



Kensilver Express Limited & another v JNG (Suing as Legal Representative for SKN (Deceased) (Civil Appeal E019 of 2021) [2024] KEHC 5517 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E019 OF 2021
TW CHERERE, J
APRIL 25, 2024**

BETWEEN

KENSILVER EXPRESS LIMITED 1ST APPELLANT

DOUGLAS NTAMBURA 2ND APPELLANT

AND

**JNG (SUING AS LEGAL REPRESENTATIVE FOR SKN
(DECEASED) RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Maua CMCC
187 of 2013 by Hon. C.K. Obara (SPM) on 25th January, 2021)*

JUDGMENT

1. On 06th November, 2010, Respondent's 3-year-old son SKN suffered fatal injuries while travelling as a fare paying passenger in 1st Appellant's motor vehicle KAW 097K which was being driven by 2nd Appellant.
2. After the hearing, the trial court by a judgment dated 25th January, 2021 found Appellants liable at 100% and awarded the Respondent damages in the sum of Kes. 1,500,000/-.

The Appeal

3. The Appellant being dissatisfied with the lower court's decision preferred this appeal and set out 19 grounds which were summarized into four as follows:
 - (1) Whether Respondent's suit had abated
 - (2) Respondent was a passenger in the accident motor vehicle
 - (3) Whether the defence was considered



- (4) Whether the general damages were excessive

Analysis and Determination

4. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v. Sunday Post Limited* (1958) EA at Pg. 424).
5. I have considered the appeal in the light of the grounds of appeal and submission filed by both parties. In determining this appeal, I shall consider the 4 grounds of appeal as follows;

Whether there was a proper suit before the court and whether Respondent's suit had abated

6. These two issues were not pleaded and did not form part of the issues for determination before the trial court. In *IEBC & Another v Stephen Mutinda Mule & 3 Others* CA 219/2013 (2014) eKLR, Majanja J in a persuasive decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladej Ltd vs Nigeria Breweries PLC* 91 of 2002 where Pius Adereji, JSC expressed himself as follows: -

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded.... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

7. From the foregoing, I find that the Appellants' attempt to raise new matters on appeal is mischievous and this ground is rejected.

Whether Respondent was a Passenger in the Accident Motor Vehicle

8. Appellants do not deny that an accident occurred on the material date and that several passengers were injured but deny that deceased was one of the said passengers.
9. A reading of the trial court's judgment reveals that judgment on liability was agreed in a test suit Maua CMCC 182 of 2013 which is binding on the Appellants in this case. Appellants cannot therefore be heard to say that the deceased was not a passenger in the accident motor vehicle.

Whether the Defence was Considered

10. Appellants did not tender any evidence. That averments in pleadings are not evidence was appreciated in *Francis Otile vs. Uganda Motors Kampala* HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in *Mohammed & Another vs. Haidara* [1972] E.A 166 where that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter* Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by



the defence is not evidence. In *CMC Aviation Ltd. vs. Cruisair Ltd.* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

11. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Babra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

12. Again, in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others* [2009] eKLR Lesiit, J (as she then was) citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
13. From the foregoing, I find that there was no defence that the court could have considered and this ground too must fail.

Whether the General Damages were Excessive

14. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor.*, No. 2 [1987] KLR 30).
15. The principles on which a court can interfere with an award for damages was stated by Madan JA in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898 and restated by Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor.*, No. 2 [1987] KLR 30 that:

“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.”

16. Concerning pain and suffering, I notice that Respondent asked for Kes. 200,000/- and cited *Samuel Njenga Ngunjiri v Changwon Cheboi & Another* [2013] eKLR where Kes. 100,000/- was awarded under this heading. Appellant did not submit on this issue.
17. The learned trial magistrate considered that the deceased died immediately after the accident and awarded Kes. 50,000/- which in my considered view is a reasonable sum.
18. Concerning loss of expectation of life, Respondent asked for Kes. 200,000/- and cited *Samuel Njenga Ngunjiri v Changwon Cheboi & Another* (*supra*) where the court awarded Kes. 100,000/-. Appellant did not submit on this issue.
19. The learned trial magistrate considered *Hyder Ntbenya Musili & another v China Wu Yi Limited & another* [2017] eKLR where Kes. 100,000/- was awarded for a 7-year-old and awarded a similar sum which in my considered view was well grounded.
20. The general approach is that comparable damages should, as far as possible, be compensated by comparable awards. The only authority cited before the trial court was for Kes. 200,000/-. Deceased died at the age of 23 years and there being no explanation for the trial magistrate’s departure from the cited authority, I find that Appellant was entitled to Kes. 200,000/- sought under this heading.
21. In determining loss of dependency, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.
22. Deceased was a 3-year-old child. Respondents asked for a global sum of Kes. 2,000,000/- and Appellant made no submission on this issue.
23. Under this heading, the learned trial magistrate considered the holding in *Mini Bakery & Anor v Zamzam Josephine Akinyi Aindo* [2019] eKLR and *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD))* [2016] where a global sum of Kes. 1,000,000/- was awarded for a 5-year-old and 9-year-old respectively.
24. In *Kenya Breweries Limited v Saro* [1991] Mombasa Civil Appeal No. 441 of 1990 (eKLR), the Court of Appeal stated that damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution.
25. The award of Kes. 1,350,000/- for the death of the 3 year old child was in my view well founded and I have no reason to interfere with it.
26. Consequently, this appeal is considered and found to have no merit and it is dismissed with costs to the Respondent.

DELIVERED AT MERU THIS 25th DAY OF April 2024

T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Applicants - Mr. Chebii for M.K.Chebii & Co. Advocates



For Respondent - Mr. Njindo for Michael Ngunjiri & Kimathi & Co. Advocates

