Kariuki v Sanga & another (Suing as the legal representatives and administrators of the Estate of Collins Kipkosgei - Deceased) (Civil Appeal E011 of 2021) [2024] KEHC 5824 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E011 OF 2021

JRA WANANDA, J

MAY 24, 2024

BETWEEN

JULIUS KARIUKI .... APPELLANT

AND

ROSE JEPKEMOI SANGA .... 1ST RESPONDENT

SAMUEL SAMOEI SANGA .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF COLLINS KIPKOSGEI - DECEASED

JUDGMENT

1. This Appeal arises from a suit seeking compensation for the death of an 8 years old child (boy) which arose as a result of injuries suffered in a road accident. It is not clear whether the Appeal challenges the trial Court's finding on liability but it expressly challenges the award or assessment of quantum (damages). In the suit, namely, Eldoret Chief Magistrate's Court Civil Case No. 726 of 2013, the Appellant was the Defendant whereas the Respondents were the Plaintiffs.

2. The suit was instituted vide the Plaint filed through Messrs A.K. Chepkonga & Co. Advocates. Suing as the legal representatives of the deceased, the Respondents pleaded that the Appellant was the owner of the motor vehicle registration number KBK 371R, (hereinafter referred to as "the matatu"), that on 3/01/2012, the deceased was a pedestrian along the Eldoret-Nakuru Road at Mugundoi area when the Appellant's driver managed and/or controlled the said matatu negligently causing it to veer off the road and knock down the deceased occasioning him fatal injuries. It was pleaded further that the deceased was of good health and a pupil at a Primary School. The Respondents then sought general damages, special damages at Kshs 50,000/-, costs and interest.

3. The Appellant, through Messrs Kairu & Mc Court Advocates filed a defence whereof the allegations of negligence were denied. Blame for the accident was also attributed to the Plaintiffs for, among others, leaving a minor unattended on the road and also against the minor-deceased for being negligent.

4. The matter then proceeded for hearing and the 2nd Respondent then testified as PW1. He adopted his Witness Statement and stated that the deceased was his son, that on the material date he was with his daughter and the deceased along the road referred to above, that he was behind the children, that when the children started to cross the road, a matatu emerged and he heard his daughter scream out the name of the deceased, that the driver could have seen the child save that he was moving at a very high speed, that the matatu stopped 15 metres away and is the same one that took the deceased to hospital but he was already dead as he died on the spot. He produced several documents in support of the case. In cross-examination, he conceded that was on phone when the accident occurred but denied that he was chasing the deceased or that this is the reason why the deceased ran onto the road. He also conceded that he was charged with the offence of manslaughter but insisted that he was acquitted.

5. PW2 was one Police Constable Chesek Kiptoo. He confirmed occurrence of the accident, produced the police abstract and stated that the case is still pending under investigations. He then stated further that the investigating officer was transferred, that the matatu was moving from Nakuru to Eldoret and the deceased was crossing the road from right to left facing Eldoret from Nakuru, that the spot was a centre and thus a busy area, that the matatu must have been moving at a high speed when it ought to have moved at 50km/h, and that there are bumps in the area and it should have moved at 20km/h. In cross-examination, he conceded that not being the investigating officer, he had never investigated the case. He denied knowledge that the 2nd Respondent (PW1) was charged for manslaughter or that the deceased was being chased by his father, the 2nd Respondent (PW1) when the accident occurred. He conceded that the report does not indicate the point of impact but blamed the driver of the matatu for causing the accident. He also conceded that he had not brought the police file nor the sketch maps to prove that the matatu was speeding.

6. On its part, the defence called another Police Constable, Ruth Mutinda who testified as DW1. She too confirmed occurrence of the accident but insisted that the same occurred when the deceased ran onto the road as he was being chased by the father. She too confirmed that she was not the investigating officer. According to her, it is the deceased who was blamed for the accident and that the father was charged in Court for the offence of manslaughter. She too produced a police abstract and confirmed that no one was charged with the offence of causing the accident and that the case is still pending under investigations.

7. After trial, the Court delivered its Judgment on 29/01/2020 whereof it found both parties to blame, apportioned liability at 50:50 and awarded damages to the Respondents. The quantum assessed and awarded was computed as follows:

Pain & suffering	Kshs 40,000/-
Loss of expectation of life	Kshs 100,000/-
Lost years	Kshs 800,000/-
Total	Kshs 940,000/-
Less 50% contributory negligence	Kshs 470,000/-
Grand total	Kshs 470,400/-
Add special damages	Kshs 20,500/-
Net sum	Kshs 490,500/-
Costs and interest	

8. Aggrieved by the said award, the Appellant preferred this Appeal on 6 grounds as follows:

    i. That the learned Magistrate misdirected herself in law when she failed to consider the Appellant's Submissions on both points of law and fact.

    ii. That the learned trial Magistrate was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    iii. That the learned trial Magistrate erred in assessing an award hereunder which was wholly erroneous estimate of the loss and damages suffered by the Plaintiff.

    ....

    iv. That the learned Magistrate erred in fact and in law in finding that the Respondent was entitled to general damages under pain and suffering of Kshs 400,000/-, loss of expectation of life of Kshs 100,000/- and lost years of Kshs 800,000/- and failed to take into consideration submissions of the Defendant.

    v. That the learned trial Magistrate erred in law and fact in failing to pay regard to the 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.

    vi. That the learned Magistrate erred in fact and law in failing to consider the Appellant's submissions on general damages.

Hearing of the Appeal

9. On the date of taking directions, only Counsel for the Respondent, Mr. Kabita, holding brief for Mr. Mugo, was present in Court. Although Counsel for the Appellant was absent, I nevertheless directed that the Appeal be canvassed by way of written Submissions. However, by the time that I concluded this Ruling, only the Respondent's Submissions was on record as I did not come across any Submissions filed by or on behalf of the Appellant.

Respondent's Submissions

10. On liability, Counsel for the Respondent submitted that the learned Magistrate made a sound decision by entering judgment and by making a finding that the parties were each 50% liable for the accident, that the Magistrate was fair to acknowledge that road users should take care of other road users and that a higher degree should apply to drivers. He added that in any case, as a general rule, a child cannot be held liable or contributory negligent unless he/she is of such an age as to be expected to take precautions for his/her safety. He cited several authorities.

11. On quantum, Counsel submitted that the award was not inordinately excessive to amount to an erroneous estimate and that there is nothing to suggest that the Magistrate took into account any irrelevant factors or applied wrong principles. On "pain and suffering", he submitted that the award was reasonable since the deceased suffered pain before death and that there is no evidence that the deceased died on the spot. On "loss of expectation of life" and "lost years", Counsel also submitted that the awards were fair and in line with comparable cases. On "special damages", he submitted that the award for the claim for Kshs 25,500/- was justified as it was proven by the receipt produced.

Determination

12. As reiterated in a plethora of cases, this being a first appellate Court, its role is to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusion. In the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, for instance, the following was stated:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

13. As aforesaid, although the Appeal expressly challenges the award or assessment of quantum (damages), it is not clear whether it also challenges liability. This uncertainty is compounded by the fact that the Appellant does not seem to have filed Submissions as directed by the Court. For completeness of record however, I will assume that liability is also challenged.

14. In the circumstances, I find the issues that arise for determination in this Appeal to the following:

    i. Whether the apportionment of liability by the trial Court at 50:50 between the parties was justified.

    ii. Whether the trial Court's award for "pain and suffering", "loss of expectation of life", "lost years" and "special damages" were assessed and awarded on proper principles of the law.

15. Regarding liability, the overwhelming evidence is that the minor attempted to cross the road without proper lookout. According to the father (2nd Respondent), he had accompanied the deceased and his other child, a daughter, when he stopped to pick a phone call. According to him, it is while he was on phone that the children moved on and attempted to cross the road in the course of which the deceased was fatally knocked down by the Appellant's matatu. A contrary version was however alleged by the Appellant that the accident occurred because the 2nd Respondent was chasing the deceased.

16. On the part of the matatu driver, it was stated that the spot where he knocked the deceased was a busy and relatively populated centre and even had bumps erected thereon. There is therefore strong belief that had he been moving slowly, then he would have managed to avoid the accident by either slowing

down the vehicle or swerving safely. His failure to achieve either of these manouvres coupled with the fact that the impact was so severe that it instantly killed the minor, points to the merited suspicion that he was driving at a very high speed.

17. I borrow the remarks made in the case of Masembe v Sugar Corporation and Another [2002] 2 EA 434, where it was held that:

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it … A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

18. I am also guided by the Court of Appeal case of Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR where it was stated that where the trial Court is in doubt as who between two parties is to blame for an accident, it is only fair to apportion liability equally between them.

19. For the above reasons, I find no reason to fault the trial Magistrate's finding of equal liability. The bigger question however is, the deceased being an 8 years old minor, could he be held contributory negligent? On this point, I cite the Court of Appeal case of BB (A minor suing through his next friend and father GON) v Ragae Kamau Kanja [2019] eKLR where the following was stated:

> "
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> " 22. We shall first deal with the issue of contributory negligence. The learned judge apportioned 25% liability against the minor appellant and 75% against the respondent. The trial court had initially found the appellant 40% to blame for the accident and the respondent 60%.
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> 23. In this appeal, the appellant contends that both the trial magistrate and the learned judge erred in finding contributory negligence on the part of the appellant who was a minor. In the appellant's submission, there should be no liability on a minor in road traffic accident. Conversely, the respondent submitted that the learned judge did not err in finding the minor appellant liable at 25% for the accident.
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> 24. Lord Denning in Gough -v -Thorne [1966] WLR 1387 expressed:
> "A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."

25. In Burke -v- Woolley and Maughan [1980] CA No 744, reported in 2 Kemp & Kemp (4th edn) at pp 3311 and 3459, the plaintiff was ten years old. She was injured when struck by a car while crossing a road. She was unconscious for ten days. Two and a half years later she began epileptic attacks. The major attacks were of frequent occurrences. She suffered about six major attacks a month and about eight minor attacks a day. The plaintiff in Burke's case was found to have been 25% to blame for the accident, although only ten years old at the time.

26. In Attorney General -v- Vinod [1971] EA 147 this Court's predecessor upheld a finding that a boy aged 8½ years, who ran out from a line of parked cars into the path of an oncoming car, was contributorily negligent to the extent of 10%. In his judgment Mustafa, JA said:

> " In dealing with contributory negligence on the part of a young boy the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration"

27. In Tayab -v- Kinanu [1983] eKLR, on 21 September, 1976 a girl who was then nine years of age was struck by a motor car whilst crossing a road. Contributory negligence was apportioned at 10% against the child. She was awarded general damages of Kshs.300,000/=. ....

28. In the instant case, in apportioning 25% liability against the appellant, the learned judge disagreed with the sentiments of Madan, JA. in Bhutt -v- Khan (1982 – 88) 1 KAR 1 where Judge Madan stated "the practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence..." In this matter, the learned judge found favour and comfort with the decision in Gough -v- Thorne (supra) where it was stated that the test for contributory negligence for a child should be whether or not the child is of such an age as to be expected to take precautions for his own safety.

29. On our part, we are of the view that each case should be determined on its own merits and there should be no hard and fast rule that a child cannot be held contributorily negligent in an accident. The appellant has not pointed to our satisfaction facts which absolve the minor from any contributory negligence for the accident. The appellant has simply cited judicial authorities without laying a factual foundation that would support application of these decisions to the facts of the present case. Accordingly, we are satisfied that the learned judge did not err in apportioning 25% contributory negligence on the part of the appellant."

20. From the foregoing, it is clear that on the issue of a minor being held contributory negligent, each case is to be determined on its own merits. In this case, the Appellant having not filed any Submissions as directed, this Court is not in a position to ascertain the exact nature of arguments that the Appellant intended to put across. As the Court is not in the business of speculation, I find that the material placed before me is insufficient to alter the liability apportionment made by the learned Magistrate.

21. On quantum of damages, the Appellants "feels" that the respective awards made are excessive. On this issue, in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia [1985], Kneller J.A, guided as follows:

> " 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 ...."

22. Similarly, in the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal pronounced itself as follows:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing

the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled ……….”

23. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The question is therefore whether there are justifiable grounds for this Court to interfere with the quantum of damages awarded by the trial Court.

24. On “pain and suffering”, there is no serious dispute that the deceased-minor died instantly. However, in her Judgment, the trial Magistrate stated that “the deceased took a long time in pain before succumbing”. It is not clear how she arrived at this finding. On quantum, while the Appellant had proposed a sum of Kshs 10,000/- and the Respondents Kshs 50,000, the learned Magistrate awarded Kshs 40,000/-. My review of awards for pain and suffering in instances where the deceased dies on the spot reveals that the Courts give figures in the region of Kshs 20,000/- to 40,000/-. In the circumstances, although the learned Magistrate’s finding of there having been prolonged pain or suffering was without basis, I do not find the award of Kshs 40,000/- to be too excessive or inordinately high to merit a review by this Court. I therefore decline the award under this head.

25. On “loss of expectation of life”, while the Appellant proposed Kshs 80,000/- and the Respondents proposed Kshs 150,000/-, the trial Magistrate awarded Kshs 100,000/-. From my own review of comparable authorities, it is clear that the Courts have been awarding figures in the region of Kshs 100,000/- to Kshs 200,000/-. The trial Magistrate having therefore awarded Kshs 100,000/-, that figure is within what is ordinarily awarded. I do not therefore find any fault on the part of the Magistrate in giving the award.

26. On “lost years”, as has oft been stated, exercise of award of damages in respect of a minor deceased person always poses a challenge to the Courts as it involves some level of speculation (see Chen Wembo & 2 others v IKK & Another (suing as the legal representatives and administrators of the estate of CRK (Deceased) [2017] eKLR). There is also no agreed uniform principle on how to tabulate “lost years” damages where the deceased is a minor. The multiplier-multiplicand, global or mixed approaches have been applied by the Courts. A trial court does not therefore necessarily err simply by choosing one method over another.

27. Although it is not possible to ascertain what the future holds for minors, the courts are however in agreement that, whereas the minors could not make contribution, parents of deceased minors are entitled to some form of compensation. This is what was stated in the Court of Appeal case of Shaikh Mushaq v Nathan Mwangi Kamau Transporters & Five Others [1985-1986]4 KCA 217 where the court stated that in kenya children were expected to provide for their parents when they are in a position to do so and therefore damages are clearly paid to the parents of a deceased child irrespective of the age of the child and irrespective of whether there is or there is evidence of pecuniary contribution.

28. The age of the minor is also a relevant factor to consider. In the case of Kenya Breweries Limited vs. Saro [1991] Mombasa Civil Appeal No. 441 of 1990 (eKLR) the Court of Appeal rendered itself thus:

> “We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well

in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law.

29. In respect to the figure of Kshs 800,000/- awarded by the trial Magistrate as "lost years", I have looked at many comparable previous recent cases, for instance, the following:

a. In Wycliffe Momanyi v Daniel Absolom Otwoma & another [2022] eKLR, Nyakundi J awarded a sum of Kshs 600,000/- in respect to a deceased-minor aged 6 years.

b. In Savannah Hardware v EOO (Suing As representative of SO (deceased) [2019] eKLR, Aburili J, on appeal, upheld an award of Kshs 700,000/- made in respect of a deceased minor aged 10 years.

c. In *Mwaniki & another v RMN & JWM (Suing as the representative of the Estate of MNM - Deceased) (Civil Appeal 89 of 2015)* [2022] KEHC 11143 (KLR) (10 August 2022) (Judgment), Wakiaga J awarded a sum of Kshs 600,000/- in respect of a deceased minor aged 4 years old.

d. In Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased) [2020] eKLR, Nyakundi J awarded a sum of Kshs 900,000/- in respect of a deceased minor aged 7 years old.

e. In Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD) [2016] eKLR, Gikonyo J awarded a sum of Kshs 1,000,000/- in respect of a deceased minor aged 6 years old.

30. Considering the above awards, it is clear that the amount of Kshs 800,000/- made by the trial Magistrate cannot be said to be inordinately high as it is within those awarded in comparable cases. As such it is my considered opinion that it has not been demonstrated that the trial Magistrate proceeded on any wrong principle. I therefore also decline to disturb this item.

31. On "special damages", in the Plaint, the amount pleaded was Kshs 50,000/-. However, in her Judgment, the trial Magistrate awarded Kshs 20,500/- which is what she found to have been proved through receipts. The Appellant having not filed any Submissions, again this Court is not in a position to ascertain the exact nature of his challenge, if at all. In any case, I have not come across any denial by the Appellant that indeed Receipts amounting to the figure awarded were produced. In the circumstances, I have no reason to disturb the award.

Final Orders

32. The upshot of my findings above is that this Appeal fails. Accordingly, it is dismissed in its entirety with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Chepkonga for Respondent
N/A for Appellant