



Lochab General Transporters Co. Ltd v Mutio & another (Civil Appeal E186 of 2021) [2023] KEHC 18785 (KLR) (Civ) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E186 OF 2021

AN ONGERI, J

JUNE 21, 2023

BETWEEN

LOCHAB GENERAL TRANSPORTERS CO. LTD APPELLANT

AND

DOMINIC MUTUKU 1ST RESPONDENT

CAROLINE KAVAKI WILLY (BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE ANTHONY MUSEMBI MUTUKU) .. 2ND RESPONDENT

(Being an appeal from the judgment of HON. PETER MUHOLI (PM) in NAIROBI CMCC No. 1436 of 2018 delivered on 17/3/2021)

JUDGMENT

1. The respondent in this case Dominic Mutuku Mutio in a plaint dated 1/3/2018 sued the appellant, Lochab General Transporters Co Ltd in CMCC no 1436 of 2018 seeking general damages under the Law Reform and the Fatal Accident Act for fatal injuries sustained by Anthony Musembi Mutuku (deceased) on 2/4/2014 while the deceased was travelling as a turn boy in motor vehicle registration no KAJ 772R at Voi along Mombasa Road.
2. The appellant is the owner of motor vehicle registration no KAJ 772R and the deceased was the turnboy for the said motor vehicle who was in the employment of the appellant earning kshs 20,000 per month. The respondent is the father of the deceased.
3. The appellant filed a defence dated 3/8/2018 denying the respondent's claim.
4. A summary of the respondent's case was that on the material day Pw 2 Joseph Ngire was travelling from Mombasa to Nairobi when he saw motor vehicle registration no KAJ 772R which was being driven ahead on them in a zigzag manner.



5. PW 2 said the motor vehicle overturned and he went to the scene where he identified the deceased who used to work with him at the appellant company.
6. PW 2 said the accident occurred at Mwembeni along Mombasa Road. He said motor vehicle registration no KAJ 772R was being driven at a high speed before the accident.
7. The appellant did not call any witnesses. The trial court found the appellant 100% liable for the accident and awarded general and special damages as follows;
 - i. General damages for pain & suffering 50,000
 - ii. Loss of expectation of life 100,000
 - iii. Loss of dependency 4,362,480
 - iv. Special damages 70,000

Total 4,582,480
8. The appellant filed this appeal against the said judgment on the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in failing to address and resolve all the legal issues before him for determination particularly the issue of limitation
 - b. That the learned trial magistrate erred in law and in fact in completely ignoring and not considering the issue of limitation as pleaded in paragraph 10 of the defence and as submitted by the appellant's counsel, thereby arriving at an erroneous and unjust decision.
 - c. That the learned trial magistrate erred in law and in fact in failing to find that the leave granted to the respondents to file suit out of time was erroneous as the requirements of sub section 2 of section 27 of the Limitations of Action Act Cap 22 Laws of Kenya had not been fulfilled in relation to the respondents' cause of action.
 - d. That the learned trial magistrate erred in law and in fact in adopting a multiplier of 30 years under the Fatal Accidents Act which was too high in the circumstances.
9. The parties filed written submissions as follows; the appellant submitted that the respondent/plaintiff did not satisfy the requirements of sub section 2 of Section 27 of the Limitations of Actions Act for the grant of such leave. That Sub-section provides thus:-

"27(1) Section 4(2) does not afford a Defence to an action sounded on tort where;

- (a) the action is for damages for negligence, nuisance or breach of duty...
 - (b) the damages claimed by the Plaintiff for the negligence, nuisance or duty consist of or include damages in respect of personal injuries of any person, and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and
 - (d) the requirements of Sub-section 2 are fulfilled in relation to the cause of action.
- (2) The requirements of this Sub-section are fulfilled in relation to a cause of action if it is proved that material facts relating



to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff...."

10. That the 2nd respondent/plaintiff instructed her advocate on May 6, 2015 to file and prosecute the matter on her behalf which clearly showed that the material facts relating to her cause of action against the appellant were within her knowledge as at that time. That her advocate died in November 2017 which was more than 2 years since she gave instructions to him. Therefore the trial magistrate was wrong when stating that the delay in filing the matter was caused by the death of the said advocate.
11. It was further submitted that the multiplier of 30 years adopted by the trial magistrate while working out the claim of loss of dependency was too high. That the deceased died at the age of 27 years and they had proposed a multiplier of 25 years as reasonable which was reasonable considering other vicissitudes and imponderables of life. That also the deceased was a turn boy which occupation is risky.
12. The respondents in their submission argued that in November 2017 Mr Wariuki, their advocate passed away and the respondent found out shortly thereafter that the law firm was being wound up and all the files were being given back to the instructing clients. The file was handed back on January 30, 2018 and that was when she realized that the deceased advocate had not lodged the claim in court.
13. It was submitted further that the accident that is the subject matter of the claim occurred on April 2, 2014 and by January 30, 2018, 3 years and 9 months had lapsed meaning that the respondents claim was time barred. In order to salvage the claim, the respondent instructed its current advocates who moved with speed to have it filed. They filed the suit first and sought for extension of time which was granted on May 21, 2018. That the trial court was therefore correct in granting the said orders because fulfilled the requirements for grant of the same and in support cited the case of *Royal Media Services Limited vs Valentine Mugure Maina & Another* [2019] eKLR, Ngaa J explained the application of Section 4 (2) of the Limitation of Action as follows:-

"Before I conclude, I must mention that Section 4 (2) is couched in such terms that the trial court is left with discretion to extend the time within which a claimant can file suit for damages in defamation claims. It may be that the claimant was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period. Where the court is inclined to extend time, it must have regard to all the circumstances of the case and in particular to such circumstances as the lengths and the reasons for, the delay on behalf of the plaintiff.....the court, in making its discretion will consider the date on which any such facts did become known to him on the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action."

14. On the multiplier it was the respondent's submission that indeed the deceased was a turn boy who died at the age of 27 years. That the appellant proposed a multiplier of 25 years while the court awarded 30 years. That a difference of 5 years does not indicate that the trial magistrate applied the wrong principles or failed to take into account the evidence tendered by the appellant. That it has been observed by the court severally that a deceased person in private business or employment would work past 60 years retirement age. That also the choice multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with reason.
 1. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity



of seeing the witnesses. In *Selle –Vs- Associated Motor Boat Co* [1968] EA 123 in the following terms: -

“ An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

15. The issues for determination in this appeal are as follows;
 - i. Whether the respondent’s suit is statute time barred.
 - ii. Whether leave to file suit out of time was properly granted.
 - iii. Whether the multiplier of 30 years adopted for loss of dependency was excessive.
 - iv. Who pays the costs of this appeal?
16. On the issue as to whether the respondent’s suit was statute time barred I find that there was evidence that the respondent sought leave for extension of time after filing suit.
17. The respondent submitted that the same is allowed under Order 37 Rule 6 of the [Civil Procedure Rules 2010](#).

"Extension of limitation period [Order 37, rule 6.]

 - (1) An application under section 27 of the [Limitation of Actions Act](#) made before filing a suit shall be made ex parte by originating summons supported by affidavit.
 - (2) Any such application made after the filing of a suit shall be made ex parte in that suit."
18. The law makes provision for any such application made after the filing of a suit to be made ex parte in that suit.
19. I find that the reason for failing to comply with time lines was that the respondent’s advocate one Mr Wariuki died in 2017 and the respondent got to know later that the suit had not been filed.
20. On the issue as to whether the leave to file suit was properly granted therefore I find that the answer is in the affirmative.
21. The appellant did not raise any preliminary objection in the original suit on the issue of limitation for the determination of the same as intimated in the defence filed in the Trial court.



- 22. Failure to object to the said issued during the trial implied that the appellant had acquiesced the issue of limitation and submitted to the jurisdiction of the court.
- 23. On the issue as to whether the multiplier of 30 years was excessive, I find that it is not in dispute that the deceased was 27 years and he was earning a salary of ksh 20,000 per month.
- 24. I find the trial court was right in adopting a multiplier of 30 years in the circumstances.
- 25. The only time when the appellate court can interfere with the award of the trial court is when wrong principles were relied on or where the award is too low or too high as to warrant interference.
- 26. In the case of *Butt vs Khan* (1977) 1 KAR, the court set the test as follows: -

“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.”

27. I find that the appeal herein lacks in merit and I accordingly dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF JUNE, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents

