Lukulu (Administrator of the Estate of Margaret Njeri Lukulu) v Mutindi & another (Civil Appeal 445 of 2017) [2023] KEHC 18420 (KLR) (Civil) (2 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18420 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 445 OF 2017

JN NJAGI, J

JUNE 2, 2023

BETWEEN

EDWIN NGAIRA LUKULU (ADMINISTRATOR OF THE ESTATE OF MARGARET NJERI LUKULU) ..... APPELLANT

AND

ALEX MUTINDI ..... 1ST RESPONDENT

TARMARIND MANAGEMENT LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. A. M. Obura, SPM, in Nairobi Chief Magistrate`s Court Civil Suit No.207 of 2009 delivered on 24/7/2017)

JUDGMENT

1. The appellant herein and another instituted a suit against the two respondents in their capacity as administrators of the estate of the appellant`s mother, the late Margaret Njeri Lukulu, after the deceased was fatally knocked down by a motor vehicle registration No. KAS 519 T that at the time of the accident was being driven by the 1st respondent and was said to be registered in the name of the 2nd respondent. The estate of the deceased was seeking damages under the *Law Reform Act* and *Fatal Accidents Act*. The 2nd respondent in their defence contended that as at the time of the accident they had already transferred the subject motor vehicle to the 1st respondent who was their former employee. After a full trial the trial Magistrate held that there was no clear evidence as to how the accident occurred and as to who was to blame for causing the accident. The magistrate thereupon apportioned liability equally between the appellant and the 1st respondent. the court found that at the time of the accident the 2nd respondent had transferred the vehicle to the 1st respondent and accordingly dismissed the case against the 2nd respondent.

2. The trial Magistrate consequently assessed and awarded Ksh.50,000/= in general damages for pain and suffering and Ksh.716,910/= for loss of dependency, among other damages. The Appellant was aggrieved by finding on liability and on the amount of quantum awarded on the two heads and filed the instant appeal.

3. The grounds of appeal are that:

    a. The learned trial Magistrate erred in law and in fact in holding that the deceased and or appellant was fifty percent liable for the accident contrary to the evidence before court.

    b. The learned trial Magistrate erred in law and in fact in not considering the submissions of the Appellant hence arriving at the wrong decision.

    c. The learned trial Magistrate erred in law in not taking into account the evidence which was placed before the court hence arriving at the wrong decision.

    d. The learned trial Magistrate erred in law in not finding that the Respondents were jointly and severally liable for the accident.

    e. The learned trial Magistrate erred in law and in fact in failing to follow the law regarding the award of damages.

    f. The learned trial Magistrate erred in law in shifting the burden of proof to the deceased and or Appellant contrary to the law.

    g. The learned trial Magistrate erred in law and in fact in relying heavily on the submissions of the Respondent to write the judgment rather than the evidence which was before the court.

    h. The learned trial Magistrate erred in law and in fact in not applying the minimum wage in respect of the salary hence arriving at the wrong decision.

    i. The learned trial Magistrate erred in law and in fact in awarding damages which were not in line with the evidence on record.

4. The 2nd Respondent did not take part in this appeal.

The Evidence at the trial court –

5. The Appellant called two witnesses in the case. The first witness, Violet Ngaira PW1, testified that she was a sister to the deceased. That on the 9/1/2007 at around 7 pm she was selling vegetables at a kiosk on the side of Waiyaki Way in Westlands in Nairobi when she heard a bang. She went to check and found that it is her sister, the deceased, who had been hit by a vehicle. Policemen who were on patrol went to the place and rushed the deceased to hospital. She accompanied them to hospital. The deceased however succumbed at the entrance to Kenyatta National Hospital.

6. The other witness was the Appellant herein, PW2, who is a son to the deceased. He testified that he received a call from his aunt PW1 that his mother had been knocked down by a vehicle. On the following day he went to the scene of the accident and found blood stains off the road on the pavement. He went to City Mortuary and identified his mother`s body.

7. The 1st Respondent, Alex Karanja (Mutindi), DW1, testified in the case and stated that he was on the material day driving towards Kangemi from town. That he reached a place where there was a zebra crossing. After passing the place, he saw a group of people on the side of the road. He flashed his lights on them as it was just before dusk. He hooted. Suddenly a woman jumped into the road to cross to the

left side. He swerved to the right to avoid her. She was hit by the front left side of his vehicle. She died on the spot. He called the police. He said that it is the woman who was to blame for the accident.

8. The 2nd Respondent called one witness, Maureen Namiroi, DW2, who testified that she was the Human Resource Officer of the 2nd Respondent. That the 1st Respondent was working for them as an Assistant Manager. That he had a company vehicle that was transferred to him when he left their employment. He resigned from their company on 30/11/2006. The witness produced copies of search certificates from the Registrar of Motor vehicles showing that the vehicle was registered in the name of the 1st Respondent. The witness said that the 1st Respondent was the owner of the vehicle at the time of the accident.

Appellant`s Submissions –

9. The Appellant faulted the trial Magistrate for finding the deceased to have been 50% liable for the accident when there was no evidence to support the finding. That PW1 witnessed the accident and it was clear from her evidence that the deceased was hit by the vehicle while on her lawful lane. That it was apparent that the 1st Respondent was driving at high speed and was thus unable to control the vehicle, slow down, stop or do or act in a way so as to avoid causing the accident.

10. It was submitted that the trial Magistrate did not refer to the submissions of the Appellant in his judgment which meant that he did not consider the submissions of the Appellant in concluding that the deceased was 50% liable in causing the accident.

11. The Appellant submitted that he produced a copy of records that showed the 2nd Respondent as the registered owner of the subject motor vehicle. That the 1st Respondent confirmed in his evidence in court that the 2nd Respondent was the registered owner of the vehicle at the time of the accident. Further that DW2 testified that the motor vehicle had been sold to the 1st Respondent who was their employee. However, that the 2nd Respondent failed to prove that the motor vehicle had been sold or transferred to the 1st Respondent at the time of the accident as no agreement of sale was produced to prove so. The trial court was thus wrong in its finding that the 2nd Respondent was not the owner of the motor vehicle. That the court erred in not finding that the Respondents were jointly and severally liable for the accident.

12. On quantum of damages, the Appellant submitted that the trial court held that the deceased died immediately after the accident and awarded Ksh.50,000/= for pain and suffering. That the court erred in this respect as it disregarded the evidence that the deceased died at Kenyattta National Hospital. The Appellant urged this court to increase the award for pain and suffering to Ksh.200,000/=.

13. It was submitted that the Appellant had adduced evidence that his mother was working as a house help in an Asian house earning a salary of Ksh.10,000/=. That even though the trial Magistrate adopted the minimum wage of Ksh.5,974/25 as per Legal notice No.38 of 2006, the court ought to have considered the lapse of time and inflation. It was submitted that a fair determination would have been to adopt a minimum wage of Ksh.15,000/=.

1st Respondent`s submissions –

14. The 1st Respondent supported the finding of the trial court on liability. He submitted that the witness for the Appellant PW1 was not a credible witness. That in her evidence in court she stated that she was at the time of the accident selling vegetables beside the highway while in her written statement she had stated that she was at the time buying vegetables. That the trial Magistrate made a finding that there was no independent witness on how the accident occurred and no evidence as to the probable point

of impact. It was submitted that the Appellant failed to call the investigating officer to testify as to the circumstances of the accident. That in the premises the trial court was correct in apportioning liability. The 1st Respondent relied on the case of Domitila Wangui Karuga & another v Dagu Hidris Haide (2020) eKLR where the court held that:

> It is not clear under what circumstances he was hit. Further, the Respondent's testimony was uncontroverted as he was the only direct witness. Since it is difficult to apportion blameworthiness in these circumstances, I too, would apportion liability equally. This approach to apportionment of liability is not novel. Our courts have dealt with situations where it was difficult to apportion liability were two vehicles have collided and have apportionment liability equally (see generally Beckley Stewart Ltd and Others v Lewis Kimani Waiyaki [1982-88] 1 KAR 1118, Lakhamshi v Attorney General [1971] EA 115, Simon v Carlo [1970] EA 284). The same principle was outlined by the Court of Appeal in Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR where it observed that:
>
> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

15. The 1st Respondent also cited the case of Salmin Mbarak Awadhi v Emma Nthoki Mutwota (2017) eKLR where it was held that:

> 33. The evidence by plaintiff and the defence was conflicting on the correct fashion of the happening of the accident. The fact remains that the victim was knocked by the appellant motor vehicle as admitted but court was not convinced on each sides stories on the actual happening of the accident and thus found same not credible leaving the court with no option but to blame both sides equally.
>
> 34. There are plethora of authorities which are to the effect that where the court had no concrete evidence to distinguish the blame between the two sides in accident incident, the court ought to apportion liability equally. See Berckey Steward Ltd And Others –vs- Lewis Kimani Wayaki (1982-88) Kar 1118 And Also Baker –vs- Market Hark Burough Industrial Co-operative Society Ltd (1953) Iwlr.

16. The 1st Respondent urged the court to uphold the trial court`s finding on liability.

17. On ownership of the subject motor vehicle the 1st Respondent submitted that the 2nd Respondent failed to prove that the vehicle had been sold to the 1st Respondent at the time of the accident. That no sale agreement was produced to prove the sale and no receipt was produced to prove the transfer. That the copies of records produced show that the 1st Respondent assumed ownership way after the accident and not at the date of the accident. That the 2nd Respondent should be held vicariously liable since it was the registered owner of the vehicle at the time of the accident.

18. The 1st Respondent supported the award of Ksh.50,000/= on pain and suffering and relied on the case of Sukari Indusries Limited v Clyde Machimbo Juma (2016) eKLR where an award of Ksh.50,000/= under this heading was upheld.

19. The 1st Respondent submitted that the Appellant did not dispute the award of Ksh.150,000/= for loss of expectation of life. The same should therefore remain.

20. It was submitted that the wage for a domestic worker in 2007 was Ksh.5,974/25 inclusive of house allowance. That the trial court correctly adopted a multiplier of 15 years after taking into regard the vicissitudes of life. That the award on lost years should be upheld.

21. The 1st Respondent urged this court to dismiss the appeal with costs.

Analysis and Determination –

22. This being a first appeal, the duty of the court is as was stated by the Court of Appeal in Selle –vs- Associated Motor Board Company Ltd (1968) E.A. 123, 126 that:

> " Briefly put they (the principles) are that, this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's finding 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."

23. I have considered the grounds in support of the appeal, the grounds in opposition thereto and the submissions by the parties. The issues for determination are:

    (1) Whether the trial court was right in its finding on liability.

    (2) Whether the trial court erred on its award on damages.

Liability –

24. The trial court apportioned liability between the Appellant and the 1st Respondent on the ground that it was not clear on how the accident occurred. The 1st Respondent supported this finding while the Appellant did not agree with it.

25. I have keenly looked at the evidence of PW1. It was her evidence that she saw the accident taking place. However, a look at her evidence creates doubt on whether she actually witnessed how the accident took place. In her written statement that was filed with the court she stated that she was buying vegetables when the accident took place, while in her evidence in court she said that she was at the time selling vegetables near the place where the accident took place. The witness further said in cross-examination that there was a zebra crossing at the place where the accident took place but when re-examined on the issue said that there was no zebra crossing at the place.

26. The witness further claimed that before the accident her sister was on the opposite side of the road and was waiting to cross the road. That she saw the vehicle approaching. It then veered off the road and hit her sister. It threw her onto the middle of the road.

27. At the same time, the witness told the court that she only heard a bang and turned to check on what had happened. She went to check and found that it is her sister who had been knocked down by a vehicle.

28. It is then obvious that the witness gave two conflicting versions on how the accident took place. She did not explain how the vehicle threw the deceased into the middle of the road if it had hit her off the road. It is to be noted that the accident took place at 7pm when darkness may have entered. There was

no convincing evidence that PW1 saw the accident taking place. It is most likely that she only heard a bang and when she went to the scene of the accident she found that it is her sister who was knocked down by a vehicle.

29. The 1st Respondent gave evidence that he knocked down the deceased when she was crossing the road. That it is the deceased who crossed the road without due care and attention as a result of which she was knocked down by his vehicle.

30. The witness further stated in his defence in the alternative that the accident was wholly or substantially caused by the deceased. In this appeal he supported the finding of the trial court in apportioning liability equally between him and the Appellant. The duty was therefore on the Appellant to show that the finding of the Magistrate was wrong by proving that the 1st Respondent was entirely to blame for occasioning the accident or that his liability was higher than the 50% adjudged by the trial Magistrate. He did not prove either of these. In such circumstances it was open for the trial court to apportion liability equally between the parties. In Abbay Abubakar Haji Patuma Ali Abdulla vs Freight Agencies Ltd [1984] eKLR the Court of Appeal cited with approval the holding in Lakhamshi v Attorney General, (1971) E A 118 that:

> Where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

31. The apportionment of liability between the Appellant and the 1st Respondent is thereby upheld.

32. The 2nd Respondent in its written statement of defence denied that the 1st Respondent was its driver, servant, agent and or employee at the date of the accident. It stated in paragraph 5 of the defence that at the time of the alleged accident it had sold the subject motor vehicle to the 1st Respondent and therefore any liability arising from reckless or negligent driving of the motor vehicle could not be against them.

33. The 2nd Respondent filed a copy of record dated 30/12/2014 that indicated that the subject motor vehicle was registered in the name of the 1st respondent as of 0/1/2007. The 2nd Respondent filed other copies of records procured in 2013 and 2014 indicating that the vehicle was registered in the name of the 1st Respondent. The 2nd Respondent also filed documents showing that the 1st Respondent left their employment on the 30/11/2006. The 1st Respondent did not file a response to the defence of the 2nd Respondent denying the contents of their defence.

34. In his defence in court, the 1st Respondent admitted that he resigned from the employment of the 2nd Respondent on 30/11/2006. He admitted that at the time of the accident on 9/1/2007 the vehicle was

in his possession and benefit, though it was still registered under the name of the 2nd Respondent. He said that the vehicle ought to have been transferred to him by the time of the accident.

35. The trial Magistrate had the following to say on the issue of ownership of the motor vehicle:

> ...It is also their case (2nd Defendant) that as at the time of the accident, the vehicle belonged to the 1st Defendant...The Exhibits 2nd DEXT 1 – 7 support the 2nd Defendant`s position. The 1st Defendant did not deny these claims... I agree with the 2nd Defendant`s submission that the mere registration of the vehicle in their name is not conclusive proof of ownership... It is clear that at the time 1st DW1 was driving the subject motor vehicle he was no longer an employee of the 2nd Defendant. There is proof on a balance of probability that as at the time of the accident ownership of the company vehicle had been transferred to the 1st Defendant. The 2nd Defendant had no control of or interest in the said vehicle as at 9th January 2007 although the copy of records still reflected its name as owner....I find that there is no justification for finding the 2nd Defendant vicariously liable for the negligence of the 1st Respondent since he was no longer their employee and the company had relinquished its interest in the subject motor vehicle at all material times.

36. In view of the fact that the 1st Respondent did not respond to the 2nd Respondent`s defence that they had as at the time of the accident sold the motor vehicle to him; the fact that the 1st Respondent had already left the employment of the 2nd Respondent as at the time when the accident occurred; that the copy of record of 30/12/2014 indicated that the 1st Respondent was the registered owner of the vehicle as of 9/1/2007 and also considering that the 1st Respondent admitted that he was the one in possession of the motor vehicle at the time of the accident, I find that the trial Magistrate was correct in his finding that the 2nd Respondent had by the time of the accident relinquished their interest in the motor vehicle to the 1st Respondent. The Magistrate did not err in holding that the 1st Respondent was singly liable for the accident.

Quantum –

37. The awards that were challenged are on pain and suffering and on loss of dependency.

38. The grounds under which an appellate court may interfere with an award of damages made by a lower court were stated by the Court of Appeal in the case of Butt v Khan 1982 -1988 1 KAR where the court pronounced itself 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 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.

The duty of this court is to examine the evidence and see whether there is reason to interfere with the award.

Pain and suffering –

39. The trial court awarded Ksh.50,000/ under this head upon considering that the deceased died on the spot. The Appellant submitted that the deceased died on the way to hospital and urged the court to award Ksh.200,000/=. The 1st Respondent supported the award of Ksh.50,000/=.

40. The Appellant`s witness, PW1, testified that the deceased died at the gate of Kenyatta National Hospital while the 1st Respondent said that the deceased died on the spot of the accident. There was no doctor`s report to confirm the exact time that the deceased died. It was all the same clear that the deceased died shortly after the accident. I find that the award of Ksh.50,000/= was sufficient for pain and suffering for death which occurred shortly after the accident. The Appellant did not cite any authority to support an award of Ksh.200,000/=. The invitation to increase the award is declined.

Loss of dependency –

41. The Appellant (PW2) stated in his evidence that his mother was working as a domestic worker in some Asian quarters where she was earning a salary of Ksh.10,000/= per month. The Appellant however never produced any documents to support the earnings. The Appellant while urging the court to adopt the minimum wage of Ks.5,974/25 as per Legal Notice No 38 of 2006 (The Regulation of Wages General) (Amendment) asked the court to consider the element of inflation and award Ksh.15,000/= as the minimum wage.

42. On the multiplicand the Appellant submitted that the deceased died at the age of 43. That as a house help she would have worked for another 25 years. That the trial Magistrate erred in applying a multiplicand of 15 years.

43. The trial court awarded loss of dependency as follows:

    5,974/25 x 12 x15 x 2/3 = 716,910.

44. The Appellant did not produce any evidence to show that his mother was working as a domestic help. Though the court can accept such evidence without production of documents to prove the same, the evidence in this matter left lingering doubt whether the deceased was in any salaried employment. The Appellant in his written statement of defence and in in his witness statement never mentioned that the deceased was in salaried employment. The issue only cropped up when the Appellant`s witnesses testified in court. I do not think that this is something that would have escaped being mentioned in the written defence as it was something crucial in the claim. In the absence of credible evidence that the deceased was working as a domestic worker, the trial court was right in adopting the minimum wage of Ksh.5,974/25 which was the wage applicable at the time of the deceased`s death in the year 2007. There is no basis for the argument that the court should have considered the element of inflation on top of the minimum wage.

45. The deceased died at the age of 43 years and the trial court used a multiplier of 15 years. A look of other authorities will show that the Magistrate was right in adopting a multiplier of 15 years. In Sarah Naitore M'ikunyua v Geofrey Mwangi Bor & another [2021] eKLR where the deceased died at the same age of 43 years, Muriithi J. upheld a multiplier of 13 years. In Hillary Tom Mboya v Jane Wangechi Njihia & another [2022] eKLR, Sergon J. upheld a multiplier of 17 years where the deceased died at the age of 43 years. In the premises, the trial court properly used its discretion to adopt a multiplier of 15 years. The award on loss of dependency of Ksh.716,910/=, less the 50% contribution, is upheld.

46. In view of the foregoing, it is the finding that the Appellant has not shown that the trial magistrate was wrong in apportioning liability equally between the Appellant and the 1st Respondent. The court was right in dismissing the case against the 2nd Respondent. The Appellant has not demonstrated that the trial Court acted on a wrong principle of law, or misapprehended the facts, or made a wholly erroneous estimate of the damages awarded. There is no basis for disturbing the finding of the trial court on quantum.

47. The upshot is that the appeal herein lacks merit and is dismissed with costs to the 1st Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE 2023

J. N. NJAGI

JUDGE

In the Presence of:

Mr Omwenga for Appellant

Miss Murigu for 1st Respondent

Court Assistant – Simon

30 days Right of Appeal.