P. N Mashiru Limited v Kyule & another (Suing as Administrators of the Estate of Catherine Mueni Sina – DCD) (Civil Appeal E058 of 2021) [2023] KEHC 4018 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E058 OF 2021

SM MOHOCHI, J

MAY 4, 2023

BETWEEN

P. N MASHIRU LIMITED .... APPELLANT

AND

PASCAL MUTWETUMO KYULE .... 1ST RESPONDENT

STEPHEN WAMBUA SINA .... 2ND RESPONDENT

SUING AS ADMINISTRATORS OF THE ESTATE OF CATHERINE MUENI SINA – DCD

(Being an Appeal from the judgment and decree by Linus P. Kassan (CM) delivered on21st May ,2021 in Eldoret CMCC NO. 1189 of 2019)

JUDGMENT

1. The suit in the lower court was initiated by the Respondents who sued the Appellant on account of the death of Catherine Mueni Sina (Deceased). The Respondents averred that on 2nd November, 2017 the deceased was travelling as a lawful passenger in the Appellant's motor vehicle registration number KBN 962 C/ZD 7177 Scania along Makuru-Kerita road in Eldoret which was carelessly and negligently driven by its agent or servant as a result of which it was involved in an accident claiming the life of the deceased.
2. The Appellant denied the entire claim by the Respondents through its statement of defence dated 23rd September, 2020 and averred that if the accident occurred then the same was wholly occasioned and or substantially contributed to by the negligence on the part of the deceased.
3. In its judgment, the trial Court held the Appellant 100% liable for the accident. On the issue of quantum, the court assessed damages as follows: -

1. Pain and Suffering- Ksh. 20,000/=
2. Loss of Expectation of Life- Ksh. 120,000/=
3. Loss of Dependency 12x 2/3x 32,755x 20

   Ksh. 5,267,004/=

   Total – Ksh. 5,387,004/=
4. Costs and interest of the Suit.

4. The Appellant has appealed against the said judgment on both liability and general damages based on the following grounds: -

   i. That the Learned Trial Magistrate erred in Law and in fact in holding the Appellant 100% liable for negligence without taking into account the evidence on record.

   ii. That the Learned Trial Magistrate erred in Law and in fact in failing to take into account the evidence on record hence arriving at a wrong decision on the issue of liability.

   iii. That the Learned Trial Magistrate erred in Law and in fact by failing to hold that the deceased was not a passenger on board the Appellant's Motor Vehicle.

   iv. That the Learned Trial Magistrate erred in Law and in fact in adopting the wrong principles in the assessment of damages payable to the Respondent under the *Fatal Accidents Act*.

   v. That the Learned Trial Magistrate erred in Law and in fact in awarding damages which were excessive in the circumstances in view of the evidence adduced.

   vi. That the Learned Trial Magistrate erred in Law and in fact in adopting dependency ratio of 2/3 despite the evidence on record.

   vii. That the Learned Trial Magistrate erred in Law and in fact in failing to properly discount the multiplier to take into account the vicissitudes and vagaries of life.

5. The Appellant thus prays that: -

   i. This Appeal be allowed

   ii. This Honourable Court be pleased to set aside the lower court's judgement and/or decision and be substituted with a Judgement and/or order dismissing the Respondent's suit with costs to the Appellant.

   iii. In the alternative and without prejudice to (b) above this Honourable Court be pleased to set aside the dependency ratio and replace with a dependency ratio of 1/3.

   iv. Further the Multiplier adopted be discounted to adopt a multiplier of about 5-7 years.

   v. The costs of the Appeal be awarded to Appellant.

6. The Appeal was canvassed via written submissions.

Appellant's Submissions

7. The Appellant framed two issues for determination. Namely: -

1. Whether the trial Magistrate considered the evidence tendered by the Appellant in determining the issue of liability?

2. Whether the damages awarded by the trial Magistrate under the Fatal Accident Act were excessive?

8. With respect to the first issue, the Appellant submitted that the trial Court's reasoning on the same was wrong and misguided.

9. The Appellant argued that there was no evidence adduced to prove that the deceased was a passenger aboard its motor vehicle on the material date. It contended that the police officer who testified that the deceased was a passenger was not an eyewitness and did not also visit the scene of the accident.

10. The Appellant faulted the trial Court for relying on the evidence of the police officer on grounds that he neither adduced the sketch plan nor the police file. Reliance was placed on the case of Kennedy Nyangoya v Bash Hauliers [2016] eKLR where the Court held that the evidence of the police officer did not build the plaintiff's case as he was not the investigating officer, did not visit the scene of the accident or took any sketch plan/ map of the area where the accident happened for production in court.

11. The Appellant submitted that there was no independent eye witness and that the trial magistrate proceeded on assumptions. He relied on the case of EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR where the Court stated as follows: -

> " Albeit the plaintiff's witness who recorded a filed witness statement did not testify, what this court observes from the said witness statement which is not evidence before the court as the statement was never adopted as evidence, is that the said witness' evidence could not have aided the defendant's case, and neither can it be said that the said witness could have given evidence that was adverse to the plaintiff's case. In the circumstances, albeit the plaintiff did not have an eye witness testify as to how the accident leading to his injuries was caused, this court finds and holds that the doctrine of Res ipsa would apply as PW1 was not an eye witness to the material accident and neither was he at the scene of accident..."

12. The Appellant further submitted that DW1 testified that the suit motor vehicle was meant for commercial purposes and not allowed to carry passengers. On a without prejudice basis the Appellant argued that if the deceased was a lawful passenger in the subject motor vehicle then he was fully aware of the risks involved in boarding the suit motor vehicle meant for commercial purposes as there was a conspicuous warning notice against unauthorized passengers.

13. In regards to the second issue, precisely on dependency ratio, the Appellant submitted that the dependency ratio of 2/3 adopted by the trial Court was on the higher side and not backed by any evidence.

14. According to the Appellant, the trial Court ought to have adopted a dependency ratio of 1/3 since the only dependent of the deceased was his son aged 9 years old. To support this position reliance was placed on the case of Mayfair Holdings Limited v Christine Rutto (suing on her own behalf and on behalf of the Dependants of the estate of Christopher Kibitok, Deceased) [2020] eKLR.

15. On multiplier, the Appellant submitted that the multiplier of 20 years was inordinately high and that the trial magistrate failed to consider the vagaries and vicissitudes of life. The Appellant urged this Court to adopt a multiplier of about 8-10 years. To support this position reliance was placed on the case of Monica Njeri Kamau v Peter Monari Onkoba [2019] eKLR. where the Court applied a multiplier

of 11 years on the grounds that the deceased was aged 39 years and an unskilled worker engaging in heavy work which may contribute in reducing his life span.

16. The Appellant prayed that the appeal be allowed with costs to it.

Respondent's Submissions

17. The Respondent framed the following issues for determination: -

1. Whether the deceased was a passenger on board the Appellant's Motor Vehicle
2. Whether the correct principle in assessment of damages was applied
3. Whether the dependency ratio adopted was correct
4. Whether the appeal should be allowed.

18. In regards to the first issue, the Respondent submitted that they proved the deceased was a passenger on board the suit motor vehicle through the police abstract that was produced as an exhibit before the Court. They asserted that the Appellant did not controvert this issue. They faulted the Appellant for failing to avail the driver of the subject motor vehicle who according to them was an eyewitness and better placed to state whether or not the deceased was a passenger in the suit motor vehicle.

19. They argued that they proved their case to the required threshold. In addition, they stated that in view of absence of the contrary evidence as to how the accident occurred by the Appellant and the fact that the deceased had no control over how the suit motor vehicle was driven this Court should be persuaded by the holding in the case of Caleb Juma Nyabuto v Evance Otieno Magaka & another [2021] eKLR where the court agreed with the decision in In Civil Appeal No. 7 of 2019 Isaac K. Chemjor & Another vs Laban Kiptoo (2019) eKLR where the Learned Judges observed as follows on paragraph 9:-

> "…There being no evidence that could lead to any other probability that another person was involved or the cause of the accident, the Court on a balance of probabilities test believe the explanation for the accident as given by the Respondent, and there was in it no reasonable hypothesis that another vehicle or person was involved in the cause of the accident. The Respondent had discharged his burden of proof under sections 107 and 108 of the *Evidence Act* in showing that the accident was occasioned by the 2nd appellant in his driving fast beyond his ability to control the vehicle when he encountered another road user. There being no evidence of involvement in the cause of the accident by any other person the Court finds on a balance of probabilities that the events as related by the Respondent are more probable than not."

20. The Respondents thus urged this Court to uphold the trial's Court finding that the deceased was a passenger who did not know the dangers of boarding the suit motor vehicle and did not see the alleged notice and ignored it.

21. On quantum, precisely on dependency, the Respondent submitted that the deceased was 39 years old and was in extremely good health prior to her death, and that she was working in a private company and would have worked past 60 years. They submitted that a multiplier of 20 years bearing in mind the uncertainties of life generally suffices. To support this position, reliance was placed on the case of

David Kimathi Kaburu v Gerald Mwobobia Murungi (Suing as Legal Representative of the Estate of James Mwenda Mwobobia(Deceased) [2014] eKLR where the Court stated that: -

> " the trial court correctly observed that the deceased was in private business, was aged 28 years and that the maximum retirement age in Kenya is now 60 years. The Court in applying a multiplier of 30 years took 60 years' retirement age of civil servants but failed to note the deceased was in private sector where the retirement age of 60 years do not apply as one can continue working even beyond 60 years and generally retirement depend on the nature of the business and health of the individual."

22. The Respondent submitted that no evidence of ill health of the deceased was produced to indicate or suggest that she would not have worked beyond the retirement of 60 years. For this proposition, reliance was placed on the case of Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased) [2019] eKLR.

23. On the dependency ratio, the Respondent submitted that 2/3 equally sufficed. They relied on the case of Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) [2020] eKLR which the court adopted a ratio of 2/3 for unmarried deceased woman who was survived by a child who depended on her.

24. On costs, they cited the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR for proposition that costs follow the event and the case of In the case of Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR which cited the case of Nedbank Swaziland Ltd verses SandileDlaminiNO.(144/2010) [2013] SZHC30 (2013)Maphalala J. referred to the holding of Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227, stated that costs are a matter of Court's discretion and awardable to a successful party.

25. They thus prayed that the costs of this Appeal be awarded to them.

Issues for determination

26. The issues that arise for determination in this Appeal are as follows: -

    1. Whether the deceased was a passenger in the Appellant's Motor Vehicle?
    2. Whether the trial court erred in finding the Appellant 100% liable for the accident?
    3. Whether the dependency ratio adopted by the trial court was incorrect?
    4. Whether the trial court erred in applying a multiplier of 20 years?

Duty of this Court

27. As a first Appellate Court, this Court is under a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis only bearing in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '...... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'

28. The above provision was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that: -

> " We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)."

Analysis of the issues

Issue No.1

29. It is trite that the onus of proof is on he who alleges. Section 107 of the *Evidence Act* provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

30. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while Section 109 states that 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 that fact shall lie on any particular person.

31. In the instant case the Respondents pleaded that the deceased was a passenger in the subject motor vehicle on the material date. During hearing PW1, PC Felix from Tarakwa Police Station testified that the accident herein was self-involving. He said the driver of the subject motor vehicle lost control and rolled to the right side of the road facing Eldoret Direction. That later they learnt that the deceased herein died as a result of the accident. He confirmed he did not visit the scene of the Accident.

32. PW2, Paschal Kyule adopted his witness statement as his evidence in chief. According to that statement, the deceased was fatally hit by the suit Motor Vehicle. During the hearing he contradicted himself by stating that the deceased was a passenger in the subject motor vehicle. He further testified that he visited the scene after the accident had happened. He confirmed he did not witness the occurrence of the accident.

33. DW1 confirmed that he did not witness the accident. According to him, the subject motor vehicle was principally for commercial use.

34. From the above evidence, there is no conclusive evidence that the deceased was a passenger in the suit motor vehicle.

Issue No.2.

35. There is no dispute that the accident occurred. The Respondents attributed the cause of the accident to the negligent acts of the Appellant's driver and or agent. The particulars of negligence against its driver or agent were as follows: -

    1. Driving the Motor Vehicle at a high speed
    2. Failing to control Motor Vehicle and/or manage the said Motor Vehicle
    3. Driving the Motor Vehicle while drunk
    4. Failure to slow down, stop and or swerve to avoid the accident

5. Driving the said motor vehicle in a careless manner

6. Breach of the provision of the High way code and *traffic Act*.

36. It was therefore the duty of the Respondent to adduce evidence to prove the above allegations against the Appellant.

37. It is imperative to note that the Appellant did not adduce any concrete evidence to controvert the Respondent's case.

38. In the case of Kirugi and Another –vs- Kabiya & 3 Others (1987) KLR 347 the Court of Appeal held that: -

> " The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as a formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard."

39. Similarly, in the case of Gichinga Kibutha –vs- Caroline Nduku, (2018) eKLR, the court held that: -

> " It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

40. PW2, did not witness the accident therefore his evidence on liability was immaterial.

41. PW1 confirmed he was not the investigating officer. He stated that the scene was visited. He however confirmed that no one was charged or blamed as a result of the accident. He did not have the police file in court and he did clarify that without the same it was impossible to know the circumstances that led to the accident. He did not also have sketch plan and his evidence was of no probative value.

42. It is not enough for the Respondents to submit that the Appellant did not controvert their case and therefore their evidence must be taken as truthful. It must be proved.

43. In Trust Bank Ltd -vs- Paramount Universal Bank Ltd [2009] eKLR it was held that where a party fails to call evidence in support of his case, the parties' pleadings remain as mere statements. The two police abstracts produced confirmed the occurrence of the accident only. All other statements therein, there having been no evidence in support to the same, they remained as opinions, that are not binding on the court. The police abstract produced or the Respondent stated that the appellant was to blame yet no evidence was called to support such finding. As stated above, no investigation file and report were produced.

44. Mulwa J in Lochab Brothers Ltd & Another -vs- Johana Kipkosgei Yegon [2017] eKLR. found that the police officer who only produced the Police Abstract and gave hearsay evidence and did not have a police file therefore making his evidence of little probative value.

45. In Florence Mutheu Musembi & Geofrey Mutunga Kimiti v Francis Karenge [2021] eKLR the Court held that: -

> " A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance

company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents."

46. In the premises, it is my considered view that there is no cogent evidence that the Appellant was negligent and was to blame for the accident. The trial court therefore erred in holding it 100% liable for the accident.

Issue No.3

47. The Appellant submitted that a dependency ratio of 1/3 would suffice while the Respondents was of the view that 2/3 adopted by the trial Court was sufficient.

48. It is not in dispute that the deceased was survived by his child aged 9 years old.

49. The Appellant in support of its submissions relied on the case of Mayfair Holdings Limited v Christine Rutto (suing on her own behalf and on behalf of the Dependants of the estate of Christopher Kibitok, Deceased) [2020] eKLR. This case is distinguishable from the facts of this case. In this case the Court applied dependency ratio of 1/3 after finding that the deceased child was listed among the grandchildren of the deceased in the pleadings and there was no proof of dependency.

50. In the instant case there was sufficient proof that the deceased had a dependent.

51. In the authority relied on by the Respondents of Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) (supra) the Court held as follows: -

> " As regards the fraction income which is spent on the dependants in the case of an unmarried woman who supports a child (and in this case her mother) I consider that in the absence of evidence that the child or children are also supported by their father pursuant to parental responsibility, or by any other person in filial or other guardian relationship to the child or children, the single female parent's dependency ratio should be equal to that of a married man who maintains his family household at 2/3 of his income. Both occupy the same position of family breadwinner and provider, and I do not see why an unmarried woman's support of her family should be at a lower fraction of her income than that of her male counterpart. The Court, therefore, approves the use of the dependency ratio of 2/3 in the computation of the applicable damages for dependency under the *Fatal Accidents Act*."

52. The above case is relevant to the facts of this case and I am persuaded by it. The trial court therefore did not err in adopting a dependency ratio of 2/3 in the instant case.

Issue No.4

53. According to the death certificate the deceased was 39 years old. The trial Court applied a multiplier of 20 years on grounds that there was no evidence of any illness.

54. The choice of multiplier is a matter of the Court's discretion. In the case of Board of Governors of Kangubiri Girls High School & another vs Jane Wanjiku Muriithi & another [2014] eKLR where

the Court of Appeal adopted the findings of Nambuye, J.A in Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others- H.C.C.C No. 754 of 2005: -

> "The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason."

55. The Appellant proposed a multiplier of 8-10 years. The Appellant however in their submissions did not consider that the deceased was not in formal employment and therefore he would have worked past 60 years. There was also no evidence that the deceased engaged in heavy work that could reduce her life span as elicited in the case of Monica Njeri Kamau v Peter Monari Onkoba (supra) which they relied on.

56. I have checked the following comparable authorities: -Joseph Gatone Karanja v Michael Ouma Okutoyi & 2 others [2022] eKLR where the court upheld a multiplier of 21 years for the deceased who was 39 years old at the time of death.Agnes Mutinda Ndolo & another [2017] eKLR where the court adopted a multiplier of 21 years for the deceased who was 39 years old at the time of death.

57. In the view of the above, I am of the opinion that the multiplier adopted by the trial Court was reasonable. Indeed, there was no evidence of any ailment prior to the deceased's death and further the deceased had a minor who would be expected to depend on her for the next 18 years which is the age of majority.

58. In the premises, the appeal only on liability is meritorious and is allowed. The trial magistrate's judgment on liability is set aside and substituted with one that the Respondents failed to prove to the required standards their case against the Appellant on a balance of probability. The case therefore before the trial Court is dismissed with costs to the Appellant.

59. Each party will bear its own costs on this appeal.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 4TH DAY OF MAY, 2023.

MOHOCHI S.M

(JUDGE)