Mbukinya Success Limited v Ndonji & another (Suing as the legal representatives of the Estate of Melvin Otieno Ndonji - Deceased) & another (Civil Appeal E018 of 2023) [2024] KEHC 3540 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E018 OF 2023

RE ABURILI, J

MARCH 22, 2024

BETWEEN

MBUKINYA SUCCESS LIMITED .... APPELLANT

AND

CELINE AKINYI NDONJI & EUNICE ATIENO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MELVIN OTIENO NDONJI - DECEASED) .... 1ST RESPONDENT

CHARLES MAVUTSE GANIRA .... 2ND RESPONDENT

(An appeal arising out of the Judgement & Decree of the Honourable S.N. Telewa in the Chief Magistrates Court at Kisumu delivered on the 26th January 2022 in Kisumu CMCC No. 463 of 2016)

JUDGMENT

Introduction

1. The 1st Respondent (s) are two but are described as one because they are joint administrators/ legal representatives of the estate of the deceased victim. They are Celine Akinyi Ndonji & Eunice Atieno (Suing as the Legal Representatives of the Estate of Melvin Otieno Ndonji-deceased). They sued the second respondent herein Charles Mavutse Ganira praying for general and special damages following a fatal road traffic accident that led to the deceased's passing on the 20.12.2015 along the Kisumu – Busia road at Lela area.

2. The 2nd respondent as described herein was the defendant in the lower court. It was the 1st respondent's case that on the 20.12.2015, the deceased Melvin Otieno Ndonji was a lawful passenger on board motor vehicle registration No. KAZ 209Q and that at Lela area, the driver of the 2nd respondent's motor

vehicle drove it so negligently thus causing it to collide with motor vehicle registration No. KBX 947R belonging to the appellant herein as a consequence of which the deceased suffered fatal injuries.

3. The appellant herein Mbukinya Success Limited was enjoined to the suit in the lower court by the 2nd respondent, by way of a Third Party Notice, who were the beneficial owners of motor vehicle registration No. KBX 947R at the time of the material accident.

4. The trial court in its judgement apportioned liability in the ratio of 70:30 between the appellant and the 2nd respondent before proceeding to award the 1st respondent damages as follows:

   Award under the *Law Reform Act* –30,000 x 12 x 20 x 1/3 = Kshs. 2,400,000

   Pain & Suffering – Kshs. 20,000

   Loss of expectation of life – Kshs. 75,000

   Special Damages – Kshs. 339,600

   Total - Kshs. 2,834,600

5. Aggrieved by the said judgment and decree on both liability and quantum, the appellant filed a memorandum of appeal dated 22nd August 2023 raising the following grounds of appeal:

   a. That the learned trial magistrate erred in fact and in law by apportioning 70% liability to the appellant (Third Party) which award was not supported by evidence of the witnesses and which evidence entirely blamed the defendant (2nd respondent) for causing the accident.

   b. That the learned trial magistrate's exercise of discretion in apportionment of liability was injudicious.

   c. That the learned trial magistrate erred in fact and in law in failing to dismiss the suit against the appellant.

   d. That the learned trial magistrate erred in law and in fact in arriving at an award of loss of dependency of Kshs. 2,400,000 by using a multiplicand approach yet the deceased was on probation and had not been confirmed and further that there was no proof of earning.

   e. That the learned magistrate erred in law and in fact in awarding special damages of Kshs. 339,600 which amount was not specifically proved.

   f. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case she was deciding.

   g. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on liability by completely disregarding the submissions and authorities of the appellant and as a result arrived at an unjustified decision on quantum.

6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. On behalf of the appellant, it was submitted that there was no eye-witness called by the 1st respondent but that all evidence adduced before court confirmed that the 2nd respondent was negligent and further that the 2nd respondent himself admitted to have hit the appellant's motor vehicle from the rear and thus the trial magistrate erred in apportioning liability to the appellant whereas the 2nd respondent was 100% liable for the same.

8. On loss of dependency, it was submitted that the evidence adduced was that the deceased was on probationary contract service and it was not confirmed whether he was going to be confirmed for the job and further that the pay slip produced did not show the statutory deductions and thus it should not have been considered by the trial court. The appellant's counsel submitted that therefore earnings were not proved and thus the court should have used the global sum approach rather than the multiplier approach as was held in the case of Kwanzia v Ngalali Mutua & Another.

9. The appellant proposed that a lump sum award of Kshs. 750,000 be awarded to the 1st respondent. Reliance was placed on th case of Dora Mwawandu Samuel (Suing on her behalf and on behalf of the Estate of Samuel Muweliani Jumamosi – Deceased) v Shabir M Hassan [2021] eKLR.

10. On the special damages awarded, it was submitted that the appellant only produced receipts for Kshs. 35,000 which was awardable and that the invoices from JOOTRH were not proof of payment.

The 1st Respondent's Submissions

11. It was submitted on behalf of the 1st respondent that the finding of the court on liability was based on the evidence presented by both parties which the court duly considered. It was submitted that it was undeniable that the accident occurred after the appellant's motor vehicle had overtaken the 2nd respondent's vehicle when it was flagged by the police and abruptly stopped and that despite the attempts by the driver of the 2nd respondent to swerve, the distance was too short as the stop was sudden.

12. On quantum, it was submitted that the deceased was employed as a nurse at Masaba Hospital and earning Kshs. 30,000 and a pay slip produced in that regard; that he was 24 years at the time of his death and could have worked for another 36 years but the trial court used a multiplier of 20 years which they submitted was inordinately low and proposed a multiplier of 30 years working out the award under this head as follows; 30,000 x 12 x 30 x 1/3 = 3,600,000

13. On special damages, it was submitted that this was specifically pleaded and proven by way of receipts.

Analysis and Determination

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and reach its own independent conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

15. In that regard, an appellate court will only interfere with the findings of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

16. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, I find the issues for its determination are:

    a. Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

    b. Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.

17. The above issues are discussed below.

Liability

18. On liability, in Khambi and Another v Mahithi and Another [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

19. That was the position in Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

20. The law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden, we sometimes talk of onus.

21. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

> "1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
>
> 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

22. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

23. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

24. The question therefore is whether the 1st respondent herein discharged the burden of proof that both the appellant and 2nd respondent were liable in negligence for the occurrence of the accident leading to the injuries that he sustained and therefore whether the trial court was in error in apportioning liability at 70:30 against the appellant Third Party and the 2nd respondent respectively.

25. The 1st respondent did not witness the accident. She was only called and informed of the occurrence of the accident. She testified and produced documents as filed in court including police abstract, receipts and stated that the driver of the accident motor vehicle (witness was not clear as to which motor vehicle she was referring to) was charged in court with the offence of causing death by dangerous driving. The deceased was her first born child and was helping her pay fees for her other son. Some documents such as pay slip for the deceased were produced by consent.

26. The 2nd respondent on his part testified as DW1 that on the particular date he was driving motor vehicle registration number KAZ 209Q. They were headed to the hospital on duty from Maseno in the company of his colleague nurse Melvin the deceased when the appellant's vehicle overtook them and then took an emergency stop without warning forcing him to collide with the said vehicle.

27. In cross-examination, the 2nd respondent stated that he tried to swerve and stop to avoid hitting the appellant's vehicle but the distance was too little. It was his testimony that no traffic charges were preferred against him.

28. The appellant third party called one PC John Kiponya who testified and produced the police investigations file in respect of the accident as DWEX1. It was his testimony that the 2nd respondent was charged with causing the accident and that he was sentenced via traffic number 74/14 and fined Kshs. 10,000. In cross-examination, PC Kiponya admitted that there was no sketch plan of the accident. He further testified that both the deceased and the 2nd respondent were drunk although he could not indicate where in the police file this was stated. He further stated that the deceased was the only occupant of the saloon car and that he did not have the cash bail receipt.

29. The parties gave varied accounts as to how the accident occurred. How should the court resolve such tension between the account rendered by the Appellant and 2nd Respondent on liability?

30. The established judicial method, which rests on the singular dependability of the fact-base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

31. As the issue of liability rested on the testimony of both the appellant through production of the police investigations file and that of the 2nd respondent, both parties bore the onus of proving their respective cases. In my view, the testimony of the 2nd respondent was coherent and consistent despite rigorous cross-examination by counsel for the appellant and the 1st respondent. However, the evidence adduced on behalf of the appellant in my view was suspicious. There are very glaring contradictions therein; PC Kiponya testified that the 2nd respondent was charged with dangerous driving and causing the accident and that both the deceased and 2nd respondent were drunk when the accident occurred, a fact that is not supported by any evidence in the police file. There was no medical evidence to show that the 2nd

respondent was tested and found to have taken alcohol. Further, the said PC Kiponya stated that the deceased was the one driving the saloon car, a fact that is not consistent with all the evidence presented before the court, including the statements contained in the police investigations file.

32. I am thus inclined to agree with the version of incident detailed by the 2nd respondent that the accident occurred following the appellant's sudden stopping after overtaking the 2nd respondent's vehicle and that despite efforts to stop, the 2nd respondent failed to do so because the distance between them was too little. It is worth noting that the accident occurred after the police at Lela flagged down the bus to stop and for the 2nd respondent coming from behind to hit the bus which was ahead, the bus must have stopped on the road and not off the road. If that were not to be the case, nothing stopped the same police officers from drawing a sketch plan of the accident scene and even any one of them coming to testify on exactly what they witnessed.

33. I must mention here that it is not uncommon for the traffic police officers to mount roadblocks anywhere on the roads and stop motorists even when it is unsafe to do so and I am satisfied that this was the situation in this case.

34. It is well settled principle that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong.

35. In the circumstances of this case, I am inclined to agree with the trial court's apportionment of liability as between the appellant and the 2nd respondent. This is because t, the appellant's driver having been flagged down by the police on the road, he should have moved off the road to give way for the vehicles following him now that it was not in dispute that he had just overtaken the 2nd respondent not far off before he was stopped by the police. I find that the appellant contributed more to the accident and therefore the trial Magistrate did not err in finding that the appellant was to blame 70%

36. I therefore find no merit in the appeal against liability. I dismiss it and uphold the holding by the trial Magistrate.

Quantum

37. Assessment of damages is a matter in the discretion of the lower court and an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal held that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)

38. It was argued by the appellant that since the 1st respondent failed to prove the amount earned by the deceased then this was a case that was ripe for the use of the global sum approach and not the multiplier approach as used by the trial court.

39. The 1st respondent on their part submitted that they produced a pay slip that showed that the deceased was a nurse earning Kshs. 30,000 per month.

40. I have perused the aforementioned pay slip from Masaba Hospital and I find no reason to doubt the same. The same is duly stamped with the stamp of the Hospital and further its noteworthy that the same was not challenged when it was produced by the 1st respondent and the fact that the statutory deductions were not indicated does not invalidate it. I thus find no reason to doubt the same or fault the trial court for using the said pay slip to find that the deceased was earning Kshs 30,000 at the time of his death.

41. On whether the trial court should have applied the global award mode in calculating damages for loss of dependency, the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the court, but of course, as dictated by the circumstances of the case. See the cases of Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR and Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR.

42. It is established through judicial precedent that a global award approach can only be applied where the deceased's earnings were unknown. Where, like in this case, the deceased was employed as a trained nurse and earning Kshs 30,000 salary as was pleaded and proved, albeit he was on probation, being a professional, I find that the trial court did not err in using the multiplier method since the multiplicand was known and proved.

43. In Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)), [2016] eKLR it was stated as follows and I agree that:

> "It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

44. Although the 1st respondent urged this court to enhance the calculations by a higher multiplier, I find that in the absence of a cross appeal, this court is devoid of any discretion or power to do so. Having said that, I find that the multiplier used by the trial court which is 20 years does not warrant interference.

45. Accordingly, the appeal challenging the award for loss of dependency fails and I proceed to dismiss it and uphold the trial court's award on loss of dependency. All the other awards for general damages remain intact as they were never challenged on appeal.

46. On special damages, the appellant submitted that only receipts for Kshs. 35,000 were provided and only that was awardable and further that invoices from JOOTRH were not proof of payment. I have examined the receipts provided and note that they add up to Kshs. 338,300. These include medical and funeral expenses which were pleaded, proved by way of receipts which are clearly on record and were never controverted.

47. Accordingly, I find this appeal is partially successful to the extent that the award on special damages awarded to the 1st respondent being Kshs 339,600 is hereby set aside and substituted with an award of Kshs. 338,300. I must however mention that the trial court did not rely on the invoices from JOOTRH.

48. I order that each party do bear costs of this appeal.

49. This file is closed and the lower court file be returned.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF MARCH, 2024

R.E. ABURILI

JUDGE