Muchiri & another v Richu & another (Suing as the legal representatives of the Estate of Nicholas Ng'ang'a Gitau - Deceased) (Civil Appeal E081 of 2023) [2024] KEHC 14221 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14221 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E081 OF 2023

MA ODERO, J

NOVEMBER 15, 2024

BETWEEN

ARTHUR GICHUBI MUCHIRI ..... 1ST APPELLANT

LIVINGSTONE WAITHAKA GITHINJI ..... 2ND APPELLANT

AND

PHILIP GITAU RICHU AND GRACE WANJA NG'ANG'A (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NICHOLAS NG'ANG'A GITAU - DECEASED) ..... RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 14th December 2023 by which the Appellants Aurthur Gichubi Muchiri And Livingstone Waithaka Githinji seek for orders that

> "(a) The appeal be allowed.
>
> (b) The Honourable Court be pleased to vary, vacate, review and/or set aside the judgment of the lower court both on liability and quantum.
>
> (c) This Honourable Court be pleased to order that the Respondents case in the lower court stands dismissed with costs.
>
> (d) In the alternative to prayer (c) above, that this Honourable court be pleased to review or set aside the award on quantum.
>
> (e) This Honourable Court be pleased to assess downwards the quantum of damages awarded to the Respondent.

(f) The Respondent does pay the costs of this appeal and the costs in the lower court.

(g) Such further relief be granted as may appear just and appropriate to the Honourable Court.

2. The Respondent Philip Gitau Richu And Grace Wanja Nganga (suing as the legal representatives of the estate of Nicholas Nganga Gitau) opposed the appeal.

3. The matter was canvassed by way of written submissions. The Appellants filed the written submissions dated 18th April 2024, whilst the Respondents relied upon their written submissions dated 12th July 2024.

Background

4. The Plaintiffs [the Respondents herein] filed in the Chief Magistrates Court a suit being Nyeri CMCC No. E25 of 2022.

5. The Plaintiffs alleged that their son Nicholas Nganga Gitau (Deceased) was on 16th May 2019 at about 3.30pm riding as a pillion passenger aboard a motor cycle Registration No. KMDL 796B along the Nyeri Mweiga Road.

6. That the 2nd Defendant [the 2nd Respondent herein] negligently and recklessly drove managed and controlled the Motor Vehicle Registration KAC 171U Volvo Saloon and permitted the said vehicle to veer into the lane of the motor cycle Registration KMDL 796B leading to collision. That as a result of that collision the Deceased was knocked off the motor cycle and sustained fatal injuries.

7. The Plaintiff's stated that the Deceased was a young man aged 22 years and was a 2nd year student at Dedan Kimathi University of Technology where he was studying Mechanical Engineering. That as a result of the accident and the demise of their son the plaintiffs suffered loss of dependency under the *Fatal Accidents Act* and the plaintiffs relied on the doctrine of '*Res Ipsa Loquitu*r'.

8. The plaintiff's initiated the suit vide a plaint dated 27th January 2022 in which they prayed for judgement against the Defendants jointly and severally for

"(a) General damages for pain, suffering and loss of amenities.

(b) Special Damages of Kshs. 131,510

(c) Costs and interest on (a) and (b) above.

(d) Any other relief this Honourable Court may deem just to grant."

9. The Defendants (the Appellants herein) filed a Defence dated 21st February 2022, wherein they contended that if indeed an accident occurred then it did not happen in the manner set out in the plaint. The Defendants denied all allegations of negligence attributed to them and instead asserted that the accident was caused by negligence of the Deceased as particularized in Paragraph 6 of the statement of Defence.

10. The Defendants deny that the doctrine of Res Ipsa Loquitur is applicable and prayed that the suit be dismissed in its entirety with costs to themselves.

11. The suit was heard interpartes and vide a judgment delivered on 29th November 2023, the learned Principal Magistrate entered judgment in favour of the plaintiffs against the Defendants in the following terms.

"(a) Liability 100% against the Defendant jointly and severally.

(b) Pain and suffering - Kshs. 50,000.00

(c) Loss of expectation of life - Kshs. 100,000.00

(d) Loss of Dependancy - Kshs. 5,564,400.00

(e) Special Damages - Kshs. 131,510.00

Total Kshs. 5,845,910.00

(f) Costs of the suit and interest

12. Being aggrieved by this decision the Defendants filed this present appeal which is premised upon the following grounds;-

"(1) That the Trial Magistrate erred in law and infact in finding that the Appellants were fully liable for the occurrence of the alleged accident.

(2) That the Learned trial magistrate erred in law and in fact in finding that the plaintiff had discharged their burden of proof on a balance of probabilities.

(3) That the Learned magistrate erred in both law and in fact in failing to appreciate that the plaintiff's evidence was misleading and lacked credibility.

(4) That the Learned magistrate erred in both law and in fact in failing to consider the Defence tendered to find the Plaintiff's case as unproven and unsubstantiated.

(5) That the Learned magistrate erred in both law and in fact and he misdirected himself in failing to appreciate the principle of a just and fair hearing.

(6) That the Learned magistrates decision occasioned a miscarriage of justice.

(7) That the learned trial magistrate acted on wrong principles of law.

(8) That the Learned magistrate misdirected himself in law by assessing general damages for loss of dependency at Kshs. 5,564,400/= which was manifestly excessive and incomparable to common judicial awards.

(9) That the Learned magistrate erred in awarding the Respondent the sums of Kshs. 50,000/- for Pain and suffering Kshs. 100,000/= for Loss of expectation of life, Kshs. 5,5564,400/- for Loss of Dependency and Special Damages Kshs. 131,510/-

(10) THAT the award in quantum is for loss of dependency in the circumstances is so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the Respondent.

(11) That the award in quantum for damages for loss of dependency is altogether disproportionate and is not in keeping with other comparable awards made in similar circumstances.

(12) The Learned Trial Magistrate erred in law and in fact by giving a very high award in quantum of damages for loss of dependency contrary to the evidence given in court.

(13) That the learned Trial magistrate erred in law making such a high award as to show that the magistrate acted on wrong principles of law.

(14) That the learned Trial magistrate award on quantum of damages was inordinately high to be entirely erroneous.

(15) That the Learned magistrate erred in fact and law by totally disregarding the Appellant's submissions and authorities in making a finding on quantum of damages.

(16) That the judgement on quantum of damages was against the weight of evidence."

Analysis And Determination

13. I have carefully considered this Appeal the Response filed thereto as well as the written submissions filed by both parties.

14. This being a first appeal it is the duty of this court to examine the evidence adduced during the trial and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others* [1968] E.A 123 the court held as follows:

> " An appeal to this court from 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 facts 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 demeanour of a witness is inconsistent with the evidence in the case generally....."

15. Likewise in the case of *Abok James Patrick Machira I/a Machira & Co Advocates* [2013] eKLR the Court of Appeal stated as follows;-

> " This being a first appeal we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on eh record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give the reasons either way."

16. The Appellants submitted that the Respondents failed to prove on a balance of probabilities that the accident was caused wholly by the Respondents negligence.

17. On the issue of quantum he Appellants submitted that the awards for pain and suffering of Kshs. 50,000 and Kshs. 100,000 were unmerited.

18. On the *Fatal Accidents Act*/Loss of Dependency, the Appellants submitted that no evidence had been availed to prove that the Respondents were dependent on the Deceased. That the Deceased was a University Student who was not earning any income, therefore the award of Kshs. 5,564,400.00 was excessive.

19. The issues which arise in this appeal include liability and quantum.

The fact of the demise of the Deceased as a result of an accident is not in any doubt. At Page 15 of the Record of Appeal is a copy of the Death Certificate Serial No. 1107069. The cause of death is clearly recorded as "severe head injury, blunt force trauma from a Road traffic accident.

20. The Respondent who are the parents of the Deceased were on 11th August 2021 issued with Grant of letters of Administration Ad Litem, authorizing them to represent the estate of the Deceased in this matter. (see page 20 of the record of Appeal).

Liability

21. In order to merit judgment in their favour the appellants were required to prove their claim on a balance of probability.

In *William Kabogo Gitau -vs- George Thuo & 2 Others* [2010] eKLR, Hon. Justice Kimaru (as he then was) stated as follows:-

> "In ordinary Civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred."

22. The Appellants case was that the 2nd Appellant was wholly to blame for the accidents.

23. PW1 PC Douglas Chebui of Nyeri Police Station, Traffic Section confirmed that on 16th May 2019 an accident occurred involving a Volvo, Motor vehicle Registration KAC 171U and a Dayun Motor Cycle Registration KMDL 7960. A copy of the police abstract dated 16th April 2021 appears at Page 14 of the record of Appeal.

24. In his evidence in chief PW1 stated that the 2nd Appellant who was coming from Nyeri direction failed to keep in his proper lane and thereby hit the motorcycle on which the Deceased and two (2) others were passengers. All three passengers were injured and were rushed to hospital but that the Deceased unfortunately succumbed to his injuries.

25. The court was informed that the 2nd Appellant was charged in traffic Case No. 241 of 2020 with the offence of Causing Death by Dangerous Driving contrary to Section 46 of the *Traffic Act*, Cap 403, Laws of Kenya. That the 2nd Appellant was convicted and fined Kshs. 50,000.

26. PW2 Joseph Muiruri Maina was the motorcycle rider. He confirms that on the material day he was riding along the Nyeri-Mweiga road carrying passengers on his motor bike Registration KMDL 796B. Suddenly a motor vehicle Registration KAL 171U heading towards Mweiga veered into his lane and hit his motorcycle. One of his passengers Nicholas Nganga died on the spot. Pw2 lost consciousness after the accident and awoke to find himself at the Nyeri County Referral Hospital. He sustained a compound fracture on his left leg and injuries to the head.

27. In the case of *Kennedy Macharia Njeru -vs- Packson Githongo Njau & Another* [2019] eKLR, Hon. Lady Justice Lucy Gitari held as follows:-

> "In determining liability the court must consider the facts of the case and come to a conclusion as to what mostly contributed to the cause of the accident. The court will consider the manner of driving, identify the person who was at fault and place he blame on

him. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability" [own emphasis].

28. In this case the evidence is that the 2nd appellant veered out of his lane and into the lane of the motor cycle thereby colliding with the motorcycle. This is corroborated by the fact that the 2nd appellant was charged with the offence of Causing Death, by Dangerous Driving, was convicted and fined for that offence. This is not denied by the Appellants.

29. The court apportioning liability must consider whether the victim in any manner whatsoever played a contributory role in causing the accident to occur.

30. The Appellants have cited the fact that the motor cycle was carrying three pillion passengers instead of one and as such was in contravention of Traffic Laws. Pw1 admits that indeed "The Motor cycle was overloaded as per the law"

31. The key question is was this overloading a contributory factor to the accident? I think not. The cause of the accident was not the overloading of the motor cycle but the fact that the vehicle drive by the 2nd Appellant veered into the wrong lane.

32. In the case of *Baro Ngo Sevelius Yophen -vs- Jared Ndemo* [2020] Eklr Hon Lady Justice Ougo stated;-

> " There is no contention that the respondent was a pillion passenger. It is not shown how his failure to wear helmet or how the fact that there were two pillion passengers on the motorcycle would have contributed to the occurrence of the accident. As pillion passenger, the respondent had no control of the motor cycle and could not have done anything to cause or avoid the accident."

33. Likewise in *Christine Daniel -vs- Sammy Kamene* [2022] eKLR the court stated that

> " .....The issue of carrying excess passengers in my view is not relevant in this appeal in so far as liability is concerned. The Appellant ought to have shown how the issue of extra pillion passengers contributed to the occurrence of the accident and/or aggravated the accident but he did not"

34. Similarly in this case I find that the Appellants have failed to demonstrate that the carrying of excess pillion passengers contributed to the accident. The motorcycle rider should and ought be sanctioned for breaching traffic laws but there is no evidence that he contributed in any manner to the accident.

35. I find that the evidence of the eye witness. Pw2 is corroborated by the evidence of the Police Officer PW1. I do agree with the finding of the trial court that the driver of the motor vehicle was fully to blame for the accident. Accordingly I uphold the finding of 100% liability on the part of the 2nd Appellant.

Quantum

36. The level of quantum assessed under each unit of the plaint lies at the discretion of the trial magistrate. In the case of *Bashir Ahmed Butt -vs- Uwais Ahmed Khan* (1982-88) KAR, the Court set out he parameters under which an Appellate court would interfere with the award on general damages made by the trial court as follows;-

> " An appellate court will not disturt on 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 the misapprehended the evidence in some material respect and so arrived a figure which was either inordinately high or low"

37. PW2 told the court that the Deceased died on the spot. The Death Certificate confirms that the Deceased died on 16th May 2019 the same day the accident occurred. For pain and suffering it has been held that where the death occurs suddenly then the award would be on the lower scale.

38. In *Sukari Industries Limited -vs- Clyde Machimbo Juma* (2016) eKLR, where the Deceased died immediately after the accident. Hon. Justice David Majanja (Deceased) held as follows:-

> " On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs. 10,000/- to Kshs. 100,000/- over the last 20 years hence I cannot say that that the sum of Kshs. 50,000/- awarded under the head is unreasonable." [Own emphasis]

39. The evidence is that the Deceased died on the spot. He did not suffer a long, painful and drawn death. I therefore uphold the award of Kshs. 50,000/= for pain and suffering.

40. Under 'Loss of Expectation of Life' the conventional award is Kshs. 100,000. [see *Hyder Nthenya Musili & Another -vs- China Wuyi Limited & Another* [2017] eKLR]. I do uphold the award of Kshs. 100,000 made under the unit of Loss of Expectation.

41. Loss of dependency is awarded under the Fatal Accident's Act. The principles to be considered were stated in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another* – Nairobi HCCC No. 1638 of 1988 (unreported) by Hon. Justice Ringera, J (retired) as:-

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

42. As regards an award under loss of dependency, the Court of Appeal in considering the law on assessment of damages under the *Fatal Accidents Act* in the case of *Chunibhai, J. Patel and Another -vs- P. F. Hayes and Others* [1957] EA 748, 749 stated as follows:

> " The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the

annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

43. Section 4(1) of the *Fatal Accident Act* Cap 32, Laws of Kenya provides that

> 4. (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
>
> Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

44. On loss of dependency the trial court considered the fact that the Deceased was a second year student who had a bright future ahead of him. The court further considered that the Deceased was survived by his parents and seven (7) siblings who would had depended on him in one way or another.

45. The trial court further took into consideration Section 4, of the *Fatal Accidents Act* and adopted a $^{1}/3^{rd}$ dependency ratio using a multiplier of 38 years based on the retirement age in Kenya which is now sixty (60) years.

46. The trial court took into account the fact that the Deceased was a 2nd year university student studying Mechanical Engineering. The court looked at the salary survey of a Mechanical Engineer which gave a starting salary of approximately Kshs. 46,370.

47. The learned trial magistrate computed the award under this heading as follows;-

46,370 x 12 x 30 x (1/3) = 5,564,400

48. In this case, it is not disputed that the deceased was a university student pursuing a mechanical engineering course. I further find the usage of the multiplier of Kshs. 46,370 reasonable as the same is gleaned from the salary survey. Further, the decision by the trial court to use the multiplier approach is purely a discretionary one. Jurisprudence by the courts reveal that either the multiplier approach or an award of a global figure is applicable when it comes to assessing loss of dependency. In the case of Mwanzia vs Nagalali Mutua Kenya Bus Ltd cited in *Albert Odawa vs. Gichumu Githenji* [2007] eKLR the court gave guidance on when to use the multiplier approach as follows:-

> "The multiplier approach is just a method of assessing damages. It is not a principle of law of a dogma. It can, and must be abandoned, where the facts do no 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." [emphasis my own]

49. In the case of *Ponderosa Logistics Limited -vs- Wesley Cheptoo Arap Chelagat & Alex Cheptoo (suing as the representative of the estate of Mark Too (Deceased)* [2020] eKLR, the court found that either method was acceptable as follows;-

> " These submissions left me with the choice between the multiplier method and the global award method. It is a discretion that I am obligated to exercise judiciously. In my mind both methods are brought with misgivings. In the multiplier one the court has to form an opinion based on the facts before it that this person could have lived and worked for this number of years, this person would have earned so much money, and supported them to a certain extent. Similarly, with the global approach the court again is expected to form an opinion as to value placed on the life lost. In each the court has a way of knowing what vicissitudes that life would have been faced with. Neither is better that the other. It all depends on the facts. Hence in principle there was nothing wrong with the trial court choosing the multiplier approach.

50. In *Rosemary Mwasya vs Steve Tito Mwasya and Another* [2018] eKLR, a case on all fours with the present case the Court of Appeal considered that he deceased was a 4th year student and utilized the starting salary of the course she was enrolled in and pronounced itself as follows:

> " As for the multiplicand, the only guide the learned judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/- took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. 118,546 = 1/3 = 39,512 when factored into the figure chosen as the multiplicand, it gives a final figure of Kshs. 79,034"

51. Given that this case did not involve a minor and that the future profession of the Deceased was ascertainable I find that the trial court was well within its rights to apply the multiplier approach as opposed to awarding a Global figure. I therefore uphold the award of Kshs. 5,564,400 as loss of dependency.

52. Regarding Special damages, the law is that these must be specifically pleaded and proved. In *Okulu Gondi -vs- South Nyanza Sugar Company Limited* [2018] eKLR the court stated that

> " Special damages must be specifically pleaded and proved with a degree of certainty and particularity"

53. In this case all those special damages claimed were proved as follows

    (a) Advocates Fees - 40,000/= (receipt is at Page 40 of the record of Appeal).

    (b) Coffin Hearse and Flowers - 90,000/= (Receipt appears at page 29 of the Record)

    (c) Fee for Record's from NTSA – Kshs. 550/= (receipt appears at pages 30-31 of the record)

54. I am satisfied that the claim for Special damages was properly pleaded and proved. As such I uphold the award of Kshs. 130,510 made under this limb.

55. Finally I find no merit in this Appeal. The judgment delivered on 29th November 2023 is confirmed and upheld. This appeal is dismissed in its entirety. Costs will be met by the Appellant.

DATED IN NYERI THIS 15TH DAY OF NOVEMBER, 2024.

MAUREEN A. ODERO

JUDGE