overtaking him, hooted at them. It was a clear case of the appellant not keeping a proper lookout, and of driving at a speed which was not appropriate in the circumstances. The appellant, no doubt, bore the greater responsibility for the accident. I would not interfere with the finding of the trial court, on liability, in the circumstances.
12. On limitation of actions, the respondents indicated, in the heading or title of their plaint, that leave to file suit out of time had been granted on 17th September 2020, by Hon. CK Kithinji, in Originating Summons No. 307 of 2020. The appellant did raise the issue of limitation in its defence statement, as amended on 6th November 2020. In its list of documents, dated 18th September 2020, the respondents did not list the leave obtained in Originating Summons No. 307 of 2020, as among the documents that they were to rely upon at trial. At the trial, the 1st respondent was cross-examined on that, and she said that there might have been an order for leave to file suit out of time, and that an extract of that order might have been with their Advocates, and it could be one of the documents filed. The trial court held that the order, for extension to time to file suit out of time, had been granted, and, therefore, it was a non-issue.
13. Does anything turn on this? Yes, it does. The appellant made it an issue, in the amended defence, that the suit was filed out of time. That made it a triable issue, which the respondents were bound to lead evidence on, to establish that they did indeed obtain such leave. The trial court erred in dismissing it off-hand. It was pleaded, and it was an issue at the trial, for which evidence ought to have been led. The respondents pleaded it, in the heading of their plaint, and the appellant challenged it in his amended defence. No evidence was placed on record to establish that such leave was obtained. The trial court relied on the pleading by the respondents to assert that leave was obtained. A pleading is not evidence. It is a mere assertion, that has to be established by concrete evidence.
14. In this case, the concrete evidence should have been the order of 17th September 2020, in Originating Summons No. 307 of 2020. Nothing would have been easier than to produce the original formal order, duly signed by the court which granted it. The alternative would have been production of the original file where it was allegedly granted, Originating Summons No. 307 of 2020. It would even have sufficed to attach a copy of the order to the plaint, at the time of lodging the suit at the registry. As it is, the trial court acted on a presumption, rather than evidence, and without any material to back the presumption. There was nothing before the court to show that that alleged leave was granted. To the extent that that was not done, then the suit was stale, and the trial court had no jurisdiction to entertain it, and should have dismissed it. Expiration of the limitation period robbed the suit of validity, which could only be cured by extension of the limitation period. Whether that extension was granted was a matter of evidence, which was not availed to the court.
15. In the end, I find merit in the appeal, and I hereby allow it. The effect shall be that the order made on 28th February 2022, is substituted with an order dismissing the suit. Each party shall bear their own costs.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 1ST DAY OF JULY 2024.

W MUSYOKA



JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Appearances

Mr. Modi, instructed by Modi & Company, Advocates for the appellant.

Mr. Kagura, instructed by Maina Kagura & Company, Advocates for the respondents.

