Pyrethrum Board of Kenya & another v Gichure (Suing as the Legal Representative of the Estate of Joseph Wambugu Kanyatta - Deceased) (Civil Appeal 95 of 2019) [2024] KEHC 16068 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16068 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 95 OF 2019

PN GICHOHI, J

DECEMBER 17, 2024

BETWEEN

PYRETHRUM BOARD OF KENYA ..... 1ST APPELLANT

JOHN KIPNGETICH ..... 2ND APPELLANT

AND

TERESIAH WANJA GICHURE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH WAMBUGU KANYATTA - DECEASED) ..... RESPONDENT

(An appeal from the Judgment delivered on 8th May 2019 by Hon. B. Mararo (PM) in Nakuru Chief Magistrate Case No. 1728 of 2005)

JUDGMENT

1. The background of this appeal is that by a plaint dated 29th September, 2005, the Respondent herein sued the Appellants and sought: -
    a. General damages.
    b. Special damages.
    c. Costs of suit
    d. Interest on (a), (b) & (c) above at court rates.
2. The Respondent's claim was that on or about 17th November, 1996, Joseph Wambugu Kanyata (Deceased) was travelling as a fare paying passenger in motor vehicle registration number KAH 606A along Nakuru-Eldoret, when Gichuhi Kiringa (Deceased) being the driver, drove the said vehicle so negligently that it collided with motor vehicle registration number KAA 255K owned by the 1st

Appellant and driven by the 2nd Appellant. She blamed the accident on the negligence of the drivers of both vehicles which accident caused severe injuries on the deceased leading to his death.

3. In their joint defence dated 27th October, 2008, the 1st and 2nd Appellant admitted that they were the registered owner and driver respectively of motor vehicle registration number KAA 255K. They further admitted that motor vehicles registration number KAA 255K and KAH 606A collided.

4. They however denied the particulars of negligence against them and that the deceased was a passenger in motor vehicle KAH 606A or that he sustained injuries that led to his death.

5. They further pleaded that without prejudice, that the entire accident was exclusively caused by negligence of the drivers of motor vehicle registration number KAH 606A and KAC 650F which caused their vehicles to collide with motor vehicle registration number KAA 255K.

6. The case proceeded for hearing with only the Respondent and a police officer. The Appellants did not adduce any evidence.

7. Teresia Wanja Gichura, testified as PW1 confirming that she was the wife of the deceased and together, they were blessed with three children. She produced the death certificate as Exhibit 1 and the children birth certificate as exhibit 2 (a), (b) and (c). She also produced Grant of Letter of Administration issued on 17th November, 1996 as Exhibit 3.

8. It was her evidence that the driver of motor vehicle KAH 606 A and KAA 225K are to blame for the accident that cause the death of her husband. However, she admitted during cross examination that she was not at the scene of accident and did not witness the accident.

9. PW2 No. 49807 PC Jackson Nkonge of Nakuru Police station testified that the accident of 17/11/1996 involved three motor vehicles registration number KAH 606A, Nissan Matatu, KAC 650F Isuzu Lorry and KAA 255K Mitsubishi Lorry. However, he could not give any other useful information on who was to blame for the accident because the police file was not available.

10. He testified that the record of the said police file must have been destroyed because by law, they are supposed to be destroyed within 10 years.

11. At the conclusion of the case, both parties filed their submissions and ultimately, the trial court rendered its decision on 5th May, 2019 as follows: -Liability- 100% for the Plaintiff against the Defendants jointly and severally.General damages.Pain and suffering-Kshs 30,000.Loss of expectation of life-Kshs 200,000.Loss of consortium- Kshs 100,000.Loss of dependency- Kshs 1,635,392.Special damages- Nil

12. Aggrieved by the entire judgment, the Appellants filed a Memorandum of Appeal 31st May, 2019 on the following grounds: -The Honourable Learned Magistrate erred in law and fact in adopting the wrong principles in assessment of damages awardable to the Respondent.The Honourable Learned Magistrate erred in law and fact by awarding damages for loss of consortium.The Honourable Learned Magistrate erred in fact and law by awarding Kshs. 200,000/=as general damages for loss of expectation of life when the deceased had died immediately the suit accident occurred.The Honourable Learned Magistrate erred in fact and law by awarding Kshs. 1,635,392/= for loss of dependency when there was no proof of the income earned by the deceased.The Honourable Learned Magistrate erred in law and fact by finding the Appellants liable for the accident that occurred on 17th November, 1996 despite there being no evidence in support of the same.The Honourable Learned Magistrate erred in law and fact by failing to consider the submissions filed by the Appellants.

13. The Appellants therefore prayed that: -The Honourable Magistrate's Judgment of 8th May, 2019 in Nakuru CMCCC No. 1728 of 2005 be set aside.The costs of this Appeal be borne by the Respondent.

Appellants' Submissions

14. These were filed on 30th July, 2024 by the firm of Rodi, Orege and Company Advocates for the Appellants.

15. On liability, it was submitted that as per the Respondent's plaint at paragraph *7*, she blamed the accident on motor vehicle registration number KAH 606A, by stating that the said vehicle was negligently driven by Gichuhi Kiringa, the 3rd Defendant's driver.

16. It was further submitted that during hearing, the Respondent confirmed that she did not witness the accident and thus could not tell how the accident occurred.

17. They further submitted that the police officer who testified also confirmed that he was not the Investigating Officer and only produced the Police abstract, which did not ascertain that motor vehicle registration number KAA 255K was involved in the accident.

18. Further, it was submitted that the matter was still pending under investigations and therefore, there being no evidence of the outcome of conclusive investigations, there was no evidence to prove that the 2nd Appellant was liable for the accident and that the 1st Appellant was vicariously liable. The Appellants therefore urged that the Respondent's claim be dismissed with costs.

19. On damages for pain and suffering, the Appellants submitted that the deceased died on the spot and therefore a sum of Kshs 20,000 should have been sufficient and not Kshs 30,000 awarded by the trial court. In support of that argument, the Appellants placed reliance on the decision in the case of E.A Growers Limited V Charles Nganga Ngugi [2015] eKLR where High Court awarded the plaintiff Kshs 10,000 as the deceased died on the spot.

20. On loss of expectation of life, the Appellants submitted that there was no basis for the trial court's finding that the accident cut shot the life of the deceased who was full of life without having evidence in regard to his past health. He therefore urged this Court to interfere with the trial court's award of Kshs. 200,000 and substitute it with an award of Kshs. 100,000.

21. On loss of dependency, the Appellants submitted that as per the Respondent's testimony, the deceased died at the age of 37 years, earning Kshs. 500.00 per day and had four dependents namely, the wife and three children but there was no evidence in support.

22. It was their submissions that during cross examination, the Respondent testified that she also used to support her family. It was therefore submitted that the deceased was not a sole breadwinner. The Appellants therefore urged this Court to set aside the dependency ratio of 2/3 and substitute it with a dependency ratio of 1/2.

23. On loss of consortium, it was submitted that the award is only made in situation where the victims survive and unable to offer companion but, in this case, the victim of the accident herein died and therefore, the trial court misdirected itself in making this award. They urged that the award of Kshs. 100,000 be set aside. In conclusion, they urged that the appeal be allowed with costs to the Appellants.

Respondent's Submissions

24. These were filed on 11th October, 2024 by the firm of Mutonyi Mbiyu & Co. Advocates. On liability, it was submitted that the occurrence of the accident involving the suit motor vehicles was confirmed by the Respondent, the police officer and the Police Abstract produced as evidence.

25. It was submitted that the Appellant did not produce any evidence to refute the fact that the deceased was a passenger in motor vehicle registration number KAH 606A and therefore, the evidence by the Respondent was unchallenged. That in absence of any evidence on negligence on the part of the deceased, the finding of liability at 100 % against the Appellants jointly and severally was not in err. They urged this Court to also make that finding.

26. It was argued that the Appellant did not produce any evidence to refute the fact that the deceased was a passenger in motor vehicle Registration number KAH 606A and therefore the evidence by the Respondent stands unchallenged. To support this, she relied on the case of Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others [2017] eKLR.

27. On whether the award of damages was inordinately high, it was submitted that the award was fair and within the allowable limits and therefore, this Court should refrain from interfering with it. In support, reliance was placed on the case of Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR.

28. Regarding the award for consortium, it was submitted that the Respondent lost a partner with who they had children and lived together. That having died due to the accident, the Respondent was robbed of her companion and life partner and therefore, she deserved the award of Kshs. 100,000 granted by the trial court. In support of that argument, she relied on the case of Caroline Leah Awino vs Francis Kipsang Ngetich (Suing as the personal administrators ad litem of the estate of Mary Jepkurgat (Deceased) [2019] eKLR, where High Court awarded Kshs 100,000 for loss of consortium.

29. On loss of expectation of life, it was submitted that due to the accident, the deceased died abruptly. That prior to his death, he was in good health and enjoyed a happy life and therefore, the award of Kshs 200,000 was fair, considering that in the case of Daniel Kuria Nganga v Nairobi City Council [2013] eKLR, High Court awarded Kshs 300,000 under this head.

30. On loss of dependency, the Respondent submitted that the deceased was a business man, who earned Kshs. 500 per day for selling cows, growing wheat and spraying wheat in people's farms, however since no evidence was tendered in support of the said amount, the trial Court awarded the basic minimum wage of Kshs 8,888 of a gardener and arrived at the sum of Kshs. 1,635,392, which is a reasonable figure.

31. Lastly, the Respondent submitted that the entire Appeal is incompetent as the Appellant did not extract and attach the decree to the record of Appeal. In support of this, the Respondent relied on the decision in Lucas Otieno Masaye V Lucia Olewe Kidi [2022] eKLR, where Ombwayo J of the Environment and Land Court held that failure to attach a copy of the decree renders the Appeal incompetent. On that note, the Respondent prayed for the Appeal to be dismissed with costs and interest to the Respondent.

Analysis and Determination

32. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions bearing in mind that it did not have an opportunity to see or hear the witnesses testify - see Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.

33. In re-evaluating the evidence before the trial court, this Court clear from the memorandum of Appeal and the submissions by the parties that the broad issues for determination are: -

    1. Whether the Respondent proved his case to warrant the finding 100% liability against the Appellants.

    2. Whether the award of damages was inordinately high.

    3. Who should bear the costs of the appeal.

34. Before dealing on the merit of Appeal, the Respondent has raised an issue on the competence of the appeal. A perusal of the Record of Appeal and the Supplementary Record of Appeal filed on 13th February, 2024 reveals that the Decree issued on 12th February, 2024 was duly annexed and therefore, the Appeal compliant.

35. On liability, the Appellant's position was that the police officer who testified as PW2 only relied on the contents of the police abstract which clearly failed to include the 1st Defendant's motor vehicle registration No. KAA255K as one of the vehicles involved in the accident and therefore, in absence of an eye witness to the accident, it cannot be construed that an indication of the details of the 1st Appellant's vehicle at the top page of the abstract means that the 1st Appellant's vehicle was involved in the accident.

36. In this case, the undisputed fact is that the Respondent did not witness the accident. Further, it is not disputed that the deceased was passenger in motor vehicle Registration number KAH 606A. As a passenger and in the circumstances herein, the deceased had no control in the manner any of the vehicles were driven and therefore, he could not bear any liability.

37. The driver of motor vehicle KAA 255K survived the accident. The Appellant did not adduce any evidence and did not call the said driver as a witness as to how the accident occurred.

38. In such a scenario, Mulwa J in Brian Muchiri Waihenya (supra) held: "It is trite that a police abstract is a public document and its contents when produced and admitted without objection ought to be taken as the truth."

39. On appeal in Jubilee Haulers Limited & 2 others v Brian Muchiri Waihenya [2021] eKLR, the Court of Appeal upheld that argument and in so doing held:

> "We respectively agree and adopt the holding of Lesiit, J. in Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] eKLR that: - "It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings."

40. Further, the Court of Appeal in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR stated: -

> " The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in Stapley V Gypsum Mines Ltd (2) (1953) A.C 663 at pg 681 as follows "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide..."The question must be determined by applying common sense to the facts of each particular case. One may find that as a

matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally".

41. Further, in Farah V Lento Agencis [2006] 1 KLR 124, 125, the Court of Appeal held that:

> " Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

42. Flowing from the above decision's and the circumstances herein, there is no err in the trial court's finding on liability.

43. On general damages, it is trite law that assessment of quantum of damages in a claim for general damages is discretionary and the appellate court should be hesitant to disturb it.

44. For emphasis, the Court of Appeal in Gitobu Imanyara & 2 Others (supra) held on the issue: -

> " ... it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

45. The Court went on to say: -

> " This is the principle enunciated in Rook v Rairrie [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
>
> > "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 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."

46. Guided by those principles and in regard to the award on pain and suffering, it is indeed true that the deceased died on the spot. In Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] eKLR M. J. Anyara Emukule J (as he then was) awarded Kshs. Kshs. 50,000/= on 7th November 2013 where the deceased was crushed by a lorry and died instantly.

47. In Josephine Kiragu v Vyas Hauliers Ltd (2017) eKLR where the deceased had died instantly and High Court found an award of Kshs. 10,000/= for pain and suffering to be on the lower side and therefore substituted it with an award Kshs. 30,000/=. This Court finds no justification in disturbing the award of Kshs 30,000/= made by the trial court.

48. On loss of expectation of life, High Court in the case of Moses Akumba & Another v Hellen Kasa Thoya [2017] eKLR did not disturb an award of Kshs. 200,000/=. Likewise, this Court finds the award made by the trial reasonable and justified. There is no reason to disturb it.

49. On the award of consortium, it is the Appellants position that this award should not be awarded in a fatal accident. However, in Salvatore De Luca v Abdullahi Hemed Khalil & another [1994] eKLR, the Court of Appeal had this to say on the issue where the deceased died in a tragic road accident: -

> " So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgement in the superior court until payment in full.

50. In this case the trial court held while making the award herein: -

> " The Plaintiff lost a partner with whom they had children and with whom they lived with. His demise robbed her of a partner and a friend with whom they shared their joys and sorrows. She had lost a companion and I opine that an award of Kshs. 100,000/= would be sufficient."

51. In the circumstances herein, this Court upholds the finding and award by the trial court.

52. On loss of dependency, the trial court used the formula as follows: - Kshs.8888x 2/3x 23 = Kshs. 1,635,392. In doing so, the trial court acknowledged the position by the Defence that the Plaintiff was not entitled to any sum under this head.

53. The court found that though the Plaintiff alleged that the deceased was a businessman earning an average of Kshs. 500 per day, she did not however tender any evidence of his earning.

54. In the circumstances, the court held:

> " I will apply the minimum wage of a gardener which is Kshs. 8,888. He had children who depended on him. I will use a dependency ratio of 2/3. He would have worked up to retirement age of 60 years. I will adopt a multiplier of 23 years."

55. In this appeal, it is noted that the Appellant has not challenged the multiplier and the multiplicand applied by the trial court. His issue is the dependency ratio applied by the trial court.

56. He argued that a ratio of ½ could have sufficed considering that the deceased's wife testified during trial that she was also providing for her family through her farming activities.

57. The deceased herein was married with three children. It is expected that most of his income would be utilized to support his family. A dependency ration of 2/3 applied by the trial court was therefore justified.

58. In conclusion, this Court finds no merit in this appeal. The appeal is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF DECEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kabaka for Appellants

Ms Mungai for Mr. Mbiyu for Respondent

Ruto Court Assistant

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