Mwendwa v Sila & another (Suing on Their Own Behalf and as the Administrators of the Estate of the Late Esther Matii Kitonga) & 2 others (Civil Appeal E054 of 2021) [2024] KEHC 10721 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E054 OF 2021

FR OLEL, J

SEPTEMBER 16, 2024

BETWEEN

BENSON KYALO MWENDWA ..... APPELLANT

AND

STEPHEN GITONGA SILA & MICHEAL MUTUKU SILA (SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE ESTHER MATII KITONGA) ..... 1ST RESPONDENT

JULIUS MATII KATHULI ..... 2ND RESPONDENT

EMIRATES COACH LIMITED ..... 3RD RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant has filed this appeal against the Judgement/Decree passed by Hon M. Onkoba PM dated 7th July 2021 delivered in Mwingi PMCC No 112 of 2018 where he entered judgement in favour of the 1st respondents as follows;

    a. Liability 30% as against the 1st Defendant (Appellant herein) & 70% as against the 3rd Party.

    b. Pain and Suffering Kshs.30,000/=

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

    d. Loss of Dependency Kshs.2,003,520/=

    e. Special Damages Kshs.165,200/=

2. The Appellant being dissatisfied by the quantum awarded did file their memorandum of Appeal on 6th August, 2021 and raised three (3) grounds of appeal namely: -

   a. That the learned trial magistrate erred in law and fact in the manner that he assessed damages under the *Fatal Accidents Act*.

   b. That the learned magistrate erred in law and in fact in awarding the estate of the deceased damages on loss of dependency which was excessive as to amount to an erroneous estimate of loss or damages suffered by the estate of the Deceased.

   c. That the learned trial Magistrate erred in law and in fact in failing to consider the Appellants submissions and the Authorities that had been tendered and in doing so he arrived at an erroneous assessment of the damages.

3. The Appellant prayed that this Appeal be allowed and judgement of the trial magistrate on loss of dependency be set aside and the same be reassessed afresh.

B. Pleadings

4. The 1st respondents filed the primary suit claiming damages in tort arising from a road traffic accident which occurred on 3rd May 2018 involving motor vehicle registration Number KCH 794M Toyota Probox (hereinafter referred to as the 1st suit motor vehicle) and motor vehicle registration Number KBP 217A Nissan UD Bus (hereinafter referred to as the 2nd suit motor vehicle). It was averred that the deceased was a lawful paying passenger in the 1st suit motor vehicle which was being driven along Mwingi – Garissa Road, when at Kyanundu center the 2nd suit motor vehicle rammed into the rear of the 1st suit motor vehicle thereby causing the deceased to sustain fatal injuries. The respondents therefore claimed special damages and General damages under *law reform Act* and *Fatal Accidents Act*.

5. The 1st respondents later amended their plaint to enjoin the 2nd and 3rd respondent's herein respectively as the co-owner of the 1st suit motor vehicle and owner of the 2nd suit motor vehicle respectively and averred that were all vicariously liable for the accident, which occurred on the 3rd May 2018. The appellant filed his statement of Defence denying all the averments pleaded, and in the alternative stated that if indeed an accident had occurred, it was substantially caused and/or contributed to by the negligence of both the deceased and the driver of the 2nd suit motor vehicle and pleaded particulars of negligence thereof. The Appellant also raised the defense of Res ipsa loquitor and violenti non fit injuria.

6. The 2nd respondent herein, on his part also denied all the averments pleaded in the plaint and stated that as at the date of the accident, he had already sold the suit motor vehicle to the appellant vide a motor vehicle sale agreement dated 24th August 2017 and did not have personal possession of the said motor vehicle and therefore was not vicariously liable for the accident which occurred. The 3rd respondent in this Appeal did not file their statement of defence nor did they call any witness to testify on their behalf.

C. Facts of the case

7. At the trial, the PW1 (the 1st respondent) stated that the deceased was his wife and they were blessed with six (6) children. She had been involved in a road traffic accident, which occurred on 3rd May 2018, while she was a passenger in the 1st suit motor vehicle, enroute to Mutwangombe Market and as a result thereof had sustained fatal injuries. It was his further evidence that the deceased engaged in livestock trade and would make approximately Kshs.30,000/= monthly as profit. PW1 produce all the claim supporting documents and prayed for compensation. In cross examination PW1 confirmed that the

two motor vehicles were involved in the said accident and it was the 2nd suit motor vehicle which had hit the 1st suit motor vehicle from behind, though he did not witness the said accident occur and also did not have proof of the deceased earnings.

8. PW2 Nichodemus Kakusu Kenzi testified that he was a bodaboda rider and on the material day he was travelling from Kyanundu Market heading to Mutwangombe using the Mwingi- Garissa Highway. The 1st suit motor vehicle overtook him and drove ahead and it was closely followed by the 2nd suit motor vehicle, which came from behind and crashed into the 1st suit motor vehicle. He rushed to the accident scene, assisted to get the injured out and the deceased was rushed to hospital. The accident had occurred when the 1st suit motor vehicle had slowed down to pick passengers and the 2nd suit motor vehicle had crashed into it from behind. He blamed both driver for causing the accident. In cross examination he maintained that both drivers were to blame for causing the accident, as the 1st suit motor vehicle had slowed down on a busy road and the 2nd suit motor vehicle did not break before ramming into the 1st suit motor vehicle.

9. PW3 P.C Fredrick Kirinya, also confirmed that indeed the road accident did occur involving the two suit motor vehicles, which accident was reported at Mwingi police station. The 1st suit motor vehicle had four occupants, including the deceased, who later died while receiving treatment at Mwingi County Hospital. PW3 produced the police abstract and OB extract as evidence before court. In cross examination PW3 confirmed that he was not the investigating officer and did not go to the accident scene and was relying on information extracted from the OB abstract. The 2nd suit motor vehicle had crashed into the 1st suit motor vehicle from behind and was to blame for the accident.

10. DW1 (the Appellant) testified that he was the driver of the 1st suit motor vehicle and when he reached Kyanundu area the 2nd suit motor vehicle rammed into him from behind and the impact pushed his vehicle to the left side near the metal rails before he said bus, ramming into him for the second time. The accident impact had occasioned immense damage to the 1st suit motor vehicle and injured his passengers. His passengers were rushed to Mwingi General Hospital where one female passenger had succumbed to her injuries during treatment. The police were informed, they came and processed the accident scene before towing the 1st suit motor vehicle to Mwingi police station.

11. Upon cross examination DW1 stated that he had ten (10) years driving experience and denied speeding or being reckless thereby contributing to the occurrence of the said accident and blamed the driver of the 2nd suit motor vehicle for knocking the 1st suit motor vehicle from behind.DW2 (the 2nd respondent) explained that he had sold the suit motor vehicle to the Appellant and as at the time of the accident, it had been long transferred to the Appellant and he had no direct , actual , beneficial interest or control of the 1st suit motor vehicle hence could not be held liable for the accident which occurred. The 3rd party (the 3rd respondent bus company) did not participate in the proceedings held before the trial court and did not call any witness to testify on their behalf.

12. The trial Magistrate did consider the evidence adduced, the party's written submissions and in his considered judgement apportioned liability at 30% as against the Appellant and 70% as against the 3rd respondent, and further awarded the 1st respondent Kshs.30,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs 2,003,520/= for loss of dependency and Kshs.165,200/= for proved special damages. Plus, costs and interest of the suit.

D. The Appeal

13. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial

and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123).

14. In Peters Vs Sunday Post Limited(1968) EA 123 the court of Appeal for East Africa stated as follows;

> " It is a strong thing for the appellate court to differ from the finding, on a question of fact, of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine, whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a difference conclusion".

15. Further in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held:

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it 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 allowances in this respect".

16. In this appeal, the Appellant has only challenged the quantum of damages awarded and specifically stated that the award on loss of dependency was excessive as to amount t0 an erroneous estimate of loss or damages suffered by the estate of the deceased. The appellant urged the court to reconsider the same and reassess the said damages downwards.

17. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu &Another (supra). Further the Court of Appeal in the case Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 stated:

> " Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-
>
> '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 ..."

18. On loss of dependency, it was held by the Court of Appeal in *Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995* that the issue of dependency is always a question of fact to be proved by he who asserts. Further I am guided by the observation of the Court of Appeal for East Africa in the case of Chunibhai J Patel and Another vs PF Hayes and Others [1957] EA 748, observed that:

> " The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependent's, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependent's. From this it should be possible to arrive at the

annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."

19. Also, in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 199 Ringera J (as he was then) held that:

> "In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependents such an award as would when wisely invested be able to compensate the dependents for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependents, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

20. I have carefully considered all the pleadings filed, and evidence tendered in court by the 1st respondent with respect to the deceased earnings, level of dependency and the trial magistrate obiter as to why he used Legal Notice No 112 Regulation of wages (General) (Amendment) Order 2017, where he found that the minimum wage of a general worker is Kshs.12,522/= and applied the same for the deceased. The appellant urged the court to find that this was an error as the trial magistrate ought have used Ksh.6,896/= allocated for all other areas as provided for under the said legal notice since the Appellant resided with Kivou location which is not a municipality.

21. The appellant did not lead evidence during trial to show that Kivou area is not within Mwingi municipality and/or Mwingi Town council. They cannot make submissions/lead evidence from the bar to suggest otherwise at this late stage. According to legal notice 112 Regulation of wages (General Amendment) Order 2017, which came into effect on 1st May 2018, a General worker for all former municipalities and town councils of Mavoko, Ruiru or Limuru would earn monthly wages of Ksh.11,926.40. Accordingly, this is the multiplicand, which ought to have been used and not Kshs.,12,522.70/=.

22. The amount of loss of dependency ought to then reduce to Ksh. 11,926.40 x 20x 12 x2/3 = Kshs.1,908,224/=.

E. Disposition

23. Accordingly, this Appeal is partially successful to that extent. The finding on loss of dependency by the trial magistrate in MWINGI CMCC NO 112 of 2018 as awarded in the judgment dated 7th July 2021 is therefore set aside and is reduced to Kshs.1,908,224/=. All other awards will remain as awarded in the primary suit.

24. Each party will bear their own costs of this Appeal.

25. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT **MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024.**

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF SEPTEMBER, 2024.

In the presence of: -

No Appearance for Appellant

No appearance for Respondent

Susan/ Sam Court Assistant