Mwasuna v Mulungye (Suing as the Administrator of the Estate of Joshua Mutiso Musyimi) (Civil Appeal E001 of 2021) [2023] KEELC 17247 (KLR) (8 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E001 OF 2021

TM MATHEKA, J

MAY 8, 2023

BETWEEN

NICHOLAS MUTUKU MWASUNA ..... APPELLANT

AND

MUSYIMI MULUNGYE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSHUA MUTISO MUSYIMI) ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A. Mayamba (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.145 of 2019, delivered on 11th December 2020)

JUDGMENT

1. The respondent filed a suit in the lower Court seeking general damages under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA) on behalf of the Estate of Joshua Mutiso Musyimi pursuant to a fatal road accident, involving motor vehicle KCQ 086Q, on 26/07/2018 (material day) along the Sultan Hamud road at SGR bridge. He also prayed for special damages, costs of the suit and interest.

2. The appellant filed a statement of defence, denied each and every allegation of fact in the plaint and called for strict proof of the claim. He averred that if at all an accident happened on the material day, it was wholly due to the negligence of the deceased. After the preliminaries; the matter proceeded for hearing and judgment was delivered on December 11, 2020. The learned trial magistrate found the appellants 100% liable and assessed damages as follows:

   Pain & suffering..... Kshs 20,000/=

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

   Loss of dependency.....Kshs 2,300,000/=

   Special damages..... Kshs 550/=

3. Aggrieved by the award, the appellants filed this appeal and listed 6 grounds as follows:

    a. That the learned trial magistrate erred in law and fact by shifting the burden of proof in an action founded on negligence to the appellant thereby misdirecting himself in law and thus arriving at a completely erroneous decision.

    b. That the learned trial magistrate erred in law and fact by failing to consider all the material facts that had been placed before the Court and thereby failed to take into account relevant matters that he ought to have considered and instead considered irrelevant matters and as a result, arrived at a completely erroneous decision.

    c. That the learned trial magistrate erred in law and fact in holding the appellant 100% liable for the accident when in fact no evidence was placed before the trial court to support such a finding.

    d. That the learned trial magistrate erred in law and fact in by misdirecting himself leading to a finding on liability when the evidence adduced did not support such a finding and thereupon assessing damages erroneously without any evidence on liability having been established.

    e. That the learned trial magistrate erred in law and fact in failing to appreciate or take into consideration the Appellant's submissions or at all.

    f. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions filed by the appellant.

    g. That the learned trial magistrate erred in awarding the sum of Kshs 2,300,000/= as loss of dependency which was inordinately high and excessive in the circumstances thus occasioning miscarriage of justice.

4. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

5. With regard to liability the appellant submits that it was erroneous for the trial magistrate to conclude that he was liable for causing the accident simply because the respondent's evidence was uncontroverted. He relies on the case of *Statpack Industries –vs- James Mbithi Munyao* C.A No. 152 of 2002 for the submission that there cannot be liability without fault. In that case, it was stated:

> "...coming to the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is in the plaintiff. He must prove a causal link between someone's negligence and his injury, he must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

6. He submits that none of the respondent's witnesses established negligence on the part of the driver as none of them witnessed the accident. He contends that their evidence amounts to hearsay. Further, he submits that no documentary evidence was tabled in court to show that the driver was convicted

of a traffic offence. He relies on Civil Appeal No. 40 of 2017; *David Abraham Tacheyo –vs- Kinyua Morris* where the court stated:

> "...even then, that evidence though unchallenged cannot be taken to be the gospel truth and credible. A party must call such evidence that proves the allegations of negligence to the required standard upon a balance of probability."

7. The appellant submits that from the evidence adduced, he cannot be held liable for the accident.

8. With regard to quantum, he submits that both parties proposed the multiplier approach but the trial magistrate adopted a global sum approach and did not lay a basis for arriving at Kshs 2.3 million for loss of dependency. He submits that the trial court proceeded on wrong principles, misapprehended the evidence and arrived at a figure which was inordinately high in the circumstances. He contends that it was easy to identify the multiplier and multiplicand hence the trial magistrate simply ignored his authorities and submissions.

9. He submits that the respondent failed to establish his claim to the required standard and was therefore not entitled to costs.

Respondent's Submissions

10. On liability, the respondent submits that the trial magistrate analyzed the facts presented by the parties correctly and extensively. That from the evidence, the single fact that contributed to the occurrence of the accident was the manner that the appellant's agent was driving. He submits that the evidence of PW1 was forthright and remained unshaken in cross examination.

11. He submits that the appellant did not call any witness hence the defence on record remains a mere allegation. He relies on the case of *Edward Mariga through Stanley Mobisa Mariga –vs- Nathaniel David Schulter & anor* (1997) eKLR where the Court of Appeal stated:

> "In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

12. He has also relied on the case of *John Wainaina Kagwe –vs- Hussein Dairy Ltd* (2013) eKLR where the Court of Appeal held:

> "the respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability. It was thus substantially to blame for the accident.

13. As to whether the award on loss of dependency was inordinately high, he submits that evidence was led to show that the deceased was 22 years old and was a casual laborer earning Ksh 1,000/= per day. That the trial magistrate evaluated the evidence and observed that the deceased was energetic, full of

potential and healthy and his life was abruptly cut short at a prime age by the appellant's negligence. Consequently, he submits that his estate suffered enormous loss and suffering. He relies on *Gitobu Imanyara & 2 Others –vs- Attorney General* (2016) eKLR where the Court of Appeal held that;

> "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

14. He has also relied on *Kenya Breweries Ltd –vs- Saro* (1991) eKLR where the court stated that:

> "the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults, they are expected to and do invariably take care of their aged parents."

15. He submits that the trial magistrate stayed alive to the principle that comparable awards should be made for comparable injuries and contends that even if the multiplier approach was adopted, the resultant amount would be within the range awarded i.e. 13,572 x 12 x 38 x ½ = Kshs 3,094, 416/ =. The multiplicand herein, he submits, is from the regulation of wages (general) amendment order, 2018 for casual laborers.

16. Further, he submits that assessment of damages is a discretionary function of the court to be exercised pegged on the unique circumstances of each case. He has urged this court to be guided by the following authorities in affirming that the award was reasonable in the circumstances.

    a. *Kenya Power and Lighting Co. Ltd –vs- James Muli Kyalo & Another* (2020) eKLR where the appellate court awarded Kshs 3,200,000/= for loss of dependency for a casual laborer earning Kshs 1,000/= per day and who died at 29 years.

    b. Civil Appeal 129 of 2018; *Peter & Anor –vs- Kimeu* (2021) KEHC 281 (KLR) where the appellate court upheld an award of Kshs 2,352,000/= for loss of dependency.

17. As for costs, he submits that they follow the event and the trial magistrate exercised his discretion correctly in awarding them to him.

Duty of Court

18. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See *Selle & another v Associated Motor Boat Co Ltd &another* (1968)EA 123

19. Having looked at the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination:

    a. Who was to blame for the accident and to what extent?

b. Should the quantum of damages be disturbed?

Analysis and Determination

Liability

20. PW1 was No.93436 PC Denis Kithinji, the investigating officer in the matter. He testified that the accident was reported by school children i.e that there was a person lying on the road. They investigated and established that the person was a loader by the name Joshua Mutiso who had fallen from a moving vehicle. That he was on board motor vehicle registration number KCQ 086Q Isuzu FSR lorry. They arrested the driver for failing to take reasonable precaution of a passenger and he was fined Kshs 40,000/ = or 8 months imprisonment in default. He identified the traffic case as number 650 of 2018.

21. On cross examination, he said that a passenger is any person who is aboard a motor vehicle and it does not matter where he is sitting. He agreed that according to the police abstract, the matter was pending before court and the person to be blamed could not be established from it.

22. In re-examination, he said that when the police abstract was issued, the traffic case had not been determined but it was eventually determined and he was a witness in it.

23. PW2 was the deceased's father and he did not witness the accident.

24. The evidence of the investigating officer described what the investigations established with regard to how the accident occurred. PW1 was a witness in the traffic case and he testified that the lorry driver was found guilty and convicted. The only documentary evidence he placed before the court was the police abstract that only established that indeed aim accident happened but did not contain the evidence of the alleged conviction of the appellant. He did not produce the anything to establish who was charged in 'court file No 650 of 2018' or what offence the person was charged with. Basically his testimony was that he had a police abstract to prove that an RTA happened, the deceased was not to blame, but there was case pending before court. Other than that there was no evidence to show that the appellant was negligent.

25. The plaintiff /respondent pleaded several heads of negligence as set out in the particulars of negligence at paragraph 4 of the plaint: viz failing to keep any or proper outlook, driving at a speed hat was too fast failing to control the m/v, driving without due attention, failing to have any regard for the safety of other road users and in particular of the deceased (raising the question was he a passenger or road user), failing to do anything to avoid the accident, driving recklessly carelessly and dangerously, failing to steer a safe and proper course, causing the accident, loosing concentration at a crucial time. The respondent then led evidence to show that an accident had occurred and that the deceased had died from injuries sustained from that accident.

26. In addition, the plaintiff/respondent pleaded the doctrine of res ipsa loquitur. In his defence the defendant denied that the doctrine was applicable and instead averred that it was a case of volenti non fit injuria

27. The learned trial magistrate in his Judgment applied the doctrine of res ipsa loquitur stating that 'the principal of res ipsa loquitur sets in as the only surviving eye witness could have been the driver of the m/v . to unravel the mystery behind the death of the deceased in relation to the accident'. Citing *Jackline Mueni Nzioka v Jetha Ramji Kerai* Civil App Nai 154 and 155 of 1996 where the court of appeal held that the defendant has a duty to rebut the plaintiffs evidence, the learned trial magistrate found that the defendant /appellant herein had failed so to do and found in favour of the respondent.

28. On the application of the doctrine I did find relevance in *Uchumi Supermarket Limited & another v Boniface Ouma Were* [2021] eKLR where the judge stated as follows:-

> " The doctrine was aptly discussed in the authority of Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR with reference to the East African Court of Appeal's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22 thus:
>
> "The doctrine of *res ipsa loquitor* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."

29. And in *Obed Mutua Kinyili v Wells Fargo & another* [2014] eKLR the court dealing with a similar situation discussed this doctrine thus; Indeed, from the police abstract produced in Court it is clear that the driver and the Deceased, who seem to have been the only two people in the subject car both died from their injuries in that accident. In Law the Court can infer negligence from the circumstances of the case in which the accident occurred. This is by invoking the principle of *res ipsa loquitor*. In the book by *Winfield & Jolowicz* on Tort 17th Edition the learned author wrote-

> " This has traditionally been described by the phrase res ipsa loquitur – the thing speaks for itself. .... Its nature was admirably put by Morris L. J. when he said that it: 'Possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying:
>
> 'I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant ...' There are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer."
>
> The learned author went further to say:
>
> "The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant. This is commonly divided into two parts on the basis of Erle C.J.'s famous statement in Scott v London and St. Katherine Dock Co:
>
> 'There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

30. And in *Kago v Njenga* [1979] eKLR the court of appeal held

> For the defence to rebut the presumption of negligence arising from res ipsa loquitur, they have to avoid liability by showing either that there was no negligence on their part or that the accident was due to circumstances beyond their control. In this case evidence showed that the tyre burst before impact hence this was considered probable cause of the accident. A blameless victim of an accident must be compensated otherwise there is a barren vacuum and impotence in the law which leaves someone exposed to dreadful results of an accident without redress.

31. In this case the defence (appellant) pleaded *volenti non fit injuria*

In *AAA Growers Ltd v Ann Wambui (Suing as the Administratrix in the Estate of Thomas Wahome Wambui) & another* [2016] eKLR the court explained the doctrine of volenti non fit injuria when it held as follows:

> "It has, however, been held that the question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he should bear the loss in the event of an injury; the consent that is relevant is not consent to the risk of injury but the consent to the lack of reasonable care that may produce that risk (see Kelly v Farrans Ltd [1954] NI 41 at 45 per Lord Macdermott, cited at paragraph 69 of Halsbury's Laws of England (supra)..... It has been held that in order to establish a defence of volenti non-fit injuria the claimant must be shown not only to have perceived the existence of danger but must also have appreciated it fully and voluntarily accepted the risk. (See the cases of Thomas v Quartermaine (1887) 18 QBD 685, CA; Letang v Ottawa Electric Rly Co [1926] AC 725, PC and Williams v Birmingham Battery and Metal Co [1899] 2 QB 338, CA) Further, the question whether the claimant's acceptance of the risk was voluntary is generally one of fact, and the answer to it may be inferred from his conduct in the circumstances. The inference of acceptance is more readily to be drawn in cases where it is proved that the claimant knew of the danger and comprehended it (See Thomas v Quartermaine (1887) 18 QBD 685 at 696, CA, per Bowen LJ), for instance where the danger was apparent or proper warning was given of it and where there is nothing to show that the claimant was obliged to incur it (See Sylvester v Chapman Ltd (1935) 79 Sol Jo 777, where it was held that the plaintiff unnecessarily put his hand near the bars of a leopard's cage)..."
> See Rabbi Kiogora Angaine v Jane Karimi Duati [2020] eKLR

32. The defence produced no evidence to establish that this was a case of volenti non fit injuria on the part of the deceased. The respondent cannot be heard to say that by upholding the pleaded doctrine of res ipsa loquitur the learned trial magistrate erroneously placed the burden of proof on the appellant. That was not the case. In a way the appellant lifted some of that the burden and placed it on himself when he pleaded volenti non ft injuria.

33. It is my conspired view that the learned trial magistrate was not at fault in finding that the appellant was 100% liable for the accident.

Whether the quantum of damages should be disturbed.

34. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In *Butt –vs Khan* (1977)1KAR it was held that;

> "An appellate Court will not disturb an award for damages unless it is 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.

35. From the memorandum of appeal, it is clear that the dispute is with regard to the award for loss of dependency.

Award under the *Fatal Accidents Act*

36. It was pleased that the deceased was working and had an income of Kshs 1,000/= per day. The deceased's father (PW2) testified that the deceased was a businessman and casual laborer and he assisted him with house rent. Further, the plaint indicates that PW2 was the only dependant for the deceased.

37. The appellant and respondents had proposed the use of multiplier approach in the trial court but the learned magistrate chose to use the global sum approach. It is noteworthy that the parties had consented on the dependency ratio at 1/2. Each party submitted on the multiplier approach and none submitted on the global sum approach.

38. The appellants used the minimum wage approach which they supported with authorizes that they cited and the respondent proceeded on the evidence given by the father to the deceased that he was working and earning a daily rate of Ksh 1000/=.

39. Without having set aside, the consent by the parties it is not evident how the learned trial magistrate would proceed otherwise.

40. Hence it is only on that basis that I find it necessary to re look at the quantum of damages with respect to loss of dependency

41. There was no evidence to support the daily rate of Ksh 1000, hence the respondent could not rely on that. It is also noted that the appellant chose to use the minimum monthly rate from the *Regulation of Wages (General Amendment) Order, 2018*. However, the proper rate in my view would have been the daily rate because that is what the evidence on the part of the respondent said.

42. The daily rate as per that *Regulation of Wages (General Amendment) Order, 2018* was Ksh 367. 30 days a month brings it to a multiplicand of Ksh 11, 010.

43. The respondent proposed a multiplier of 38 years, the appellant 27 years. The deceased was 22 years, he could have worked and retired at 60 years. In my view a multiplier of 33 years would take into account the vicissitudes of life. It would work out this way; 33x12x11,010 x1/2 =2,179,980

44. In the end, I do find that the appeal succeeds only to the extent that the trial court used the global sum approach and not the multiplier approach as agreed by parties,

45. The only part of the judgment that is disturbed is the award on loss of dependency.

46. The trial court's judgment is set aside and substituted with the following:

a. Liability 100%

b. Loss of dependency Ksh 2,179,980

c. Pain and suffering Ksh 20,000

d. Loss of expectation of life Ksh 100,000

e. Special damages Ksh 550

Total Award Ksh 2,300,530

47. The respondent will have costs plus interest at court rates from the date of entry of judgment in the subordinate court.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MAY 2023

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MUMBUA T MATHEKA

JUDGE

Appellant's Advocates: Awino for Appellant

Cootow & Associates

Waiganjo Wachira & Co. Advocates: Kiptanui for Waiganjo