Kariuki & another (Suing as the Administrators Ad Litem of the Estate of the Late Pharis Wainaina Kariuki - Deceased) v Wambugu (Civil Case 137 of 2009) [2024] KEHC 14246 (KLR) (Civ) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14246 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 137 OF 2009

CW MEOLI, J

OCTOBER 24, 2024

BETWEEN

AGNES WAMBUI KARIUKI ..... 1ST PLAINTIFF

SAMUEL WAINAINA KARIUKI ..... 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS AD LITEM OF THE ESTATE OF THE LATE PHARIS WAINAINA KARIUKI - DECEASED

AND

JAMES NDEGE WAMBUGU ..... DEFENDANT

JUDGMENT

1. Agnes Wambui Kariuki and Samuel Wainaina Kariuki (hereafter the 1st and 2nd Plaintiffs) brought this suit in their respective capacities as the administrators ad litem of the estate of Pharis Wainaina Kariuki (the deceased). The suit was instituted by a plaint dated 23.01.2009 against James Ndege Wambugu (hereafter the Defendant). Therein, the Plaintiffs sought general damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages in the sum of Kshs. 101,375/-, costs of the suit and interest thereon. The suit arising from a road traffic accident which resulted in the death of the deceased. The Defendant was sued in his capacity as the registered owner of the motor vehicle registration number KAW 517M Honda CRV (the subject motor vehicle).

2. It was averred in the plaint that sometime on or about 16.02.2007 the deceased was lawfully travelling aboard the subject motor vehicle along Nyeri-Nairobi Road when the Defendant so carelessly, negligently and/or recklessly drove, managed and/or controlled the subject motor vehicle that it lost control and overturned, as a result of which the deceased sustained fatal injuries. The particulars of negligence pleaded as against the Defendant were as follows:

”Particulars Of Negligence

a. Driving at speed that was excessive or excessive in the circumstances

b. Failing to keep any or any proper lookout

c. Failing to have any or any adequate regard for the safety of passengers lawfully travelling in the said vehicle, particularly the deceased

d. Losing control of the said motor vehicle thereby causing the same to overturn

e. Failing to keep and maintain any or any adequate control over the said motor vehicle

f. Failing so to steer or maneuver the said motor vehicle so as to avoid the said accident

g. The plaintiff will in the premises rely on the doctrine expressed in the maxim res ipsa loquitor to establish negligence.” (sic)

3. It was further pleaded that at the time of his death, the deceased was aged 32 years and enjoyed good health and had high prospects. That the deceased worked for M/S Nationwide Credit (K) Ltd, earning a gross salary of Kshs. 40,500/- which substantially supported his dependants, listed hereunder:

a. Agnes Wambui Mburu Wife

b. Samuel Kariuki Gitahi Father

c. Mary Wanjiku Kariuki Mother

d. Felix Kariuki Wainaina Son

4. The Defendant entered appearance and filed the statement of defence dated 6.05.2009 denying the key averments in the plaint and liability. The Defendant pleaded in the alternative and without prejudice to the foregoing denials, that if an accident did occur, then the same was solely caused and/or substantially contributed to by the negligence on the part of the deceased and/or an unidentified motor vehicle, as follows:

‘’Particulars Of Negligence Of The Deceased

a. Traveling as an unauthorized passenger.

b. Failure to use seat belt provided.

c. Traveling as a standing passenger.

d. Failing to exercise due care. (sic)

Particulars Of Negligence Against The Unidentified Motor Vehicle

a. Blocking the way of motor vehicle registration number KAW 517M.

b. Violently hitting motor vehicle registration number KAW 517M from the rear.

c. Abruptly moving from one lane to another without any warning.

d. Driving at a very high and dangerous speed.

e. Failing to have due regard to other motor vehicles on the road and in particular motor vehicle registration number KAW 517M.

f. Attempting to hijack motor vehicle registration number KAW 517M”.(sic)

5. The hearing of the suit commenced on 13.04.2024. The 2nd Plaintiff through his oral testimony as PW1 testified that he resides in Kangema and primarily adopted his witness statement dated 1.04.2011 as his evidence-in-chief. During cross-examination, the 2nd Plaintiff testified that he did not witness the material accident. He equally testified that the deceased married the 1st Plaintiff under customary law and the couple bore a child together. That both the 1st Plaintiff and the minor child resided with him. He admitted that the birth certificate constituting part of the Plaintiffs' trial bundle of documents did not mention the name of the father of the 1st Plaintiff's child and that the Plaintiffs had no records to indicate the deceased's earnings as at February, 2007; that the pay slips filed as part of their trial bundle related to the deceased's earnings in the year 2005. Further admitting that the Plaintiffs had no documentation confirming the deceased's profession prior to his death.

6. The 1st Plaintiff next testified as PW2. She too adopted her signed witness statement dated 1.04.2011 as her evidence-in-chief and produced the Plaintiffs' trial bundle of documents dated 17.10.2023 as P. Exhibit 1 to 10. She then testified that she resides in Ruiru and did temporary jobs to earn a living. In cross-examination, the 1st Plaintiff briefly stated that she was married to the deceased under customary law though but had no marriage certificate to that effect, which evidence was echoed in re-examination. This marked the close of the Plaintiffs' case.

7. The Defendant testified as DW1. Adopting his signed witness statement dated 24.02.2012 as his evidence-in-chief, he proceeded to testify that he disputed the particulars of negligence set out in the plaint. In cross-examination, the Defendant stated that he blames the motor vehicle which attempted to carjack him, though he did not have particulars of the motor vehicle in question. He further stated that he reported the attempted carjacking incident to the police but that he was not issued with the Occurrence Book (OB) extract or details thereof. He confirmed the occurrence of the accident in question and further testified that the deceased was aboard his motor vehicle at the material times together with four (4) other passengers including the Defendant's wife, adding that the said deceased sustained fatal injuries in the accident. That out of all the persons aboard the motor vehicle, only he and his wife survived.

8. The parties were thereafter directed to file and exchange written submissions. The Plaintiffs' counsel submitted on two issues namely: liability and quantum of damages. On liability, it was submitted that evidence had been tendered to support the claim that the accident and death of the deceased were the direct result of negligence on the part of the Defendant, adding that no evidence was tendered by the Defendant to support the allegations of an attempted carjacking incident and to support his defence that the said incident resulted in the accident. That in the circumstances, the court ought to find the Defendant 100% liable for the accident.

9. On quantum, counsel submitted on four (4) heads of damages. On the prayer for general damages for pain and suffering, a sum of Kshs. 100,000/- was proposed predicated on the case of Sukari Industries Limited v Clyde Machimbo Juma Suing as the Legal Representatives of the Estate of John Juma Machimbo (Deceased) [2016] KEHC 8728 (KLR) where the court held that awards under a similar head have ordinarily ranged from Kshs. 10,000/- to Kshs. 100,000/- over the last 20 years.

10. Regarding the claim for loss of expectation of life, it was submitted that the deceased was aged 32 years when he died. Consequently, a sum of Kshs. 100,000/- was sought with reliance being placed inter alia, on the just cited case of Sukari Industries Limited v Clyde Machimbo Juma Suing as the Legal Representatives of the Estate of John Juma Machimbo (Deceased) (supra) where the court upheld an award of Kshs. 100,000/- made under that head.

11. Concerning lost dependency, it was reiterated that the deceased was aged 32 years when he died and that a substantial share of his income was used to support his parents as well as the 1st Plaintiff being his wife; and their minor son. The court was thus urged to apply a dependency ratio of 2/3 with reference to the case of Gordon Ouma Sunda & Stella Awuor Ndisio v Adan Abdikadir Omar & Benard Kipkemoi Asena [2019] KEHC 1550 (KLR) where a similar ratio was applied on appeal. Counsel similarly proposes use of a multiplicand of Kshs. 40,500/- arising out of the deceased's earnings and a multiplier of 12 years borrowing from the case of Isaack Abdikarim Abdile & Palm Oil Transporters v Rose Kinanu Muchai (Legal Representative of the Estate of Paul Rufus Muguongo [2016] KEHC 5953 (KLR) where the court applied a multiplier of 28 years at the instance of a deceased person who was aged 49 years. That resultantly, the award under the above head be tabulated as follows:

    Kshs. 40,500/- x 28 x 12 x 2/3 = Kshs. 9,072,000/-.

12. On specials, the Plaintiffs' counsel sought the sum of Kshs. 1,575/- incurred in respect of the motor vehicle search and grant of letters of administration ad litem. The court was thus urged to allow the claim as prayed.

13. The Defendant's counsel also filed the submissions dated 14.08.2024 being anchored on the decisions in Susan Kanini Mwangangi & John Wambua Maingi (Suing as the legal representatives of the estate of Charles Sila Wambua-Deceased) v Patrick Mbithi Kavita [2019] KEHC 9906 (KLR) and Sections 107 and 109 of the *Evidence Act* on who has the burden of proof in civil cases. Counsel then proceeded to contend that the Plaintiffs herein have not proved their claim of negligence against the Defendant, since they failed to call any eyewitness to the accident and that the police abstract which was tendered showed that the matter was still pending under investigations. Counsel further contended that the Defendant stated by way of his testimony that the accident was caused by circumstances beyond his control, namely, the attempted carjacking incident which caused him to lose control of the subject motor vehicle in attempt to flee from the unidentified motor vehicle and secure his own safety as well as that of his passengers.

14. On quantum, the Defendant's counsel proposed an award of Kshs. 10,000/- under the head of pain and suffering, citing the decisions in Paul Ouma v Rosemary Atieno Onyango & Peter Juma Amolo (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased) [2018] KEHC 7123 (KLR) and Harjeet Singh Pandal v Hellen Aketch Okudho [2018] KEHC 1882 (KLR) where the respective courts awarded similar sums under the same head. On damages for loss of expectation of life, it is counsel's submission that a sum of Kshs. 100,000/- would suffice. Concerning damages under the head of loss of dependency, counsel argued that the Plaintiffs did not tender any evidence on the nature and status of employment of the deceased at the time of his death. Counsel further argued that the Plaintiffs did not produce any evidence in proof of marriage between the 1st Plaintiff and the deceased, adding that the birth certificate in respect of the minor did not list the deceased as the minor's father. That in the circumstances, a dependency ratio of 1/3 would apply. As concerns the multiplicand, counsel for the Defendant urged the court to apply one of Kshs. 8,171/- being the minimum wage applicable as at the time of the deceased's death. The court was further urged to apply a multiplier of 15 years with reference to the case of Antony Nyaga Njagi v Mohamed Ibrahim Abdirahmed [2018] KEHC 18 (KLR) where the High Court sitting on appeal substituted a multiplier of 27 years with one of 15 years on account of a deceased person aged 32 years; thus tabulating the award under the above head as follows:

    Kshs. 8,171 x 15 x 12 x 1/3 = Kshs. 490,260/-

15. Finally, counsel for the Defendant submitted that the Plaintiffs would only be entitled to the sum of Kshs. 1,075/- being the special damages both specifically pleaded and proved. Otherwise, the court was urged to dismiss the case against the Defendant, with costs.

16. The court has considered the pleadings filed and the evidence tendered at the trial, as well as the rival submissions and authorities cited therein. The disputed issues revolve around liability and quantum.

17. Concerning liability, it is trite law that the burden of proof rests with the Plaintiffs to prove their case against the Defendant, on a balance of probabilities. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya clarifies this position by providing that:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

18. Moreover, the evidential burden of proof which is captured in Sections 109 and 112 of the same Act stipulates that:

> " 109.The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

19. The abovementioned provisions were discussed in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

20. There is no dispute concerning the occurrence of the accident in question on the material date and that it resulted in the death of the deceased who was a passenger in the subject motor vehicle. There is no dispute that the vehicle was at the time being driven by the Defendant. Regarding the question of ownership of the subject motor vehicle, the copy of records dated 25.05.2011 at page 19 of the Plaintiffs' trial bundle of documents and produced as P. Exhibit 8, indicates that the Defendant was the owner of the subject motor vehicle, at all material times. The contents of the copy of records are deemed to be 'prima facie' evidence of ownership pursuant to the provisions of Section 8 of the *Traffic Act*, Cap. 403 Laws of Kenya which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will, prima facie be considered the vehicle's owner.

21. The police abstract found at page 12 of the respective parties' bundle of documents and produced as P. Exhibit 2 equally cites the Defendant as the owner of the subject motor vehicle as of the material date. No contrary evidence was tendered to rebut this position. In the absence of any contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another

(2010) eKLR as referenced in the case of Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki [2016] eKLR thus:

> " Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the Plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

22. In the court's considered view, this case turns on the question of negligence. In that regard, it is not in dispute that the Defendant was the driver of the subject motor vehicle at all material times prior to and during the accident. However, the Plaintiffs were not eyewitnesses to the accident, and did not call an eyewitness concerning the circumstances of the accident, in proof of the particulars of negligence pleaded. By his defence statement and evidence at the trial, the Defendant admitted having lost control of the vehicle, which was one of the pleaded particulars of negligence, but asserted that this was due to an attempted carjacking incident by a second unknown vehicle. Although the Defendant did not adduce any further evidence in support of the purported unidentified motor vehicle and/or the attempted carjacking incident, the duty always rested on the Plaintiffs to prove the particulars of negligence pleaded. The Plaintiffs did not call any evidence in this regard. The police abstract indicated that the accident was pending investigation.

23. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

24. The Defendant by his defence statement had pleaded the attempted carjacking incident leading to the accident, which pleading ought to have given sufficient notice to the Plaintiffs to bring evidence to demonstrate the negligence of the Defendant and to rebut his assertions on the cause of the accident. The Plaintiffs not having called their own eyewitness could not hope to support their case through the defence evidence, in the circumstances of this case. Carjacking on Kenyan roads is in any event not such a strange occurrence as to be outrightly dismissed. The Plaintiffs appeared to suggest by their submissions that the Defendant was under a duty to prove his defence, especially with regard to the alleged carjacking incident, even when they themselves failed to discharge their burden of proof in respect of the allegations of negligence in the plaint, or to rebut the alleged carjacking incident.

25. Concerning the application of the doctrine of res ipsa loquitur also pleaded by the Plaintiffs, the Court of Appeal in Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited [2022] KECA 477 (KLR) stated thus:

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the Appellant to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

26. The Court proceeded to conclude that:

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable. There cannot be an assumption of liability as the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding."

See also Nandwa v Kenya Kazi Limited [1988] eKLR.

27. Similarly in this case, there was no evidence tendered by the Plaintiffs to give rise to the 'res ipsa loquitur situation', by demonstrating facts from which negligence could be inferred against the Defendant. Suffice it to say, in conclusion, that the mere occurrence of an accident is not proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant(s). The court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, while reiterating the foregoing, stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

28. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal observed that:

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

29. In this case, neither the evidence of the Plaintiffs nor that by the Defendant supports the particulars of negligence pleaded in the plaint. It follows that the Plaintiffs upon whom the burden of proof rested, should fail. Consequently, the Plaintiffs' suit must fail and is hereby dismissed. However, considering the circumstances giving rise to the suit, the court will order that the parties will bear their own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of:

Mr. Mwenda holding brief for Mr. Gichigo for the Plaintiffs:

Mr. Muriithi holding brief for Mr. Kinayanjui for the Defendant:

C/A: Erick