REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. E097 OF 2024

NANCY WANJIRU WANYAMA

(Suing as the legal representative of the estate of Wilfred Kisangani Wanyama deceased).

……..……...……..…**APPELLANT**

VERSUS

BOARD OF MANAGEMENT KAMUIRU SECONDARY SCHOOL ... RESPONDENT

JUDGMENT

[1] The Appellant filed this appeal against the Judgment delivered by Hon. Cheruto C. Kipkorir in Kerugoya CMCC Number E061 OF 2023 delivered on 7th August, 2024 and raised the following grounds:

1. The learned magistrate erred in law and fact in finding that the Respondent had proved the negligence pleaded against Wilfred Kisangani Wanyama-Deceased while no concrete evidence was produced by the appellant to prove the said negligence by the deceased.
2. The learned magistrate erred in law and fact by making a finding that Wilfred Kisangani Wanyama-Deceased was solely to be blamed for the accident based on the determination made in Kerugoya Inquest 7 of 2019.
3. The learned magistrate erred in law and fact by disregarding the Appellant's evidence and the authorities relied on by the Appellant in her submissions in support of the liability against the driver of the Respondent.
4. The learned magistrate erred in law by giving an award of Kshs 80,000/= under Loss of Expectation of Life instead of Kshs

100,000/which is the conventional award provided under Loss of Expectation of Life.

5. The learned magistrate erred in law and fact in dismissing the Appellant's suit when the Appellant had proved his case on a balance of probabilities that the accident did occur and that Wilfred Kisangani Wanyama-Deceased lost his life as a result of the accident.

Background

[2] In the lower court matter the Appellant/plaintiff filed the suit vide a plaint which was amended. In the amended plaint on 21/7/2023, she was seeking payment of damages as a result of the accident that occurred on 29th May, 2018 involving Motor Vehicles Registration Number KBN 556E and KBA 569T along Mukinduri — Baricho Road near Mombasa Ndogo. As a result of the accident Wilfred Kisangani Wanyama who was the driver of Motor Vehicle Registration Number KBA S69T passed on. The Appellant brought the suit as the Legal Administrator of the Estate of Wilfred Kisangani Wanyama who was her son.

[3] The particulars of negligence were pleaded against the driver of the defendant in paragraph 5(i-v) of the amended plaint. The particulars pursuant to the Fatal Accidents Act and Law Reform Act were pleaded as were the special damages. The plaintiff prayed for general damages under the Fatal Accidents Act and the Law Reform Act, special damages and costs of the suit.

[4] The defendants filed a defence which was also amended on 22/8/2023. The content of the amended plaint was denied in general and the plaintiffs were put to strict proof. It was pleaded that the accident was caused by the negligence of the deceased.

[5] The reply to defence was filled on, 13/ 10/ 2023, it was denied that the deceased was negligent and the defendant was put to strict proof. The plaintiff called two witnesses, the defendant called one.

[6] After conclusion of the hearing the Court dismissed the Appellants suit with costs to the Respondent. The Appellant was dissatisfied and filed this Appeal.

Evidence

[7] **PW1 – Nancy Wanjiru Wanyama,** the plaintiff adopted her statement dated 2nd May, 2023 as her exam in chief. She stated that the deceased was her son. She

reiterated the content of amended plaint. She adduced in evidence the list of documents filed alongside the initial plaint as exhibit 1-8.

[8] On cross-examination, she stated that she was granted leave to file suit out of time. She conceded she was not with her son when the accident occurred. She added that the deceased was hit on his side, as per the police report. She could not confirm particulars of negligence. She confirmed she was aware of the inquest file that was opened following the death of the son, she did not know the finding of the court. He was driver working for Wambui. She did not know how much he earned. She had other adult children, though she they did not help her. Her daughters are married.

[9] **Pw2- Sergeant Timothy Kingara w**as summoned to produce the police abstract. He explained that the accident occurred on 29/5/2018 along Mukinduri-Baricho road involving the vehicles KBN 599E and KBA 569T, Toyota Hilux. The deceased passed on as a result. He stated that an inquest was opened, though he did not know the finding of the court. He admitted that he was not the investigating officer, though the investigating officer, Corporal Yusuf visited the scene after the accident occurred. On cross-examination, he stated that he did not the conclusion of the investigation or the inquest.

[10] **Dw1- James Mwangi Gakuru** relied on his witness statement filed on 18th July, 2023 as his evidence in chief. He was the bus driver from Kamuiru Secondary School, registration number KBN 599E. He was on his way to a funeral for one of the relatives of a teacher of the school with 20 teachers on board. He was driving at 60km/ ph. It was 5pm at Mombasa Ndogo. He said he saw an oncoming pick up which swerved on his lane suddenly. It hit his right side as he tried to swerve to no avail. He did hit it too.

[11] Further, the inquest file was opened being; Inquest number 7 of 2019, where the court blamed the deceased driver of vehicle KBA 569T for the accident. On re-examination, he blamed the deceased for the accident.

Appellant submissions

Whether the Inquest proceedings vide Kerugoya Inquest Number 7 of 2019 were binding before the trial Court

[12] It is on the basis of the evidence that was adduced in the Inquest proceedings that the court made a finding that the deceased was to blame for the accident. The trial

court based on the inquest findings went ahead to find that the deceased was 100% liable for the accident.

[13] It is the Appellants submissions that the trial court made an error when it merely perused the record of the inquest proceedings and made a conclusion that the deceased was liable for the accident. The Respondent in the Defence made allegations of negligence by the Deceased which they ought to have proved during trial. The court had a duty to assess the blameworthiness of each of the drivers of the Motor Vehicles which the court failed to do so. The trial court failed to consider the decision quoted by the Appellant in **Kennedy Muteti Musyoka v Abedinego Mbole [2021] KEHC 1751 (KLR) -**

> **"This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be."**

[14] On the issue of inquest, the appellant relied on decided cases –

Masembe versus Sugar Corporation and another [2002]2EA 434 that it is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance to contradict a witness… but cannot be made the basis of proving a civil claim.

Jimnah Munene Macharia -vs- John Kamau Erera C.A No.218 of 1998), the court ought to have made a finding that liability be apportioned as there was "no concrete evidence to determine who (was) to blame between the two drivers.

[15] It is the Appellants submissions that the court did not consider that both the plaintiff and the Defendant had each filed pleadings and each had pleaded negligence against the other. The Appellant blamed the Respondent for the occurrence of the accident wherein the Respondent equally blamed the Appellant for the occurrence of the accident.

[16] **Section 107 (1) of the Evidence Act Cap 80 provides whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"** The evidential burden is cast upon any party of proving any particular fact which he desires the court to bel eve in its existence. Section 109 of the Evidence Art further provides that- **The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of the fact shall lie on any particular person"**

Whether the analyses on the finding that they could have made in awarding damages was correct

[17] The trial court made a finding on the award of damages it could have made if the Appellant succeeded in the case. The finding by the trial magistrate was not Appealed against by the Respondent hence they were contented with the finding of the award of Kshs. 2,286,916.20

[18] The Appellants main contention with the finding is only on the award of Kshs. 80,000/= under the loss of expectation of life which the Appellants submits ought to have been awarded at Kshs. 100,000/= which is the conventional award provided for under loss of expectation of life. The Appellants relies on the case of **Melbrimo investment company limited versus Dinah Kemunto and Francis sese [2022] EKLR** where a similar award was made.

Respondent submissions

Whether the Inquest proceedings were binding before the trial court

[19] The Appellant has faulted the trial magistrate for relying on the findings of the inquest proceedings in Kerugoya CM's Inquest No. 7 of 2019.

[20] They submit that the learned trial magistrate property considered the ruling and record of the inquest proceedings pursuant to Section 33(b) and Section 35(1) of the Evidence Act (Cap. 80). These provisions allow the court to admit statements made in the course of official duty by persons who cannot reasonably be called as witnesses, as well as certified copies of public documents. The inquest record, being a judicial proceeding conducted by a magistrate in the performance of official duty, was therefore admissible and its findings persuasive in guiding the trial court on the circumstances of the accident.

[21] The court in **Njeri v Chuchu & another (Civil Appeal E045 of 2023) [2024] KEHC 10877 (KLR) (2 August 2024) (Judgment)** held that the findings reached in an inquest file may be admitted in evidence in a civil suit and may assist the court in assessing which facts appear more probable, especially where the party seeking to rely on them presents the inquest record and there is no competing credible evidence.

[22] The trial magistrate was therefore entitled to consider those findings as corroborative evidence of the Respondent's position. The inquest proceedings provided credible and unchallenged factual context that supported the Respondent's account of events. The Appellant did not present any contrary expert or documentary evidence to displace those findings.

Whether the learned magistrate erred in law in and fact in finding that the Appellant had not proved her case

[23] The Respondent adduced direct, credible and uncontroverted evidence through DW1, the driver of the Respondent's motor vehicle. He testified that the deceased suddenly veered onto his lane, causing the collision. This testimony was fully supported by the findings of the inquest, which independently confirmed that the deceased was on the wrong lane and had caused the accident.

[24] The Appellant argues that the trial court did not consider that both parties pleaded negligence against each other. However, with respect my Lord, the Plaintiff, who bore the legal burden of proof, did not present even an iota of evidence demonstrating any act or omission of negligence by the Respondent's driver.

[25] In **Kimani (Suing as the Administratrix of the Estate of Amos Kanina Kimani - Deceased) v Mwangi (Civil Appeal 120 of 2021) [2024] KEHC 2434 (KLR) (7 March 2024) (Judgment),** the e appellant's appeal was dismissed because they failed to meet the burden of Proof in demonstrating that the respondent was negligent in causing a fatal accident. Despite listing multiple allegations of negligence, the appellant only presented the testimony of one witness who was not an eyewitness and whose evidence did not support the claims. The court noted that the appellant failed to establish negligence, and the doctrine of res ipsa loquitur, which could infer negligence in certain circumstances, did not apply here. As a result, the case collapsed due to insufficient evidence, and the appeal was unsuccessful.

Assessment of damages

[26] The respondent submits that the learned magistrate properly directed herself on the applicable principles and arrived at a reasonable assessment based on the

evidence and prevailing awards. In any event, we submit that the award of Kshs. 80,000 was on the higher side given the circumstances of the case and invites this Honourable Court, if inclined to interfere, to reduce the sum to Kshs. 50,000 as earlier submitted.

[27] They place our reliance on the case of ***China Henan International Co-operation Ltd v China Henan International Co-operation Ltd & another*** [2021] eKLR, where the Court upheld the decision of the lower court in awarding Kshs. 50,000 for loss of expectation of life.

Issues

[28] Whether the Inquest proceedings vide Kerugoya Inquest Number 7 of 2019 were binding before the trial Court.

[29] Whether the learned magistrate erred in law in and fact in finding that the Appellant had not proved her case.

[30] Whether the analyses on the finding that they could have made in awarding damages was correct.

Analysis

Issue One: Whether the inquest proceedings were binding

[31] It is common ground that an inquest was conducted following the accident and that the inquest court found that the deceased was to blame. The central question, however, is whether those findings were binding on the civil court.

[32] Proceedings in criminal matters, including inquests, are not conclusive proof of liability in civil proceedings. **In Masembe v Sugar Corporation & Another [2002] 2 EA 434, the Court held:**

> ***"It is trite law that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit, although the record may be used for certain limited purposes."***

Similarly, in Jimnah Munene Macharia v John Kamau Erera (CA No. 218 of 1998), the Court of Appeal emphasized that civil liability must be independently established on a balance of probabilities.

[33] While the Respondent correctly submitted that inquest records may be admissible under **Sections 33(b) and 35(1) of the Evidence Act**, admissibility does not equate to conclusiveness. The learned trial magistrate erred in treating the inquest

findings as determination of liability, rather than supportive evidence to be measured alongside other evidence.

Issue Two: Whether negligence was proved

[34] Under Section 107(1) of the Evidence Act (Cap 80):

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

[35] The Appellant bore the legal and evidential burden of proving negligence against the Respondent's driver. Upon reviewing the record, the Appellant's evidence consisted of: Testimony of PW1, who was not an eyewitness and could not testify as to how the accident occurred; and Testimony of PW2, a police officer who merely produced the police abstract and was not the investigating officer.

[36] On the other hand, DW1, the Respondent's driver, gave direct evidence explaining how the accident occurred, stating that the deceased veered into his lane. The appellant did not call expert evidence to contradict DW1's testimony. However, PW2 during his testimony did not produce sketch map, scene photographs, or investigation report. The investigating officer was not called.

[37] In **Kimani (Suing as Administratrix of the Estate of Amos Kanina Kimani) v Mwangi [2024] KEHC 2434 (KLR), the High Court held that where a plaintiff merely pleads negligence but fails to adduce cogent evidence in support thereof, the claim must fail.**

[38] This Court is persuaded that, notwithstanding the trial court's error regarding the inquest, the Appellant still failed to discharge the burden of proof required under Sections 107 and 109 of the Evidence Act. It is the Appellants submissions that the court did not consider that both the plaintiff and the Defendant had each filed pleadings and each had pleaded negligence against the other. Since liability was not conclusively determined, the plaintiff's suit cannot succeed.

Issue Three: Assessment of damages

[39] The finding by the trial magistrate was not appealed against by the Respondent hence they were contented with the finding of the award of Kshs.2,286,916.20. The trial court assessed damages hypothetically, had liability been established, and awarded Kshs.80,000 for loss of expectation of life.

[40] The Appellant contends that the conventional award should have been Kshs. 100,000. The law is that an appellate court will only interfere with an award of damages where it is shown that the trial court applied wrong principles or the award is so inordinately high or low as to represent an erroneous estimate. **(Butt v Khan [1981] KLR 349).** Awards for loss of expectation of life have varied over time. Courts have awarded between **Kshs. 50,000 and Kshs. 100,000**, depending on circumstances. See ***China Henan International Co-operation Ltd v China Henan International Co-operation Ltd & another*** [2021] eKLR, where the Court upheld the decision of the lower court in awarding Kshs.50,000 for loss of expectation of life. An award of **Kshs. 80,000** cannot be said to be erroneous or outside the accepted range.

[41] The Court does not interfere with the trial court's discretion in quantification of the award of damages.

ORDERS

[42] Accordingly for the reasons set out above, the Court finds, not without sympathy for the appellant, that the appeal is without merit and it is dismissed.

[43] The Court would not interfere with the quantum of damages which remain as quantified by the trial Court.

[44] Each party will bear its own costs.

Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Otieno for the Appellant.

Ms. Jayo for the Respondent.