Kirimi v Cheptumo & another (Suing as the Personal Representatives of Zaphania Kiptoo Kipyegomen) (Civil Appeal E807 of 2022) [2024] KEHC 10538 (KLR) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10538 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E807 OF 2022

WM MUSYOKA, J

SEPTEMBER 3, 2024

BETWEEN

JAFORD KIRIMI ..... APPELLANT

AND

JOSEPH KIPYEGOMEN CHEPTUMO ..... 1ST RESPONDENT

MAUREEN JERUTO TUITOEK ..... 2ND RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVES OF ZAPHANIA KIPTOO KIPYEGOMEN

(Appeal from judgment and decree of Hon. HM Nyaga, Chief Magistrate, CM, in Milimani CMCCC No. E9871 of 2021, of 15th September 2022)

JUDGMENT

1. The appellant had been sued by the respondents, at the primary court, for compensation arising out of the death of Zaphania Kiptoo Kipyegomen, to be referred hereafter as the deceased, following a road traffic accident on 6th November 2020, along Baraka Road. The deceased was a pedestrian on the said road, and was knocked down by motor vehicle registration mark and number KBP 252V, said to have belonged to the appellant, and liability was attributed on the appellant on account of negligence. The appellant filed a defence, admitting the accident, but denying 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 1 testified for the appellant. Judgment was delivered on 15th September 2022. On liability, the court held the appellant 50% liable and the deceased 50%. On quantum, the court awarded Kshs. 100,000.00 for pain and suffering and Kshs. 150,000.00 for loss of expectation of life; Kshs. 10,634,160.00 for loss of dependency; and Kshs.

550.00 being special damages; all totalling Kshs. 10,884,610.00. Upon subjecting the total judgment award to contribution, the amount came to Kshs. 5,442,355.00.

3. The appellant was aggrieved, hence the instant appeal. The appeal has raised several grounds revolving around liability and quantum.

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 quantum. On liability, he submits that the respondents did not provide eyewitness evidence on how the accident happened, and, therefore, there was inadequate evidence to establish negligence on the part of the appellant. He cites *Violet Kamwenga Odiara & another (suing as the administratrix of the Estate of the late Timothy Odiara Ndege) v. Kiprono Chemwono* [2019] eKLR (SM Githinji, J), *Benter Atieno Obonyo v. Anne Nganga & another* [2021] eKLR (Chemitei, J), *Catherine Wambui Njogu v. Jacob Mash Shake & another* [2019] eKLR (Okwany, J) and *Stephen Kanjabi Wariari v. Dennis Mutwiri Muriuki & another* [2022] (Njuguna, J). He urges that the trial court should have found the deceased wholly liable for what befell him, and liability should have been assessed at 100% against him.

6. On quantum, he has submitted on several sub-heads. On loss of expectation of life, he argues that the award of Kshs. 200,000.00 was on the higher side, given that the deceased was aged 27 years at the time of his death. He urges that Kshs. 100,000.00 would have been adequate. He relies on *Hyder Nthenya Musili & another v. China Wu Yi Limited & another* [2017] eKLR (Nyamweya, J) and *Njiru Benson Murage v. Peter Njue Zachariah (suing as the administrator of the estate of Justin Mukundi Njue* [2019] eKLR (Muchemi, J). On pain and suffering, he submits that the award of Kshs. 100,000.00 was on the higher side, and argues that the award should have been Kshs. 50,000.00, relying on *Hyder Nthenya Musili & another v. China Wu Yi Limited & another* [2017] eKLR (Nyamweya, J).

7. On the multiplier used of 30, for someone aged 27 years, he submits that the same was on the higher side, and argues that a multiplier of 20 should have been adopted, after taking into account the vagaries and uncertainties of life. He cites *Rose Wangui Machua & another v. Japheth Mbiuki* [2016] eKLR (Msagha, J), where a multiplier of 20 was adopted for a 23 year-old; and *Mary Kerubo Mabuka v. Newton Mucheke Mburu & 3 others* [2006] eKLR (Kimaru, J), where a multiplier of 20 was adopted for a 26 year-old. It is submitted that the life expectancy of Kenyans has reduced due to poverty, the HIV/AIDS pandemic and road traffic accidents. He does not challenge the multiplicand and dependency ratio adopted and applied by the court.

8. On their part, the respondents submit on the 2 grounds argued by the appellant: on liability and quantum. On liability, the respondents support the conclusions arrived at by the trial court. They rely on the principle that where there is evidence that an accident happened, but it is unclear as to who caused it, it ought to be presumed that both sides contributed to it, on equal basis. They rely on *Hussein Omar Farah v. Lento Agencies* [2016] eKLR (Omolo, Tunoi & Githinji, J), *Commercial Transporters Limited v. Registered Trustees of the Catholic Arch-Diocese of Mombasa* [2015] eKLR (Aburili, J), *Masembe v. Sugar Corporation & another* [2002] 2 EA 434 and *ZOS & CAO (suing as the legal representative in the estate of SAO (Deceased) v. Amollo Stephen* [2019] eKLR (Aburili, J).

9. On pain and suffering, they submit that the award of Kshs. 200,000.00 was justified as the deceased was hospitalised for a while, and they rely on *Margaret Wanjiru Wanjiri & another v. Isaac Thumbi Gitau & 2 others* [2017] eKLR (JN Mulwa, J). They support the award of Kshs. 150,000.00, and cite *Joseph Gatone Karanja v. John Okumu Soita & Esther Chepkorir (suing as admin of the estate of Benard Soita Nyongesa* (DCD) [2022] eKLR (Ogola, J), where an award of Kshs. 150,000.00 was made for a 34-year old. They equally support the multiplier adopted by the court, but cite no authority.

10. On liability, it will be noted that the deceased person, on whose behalf the suit was brought, died after the accident, and before the suit was heard. He was not available to tell his side of the story. The respondents did not provide an eyewitness, to recount to the court on what transpired. One of them, the 1st respondent, testified as PW1. She did not witness the accident, and said she did not know who was to blame. She called PW2, a police officer, who produced the police abstract report. She stated that the matter was still under investigation. DW1 testified for the appellant. He was the driver of the accident vehicle. He said that his motor vehicle was stationary, when the deceased walked to the side of the vehicle, and hit its side mirror, and fell to the ground, got up and walked away. He stated that individuals who were around asked DW1 not to leave the scene, and officers from the Kenya Defence Forces arrived.

11. The accident was conceded by the appellant. There was an incident which involved the deceased and a vehicle belonging to the appellant. There was police evidence of it, no doubt based on the reports made by the parties. The only issue is on negligence. Who was liable for it? The duty was on the respondents, by dint of sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya, to establish that that incident was wholly or partially caused by the appellant or his driver. The evidence presented by them fell short of that, for nothing was adduced on what exactly happened. However, the appellant led evidence, which partially filled the gap. The appellant was not obliged to lead any evidence, on account of the inadequate evidence led by the respondents, for the evidential burden had not shifted to him. The trial court did not shift the burden to him. He, of his own volition, chose to lead or adduce evidence, which shed light on what might have happened. The testimony by DW1 placed the deceased at the scene, and brought him into contact with the accident vehicle. He alleged that his vehicle was stationary, when the deceased came into contact with it, and that whatever injuries he sustained arose from a fall as a result. The trial court disbelieved that narrative, upon taking into account the fact that the deceased suffered fatal injuries.

12. The case would have been fairly straightforward, had DW1 not testified. There would have been nothing upon which the trial court could have assessed liability. As indicated above, the appellant was not obliged to lead evidence on what transpired, but he chose to. The testimony was illuminating. It established that a collision happened. The narrative was no doubt incredible, that a staggering drunk individual would knock himself so badly on a stationary vehicle, as to suffer fatal injuries. The trial court was justified, in disbelieving the testimony, and in concluding that there must have been a violent collision between the deceased and a fast moving vehicle, bad enough to cause fatal injuries.

13. I agree with the respondents, that where there is evidence of a collision, but there is inadequate evidence of how the collision occurred, the way to go is not to excuse everyone of liability, for one or both parties must have contributed to the collision. The way out is to hold both parties liable for the collision. That principle, stated in a plethora of cases, among them those cited by the respondents, and others, such as *Lakhamshi v. Attorney General* [1971] EA 118 (Spry VP, Lutta & Mustafa, JJA), D*omitila Wangui Karugu & another v. Dagu Hidris Haide* [2020] eKLR (Majanja, J), *Amani Kazungu Karema v. Jackmash Auto Ltd & another* [2021] eKLR (Nyakundi, J) and *Ndatho v. Chebet* [2022] KEHC 346 (KLR)(Gitari, J), would apply here. A collision happened between the deceased and the vehicle belonging to the appellant, something conceded by the appellant in his defence, and in the evidence adduced. The explanation by the defence witness of what transpired was simply out of this world, hence the court disbelieved it. That left no option, but to conclude that both parties were equally to blame for it.

14. On loss of expectation of life, the trial court awarded Kshs. 150,000.00. The appellant argues his appeal on the basis that the trial court had made an award of Kshs. 200,000.00, which is erroneous. Whatever the case, the question is whether the award of Kshs. 150,000.00 was excessive. The appellant

argues that whatever was awarded was excessive, and the trial court ought to have awarded Kshs. 100,000.00 instead. The award for loss of expectation of life is more of a standard figure, which is not subject to assessment as such. Kshs. 100,000.00 is considered to be the conventional figure currently, but nothing stops the court, in exercise of its discretion, from considering a higher figure. See *Commercial Transporters Limited v. Dorcas Adoyo Owiti & another* [2017] eKLR (PJ Otieno, J). In the circumstances, the trial court properly exercised its discretion in picking on the figure of Kshs. 150,000.00, rather than apply the conventional Kshs.100,000.00 .

15. On the award for pain and suffering, of Kshs. 100,000.00, the appellant argues that it is on the higher side, and urges for Kshs. 50,000.00. Kshs. 100,000.00 is considered to be the current or conventional figure, unless the deceased died instantaneously, or shortly thereafter. In this case, the deceased did not die on the spot, or instantaneously, but after a stint of hospitalisation. He must have endured some measure of pain and suffering in that interim period. The award of Kshs. 100,000.00 would be defensible.

16. On the multiplier, the submission is that the figure adopted, of 30 years, was on the higher side, given that the deceased died at 27 years. A more realistic figure, it is argued, should be 20, upon taking into account the vagaries and uncertainties of life. The multiplier is about the length of time that the deceased would have continued working had he not died at the accident. What would be considered would be the actual age of the deceased, against the average mortality rate in the country and the age of retirement, for the sort of engagement the deceased was in. The so-called vagaries and vicissitudes of life are then brought to bear on these. The retirement age in Kenya is 60 years. The average mortality rate varies from time to time. The court works out the multiplier from a consideration of these factors. There is no scientific way of working out the multiplier, and the courts rely on past decisions as a guide. Let me do so, for a deceased person aged 27, at the time of his death.

17. In *Ngotho Gachanja & another v. Mary Wangui Wanyoike (suing as the legal representative of the estate of Gerald Ithagu)* [2020] eKLR (Ng'etich, J), the court applied a multiplier of 28 for a 22-year-old deceased person. 30 was adopted as the multiplier, where the deceased died at 21 years, in *Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) v. Dubai Superhardware*[2021] eKLR (JN Mulwa, J). In *Petronila Muli v. Richard Muindi Savi & Catherine Mwende Mwindu* [2021] eKLR (Limo, J), the court adopted 20 years for a 19-year-old. 27 years was adopted, in *Retco East Africa Limited v. Josephine Kwamboka Nyachaki & another* [2021] eKLR (Maina, J), for a 23 year-old. In *Mosonik & another v. Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased)* [2022] KEHC 11823 (KLR) (Sewe, J), a multiplier of 37 was adopted for a deceased person aged 23, while *Mutinda (Deceased) v. Maraga t/a Mwamasaburi Hydrotech Services & another* [2023] KEHC (JN Mulwa, J) adopted a multiplier of 30, for a 28 year-old.

18. The survey above reveals a very wide variation on the multiplier adopted for persons who die in their 20s. They range from 20 for a 19-year-old to 37 for a 23-year-old. It would appear that the multiplier adopted by the trial court herein is closer to that used in *Mutinda (Deceased) v. Maraga t/a Mwamasaburi Hydrotech Services & another* [2023] KEHC (JN Mulwa, J), where the deceased was 28 years old, and the court adopted a multiplier of 30. I doubt, from the above review, whether there is a uniform way of arriving at a proper multiplier. I hold the view that the multiplier approach does not do justice, in the end, given these very wide variations. Perhaps, the global award or lumpsum approach would be more appropriate, as was suggested in *Mwanzia Ngalali Mutua v. Kenya Bus Services (Msa) Ltd* (Ringera, J), cited in *Albert Odawa v. Gichimu Gichenji* [2007] eKLR (Koome, J). Anyhow, adoption of a multiplier is at the discretion of the court. That adopted by the trial court appears to be within range, going by *Ngotho Gachanja & another v. Mary Wangui Wanyoike (suing as the legal representative of the estate of Gerald Ithagu)* [2020] eKLR (Ng'etich, J), *Muthike*

Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) v. Dubai Superhardware[2021] eKLR (JN Mulwa, J), *Petronila Muli v. Richard Muindi Savi & Catherine Mwende Mwindu* [2021] eKLR (Limo, J) and *Mutinda (Deceased) v. Maraga t/a Mwamasaburi Hydrotech Services & another* [2023] KEHC (JN Mulwa, J), and I find no basis for interfering with it.

19. In the end, I find no merit in the appeal, and I hereby disallow it. The effect shall be that the appeal herein is hereby dismissed. Each party shall bear their own costs.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 3RD DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Njeri, instructed by Kiugu & Company, Advocates for the appellant.

Ms. Muyuka, instructed by Nyingi Wanjiru & Company, Advocates for the respondents.