Tangent Supplies Limited & another v Ndiriru (Civil Appeal E266 of 2023) [2024] KEHC 13118 (KLR) (Civ) (8 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E266 OF 2023

AM MUTETI, J

OCTOBER 8, 2024

(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MARY WAMUYU NJUGI)

BETWEEN

TANGENT SUPPLIES LIMITED .... 1ST APPELLANT

LUCY NJERI NYOIKE .... 2ND APPELLANT

AND

PETER NJUGI NDIRIRU .... RESPONDENT

(Being an appeal against the judgment and decree delivered by Hon. C.K Cheptoo (Principal Magistrate) on 10th March 2023 in the Chief Magistrates Court at Nairobi in Civil Case Number 421 of 2020)

JUDGMENT

Introduction

1. The appeal arises out of an accident that occurred on the July 22, 2019 along Thika Road at KCA involving Motor vehicle registration KCS 077P and the deceased who was a pedestrian.
2. The Lower Court after hearing the parties entered judgment against the appellant on liability at 80:20.
3. The appellant was condemned to pay to the respondent the sum of Kshs. 2,951,856.70 plus costs of Kshs. 257,350.
4. It is against the judgment that the appellant has moved to this Court.
5. The appellant has raised 12 grounds of appeal as reproduced here under: -

1. That the Learned Trial Magistrate erred in fact and in law in finding the Appellants 80% liable despite the fact that the police evidence adduced blamed the deceased for the accident.
2. That the Learned Trial Magistrate erred in fact and in law in failing to appreciate the fact that all the evidence adduced before the Court proved that the deceased was wholly to blame for the accident.
3. That the Learned Trial Magistrate erred in fact and in law in choosing to adopt the 2nd Appellants evidence as the basis of her finding on liability without finding and/or holding that the Respondent's evidence relating to the occurrence of the accident was uncorroborated and that the 2nd Appellant's evidence did not amount to an admission of the accident as narrated by the Respondent and/or did not support the Respondent's evidence in any way
4. That the Learned Trial Magistrate erred in fact and in law in failing to make any adverse inference in relation to the Respondent's failure to call any independent witness in relation to the accident.
5. That the Learned Trial Magistrate erred in fact and in law in laying blame on the 2nd Appellant on the grounds that she did not see the deceased jump over guard rails and took no evasive action to avoid hitting the deceased and by so doing:
    a. Raised a presumption of liability against the Appellants;
    b. Disregarded the requirement for the Respondent to first prove his case before the burden of proof shifted to the Appellants.
6. That the Learned Trial Magistrate erred in fact and in law for awarding excessive damages for pain and suffering without considering the circumstances of the accident and comparable judicial awards.
7. That the Learned Trial magistrate erred in fact and in law and misdirected herself in using the multiplier method of computing loss of dependency when there was no evidence to support a finding on the appropriate multiplier and multiplicand thereby giving an inordinately high award.
8. That the Learned Trial magistrate misdirected himself in law and in fact in adopting the minimum wage of Kshs. 30,627.45/= as per the Regulation of Wages (General) (Amendment) Order, 2018 applicable to a cashier as the multiplicand for income applicable to the deceased without indicating the areas where the deceased would have worked.
9. That the Learned Trial Magistrate erred in fact and in law in adopting a multiplicand of Kshs. 30,627.45/= without taking into account the applicable statutory deductions thereby giving an inordinately high award.
10. That the Learned Trial Magistrate erred in fact and in law by adopting a multiplier of 27 years thereby giving an inordinately high award.
11. That the Learned Trial Magistrate erred in her evaluation and analysis of the pleadings and the evidence adduced before the Court.
12. That the Learned Trial Magistrate erred in fact and in law in failing to consider the evidence adduced in its entirety hence arriving at a decision against the weight of evidence placed before the Court.

6. The issues that emerge from the grounds are: -

   a. Whether the learned Honourable Magistrate was correct in the manner he apportioned liability against the appellant and the deceased.

   b. Whether the learned Honourable magistrate was correct in the assessment of damages.

   c. Whether damages awarded where inordinately high in the circumstances to warrant a reduction.

Analysis And Determination

7. The appellant in his written submissions has contended that the witness called by the respondent did not narrate how the accident occurred but simply reiterated the contents of the plaint in his statement which was adopted as evidence in examination in chief.

8. According to the appellant, the witness could not explain how the accident occurred since he was not at the scene of the accident.

9. The respondent did not call any eye witness who could testify in support of her case.

10. The appellant further submits that the respondent did not establish how the accident occurred thus the burden of proof on her part was not discharged in line with Section 107 of the *Evidence Act*.

11. The appellants in their submission on liability have heavily relied on the evidence of the police witness DW2 PC Bonface Mutembei.

12. The witness DW2 testified that the accident involved motor vehicle KCS 077B Toyota Hilux driven by DW1 Lucy Njeri Nyoike and one pedestrian named Mary Wamuyu Ngugi around 19 years old a student at KCA University.

13. The witness went further to state that the deceased crossed the road at about 150-170 meters away from the under pass to KCA University.

14. The police officer blamed the deceased for the occurrence of the accident for she did not cross the road at a safe point.

15. The second appellant DW1 supported the evidence tendered by DW2 but added that two buses avoided hitting the deceased but she could not.

16. Poring through the evidence on record, I have established that the deceased contributed to the unfortunate occurrence.

17. It is clear from the evidence that she crossed the road at a point that was not designated for crossing and obviously exposed herself to great danger of being run over.

18. DW2 stated clearly that she crossed at a distance of 150-170 meters from the zebra crossing. The deceased authored her misfortune to a great extent.

19. Pedestrians must know that zebra crossings on our roads mean something and are not colorful decorations of the road by the National Highways Authority.

20. Zebra crossings on any road count for something. They are meant to ensure that all road users know that at such points, pedestrians have a right to cross the highway while exercising the judgment of a reasonable prudent man appreciating the importance of safety. The zebra crossing is not a licence for any pedestrian to cross without caution at the pace of a zebra.

21. An accident occurring at a zebra crossing would however invite a finding of 100% liability as against the driver.

22. What then is the fate of those that choose to ignore such points and out of recklessness on their part choose to cross at other points that are not designated?

23. Such pedestrians must exercise utmost care ensuring that the road is free from traffic so as for one to safely cross the road.

24. Persons such as the deceased who choose not to utilize the designated crossing points must bear the consequences of their actions.

25. The learned Honourable magistrate was extremely fair the deceased pedestrian by apportioning liability at 20%. The appellant in challenging liability has relied on the case of David Mbiyu Ng'angá "

> The respondents lay blame of the accident on the appellant. The one respondent who testified the father of the deceased, confirmed that he had no evidence to offer on how the accident occurred.
>
> It follows that since the law does not require the defendant (herein the appellant) to prove he was not negligent but rather requires the one who alleges (the respondents) to prove negligence and it will be observed from the reproduced evidence that the respondents failed to prove negligence on the part of the appellant, it therefore follows that the trial court's findings on liability was made in the absence of cogent evidence either oral or documentary. There was no basis for the trial court to apportion the appellant 60% liability for the accident. It was not based on evidence adduced. The respondents failed to meet the burden of proof. This Court therefore finds and holds that the accident was wholly attributed to the negligence of the deceased. He was the author of his own misfortune. The deceased endangered his life by not heeding the presence of the appellant's car and which had slowed down in the process of turning off the main highway."

26. The deceased in this case clearly endangered her life and put the appellant in a very difficult position as a driver. However, the 2nd appellant cannot escape liability altogether.

27. The 2nd appellant should have anticipated heavy traffic of pedestrians within that vicinity considering that there is an institution with many students thus chances of any one of them crossing the road are naturally high. That is a reasonable expectation from a driver using such a busy highway.

28. Driving within such areas calls for greater caution by drivers even as we demand good behavior by pedestrians on the road.

29. I have noted that the 2nd appellant admitted the fact that two bus drivers were able to swerve and avoid hitting the deceased but she could not.

30. The 2nd appellant did not however say why she was unable to avoid hitting the deceased. The facts therefore militate against the argument that the deceased was solely to blame for that accident.

31. The appellants have urged the Court to find that the deceased must have jumped the guard rails for her to have reached the lane where the 2nd appellant was.

32. I have looked at the evidence adduced but I did not find any evidence suggesting that that the deceased jumped the guard rails. In the circumstances I am unable to agree with the appellants submission that there was no other way she could have reached that point. If that was the case , the other two buses that were able to avoid hitting her would not have managed to swerve.

33. I find that one cannot exclude the possibility of the deceased having been walking along the road waiting for an opportunity to cross and out of her erroneous judgment got onto the road when the 2nd appellant had reached the point of impact.

34. If other drivers as per the evidence of the 2nd appellant were able to avoid hitting her, the 2nd appellant ought to have tried to avoid hitting her.

35. It is on this basis that I will interfere with the learned Honourable Magistrates finding on liability since all circumstances surrounding the occurrence of this accident point to a higher degree of negligence on the part of the deceased.

36. The 2nd appellant in my view cannot escape liability wholly for there is no evidence to show that she made any effort to avoid hitting the deceased. He who sits behind the will of a car has an inherent duty of care to others that he or she finds on the road. It is precisely for that reason drivers must drive at a speed they can comfortably halt the car and more so, in highly populated areas such as where this accident occurred.

37. The appeal on liability succeeds and I hereby apportion liability at 50:50 between the parties.

Quantum

38. I now turn to the issue of damages awarded.

39. The assessment of damages is a discretionary matter for the Lower Court.

40. This court as an appellate court will not unnecessarily interfere with the same unless it is proved to the satisfaction of the court that the learned Honourable magistrate misdirected himself on the applicable principles of law or took into account an irrelevant matter or failed to take into account a relevant matter. It would also be important for the appellant to prove that the damages awarded are inordinately high and far removed from comparable awards by other Courts. See Bhutt Vs. Khan (1982-88) 1 KLR.

41. On pain and suffering the Learned Honourable magistrate awarded Kshs. 40,000. The appellants contend that the figure was inordinately high. DW2 testified that the deceased was pronounced dead on arrival at the hospital. The death was therefore immediate.

42. The appellants propose a figure of Kshs. 10,000 citing the case of James Gakinya Karienye & Another (suing on behalf of the state of David Kelvin Gakinya deceased) Vs. Perminus Kariuki Githinji [2015] eKLR where a sum of Kshs. 10,000 was awarded for pain and suffering.

43. It is my finding that the sum Kshs. 40,000 for pain and suffering awarded by the magistrate was reasonable considering the period of 9 years has lapsed since the decision cited was passed. The rate of inflation has been astronomical.

44. On loss of dependency, the appellants have argued that since no evidence was tendered to show the year of study of the deceased and the course she was taking the Court should adopt a global sum and avoid venturing into speculation. The appellants rely on the case of Mwanzia Vs. Ngalali Mutha Vs. Kenya Bus Ltd as quoted in Albert Odawa Vs. Gichimu Githenji [2007] eKLR where the Court held:-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on

> the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

45. The appellants proposed the sum of Kshs. 700,000 as a good amount for damages for loss of dependency. The appellants contend that the sum of Ksh. 3,307,764.60 is inordinate.

46. I have examined the record and from the statement of Paul Njugi Ndiritu the deceased was a student at KCA University and in perfect health at the time of the accident.

47. The evidence of her state of health and fact of being a student were not disputed. I do not find any good reason advanced by the appellants for this Court to disturb the magistrates finding since there was no material placed before me to justify such intervention.

48. The Court cannot be said to have been engaged in speculation yet the age and her status in life was not in doubt thus the calculation of loss of dependency by way of multiplicand was feasible. The figure arrived at was in my view reasonable in the circumstance since the multiplicand could suffice in the circumstances.

49. I therefore do not find any misdirection on the part of the Court to warrant intervention by this Court.

50. The Court did not take into account any irrelevant considerations in arriving at its findings on quantum.

Conclusion

51. In conclusion the appeal on liability succeeds. Liability is to be apportioned at 50:50.

52. The appeal on quantum fails. The award is to be adjusted to accommodate the liability enhancement of upto 50% of the sum awarded.

53. The costs of the appeal shall be borne by the appellants

54. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 8TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Mugwe for the Appellants

Ogada for the Respondent