Wanyoike (Suing as the Legal Representative and Administrator of the Estate of Regina Wangari Wanyoike) v Nimke Investment Limited & another (Civil Case E042 of 2022) [2024] KEMC 60 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEMC 60 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL CASE E042 OF 2022

PA NDEGE, SPM

APRIL 11, 2024

BETWEEN

FRANCIS WANYOIKE (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF REGINA WANGARI WANYOIKE) .... PLAINTIFF

AND

NIMKE INVESTMENT LIMITED .... 1ST DEFENDANT

KENYA POWER LIGHTING COMPANY .... 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed his original Plaint dated 24/01/2022, and further an Amended Plaint dated 09/09/2022 in his capacity as the Legal Representative of the Estate of Regina Wangari Wanyoike, seeking Special Damages of Kshs.275.579/=, General Damages for Pain and Suffering, Loss of Expectation of Life, Loss of Dependency, Costs of the suit, Interests on all the sums at court rates till payment in full and any other further relief that the court may deem fit to grant.

2. It is common ground herein that the deceased herein lost her life following a fatal accident which occurred on 25/10/2021 along Nairobi- Nakuru Highway near Mwariki Police Station as she was lawfully walking on the pedestrian lane along the said road when the employees and or agents of the 1st defendant were negligently uprooting and/or felling an old wooden electricity post belonging to the 2nd Defendant and as a result of which it hit the deceased causing her to sustain fatal injuries.

3. This matter proceeded for hearing on 16/03/2024 and 27/02/2024 with the plaintiff calling 4 witnesses who basically relied on their statements and also produced several documents to prove the case herein against the defendants. The defendants herein, on their part, closed their respective cases without calling any witness to testify, nor producing any document, thereby not adducing any evidence

to support their respective cases. It should however be noted that the defense case, partially starts with the cross-examination of the plaintiff witnesses.

4. However, at the close of the hearing and cross examinations, I still do find that the plaintiff's evidence remains unchallenged that the accident herein did occur as pleaded. There are remaining two issues for my consideration herein. They are the quantum of damages and the issue of apportionment of liability as between all the parties i.e. between the plaintiffs and the defendants, or each of them, on the one hand; and/or between the defendants herein, on the other hand. After the close of hearing, all the parties herein filed and, I do believe, exchanged their written submissions citing various impressive authorities in support of their respective positions.

5. It is common ground herein that the deceased died at the age of 63. She left behind the plaintiff as a widower, a son and a daughter aged 42 and 35 respectively as at the time of her death. The plaintiff's evidence in PW1 is that the deceased used to earn between Kshs. 2000/= to 3,000/= on a daily basis. He was however not sure whether the deceased used to earn the income through farming or a butchery business. That she however used to send him a lot of money through Mpesa. Further, that as a husband, she was depending on her and not vice versa. He however did not produce the evidence of the earnings or the dependency.

6. Under the Fatal Accident Act, the Plaintiff is mainly expected to claim Loss of Dependency. I have gone through the rival submissions filed on the same. In the case of Mwanzia Vrs Ngalali Mutua Kenya Bus Ltd and quoted in Albert Odawa Vrs Gichimu Githenji NKR KCCA No. 15 of 2003 [2007] e KLR, Justice Ringera was of the following view:

> 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 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.

7. This reasoning was adopted in Mary Khayesi Awalo & Anor. Vrs Mwilu Malungu & Anor. ELD HCCC No. 19 of 1997 [1999] eKLR, where Nambuye J., stated that: -

> As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.

8. As aforestated, it is common ground herein that the deceased was 63 years old. Her occupation has however not been proved satisfactorily. PW1 her husband was not sure of the kind of work she did. He alleged that he used to receive some large sums of money from her on a daily basis through his Mpesa, yet no Mpesa records were produced. Mpesa records are readily available and should not be equated for example, with KRA returns or Banks statements. He confirmed that the deceased is the one who used to depend on him and not vice versa. The other children are also all mature adults. There is thus no evidence adduced and/or filed by the Plaintiffs herein to support their claim that the Deceased was a farmer and/or a butcher or any occupation. The plaintiff having contradicted himself on this, this evidence required corroboration in the form of another reliable evidence to prove that the deceased had an occupation that was earning her some income from which she could support any of the dependants

herein. No documentary evidence was produced and/or filed on record to back these assertions. In the case of John Wamae & 2 Others Vrs Jane Kituku Nziva & Another [2017] eKLR, where the deceased was 61 years old, there was no proof of income and dependents were over the age of majority, it was held that where it is not clear as to what the deceased did for a living, allocating the deceased an occupation on which to base the minimum wage would amount to speculation especially where his earnings were neither pleaded nor proved.[1]

9. I do further stand guided by the decision of the Court in Beatrice W. Murage Vrs Consumer Transport Ltd & Anor [2014] e KLR, where Justice Wendo was of the view that: -

> Ordinarily if one does not prove what the deceased earned, the court would base the earnings on the minimum wage. However, in this case, the minimum wage cannot apply because the deceased was beyond employment age and there is totally no evidence that he earned anything for a living.

10. I do therefore hold that the minimum wage and multiplier formulae method, which only apply where the occupation and the earnings of the deceased are not in doubt, are not appropriate herein. The global formulae method is the most appropriate one herein. On this, I am also impressively guided by the case of Antony Njoroge Ng'ang'a (Legal Representative of the Estate of the Late Fred Nganga Njoroge Aka Fred Ng'ang'a Njoroge) Vrs James Kinyanjui Mwangi & 2 Otheres [2022] e KLR that cited Mary Khayesi Awalo & Another Vrs Mwilu Malungu & Another [1999] e KLR: -

> As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting procedures.[2]

11. Further authorities cited by the learned defence counsel such as John Wamae & 2 Others Vrs Jane Kituku Nziva & Another, [2017] e KLR, awarded a global sum of Kshs. 400,000/= for a 61 years old deceased. Factoring the rise in the cost of living and inflation since 2017 when the award was made, I do therefore award the sum of Kshs. 800,000/= for loss of dependency.

12. Damages under the *Law Reform Act* includes Pain and Suffering and Lost life. It is common ground herein that the deceased died on the spot. Counsels herein agree, and it is trite, that damages for pain and suffering are determined by the length of time that the deceased had to endure pain before death. This was aptly pointed out in the case of Loise Wairimu Mwangi & Another Vrs Joseph Wambue Kamau (2006) e KLR. The court is thus guided by the proposals by the parties and in reliance on the case of *SUKARI INDUSTRIES LIMITED VRS CLYDE MACHIMBO JUMA HCCA No 68 of 2015* where Majanja J in arriving at an award of Kshs. 50,000.00 was of the view that higher damages will be awarded if the pain and suffering is prolonged before the death. Be that as it may, there exists a great deal of precedents to the effect that courts tend to award nominal damages under this head, mostly in cases where the deceased died on the spot or on the date of the accident, mostly Kshs. 10,000/=. I however do hereby find that that conventional amount to be too old, hence outdated, and has been overtaken by inflation and the rise in cost of living. Recent authorities such as Masonik & Another Vrs Cheruiyoy (Suing as the Legal Administrator of the Estate of Stanley Kipchumba, Deceased) [2022] KEHC 11823 (KLR), has awarded Kshs. 50,000/= for pain and death. I thus do therefore agree with

[1] Cited by the learned counsel for the 2nd Defendant

[2] Ibid

the learned plaintiff counsel's submissions that Kshs. 50,000/= would suffice as damages for Pain and Suffering.

13. On loss of life expectancy, the deceased herein died at 63 years old. No evidence was tendered as to his state of health prior to his death. Learned counsel for the Plaintiff has proposed a sum of Kshs 200,000/=, while the learned defence counsel have proposed Kshs. 60,000 and Kshs. 30,000/=, respectively. I do agree with the learned counsel herein that a conventional sum is awardable herein. In Abson Motors & 2 Others Vrs Sinema Kitsao & Another (Administrators of the Estate of the Late Kitsao Kajefwa Kitunga (deceased) [2016] e KLR, the deceased died at the age of 85 years and the High Court upheld an award of Kshs. 100,000/= for lost life (loss of expectation of life). That was in 2016, and considering the rise in cost of living in present times, I do hereby maintain the same, and do award Kshs. 100,000/= for loss of expectation to life. In any case, Kshs. 200,000/= was awarded in Masonik & Another Vrs Cjeruiyoy (Suing as the Legal Administrator of the Estate of Stanley Kipchumba, Deceased) [2022] KEHC 11823 (KLR), for a deceased person who was died at approximately half the age of the deceased herein.

14. There is a debate as to whether the award for loss of dependency under the Fatal Accident Act shall be awarded less those for Pain and Suffering and Loss of Life expectancy awarded under the Law Reforms Act, as held by Justice Wendo in Richard Macharia Nderitu Vrs Philemon Rotich Langas [2013] e KLR. The learned judge, relying on the Court of Appeal decision in Kemfro Africa Ltd Vrs A. M. Lubia [1982-85] 1 KAR 727, found that when the people entitled to the deceased's estate are the same persons for whose benefit the action over the *Fatal Accidents Act* is brought, such as in the present case, the award for loss of expectation to life is deductible. She then proceeded to deduct the same. That was equally the position by Justice R. N. Sitati in Makario Makonye Monyancha Vrs Hellen Nyangena [2014] eKLR.

15. Justice Kariuki, however, in John Wamae & 2 Others Vrs Jane Kituku Nziva & Another, supra, interpreted the same Court of Appeal decision which provided as follows:

> ...the net benefit will be inherited by the same dependants under the *Law Reform Act* and that must be taken into account in the damages awarded under the *Fatal Accidents Act* because the loss under the latter Act must be offset by the gain from the estate under the former Act...
>
> This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that – 'the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the *Fatal Accidents Act*. Anyway, the principle that is a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and, in my judgment, should be applied in Kenya.

16. In Justice Kariuki's view, the words 'take into account' do not make it mandatory that the sums be deducted. To buttress his view, he cited the case of Peres Wambui Kinuthia & Another Vrs S.S. Mehta & Sons Limited, Nairobi Civil Appeal No. 568 of 2010 (UR) where Justice Mabeya held that: -

> In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor – vrs – Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words 'to be taken into account' and 'to be deducted' are two different things. That the words used in Section 4(2) of the *Fatal Accidents Act* are 'taken into account'. That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court says that in reaching the figure awarded under the *Fatal Accidents Act*, the

trial court bears in mind or considers what has been awarded under the *Law Reform Act* for non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction.

17. I do therefore assess the general damages herein as follows:

    Under the *Law Reform Act*:

    Pain and Suffering: Kshs. 50,000.00

    Loss of Expectation of Life: Kshs. 100,000.00

    Under the *Fatal Accidents Act*:

    Loss of Dependency: Kshs. 800,000.00

18. Relying on Justice Kariuki's interpretation hereinabove, I do hereby find that the Kshs. 150,000/= award under the *Law Reform Act*, has been adequately factored in the Kshs. 800,000/= award under the *Fatal Accidents Act*. I do therefore find that the plaintiff herein is only entitled to a sum of Kshs. 800,000/= as general damages herein.

19. Of all the special damages pleaded, the plaintiff has been able to prove Kshs. 253,379/= only. The word document purportedly with an Mpesa transaction message appears unreliable hence inadmissible as the plaintiff ought to have produced a verified Mpesa statement of the transaction. I therefore hereby award the sum of Kshs. 253,379/= being mortuary and funeral expenses.

20. On liability, I have found from the evidence and submissions herein that the issue is mainly on the apportionment of liability between the defendants herein. The evidence adduced herein is clear that the deceased had nothing to do with the falling of the post on her. She was lawfully walking as a pedestrian while undergoing her usual or normal activities when the post, which was actively being uprooted by the 1st defendant fell on her. The plaintiff called eye witnesses including PW2, Simon Muchai) whose evidence have not been rebutted or challenged in any way. He was a boda boda described in details how the fatal accident herein occurred.[3] Neither defendants called any witness to rebut the plaintiff's evidence on this. Thus, the active issue herein is whether the 2nd defendant is also liable for the acts of the 1st defendant.

21. Whereas there is proof that the 1st defendant directly caused the accident when they were working on the 2nd defendant's post, that notwithstanding, it is the finding of this court that this is a case where the 2nd Defendant is vicariously liable for the acts of the 1st Defendant for the following reasons.

22. Vicarious liability in general arises where a person is found liable for the torts of an employee that he or she has authorized or subsequently ratified. This court has already found that there is no evidence adduced by either of the defendants herein to prove their position or relationship towards or against each other as to whether the 1st Defendant was not an independent contractor, and the key tests for determining whether parties have a relationship of employer and employee for purposes of vicarious liability are stated in Clerk & Lindsell On Torts, Twentieth Edition (2010) General Editor: Michael A. Jones, at paragraphs 6-13 to 6-16. In summary these are as follows:

    a. There must exist an essential core of mutual obligations to be ready to work and to pay for that work between the parties

    b. The employee must be under the direct control or supervision of the employer

[3] His statement was admitted as PEXH. NO. 10.

c. The existence of the relationship will not be affected by the fact that the employer is not allowed by the law to do the work for himself, but is compelled to employ an agent of a particular class to do it for him, provided that the employer has the power to control and dismiss the agent.

23. The plaintiff had no contract or any instrument constituting the relationships between the defendants herein; that authorized the 1st defendant to carry out works on the 2nd defendant's post, and we are not in a position to determine whether there existed a contract for, or of, service between them. Thus, the plaintiff's assertion that the 2nd defendant is vicariously liable for the acts of the 1st defendant remains unchallenged. This court is also not able to decide on the same, having not been availed the contract, whether for employment, or as a contractor, for its perusal.

24. Further, it was unanimously proved that the post that fell on the deceased belonged to the 2nd defendant. In this regard, it was held in Kansa Vrs Solanki [1969] EA 318;

   Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.

25. In this case the post belonged to the 2nd defendant. No evidence was led to explain the circumstances under which a privately-owned entity was working on the property of a publicly owned entity. Evidence cannot be adduced by way of submissions. In light of the above authority, I do find the 2nd defendant herein vicariously liable. The 1st defendants herein is therefore found 100% liable; while the 2nd defendant is found to be vicariously liable.

26. Judgment is therefore hereby entered in favour of the plaintiff and against the defendants as follows:

   a. General Damages...............Kshs. 800,000/=

   b. Special Damages..................Kshs. 253,379/=

   Net Total.......................KSHS. 1,053,379/=

27. The plaintiff also gets the costs and interests at court rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 11TH DAY OF APRIL, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Ndichu h/b Gakuhi Chege

1st Defendant's counsel: Mwashi h/b Githiru

2nd Defendant's counsel:N/A

Mwashi: Praying for 30 days stay.

Ndichu: No objection.

Ct: 30 days stay granted as prayed.

Plaintiff: