



Interpel Investments Limited v Mokaya (Suing as the Legal Representative of the Estate of the Late Reagan Onyancha) (Civil Appeal E027 of 2023) [2024] KEHC 4057 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E027 OF 2023
RN NYAKUNDI, J
APRIL 25, 2024**

BETWEEN

INTERPEL INVESTMENTS LIMITED APPELLANT

AND

JARED MOGENI MOKAYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE REAGAN ONYANCHA) RESPONDENT

JUDGMENT

Representation:

Yunis Ali & Company Advocates

Nyachiro Nyagaka & Co. Advocates

1. The appeal is both on quantum and liability. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 19/12/2019, wherein it is alleged that the Respondent was a lawful passenger aboard motor vehicle registration number KDH 2005011486 along Eldoret-Nakuru road at Kondoo area when the said motor vehicle owned by the defendant was being driven at a high speed, so negligently, recklessly and/ or without any due care, regard and/ or attention by the defendant's servant, agent and or authorized driver that it lost control veered off the road and rolled hence occasioning the claimant fatal injuries.
2. The appellant filed a response to the statement of claim dated 26th September, 2022 and denied the occurrence of the accident. He instead blamed the respondent for the occurrence of the accident and stated that the same was contributed to by the negligent acts and omissions on the part of the respondent.



3. After trial Judgment was delivered on 27/1/2023 and the Appellant was found 100% liable and damages assessed as hereunder: -
- a. General Damages for pain & suffering Kshs. 20,000/=
 - b. Loss of Expectation of life Kshs. 200,000/=
 - c. Dependency – Global figure Kshs. 300,000/=
 - d. Special Damages Kshs. 100,000/=
 - e. TotalKshs. 620,000/=
 - f. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (12) grounds: -
- a. That the learned trial magistrate improperly exercised her discretion and/or duty by taking into account matters which she ought not to have taken into account and failing to take into account matters which she should have taken into account.
 - b. That the learned trial magistrate erred in law and fact rendering a decision which was against *the constitution* of Kenya, the *law of succession Act*, the *Fatal Accidents Act*, the *Law Reform Act*, The *civil procedure Act*, The *Evidence Act* and the Applicable Common Law.
 - c. That the learned trial magistrate erred in law and fact in apportioning liability at 100% against the appellant.
 - d. That the learned magistrate erred in failing to appreciate and find that at all times the burden of proof rested upon the Respondent.
 - e. That the learned magistrate erred in failing to consider and adopt the only available evidence tendered on the circumstances of the accident in question on his determination of liability.
 - f. That the learned magistrate erred in reaching a conclusion of liability which was directly in contrast from and against the weight of the evidence tendered at the trial adopting a selective and biased approach to the evidence tendered in this case.
 - g. That the learned magistrate erred in fact and in law by failing to consider the appellant’s pleadings.
 - h. That the learned magistrate erred in shifting the burden of proof and imposing upon the appellant standard of proof which is higher than that relevant and applicable for cases of this nature.
 - i. That the learned trial magistrate erred in failing to list and determine all issues arising from the pleadings and evidence tendered before her.
 - j. That the learned magistrate erred in making awards of damages which were inordinately excessive on the circumstances of this case and contrary to the principles applicable to and trend of awards of this nature.
 - k. That the learned magistrate erred in making awards of damages which are not supported by the applicable law and facts.



1. That the learned magistrate erred in failing to take into consideration and applying the principles of facts and law relevant and applicable in assessment of damages.
5. The appeal was canvassed through written submissions. The Appellant on 22/01/2024 filed submissions dated 17/01/2024 whereas the Respondent filed none at the time of drafting this judgment.

The Appellant's Submissions

6. On liability, learned counsel for the appellant started by submitting that it was not the registered and/insured owner of the subject motor vehicle registration number KDH 2005011486 as at the time of the occurrence of the alleged accident on 19.12.2019. He cited section 8 of the *Traffic Act* on this. It was his argument that a perusal of page 28-36 of the record of appeal reveals that the subject motor vehicle was owned by Sadat Zahid Investment Ltd and not the appellant.
7. It was submitted for the appellant that the Respondent failed to discharge his burden of proof as regards ownership of the subject motor vehicle registration KDH 2005011486. That the Respondent failed to produce in the least a motor vehicle copy of records or logbook to prove ownership and/or link the appellant to the ownership of the subject motor vehicle. Further, he stated that the respondent failed to produce a copy of the certificate of insurance to prove that the appellant was the insuree of the subject motor vehicle.
8. The respondent maintained the position that whereas the respondent relies on the police abstract produced, it should be noted that the police abstract was challenged and all import documents revealed that the subject suit motor vehicle did not belong to the Appellant. On this he cited the court's decision in Benard Muia Kilovoo v Kenya Fresh Produce Exporters (2020) eKLR.
9. That there exists documentation to prove ownership of the subject motor vehicle registration number KDH 2005011486 which unequivocally reveal that the appellant is not the owner of the subject motor vehicle registration number KDH 2005011486 but indeed the said motor vehicle belonged to a party who was not a party to the suit.
10. In sum, the appellant submitted that the police abstract cannot be used as conclusive evidence to forcefully and conclusively link the Appellant to the ownership of the subject motor vehicle yet documentary evidence as produced by the appellant has not been challenged. Counsel invited the court to look at the decision in Joseph Wabukho Mbayi v Frida Lwile Onyango (2019), wherein the issue of vicarious liability was discussed.
11. As regards to whether the respondent proved their case on a balance of convenience, counsel submitted in the negative. He stated that the respondent failed to call any witness whatsoever to testify before court to prove their case. The Respondent failed to call the investigating officer or the doctor who allegedly prepared the medical report which the Honourable Magistrate relied on to compute general damages in favour of the respondent.
12. It was submitted for the appellant that the respondent failed to call the investigating officer to produce the abstract dated 26th August, 2020 which abstract the Honourable Court relied on to apportion liability against the Appellant. Counsel cited section 35(b) of the *Evidence Act* and the decision in Valji Jetha Kerai & another v Julius Ombasa Manono & another (2019) eKLR, in which with approval the court cited the court of appeal's decision in Mohammed Musa & another vs peter M Mailanyi & another Civil Appeal No. 243 of 1998.



13. In light of the above, it was stated that the respondent failed to call the doctor that prepared the medical report that he sought to rely on and the appellant did not get an opportunity to challenge the said medical report. That the court therefore erred in relying on the said medical report to determine general damages.
14. On quantum, he argued that if the court exercises its discretion otherwise, the award on loss of expectation of life should be reviewed downwards to Kshs. 100,000/=. On this he cited the decision in Abubakar Abdalla Salim versus Tawfiq Bus service Ltd 2. Tss Bus Service (2013) Eklr, where the court awarded Kshs. 100,000/= under this head for a minor aged 9 years old. He did not submit on the other heads.

Analysis & Determination

15. Being a first appeal, the Court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:
 - a. “...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
16. As stated above the two limbs to this appeal are quantum and liability. The gravamen of this appeal is the question of ownership. I shall proceed to address the same and make a determination.
17. A good starting point would be Section 8 of the *Traffic Act* (Cap 403 of the Laws of Kenya) which provides that:

“The person in whose name a vehicle registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
18. The appellant at the lower court produced a gate pass, receipts, bill of lading and a proforma invoice to establish that the motor vehicle belonged to a third party, Sadat Zahid Investment and not the appellant herein. According to him, the respondent failed to produce a copy of the certificate of insurance to prove that the appellant was the insured of the said motor vehicle. On the part of the Respondent, a police abstract was relied on as conclusive evidence of ownership.
19. With respect to the evidentiary value of a police abstract as proof of ownership, in the case of *Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another*, (2010) eKLR the Court of Appeal held as follows: -

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”



20. Additionally, in the case of Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003 the Court of Appeal expressed itself as follows:

“The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent.”

21. And Warsame J. (as he then was) in the case of Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001 held as follows:

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the *Evidence Act*. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

22. On perusing the court record, I have confirmed that indeed the police abstract was produced and its contents were challenged by the appellant. In doing so, the appellant produced a gate pass, receipts, bill of lading and a proforma invoice as part of documentation in support of his argument. That being the case and from the foregoing authorities cited, it was incumbent upon the respondent to go a mile further and place before the court a certificate of search evidencing the ownership of the subject motor vehicle.

23. The Court of Appeal in the case of; Joel Muga Opinja -vs- East African Sea food limited (2013) eKLR quoted in the case of; Ignatius Makau Mutisya -vs Reuben Musyoki Muli stated that:

“We agree that the best way to proof ownership would be to produce to the court a document from the registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot be denied later.”

24. In the end I find that the appellant proved his case on a balance of probabilities before the trial magistrate and I therefore set aside the judgment of the trial magistrate.

Quantum

25. The issue for determination here is whether the award of general damages of Kshs.200,000/= in light of loss of expectation of life should be reviewed. The other limbs were not challenged and as such this court shall address itself on the issue of loss of expectation of life. In Kenya Red Cross v IDS (Suing as



the Legal Representative of the Estate of MDR(Deceased)) [2020] eKLR the court did indeed award Kshs 100,000 stating that the amount was conventional. In Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased) [2020] eKLR the court equally awarded Kshs. 100,000/= on this head. Finally, in Mwangangi & another v FKM (Suing as Legal Representative of the Estate of the Late AMK) (Civil Appeal E11 of 2021) the court awarded Kshs. 100,000/= for this limb for a child who was aged 12 years old.

26. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.
27. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] Kneller. J.A, stated:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango V. Manyoka* [1961] E.A. 705, 709, 713; *Lukenya Ranching And Farming Co-operatives Society Ltd V. Kavoloto* [1970] E.A., 414, 418, 419. This Court follows the same principles.”
28. The question is whether this court should interfere with the damages awarded by the trial Court, particularly on Loss of expectation of life. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
29. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
30. Considering the cited authorities and the trends on this limb, I am inclined to slightly interfere with the award on Loss of expectation of life and substitute it with Kshs. 100,000/=. On the other limbs, I find that the trial court was properly guided by the authorities cited before her and arrived at a reasonable assessment of general damages.
31. In the end the court does not find liability on the part of the appellant for reasons that he is not the owner of the subject motor vehicle. The award on damages remains undisturbed and is entered in the following terms;
 - a. General Damages for pain & suffering Kshs. 20,000/=
 - b. Loss of Expectation of life Kshs. 100,000/=
 - c. Dependency – Global figure Kshs. 300,000/=
 - d. Special Damages Kshs. 100,000/=
 - e. TotalKshs. 520,000/=Plus, costs and interests

It is ordered so.



SIGNED, DATE AND DELIVERED AT ELDORET THIS 25TH DAY OF APRIL 2024.

In the Presence of:

.....

R. NYAKUNDI

JUDGE

