



Safe Haven Limited & another v GNM & another (Suing as the Administrators of the Estate of the Late EM) (Civil Appeal E1142 of 2023) [2024] KEHC 12107 (KLR) (Civ) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12107 (KLR)

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

CIVIL

CIVIL APPEAL E1142 OF 2023

RC RUTTO, J

OCTOBER 11, 2024

BETWEEN

SAFE HAVEN LIMITED 1ST APPELLANT

SAMULE MUTURI 2ND APPELLANT

AND

GNM 1ST RESPONDENT

SM 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE EM

(Being an appeal from the judgment delivered by Hon. Rawlings Liluma on 29th September 2023 in Milimani Commercial Court No. 6686 of 2016)

JUDGMENT

1. This is an appeal against quantum and liability as delivered in Nairobi Milimani Commercial No. 6686 of 2016. The facts are as set out in the plaint dated 30/1/2019 where the Respondents sued the Appellants, for general damages, special damages costs of the suit, and interest from the date of filing.
2. The claim arose from a fatal road accident that occurred on 8/9/2014 when the deceased was walking off the road along Karume road, at Kangemi, when Motor Vehicle Registration Number KBU 916N was negligently and or carelessly driven, managed and or controlled that the same was allowed to knock down the deceased and resultantly, the deceased succumbed to the injuries.
3. In response, the Appellants vide the Amended Defence dated 10/5/2022 denied the claim and further particularized negligence on the part of the deceased.



4. During the hearing, the Respondent called three witnesses while the Appellants did not call any witness. In determining the suit, the trial court held the Appellant wholly liable for the accident and proceeded to grant the following;
 - a. Pain and suffering Kshs 10, 000/=
 - b. Loss of expectation of life Kshs 100, 000/=
 - c. Loss of dependency Kshs 900, 000/=
 - d. Special damages Kshs 80,910/=TOTAL KSHS 1, 090, 910/=
 - e. Costs of the suit and interest.

The Appeal

5. Being aggrieved by the said decision, the appellants filed this appeal seeking that the judgment of the trial court be set aside and/or varied with orders substituted thereof, dismissing the Respondent's suit with costs. The appeal was founded on five (5) grounds of Appeal as set out in the memorandum of appeal dated 27th October 2023 as follows: -
 - a. That learned trial Magistrate erred in law and in fact by failing to appreciate that the burden of proof lay / lies with the Respondent.
 - b. The learned trial Magistrate erred in law and in fact in awarding general damages that were inordinately high.
 - c. The learned trial Magistrate erred in law and in fact by quantifying the amount for loss of dependency at an inordinately high figure given the circumstances.
 - d. The learned Magistrate erred in law and in fact by apportioning liability on the basis that the [Appellants] failed to call a witness.
 - e. The learned Magistrate failed to take into consideration the submissions filed by the [Appellants].
6. The appeal was canvassed by way of written submissions. The Appellants' submissions in support of the appeal are dated 10th June 2024 while the Respondent's submissions opposing the appeal are dated 1st June, 2024.

Appellants' submissions

7. On grounds 1, 4 and 5 of the Appeal, the Appellants submitted that he who alleges must prove that those facts exist to give any legal right. To support this argument he made reference to the case of EMC (A minor suing through MNC) v James Irungu Nyanja [2020] eKLR which cited with approval the case of *East Produce (K) Limited v Christopher Astiada Osiro, Civil Appeal No. 43 of 2001*.
8. The Appellants further submitted that the trial court erred in apportioning 100% liability to them based solely on their failure to challenge the Respondent's case by calling witnesses or presenting evidence. They stated that they had extensively addressed this issue on liability in their written submissions dated 1st August 2023, and thus, it was incumbent upon the court to first determine whether the Respondent had proven their case on a balance of probabilities before assigning any



liability to the Appellants. Moreover, the Appellants contends that the trial court relied on an outdated legal principle in concluding that they were fully liable for not calling witnesses or producing evidence.

9. On grounds 2 and 3 of the Appeal, the Appellants submitted that the award of Kshs 900,000/= towards loss of dependency is inordinately high considering the circumstances of the case. Reference was made to the case of *Mwangi & Another (Suing as the legal representatives of the Estate of the late Richard Mwangi Gathoni (Deceased) v Ngure & Another (Civil Appeal 57 of 2020)* [2023] KECA 448 (KLR) (14 April 2023) (Judgment), which cited with approval the decision in *Chumo v Messrs Kapsimatwo Express* [1992] KLR 77 which held that dependency is a matter of fact and must be determined on the existing facts at the date of death.
10. The Appellants further submitted that the Respondent failed to produce any evidence in support of the claim for loss of dependency. Consequently, the trial court had no basis to make an award on this claim, as no reference was made to any evidence to support the global award of Kshs 900,000/=. The Appellant, therefore, invites this court to interfere with the award and set aside the trial court's judgment in its entirety.

Respondent's submissions

11. The Respondent submitted that at the preparation of their submissions, the Appellants had not yet filed the Record of Appeal as per the directions issued by the Deputy Registrar on 24/5/2024. Subsequently, the Respondent urges that the Appeal be dismissed for the reasons that the appeal is incomplete.
12. The Respondent submitted that, to fulfil the burden of proof as outlined in Section 107(1) of the *Evidence Act*, they called the Respondent, PW2 (Geoffrey Nyambane Machogu), who adopted his witness statement and produced all supporting documents for the case. Furthermore, they called two additional witnesses: PW1 (the eyewitness) and PW3 (the Police Traffic Officer).
13. The Respondent contends that the only issue in dispute is whether the accident was caused by the Appellant's driver (2nd Appellant?) or the deceased. The eyewitness testified that, on the day of the accident, he was standing near the chief's gate, selling clothes, when he saw three school children walking on the pavement. At that moment, the subject motor vehicle, Registration No. KBU 619N, a school bus belonging to Nairobi International School, was being driven recklessly, veered off the road, and struck the deceased, killing him instantly. Additionally, PW3, in his testimony, confirmed that the accident occurred and that the driver of Motor Vehicle Registration No. KBU 619N was to blame.
14. The Respondent further submitted that the burden of proof was adequately discharged and that the trial court was entitled to independently evaluate the evidence before the court and render a decision based on the facts and principles of law. The Respondent relied on the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR, where the court cited with approval the decision in *Motex Knitwear Limited v Gopitex Knitwear Mills Limited, Nairobi HCCC No. 834 of 2002*, regarding the consequences of a party failing to call evidence—namely, that the Defence filed remains unsubstantiated.
15. On the issue of general damages, the Respondent submitted that the claim was brought under both the *Fatal Accidents Act* and the *Law Reform Act*, as the deceased died as a result of severe injuries sustained in the accident. Citing Section 4(1) of the *Fatal Accidents Act* regarding loss of dependency, the Respondent argues that the methodology employed by the trial Magistrate is not in dispute. Furthermore, since the deceased was a minor, the global award of Kshs 900,000/= was appropriate, taking into account case law and inflationary trends. The Respondent relies on *Peter Namu Njeru v*



Philemon Mwangoto (Civil Appeal 132 of 2012) [2016] eKLR. They submitted that the award was fair and reasonable, and therefore, this court should uphold it.

Analysis and Determination

16. In determining this appeal, this court will be guided by the courts duty to re-evaluate and assess the evidence and make its own conclusions as succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] EA 424). Thus, having carefully considered the record and grounds of appeal in its entirety; and the written submissions filed by the parties together with the authorities cited, the issues arising for determination are;
 - a. Whether the Learned Magistrate erred in his finding on liability.
 - b. Whether the trial Magistrate erred in awarding general damages of Kshs 900, 000/= for loss of dependency.
17. Before delving into the two issues for determination, this court notes a preliminary issue raised by the Respondent. The Respondent submitted that as at the time of the preparation of their submissions, the Appellants had not yet filed the Record of Appeal as per the directions issued by the Deputy Registrar on 24/5/2024. Subsequently, the Respondent requests that the Appeal be dismissed for being incomplete. The Appellants did not address themselves on this issue. Having perused the file, I note that there is on record a Record of Appeal filed by the Appellants dated 7th June 2024. Thereafter the appeal was admitted for hearing and as such the Court will focus on determining the substantive issues for determination as set out above.

a. Whether the Learned Magistrate erred in his finding on liability.

18. The first issue for determination in this Appeal, is who is to be found negligent and liable for the accident. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Courts held that:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff’s favour unless the defendant provides same answer adequate to displace that inference.”

19. Considering the above principles, it is necessary to re-examine and re-look at the evidence presented before the learned trial magistrate with the view of determining who is to be held negligent and liable for the accident. The facts of the case are that on 8th September 2014, an accident involving Motor Vehicle Registration Number 916N, belonging to the 1st Appellant and being driven by the 2nd Appellant was so negligently and carelessly driven that it knocked down the EM (deceased) as a result of which he succumbed to the injuries.
20. It is noted that during the trial, the Respondent’s witness PW1, William Adek Miago, explained how the accident occurred. According to him, he was standing near the chief’s gate waiting for any possible client, there appeared three children who were walking on the pavement off the road up the fly over, that the motor vehicle KBU 619N was recklessly and carelessly driven, it was on the opposite direction that is down the fly over it veered off knocked down one of the school children and drove over him killing him instantly. Upon cross-examination, he confirmed that the accident happened at the flyover along Waiyaki Way. He stated that the deceased was not crossing the road but was walking off the road,



in an area designated for pedestrians, when he was hit. He further noted that, on the material day, there were other people walking nearby, and they managed to jump and escape. The police officers were close by and arrived at the scene immediately. He was present when the police arrived and provided them with the phone number of the deceased's father, who works with the matatu. He also confirmed that he did not record a statement with the police.

21. PW2 stated that he did not know how the accident occurred since he was not present. Also PW3, Police Officer P.C. Murkomen, attached to the Kabete Traffic Department, produced the police abstract which indicated that the case was still under investigation. On cross-examination, he stated that he was not at the scene of the accident and, therefore, could not know who was to blame.

22. The trial court, in finding the Appellant 100% liable, held that: -

“On liability I am guided by the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR where Odunga J cited with approval the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi HCCC No. 834 OF 2002* Justice Lesit, citing the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC No. 548 of 1998 where it was stated:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counterclaim are unsubstantiated. In the circumstances, the counterclaim must fail”

Guided by the following I apportion liability against the Defendants at 100% as they failed to challenge the plaintiff's case by calling witnesses and tendering evidence.”

23. The Appellant has invited this court to interfere with the trial court's finding on liability. In doing so, I am guided by the principles governing this appellate court's power to interfere with the trial court's findings on liability, as established in cases such as *Khambi & Another vs Mahithi & Another* [1968] EA 70 where it was held that: -

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

24. I have reviewed the Appellant's defence and submissions in the trial court and submission before this court. I find no exceptional circumstances that would persuade this court to interfere with the trial court's finding. I find no error by the trial court in apportioning liability to the Appellants. The Court was guided by the evidence and testimony of PW1, who was present at the scene of the accident, and witnessed the happenings.

25. I also note that the Appellants despite detailing specific grounds of negligence in their defence, they did not present any evidence to demonstrate negligence on the part of the deceased. In the case of *Mursal*



Ɖ another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), the court stated: -

“.....It is established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved.... the evidence tendered on behalf of the plaintiff stands uncontroverted”

26. In this regard, I find that the evidence presented by the Respondent remains undisputed and uncontroverted. The appellants had an opportunity to even cross examine the lead witness and his testimony as to the circumstances of the accident remained unshaken. Consequently, I see no reason to interfere with the trial court’s decision on liability; therefore, the grounds related to this issue must fail

b. Whether the trial Magistrate erred in arriving at Kshs 900, 000/= as damages for loss of dependency.

27. The Appellants have submitted that the award of Kshs 900, 000/= is inordinately high considering the circumstances of the case and that no evidence was produced to support the claim for loss of dependency. It is important to note that despite submitting the foregoing, the Appellants have not made any counter proposal on the reasonable amount to be paid in this instance.

28. The Respondents on the other hand have submitted that the deceased was a minor and therefore the global sum awarded is proper.

a. This court is also guided by the Court of Appeal decision in Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR where the Court set out the parameters under which an appellate court will interfere with an award in general damages and held that: “An appellate court will not disturb an award for general damages unless it is so 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 ...”

29. The trial court in awarding the sum of Kshs 900, 000/= held that:-

“On the prayer of loss of dependency, the minor herein died at 7 years old. His parents couldn’t have been depending on him at that age even though they had high expectations in him. It is my opinion that a global sum approach best suits the circumstances herein. I have considered the case of Francis Odhiambo Nyunja versus Josephine Malala Owiny (2020) eKLR where the court awarded Kshs 1, 500, 000/= and the case of Antonu Konde Fondo v RMC (2020) eKLR where the court awarded 900, 000/= for a minor who died aged 7 years. I am minded to award a global sum of Kshs 900, 000/=”

30. The Appellants contend that the Respondents did not provide any evidence to justify the sum of Kshs 900,000/=. It is undisputed that the deceased was a minor and, as such, was still attending school, making it impossible to determine what the deceased might have become in the future to substantiate any evidence for this award.

31. This court notes that there is no single uniform method established by the Courts for assessing damages in the case of a deceased minor’s estate. A trial court does not necessarily err simply by choosing one method over another. In this regard, it is my view that the trial Magistrate did not apply a wrong principle by choosing to use the global sum assessment method to assessment of loss of dependency. In this regard, the trial court’s application of a global award was appropriate.



32. As to whether it was high, I am guided by the decisions in Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased) [2020] eKLR where a global sum of Kshs 900,000/= was awarded as damages for loss of dependency for a deceased minor aged 9 years. Also, in the case of Harrison Mwangi Wanarua v AKK (suing as the father and personal representative of the Estate of the Minor NK (Deceased) [2019] KEHC 6053 (KLR) in which the deceased was 5 years old at the time of his death and was awarded Kshs 500, 000/=.
33. With the above comparisons, and taking into account the time they were delivered and the inflationary trends, I do not see the need of interfering with the trial court's finding. This ground of appeal therefore fails.
34. In the upshot, I find that the appeal lacks merit and is dismissed. Each party to bear its costs
It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant:

