David & another v Kibwi & 2 others (Civil Appeal E169 of 2021)
[2024] KEHC 14631 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E169 OF 2021

CJ KENDAGOR, J

NOVEMBER 20, 2024

BETWEEN

FLORAH KAMENWA DAVID ..... 1ST APPELLANT

DENNIS MWENDA (SUING ON BEHALF OF THE ESTATE OF DAVID IKIAO DOMICIAO) ..... 2ND APPELLANT

AND

ELIJAH KIBWI ..... 1ST RESPONDENT

HOSEA KATHURI MITAMBO ..... 2ND RESPONDENT

PAUL M'MUNGANIA M'MURUNGI ..... 3RD RESPONDENT

(An Appeal from the judgement of the Honourable R. Ongira (Resident Magistrate) delivered on 18th May 2021 in Tigania Civil Case No. 72 of 2019)

JUDGMENT

Introduction

1. On 9th August 2010, David Ikiao Domiciano (the Deceased) was involved in a road traffic accident along Isiolo-Kwa Amoa Road in which he sustained fatal injuries. He was a pedestrian walking along the said road when a motor vehicle knocked him. He died later the same day. The Appellants, who are his legal representatives, blamed the Respondents for the accident, and sued them seeking general damages for Loss of earnings, Loss of Dependence, and Special Damages of Kshs.35,550/=. The 1st and 2nd Respondent entered appearance and filed their Statement of Defense refuting the claim while the 3rd Respondent failed to enter appearance and the court entered an interlocutory judgment against him.

2. The court delivered the judgment on 18th May 2021 where is dismissed the Appellants' claim with costs to the Respondents. It found that the Appellants failed to prove on a balance of probability that

the Respondents were responsible for the accident. It thus found the Deceased 100% liable for the misfortunes that befell him. The court went ahead and determined the quantum of damages it would have awarded the Appellants had they proven their case. Pain and Suffering- Kshs.10,000/= and Loss of Expectation of Life-Kshs.100,000/=.

3. It assessed damages for Loss of Dependency at Kshs.1,094,896/=. It arrived at this figure by adopting the Multiplier Approach and the Regulation of Wages General Amendment Order. It used a Multiplicand of Kshs.6,221/=, a Multiplier of 22 years, and a Dependency Ration of 2/3. It also awarded special Damages of Kshs.550/=.

4. The Appellants were dissatisfied with the judgment of the court and appealed to this court vide a Memorandum of Appeal dated 14th December 2021. They listed 9 Grounds of Appeal which are as follows;

    1. That the learned magistrate erred in law and in fact by failing to appreciate that the [Appellants] proved their case on a balance of probability.

    2. That the learned magistrate misdirected himself in finding that there was no evidence to establish liability on part of the Respondents and wholly lamed the Deceased who died after being knocked by the Respondents' vehicle which was being controlled by the Respondents.

    3. That the learned magistrate took into account irrelevant issues and thus arrived at erroneous conclusions of law and fact.

    4. That the learned magistrate erred in fact and law by holding the [Appellants] failed to prove liability as against the [Respondents] even when the [Respondents] admitted that their vehicle ran over the [Deceased] crushing his head hence his instant death.

    5. That the learned magistrate failed to appreciate the evidence showing that the Deceased was wholly to blame for the accident and his death.

    6. That the learned magistrate erred and misdirected herself in law and fact thereby arriving at an erroneous decision dismissing the Appellants' suit against the Respondents.

    7. That the learned magistrate failed to consider submissions and authorities cited by the Appellant and erred in law and fact therefore failing to appreciate that the Appellants had proved their case on a balance of probability.

    8. That the learned magistrate erred in law by wrongly interpreting the doctrine of res ipsa loquitor.

    9. That the learned magistrate erred in law and facts on quantum and wrongly applying the wrong wage as per the law and using wrong interpretation of facts and law hence arriving at a wrong decision on Loss of Dependency.

5. The Appeal was canvassed by way of written submissions.

The Appellants' Written Submissions

6. The Appellants submitted that they duly adduced sufficient evidence on a balance of probability. They argued that the driver of the accident motor vehicle must have been negligent and must have driven the motor vehicle at the wrong speed. They opine that if the driver had driven the motor vehicle at a slow speed, the impact of the knock on the Deceased would not have been fatal. They also opined that the lower Court should not have placed reliance on the driver's account of how the accident happened.

7. They also argued that the driver was negligent because a reasonable driver facing destruction on daylight is reasonably expected to engage the use of traffic rules, and that failure to do so is not expected of a reasonable man and is thus ipso facto negligence. They submitted that whichever way the accident occurred, the Respondents had the duty to exercise care and attention, as a driver of a motorized vehicle in order to avoid injuring other road users. They argued that the Respondents owed the Deceased a duty of care which they breached by driving at a high speed and failed to keep proper look out.

8. On quantum of damages, the Appellants argued that the magistrate applied the wrong wages in determining the quantum of damages. They argued that the Multiplier of 22 years adopted by the trial court was low and improper, and in its place argued that the court should have adopted a multiplier of 26 years. They also submitted that the trial Court used the wrong minimum wage for a multiplicand. They argued that the court should have used the minimum wage of Kshs.13,572.9 and not Kshs. 6,221/=.

9. Lastly, they submitted that the lower Court should have awarded them special damages of Kshs.35,550/= because they produced receipts to prove the claim.

The Respondents' Written Submissions

10. The Respondents submitted that the Appellants failed to prove the particulars of negligence to the required standard of proof. They submitted that none of the Appellant witnesses saw the occurrence of the accident and were present during the occurrence of the same. They argued that the absence of an eye witness diminishes the Appellants' chance to prove a case of negligence against them. For these reasons, they submitted that liability on the Deceased should be 100% and they should be totally exempted from any liability.

11. They also submitted that the trial Court was wrong in assessing the quantum of damages. They argued that the trial Court should have used a dependency ratio of 1/3. They opined that this ratio should be applied because the Appellants did not prove by way of birth certificates that the Deceased was survived by children. In addition, they also submitted that the Court should not have used the multiplicand of Kshs.13,572.9/=. Instead, they argued that the Court should have used a Multiplicand of Kshs.3,597/= as per legal Notice 98 Regulation of wages that was in force in 2010 when the Deceased died.

Issues for Determination

12. I have considered the grounds of appeal and submissions from both parties and I am of the view that the issues for determination are;

    a. Whether the Appellants proved Negligence against the Respondents.

    b. Whether the trial court's assessment of quantum of damages was reasonable estimate.

13. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:

> " ...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 ..."

Whether the Appellants proved Negligence against the Respondents

14. The Appellants did not call any eye witness to explain how the accident happened. They called only one witness, PW1, who admitted that she did not see the accident happen. They submitted that whichever way the accident occurred, the driver had a duty to exercise care and attention, as a driver of a motorized vehicle in order to avoid injuring other road users. On the other hand, the Respondents banked on the testimony of the driver of the accident vehicle who admitted that the vehicle crushed the Deceased to death, but maintained that he is not to blame for it.

15. The driver testified that the Deceased caused the accident by trying to open the door of the vehicle while it was still in motion. The driver admitted that he saw the Deceased emerge from the bush, and that he saw the Deceased come to the lorry. The driver gave an explanation on why he could not stop when the Deceased allegedly tried to force himself into the vehicle. He said that people were being robbed along that road in broad day light. The driver's testimony was uncontroverted because he was the only direct witness.

16. I have perused the file and I take the view that there was no independent eye witness to shade light on how the accident occurred. The police abstract on record showed that the accident was under investigation. The traffic police ought to have clarified how the accident may have happened by producing the sketch maps of the scene and any other relevant evidence. The parties did not call any independent eye witness to explain how the accident happened.

17. In Awale Transporters Limited v Dorcas Wamaitha Maina & another [2021] eKLR, the Court appreciated the delicate nature of apportioning liability in cases where there are no independent witness to explain how the accident happened. The Court observed as follows;

> "……The dead do not speak….. Determining total liability in such circumstances is a very delicate affair. I would be purely instructed by the circumstances of the case whilst at the same time applying common sense."

18. In *Mwiti & another v FNK (Suing as the legal representative of the Estate of JMM (Deceased) (Civil Appeal E128 of 2021*) [2023] KEHC 456 (KLR), the High Court faced a similar issue where there were conflicting versions of how an accident between a motor vehicle and a cyclist took place. The Court apportioned liability at 50:50 and held as follows:

> " Faced with the contracting versions of how the accident had occurred as narrated by the eye witness and the 1st Appellant, the trial court opined that it would be just to have the motor cyclist and the driver of the accident motor vehicle equally share the blame, and this court affirms that finding. The 1st Appellant was negligent because he admitted on cross examination that he only saw the motor cycle after it had hit him. If he had been careful enough, he would have seen the motor cyclist in good time to avoid the accident. The deceased was equally at fault as it was not established that he did anything to try and avoid the accident."

19. Similarly, in the case of Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR, the Court apportioned liability at 50:50 in a case where there was no eye witness to the accident. The

accident involved a motor vehicle and a pedestrian, and the parties could not adduce credible evidence on how the accident occurred. It stated:

> " 41. In fact, in Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142, it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa."

20. Similarly, in the case of Odhiambo & another (Suing as the administrators of the Estate of Denis Obiero Odhiambo) v Akello & another [2022] KEHC 16966 (KLR), the Court apportioned liability at 50:50 in a case where there was no independent witness to explain how the accident happened. The accident involved a motor vehicle and a pedestrian, and the parties could not adduce credible evidence on how the accident occurred. It stated:

> " Having considered this appeal and taking into consideration the authorities cited above, and as there was no eye witness to the accident, although lack of an eye witness cannot invalidate a suit, I find that it is appropriate to apportion liability between the deceased and the respondents in the ratio of 50:50."

21. The current case is also similar to the case of Domitila Wangui Karugu & another v Dagu Hidris Haide [2020] eKLR, where the High Court apportioned liability at 50:50 in an accident that involved a motor vehicle and a pedestrian. In the case, the parties could not adduce credible evidence on how the accident occurred. There was a direct independent witness to testify on the circumstances of the accident. The driver of the accident motor vehicle accepted that he hit the deceased and insisted the he tried to avoid the accident. The Court stated as follows:

> " 9. What is not in dispute is that the respondent hit the deceased. 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."

22. The above cases are very relevant to the current case. My analysis of the evidence placed before the trial Court shows no cogent evidence to help this Court decide who between the Deceased and the driver should carry the blame. It is clear that none of the Plaintiff's witnesses saw the accident happen and the police failed to conclude the investigations fully. In addition, although the driver was a direct witness, he was not an independent witness because he had so much to lose, and it was in his best interest to deny liability.

23. Based on this analysis and the above-cited authorities, I take the view that since it is difficult to apportion blameworthiness in these circumstances, I, too, apportion liability equally. I find it appropriate to apportion liability between the Deceased and the respondents in the ratio of 50:50.

Whether the trial Court's assessment of quantum of damages was reasonable estimate.

24. The Appellants argued that the magistrate applied the wrong wages in determining the quantum of damages. They argued that the Multiplier of 22 years adopted by the trial court was low and improper, and in its place argued that the Court should have adopted a multiplier of 26 years. They also submitted

that the trial Court used the wrong minimum wage for a multiplicand. They argued that the court should have used the minimum wage of Kshs.13,572.9 and not Kshs. 6,221/=.

25. On the other hand, the Respondents submitted that the trial Court was wrong in assessing the quantum of damages. They argued that the trial court should have used a dependency ratio of 1/3. They opined that this ratio should be applied because the Appellants did not prove by way of birth certificates that the Deceased was survived by children. In addition, they also submitted that the Court should not have used the multiplicand of Kshs.13,572.9/=. Instead, they argued that the Court should have used a Multiplicand of Kshs.3,597/= as per legal Notice 98 Regulation of wages that was in force in 2010 when the Deceased died.

26. I have looked at The Regulation Of Wages (General) (Amendment) Order, 2010. It came into operation on the 1st May, 2010. The Deceased died on 9th August 2010. I thus find that this was the applicable Order, given that it was the one in force at the time of Deceased's death. According to the order, a general labourer within a Municipality was entitled to Kshs. 6,221/=. I thus find that the trial court adopted the right Multiplicand.

27. In her plaint, the Appellants stated that the Deceased was survived by 6 children and a widow. She produced a birth notification and several birth clinic cards. She also produced a letter from the chief as an exhibit. The Respondents did not challenge the production of these documents. I thus find that the trial Court adopted the right dependency ratio of 2/3.

28. On the Multiplier, the Appellants argued that the trial court used the wrong multiplier. In the present case, the deceased was 34 years old at the time of his death. I have considered previous cases to help me arrive at the right multiplier for the Deceased who died at 34.

29. In Sidi Kazungu Gohu & another (Legal Representatives of the Estate of George Yongo Katana (Deceased) v Fatuma Abdi Mohamed & another [2021] eKLR, the court used a multiplier of 24 years for deceased who died at 34 years. Similarly, in Naomi Nyambura Karanja suing as the administrators of the estate of Simon Karanja Mirungu (Deceased) v Zacharia Muteru Kadunga & Another [2017] eKLR the Court upheld a multiplier of 24 years for a deceased aged 34 years at the time of his death. Also, in Patrick Kanai Waweru suing as legal representative of the estate of *Grace Njoki Kanai v George Ogwilla & 2 Others HCCC No. 5 of 2012* the Court applied a multiplier of 24 years for 34 years old deceased.

30. Based on these authorities, I opine that a multiplier of 24 years would be appropriate. This is particularly so given that the Deceased was in good health at the time he met his untimely death.

31. In the end, I find no reason to disturb the lower Court's choice of the Multiplicand and the Dependency Ratio. I will, however, substitute the multiplier of 22 years with a multiplier of 24 years. Thus, the assessment of the General Damages for Loss of Dependency is as follows;

    6,221X24X12X2/3=Kshs.1,194,432/=

    6,221*24*12*2/3= Kshs.1,194,432/=

32. I also find no reason to disturb the Court's assessment of the damages in the other heads. The court's awards for Pain and Suffering, Loss of Expectation of Life, and Special Damages were reasonable and justified.

Disposition

33. The Appeal succeeds.

34. Final Award of the Court is as follows;

i. Pain and Suffering- Kshs.10,000/=

ii. Loss of Expectation of Life- Kshs.100,000/=.

iii. Loss of Dependency- Kshs.1,194,432/=

iv. Special Damages - Kshs.550/=.

Total- Kshs.1,304,982/=

Less 50% - 652 491

Final Award- 652,491/=

35. The Appellants shall have costs of this Appeal assessed at Kshs.45, 000/=.

36. The Appellants are also awarded interest from the date of this judgment till payment in full.

It is so ordered.

DATE, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 20TH DAY OF NOVEMBER, 2024.

.....

C. KENDAGOR

JUDGE

In the presence of;

Court Assistant: Beryl

Ms Onyango Advocate holding brief for Aketch Advocate for the Appellant

No attendance by Respondent