Mwenda (Suing as a Legal Representative of the Estate of John Maeria) v Murithi (Suing as the Legal Representative of the Estate of Simon Mithika M'Thirura) (Civil Appeal 179 of 2019) [2024] KECA 1073 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 1073 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 179 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

FEBRUARY 2, 2024

BETWEEN

PATRICK KIRIMI MWENDA ..... APPELLANT

SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN MAERIA

AND

DIANA K MURITHI ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SIMON MITHIKA M'THIRURA

(Being an appeal from the judgment of the High Court of Kenya at Meru (Onginjo J.) dated 25th October, 2018 in Civil Appeal No. 121 of 2011.)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court at Meru (Onginjo, J.) dated 25th October, 2018, in Civil Appeal No. 121 of 2011.

2. The suit was originally instituted by the respondent before the Chief Magistrate's Court at Meru, vide amended plaint dated 24th February, 2010. The respondent's case was that Simon Mithika M'Thirura (the deceased), was employed by the appellant as a driver of motor vehicle registration number KAK 132D Toyota Hilux. The respondent averred that on 18th February, 2000, the deceased, while in the course of duty, was standing off the Meru-Nkubu road, near Kanyakine, when the appellant, his authorized driver or agent, negligently, recklessly or dangerously drove motor vehicle registration number KAK 974N, and caused it to hit the deceased, who was fatally injured. The respondent stated that the deceased was aged 40 years, and earned a salary of Kshs.30,000 per month as a professional driver. The respondent prayed that the estate of the deceased be paid general damages under the *Law*

Reform Act and the *Fatal Accidents Act*, special damages amounting to Kshs.35,190 and costs of the suit.

3. The appellant in rebuttal filed an amended defence dated 26th March, 2010. The appellant denied being the registered owner of motor vehicle KAK 974N. The appellant further denied that the deceased was his employee, as well as the particulars of negligence outlined by the respondent in its pleadings. He urged the court to dismiss the respondent's suit with costs.

4. The deceased's widow, Diana Karimi, gave evidence as PW1. It was her testimony that the deceased was 40 years old at the time of his death. She stated that the deceased worked for Farm Africa as a driver, and was earning a monthly salary of Kshs. 18,536.25. She produced the deceased's pay slips, as well as ownership documents of motor vehicle registration number KAK 974N. PW2, PC Abdulahi Hassan, told the court that on 18th February, 2000, motor vehicle KAK 974N, which was being driven by Gerald Kaimenyi, veered off the road and hit the deceased, who was fatally injured. Gerald Kaimenyi (DW1) admitted that the accident did occur, but stated that the deceased was to blame.

5. After hearing the parties, the trial court (Hon. Kiarie, SPM), in his judgment dated 30th September, 2011, found in favour of the respondent. The trial court, after taking account of the provisions of the *Law Reform Act* and the *Fatal Accidents Act*, awarded the respondent general damages amounting to Kshs.1,799,040. The trial court found that no special damages were proved and therefore awarded none.

6. The appellant challenged this decision of the trial court before the High Court at Meru, in Civil Appeal No. 121 of 2011. The appellant faulted the trial court for dismissing the evidence of the appellant's driver (DW1), and finding that the appellant was 100 % liable for the accident. The appellant was aggrieved that the trial court relied on extraneous matters in reaching its determination, and that the judgment was not supported by the evidence on record. The appellant was aggrieved that the trial court failed to observe that the deceased did not take any precautionary measures expected from a reasonable driver in the circumstances, to prevent the occurrence of the accident. The appellant faulted the trial court for failing to find that the respondent failed to tender evidence to prove the deceased's income at the time of death, and for adopting a multiplier of 15 years, as well as a dependency rate of 2/3, which was unreasonable and excessive.

7. The first appellate court (Onginjo, J.) in its judgment delivered on 25th October, 2018, upheld the trial court's decision in its entirety.

8. It is this decision of the learned Judge that provoked the instant appeal. The appellant proffered seven grounds of appeal in his appeal before this court. In summary, the appellant faulted the learned Judge for: failing to properly reappraise the evidence before the trial court on both quantum and liability; failing to find that the respondent did not tender evidence to prove the allegation that the deceased was in formal employment and was earning a monthly salary of Kshs.18,536.25 at the time of his death; failing to consider the evidence tendered by the defence, the appellant's submissions and authorities thereto, in arriving at her decision. The appellant urged us to allow the appeal as prayed, set aside the decision of the High Court in its entirety, and substitute it with an appropriate decision of this Court.

9. The appeal was canvassed by way of written submissions. Counsel for the appellant, M. Gitonga, submitted that the superior court merely restated the evidence of PW2, and failed to re-appraise the evidence of PW1, which did not establish negligence on the part of the appellant. He contended that PW2 did not avail any sketch plans of the accident scene, or any other material evidence, with respect to how the accident occurred and why the appellant was blamed for causing the accident. On quantum, counsel for the appellant submitted that PW1 did not avail any documentary evidence to show that the deceased was employed, and was earning the pleaded salary at the time of the accident, since the

pay slips produced reflected the year 1999, and not year 2000, when the accident occurred. He urged the Court to allow the appeal and set aside the judgment of the first appellate court, with respect to both liability and quantum.

10. In response, counsel for the respondent, Ms. Kiyuki, stated that it was not disputed that the deceased was hit by the appellant's motor vehicle. She explained that DW1 admitted that he did see a motor vehicle parked on the side of the road, and that the deceased was standing in front of the parked vehicle while beckoning DW1 to stop. Counsel for the respondent asserted that DW1 attributed the accident to the motor vehicle that he was driving on account of the fact that it was defective, and did not attribute any negligence on the part of the deceased. She reiterated that from the circumstances of the case, DW1 must have been over speeding, and was therefore not in a position to take necessary measures to avoid the accident.

11. With respect to quantum, counsel for the respondent submitted that PW1 adduced documentary evidence to establish that the deceased worked as a driver, earning a monthly salary of Kshs. 18,536.25 at the time of his death. Counsel was of the view that the multiplier of 2/3 adopted by the two courts below was proper, as the deceased took care of his wife, three children and his mother. She therefore urged us to dismiss the appellant's appeal for lack of merit.

12. This being a second appeal, our jurisdiction is limited to matters of law only. In Charles Kipkoech Leting v Express(K) Ltd & Another [2018] eKLR, this Court stated as follows with regards to the duty of the second appellate court;

> " ...on a second appeal, the court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

13. Having carefully considered the record of appeal in light of the grounds of appeal, rival submissions set out above and the applicable principles of law, the issues that fall for our determination can be summed up under two headings, namely, who was liable for causing the accident that led to the death of the deceased? And if the above issue is determined in favour of the respondent, what is the quantum as to damages payable to the estate of the deceased?

14. On liability, the appellant faulted the first appellate court for failing to re-appraise the evidence before the trial court, and for failing to consider the appellant's defence that was adduced in his defence. The appellant contended that the evidence on record did not establish to the required standard of proof that the appellant was liable for the accident.

15. The respondent tendered proof of ownership of the accident vehicle registration number KAK 794N through a copy of records and police abstract report, which established that the appellant owned the said vehicle. This evidence was not rebutted by the appellant. DW1, told the trial court that the appellant owned both the accident vehicle and the vehicle that was being driven by the deceased, registration number KAK 132D. DW1 further admitted that the accident did occur.

16. Contrary to the appellant's assertions, the first appellate court did re-appraise the evidence on record with respect to liability, as well as the evidence by the defence. The learned Judge, in her judgment, noted that:

> " ...He said that there were bumps at Ntharene which was 70 m to where driver to defendant confirms the deceased was in front of the stationery vehicle trying to stop him for help, but he hit the stationery vehicle from its rear left. That impact must have been the one which hit the deceased who was in front of the vehicle. DW1 said his vehicle went off the road, had

a tyre burst and overturned. He said the bend was like U. If this was the case, DW1 ought to have been overly careful..."

17. The evidence by PW2, in relation to the police abstract report, established that the stationery vehicle which was being driven by the deceased had been parked off the road, and that the vehicle which was being driven by DW1 was to blame for the accident. PW2 stated that the accident vehicle developed a tyre burst, swerved off the road and hit the deceased. From this, it can be inferred that the point of impact was not on the road, as the vehicle swerved off the road, before hitting the deceased.

18. The evidence by DW1 that the stationery vehicle was parked on the road is incredible in light of the evidence that was adduced by PW2. DW1 stated that he saw the stationery vehicle, and that the deceased was standing in front of the stationery vehicle beckoning him to stop. DW1 hit the stationery vehicle from the rear left side which led to the accident. We are in agreement with the finding made by the first appellate court that DW1 ought to have driven the vehicle with due care and attention, and taken reasonable steps to avoid hitting the stationery vehicle, which evidence shows was parked off the road. We are satisfied that the two courts below properly analyzed the evidence on record on negligence and arrived at the correct decision. We find no good reason to interfere with the concurrent findings on liability. The appeal against the finding on liability is therefore dismissed.

19. On quantum, this Court in the case of Catholic Diocese of Kisumu vs Tete [2004] eKLR observed as follows:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate."

20. The appellant faulted the superior court, rightfully so, for failing to re-evaluate the evidence on record with respect to the deceased's income and the multiplicand adopted by the said court. We note that the learned Judge did not make any comments on the award of damages assessed by the trial court, even though it formed part of the appellant's grounds of appeal before the superior court. The appellant contended in his grounds of appeal before this Court that the respondent did not tender any evidence to prove that the deceased was employed and earned a monthly salary of Kshs.18,536.25, at the time of death. The appellant submitted that the pay slips produced by PW1 reflected the year 1999, and not year 2000, when the accident occurred.

21. This Court has previously held that documentary evidence is not the only way to prove the profession or earnings of a person.

This Court in Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR observed as follows:

> "We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

22. In this case, PW1 produced the deceased's pay slips for the year 1999 which established that he was employed as a driver by Farm Africa earning a gross salary of Kshs.18,536.25. PW1 further stated that the deceased was still working for the same company and earning the same salary as at February, 2000, when the accident occurred. She further stated that the deceased worked for the appellant part time as a driver, which evidence was corroborated by DW1 who stated that the vehicle registration number KAK 132D, which was being driven by the deceased, was owned by the appellant. PW1 further produced receipts for the children's school fees as P.Exh 5-13. It is our holding that the evidence on record was sufficient to prove the damages claimed by the widow. The trial court was not misguided in applying the multiplicand of Kshs. 14,992, which was the deceased net monthly income, after statutory deductions.

23. In the circumstances, nothing has been placed before us to demonstrate that the trial court proceeded on wrong principles when assessing the damages payable, or that the award was inordinately high or inordinately low as to attract the sanction of this Court. Accordingly, we find no reason to disturb the same.

24. We find that the appellant's appeal, on both liability and quantum, is devoid of merit and is hereby dismissed in its entirety.

25. The appellant shall bear the costs of the appeal.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR