



Onyango v Otengo (Suing as Administrator and Legal Representative of the Estate of Alfred Keya Makhotsa - Deceased) & 2 others (Civil Appeal E051 of 2022) [2024] KEHC 1834 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E051 OF 2022
PJO OTIENO, J
FEBRUARY 26, 2024**

BETWEEN

PETER ONYANGO APPELLANT

AND

LOICE MUTSOTSO OTENGO (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF ALFRED KEYA MAKHOTSA - DECEASED) 1ST RESPONDENT

VIVIAN LOICE MAJANI 2ND RESPONDENT

VINCENT OSWEKHA MASAMBAYA 3RD RESPONDENT

(Being an appeal from the Judgment and decree issued by Hon. G. Ollimo (SRM) in Butere SPM's Civil Case No. 62 of 2019 delivered on 28th July, 2022)

JUDGMENT

1. The Judgment dated 28/7/2022 arose from the suit in which the 1st Respondent sued the Appellant and the 2nd Respondent for both general and special damages on account of loss and damage suffered by the 1st Respondent as a consequence of the death of the deceased.
2. It was pleaded that on the date pleaded, the deceased was lawfully travelling in the motor vehicle KBZ 212H, Toyota RAV 4, registered in the name of the 2nd Respondent but beneficially owned by the Appellant when the said vehicle was negligently driven that it was caused to lose control, veer off the road and overturn, landing on the deceased and thereby visiting upon the deceased fatal injuries to which he succumbed. The 1st Respondent, pleaded and set out both particulars of negligence, dependants and special damages and blamed the Appellant and the 2nd Respondent for the cause of the accident and therefore the loss.



3. The claim was resisted by the Appellant and 2nd Respondent by a joint amended statement of defence whose gist was to deny the connection assigned to the two with the motor vehicle, the occurrence of the accident and involvement of the deceased, as well as the particulars of negligence pleaded. There was then an alternative pleading that if any accident ever occurred as pleaded, then the same was occasioned by several negligence by the deceased a third party who was then driving the motor vehicle. Particulars of negligence by both were set out.
4. In particular, the Appellant and 2nd Respondent denied the fact that any loss had been suffered by the 1st Respondent together with the allegations that the deceased was aged forty (40) years nor that he was a farmer earning a monthly income of Kshs. 15,000/=. The 1st Respondent was then put to strict proof.
5. As notified in the statement of defence, a third party Notice was issued and the driver, the 3rd Respondent, was joined as such.
6. When the hearing commenced the 1st Respondent, as Plaintiff called three witnesses including herself, a police officer who came to produce the sketch plan for the scene and an alleged eye witness as PW3. The defence on its side led evidence from the Appellant while the third party, 3rd Respondent also gave own evidence on the causation of the accident.
7. The summary of the evidence on the side of the first Respondent was that the deceased was on the material day aboard the suit motor vehicle when it veered of the road and rolled thus occasioning to the deceased the fatal injuries. The only witness that said to have witnessed the incident was PW3. His statement stated that he had been with both deceased and the 3rd Respondent. He saw them leave the pub with 3rd Respondent visibly drunk and the vehicle was driven at a very high speed. That when the motor vehicle rolled, it threw out the deceased, then landed upon him and killed him instantly. That evidence was never shaken by the cross-examination.
8. The only evidence to meet the evidence on how the accident occurred was led by the 3rd Respondent, as third party then. He filed a statement of defence even without direction by the Court pursuant to Order 1 Rule 22. In his defence and contrary to his alternative pleadings alleging negligence against the deceased and the Appellant, the 3rd Respondent denied possession and control of the motor vehicle together with knowledge of the accident even the deceased and the Appellant. However, upon cross-examination he conceded that the deceased was village mate who died in a road traffic accident. He however denied being the driver or being at scene of the accident.
9. That state of evidence on how the accident occurred left the only credible account to be the evidence as led by PW3. Left to stand as it is, there was nothing to assign any negligence upon the deceased, yet the 3rd Respondent was evidently evasive when his evidence is juxtaposed against that by the Appellant and PW3. There was sufficient and credible evidence that the 3rd Respondent was seen drunk and drive away with the deceased before the vehicle rolled and killed the deceased.
10. Having re-appraised the entire record, the Court finds that causation and thus negligence and liability for the accident and loss was squarely upon the 3rd Respondent. The Court makes additional finding that the 3rd Respondent was in possession and control of the motor vehicle with the consent and authority of the Appellant.
11. On whether there was authority to invite and ferry a passenger as he did with he deceased, the only evidence on record is that by the Appellant that his authority to drive the motor vehicle was limited to the 3rd Respondent's personal use. With such evidence, vicarious liability upon the Appellant needed to be established by such evidence that the 3rd Respondent was acting as a servant of the Appellant or



- was using the vehicle for the benefit or for something in which the Appellant had an interest¹. For the principle to apply there must be established, not ownership but delegation of the task or duty².
12. Put in the context of the facts of the case, the evidence was that the Appellant lent the motor vehicle to the 3rd Respondent not to carry for him any task or as an agent or servant, but for purposes of enabling the 3rd Respondent attend a funeral at Webuye. There was no evidence that the Appellant knew the deceased whose funeral the 3rd Respondent was attending nor was there demonstration that there was a benefit to be derived by the Appellant. It becomes axiomatic that the 3rd Respondent was on own florid, devoid of any agency or benefit to flow to the Appellant and thus the principle of vicarious liability did not arise.
 13. From the foregoing reason, the Court finds that even though the 3rd Respondent had the possession and control of the said motor vehicle with the authority of the Appellant, he was not, in driving, the vehicle doing so as an agent or servant of the Appellant. In addition, when he let in the deceased as a passenger he had no authority of the Appellant to do so. He exceeded his authority to use the motor vehicle to transport himself to the funeral.
 14. The ultimate conclusion and finding is that the trial Court misapprehended the principle of vicarious liability and reached an erroneous conclusion in holding that the 3rd Respondent was not using the motor vehicle for his own benefit but an agent of the Appellant
 15. It was equally erroneous, anomalous and contradictory that having found that the 3rd Respondent was in possession and control of the motor vehicle with the consent of the appellant to turn around and hold that the 3rd Respondent was not a necessary party to be joined by way of a third party notice for purposes of indemnity and contribution.
 16. To this Court, for one to be found to have been liable in negligence so that the owner of the motor vehicle is held vicariously liable, such a driver needed to be afforded an opportunity to be heard. Having been heard by giving evidence, as the 3rd Respondent did, he became a necessary party even as a third party and it was erroneous to dismiss the 3rd party notice for the reasons the trial Court did otherwise that under Order 1 Rule 22 *Civil Procedure rules*.
 17. The totality of the foregoing is that the accident leading to the death was occasioned by the negligence of the 3rd Respondent who was on his own mission, although with the permission of the Appellant to use the motor vehicle. Being on his own mission his negligence cannot attach on the Appellant vicariously.
 18. The Court thus set aside the finding by the trial Court holding the Appellant vicariously liable at 100% and substitute therefore a finding that it was the 3rd Respondent who was to wholly blame for the accident.
 19. On quantum of damages, the Court finds that there was no evidence at all that the deceased was engaged gainfully as a farmer and what he earned for such engagement. Where there is no ascertainable multiplicand, it is undesirable to use the multiplier formula. It is more appropriate to adopt a global award³. In the circumstances of this case, and being a first appellate court, I do set aside the award of Kshs. 3,518,124 computed on the basis of a multiplier of thirty (30) years and multiplicand of

¹ Bachu -vs- Wainaina & another [1977-1985] EA 29

² Amvanzwa & 2 others -vs- Lugii De Caspa & another [1987] KLR 10

³ Hussein Ahmed Hanshi & another -vs- Peter Gichuru Njoroge [2016] eKLR



14,658.85 with a dependency ratio of $\frac{2}{3}$, and substitute therefor a global award of Kshs. 2,000,000 for loss of dependency.

20. In coming to this conclusion, I have appreciated the evidence led by the 1st Respondent that the deceased was aged 40 years at the time of death. Going by the known retirement age and the usual vicissitudes of life, it was erroneous for the trial Court to adopt a multiplier of 30 years. Even if I was to use the multiplier formula, I would reduce the multiplier to 20 years and arrive at an award of just above 2,000,000/=. The Court has however chosen the path of a global award.
21. The Judgment of the trial Court on quantum is therefore upset to the extent that the sum awarded for loss of dependency is reduced from Kshs. 3,518,124 to Kshs. 2,000,000 the sum awarded for pain and suffering, loss of expectation of life and special damages.
22. The final award thus computes: -
$$2,000,000 + 200,000 + 50,000 + 73,550 = 2,323,550$$

Of which sum, general damages shall attract interest at the Court rates of 14% p.a. from the date of Judgment by the trial Court while the sum of special damages shall attract interest from the date of the suit.
23. Having succeeded, the Appellant shall get the costs of the appeal while costs at trial shall go to the 1st Respondent.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 26TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Murgor for the Appellant

No appearance for Ms. Shimoli for the 3rd Respondent

No appearance for Wandala for the 1st Respondent

Court Assistant: Polycap Mukabwa

