Mwaura v Asingo & Yugu (Suing as Administrator and Personal Representative of the Estate of Maurice Oketch Asingu - Deceased) (Civil Appeal E88 of 2022) [2024] KEHC 7842 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E88 OF 2022

SC CHIRCHIR, J

JUNE 27, 2024

BETWEEN

STANELY NJENGA MWAURA ..... APPELLANT

AND

PETER ODUOR ASINGO & ADIJA IMBUNDUNGU YUGU (SUING AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF MAURICE OKETCH ASINGU - DECEASED) ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. G. Ollimo (SRM) delivered on 13/10/2022 in Butere PMCC no.99 of 2019)

JUDGMENT

1. The respondent herein filed suit against the appellant (then as defendant) seeking for general and special damages following a fatal accident which occurred on 6th July 2019 , along Mumias – Kakamega road.

2. In a judgment delivered on 13/10/2022 the trial court found the Appellant was held fully liable for the accident, and damages was awarded as follows:.

    a). Lost years Kshs. 984,769.20/=

    b). Loss of expectation of life Kshs. 200,000/=

    c). Pain and suffering Kshs. 50,000/

    d). Special damages Kshs. 78,550/=

    Total.....ks. 1,313,319.20

3. The appellant was aggrieved by the judgment and lodged the present Appeal. He has set out the following grounds:

   a). That the learned trial magistrate erred in law and in fact in holding the appellant 100%liable in negligence.

   b). That the learned trial magistrate erred in law and in fact failing to dismiss the respondent's suit in view of the evidence adduced.

   c). That the learned trial magistrate erred in law and in fact in failing to consider the submissions by the appellant on the issue of liability and quantum.

   d). That the learned trial magistrate erred in law and in fact in using the wrong principles in the assessment of damages thereby arriving at an erroneous decision.

   e). That the learned trial magistrate erred in law and in fact in adopting a multiplier of 17 years without taking into account vagrancies and vicissitudes of life and age of the deceased.

   f). That the learned trial magistrate erred in law and in fact in awarding Kshs. 50,000/= for pain and suffering which was excessive without taking into account that the deceased died on the spot.

   g). That the learned trial magistrate erred in law and in fact in awarding Kshs. 200,000/= for loss of expectation of life which was excessive in the circumstances.

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

Appellant's submissions

5. It is the Appellant's submission that there is no liability without fault , and that the Respondent had the duty to prove his case on a balance of probabilities. In this regard the Appellant has relied on the case of Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd 1991 as cited in East Produce (K) limited vs. Christopher Astiado Osiro (2006) eKLR

6. The Appellant further submits that the testimony of the only witness, on whose testimony, the trial court entirely relied on ,was doubtful. The Appellant points out that the accident was at night, and questions what the witness was probably doing on the road at night, considering that there was no suggestion that he was with the deceased; that his testimony was not credible. It is further submitted that, consequently , there was no eye witness, to the accident.

7. The Appellant further submits that the account of the two police officers was credible.

8. On damages , it is the Appellant's submission that the same was excessive, warranting the intervention of this court. In this regard he has relied on the case of Johnson Evan Gicheru vs. Andrew Morton & another (2005) eKLR.

9. On the damages for pain and suffering , the Appellant argues that since the deceased died on the award of Kshs. 50,000/= was too excessive. He urges the court to award Kshs. 10,000/= on the basis of the decision in the case of James Gakinya Karienye and Nancy Murugu Gakinya vs. Premium Kariuki Githinji Nairobi HCC No. 91 of 2014.

10. On the head of loss of expectation, the Appellant propses ksh. 100,000 as opposed to the trial court's award of ksh. 200,000 and bases his proposal on the case of Kenya power lighting company limited vs. Charles Obegi Ogeta) suing as the Legal Representative of Esther Nyanchoka Obegi (2016) eKLR, where the court awarded ksh. 100,000.

11. On the multiplier of 17 years , adopted by the trial court, the Appellant contends that the trial court erred in failing to consider the vicissitudes and vagrancies of life. It is argued that 9 years would have been reasonable. In this regard the Appellant has relied on the case of Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & another Nairobi HCCC No.1638 of 1988.

12. It is further that , in any event ,there was no evidence that the deceased was self -employed.

Respondent's submissions

13. On liability , the Respondent submits that the finding in respect thereof was at the discretion of the trial court . He has relied on the case of Mahendra M. Malde vs. George M. Angira Civil Appeal No 12 of 1981 to buttress his submissions.

14. It is submitted that the evidence tendered proved negligence on the part of the Appellant. claim that the trial magistrate was right in apportioning full liability to the appellant.

15. On damages , he submits that this too is at the discretion of the trial court.

16. On damages for pain and suffering, it is submitted that the award of Kshs. 50,000/= compares well with the award in the case of Sospeter Ndung'u Kamau (suing as the legal representative of Arthur Nderitu Ndung'u) vs. another HCC No. 404 of 1998.

17. On the award on loss of expectation of life, it was submitted that that Kshs. 200,000/= was appropriate as the deceased was 47 years and his young family depended on him. The Respondent has relied on the case of Acceler Global Logistics vs. Gladys Sasambu Waswa & another (2020)eKLR where a similar award was made.

Summary of the Evidence

The plaintiff's case

18. Pw1 was the deceased's brother. He adopted his written statement dated 15/8/2019 as his evidence-in -chief and submitted the following documents in evidence:Copy of the death certificate No. 08170869Grant Ad litem Pexh 2 (a)Receipt for grant for Kshs. 25,000/= P exhibit 2 (b)Post mortem Form PExh 3.

19. He also produced the deceased's a birth certificate for John Otieno, report cards for Jerida Apondi, Rosalia Apiyo, and John Oketch, all children of the deceased.

20. He told the court that the deceased was a peasant farmer and earned approximately Kshs. 15,000/= from the farming and that the deceased used live with his 3 children whom he took care of, since he had separated with the wife.

21. On cross -examination, he admitted that he had no proof to support his assertion that the deceased was a farmer or any record of the deceased's alleged earnings of ksh. 15, 000.

22. PW2 was the investigating officer . He testified that an accident did occur on 6/7/2019 at Makunga , along Mumias – Kakamega road, involving motor vehicle registration Number KCB 170T and the deceased. He produced the abstract(PexB) 4.

23. PW3 was one Kennedy Juma. He adopted his witness statement dated 13/8/2019. He recalled that on 6th July 2019 at around 7.20 p.m. along the Mumias –kakamega witness he saw a motor vehicle reg. KCB 170 T, which he claimed was being driven at a high speed. The driver lost lose control and hit the pedestrian who was walking on the left side of the road.

24. On cross examination, he stated that the accident occurred around 7.30 pm ; that the lights from the car illuminated the road, and the night was clear. He further stated that he called the deceased's brother , who was known to him. He assisted in escorting to the police station, he claimed

25. He denied the suggestion that the deceased was crossing the road when the accident happened ; that the police arrived on the scene 30 minutes after the accident, and that the body was lying on the left side of the road.

26. On re-examination, he stated that he was the one who witnessed the accident, and not the police.

The defendant's case

27. DW1 was CPL Duncan Owino. He told the court that the driver of the subject vehicle was one James Gacaha; that the deceased was hit on the left side. He stated that he was not the one who visited the scene. He claimed that the driver was not charged as there was no witness and the deceased was to blame for the accident

Determination

28. This is the first appellate court and its mandate is to independently review the evidence tendered during trial , re- evaluate and arrive at its own conclusion (Ref Gitobu Imanyara vs AG (2016)e KLR).

29. There are two issues for determination arising in this Appeal , namely whether the trial court erred in its finding on liability , and whether the award on damages was excessive

30. It is not in dispute that the deceased was a pedestrian walking along the Mumias-Kakamega road on 6th July 2019 when he was hit by motor vehicle registration number KCB 170T which was been driven by the appellant's driver, servant and or Agent.

31. The appellant case is that there is no liability without fault as the respondent had failed to prove, on a balance of probabilities, that the appellant's driver caused the accident. He discredits the testimony of respondent's alleged eye witness and concludes by stating that there was no eye witness to the accident in the circumstances.

32. From the trial court's record , it is evident that the Appellant's driver did not testify. The two police officers who testified on each side were not eye -witnesses. The only witness who gave a first account on what transpired is pw3.

33. This witness testified that the driver of the subject vehicle was driving at an excessive speed; that he lost control and hit the deceased who was working alongside the road. He stated that he could see well, as the vehicle lights provided sufficient illumination. He further told the court that he called the deceased 's brother who was known to him ,and later escorted the vehicle to the police station. The testimony of this witness was not controverted as there was no other witness who testified that he/ she witnessed the accident

34. The Appellant questioned the presence of this witness on the road at the time, considering that it was at night and there was no evidence that he was in the company of the deceased. I do not consider the presence of PW3 at such a time as unusual, as the accident occurred on early evening at about 7.30 pm. It is a fact of common notoriety that time of the evening usually finds people leaving their work places for home , or retreating to their homes.

35. In any event , the driver of the subject vehicle did not testify. Thus PW3's testimony was the only available evidence and the court rightly relied on it, to determine liability.

36. It was not enough for the Appellant to deny negligence or contributory negligence in his defence , he needed to submit evidence in support of his pleadings . It is trite law that pleadings are not evidence, and where a party fails to submit evidence in support of his pleadings then a court is right in making a finding that such a party's case has not been proved.

37. In Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012] e KLR G.V. Odunga J stated as follows:

> ".....in the case of Motex Knitwear Mills Limited Milimani HCC 834/2002 Honourable Lessit J citing Autar Singh Bahra & Another Vs Raju Govindji HCC 548 of 1998 stated:
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> > "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 counterclaim are unsubstantiated, in the circumstances the counterclaim must fail....." 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. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged....." (Emphasis added)

38. Thus PW3's testimony was the only evidence that the trail court could rely on . I further noticed that his testimony was hardly shaken in cross- examination. I have no reason to fault the trial court in its finding on liability. In this regard , I find support in the court's decision in the case of Khambi & Another vs. Mahithi and Another [1968] EA 70, where it was held: "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"

39. Am in total agreement with the trial court on its finding on liability and the Appellant's complain in this regard is hereby dismissed.

Quantum

40. Assessment of damages is an act of discretion by the trial court and there are principles to guide the Appellate court in deciding whether to disturb the award or not. In Bashir Ahmmed Butt vs. Uwais Ahmed Khan (1982-1988)KAR, the Court of Appeal held, "An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely 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..."

41. On the award for pain and suffering, it is the Appellant's contention that it was too excessive, considering that the deceased died on the spot.

42. In Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph *21* the Hon. Odunga J observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore

the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal."

43. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this case it was the eye witness testimony that the accident occurred at 7.30 P.M there was no indication if the impact was instant or he took time before he died.

44. However in the case of Sukari Industries Limited vs Clyde Machimbo Juma, Homa Bay HCCA NO. 68 of 2015 [2016] EKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. held that:

> "On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

45. I do not find the award of Kshs. 50,000/= for pain and suffering to be manifestly excessive . In any event , to insist that the award should remain at ksh. 10,000 in line with conventional awards is to ignore the realities of inflationary trends over the years. In the circumstances, I see no reason the court to depart from the trial court's award.

Loss of expectation of life

46. The appellant considers the award of Kshs. 200,000/= to have been too excessive and submits that an award of Kshs. 100,000/= would have been sufficient.

47. The respondent on the other submitted that the amount was proper as the deceased was 47 years old and the award was thus appropriate.

48. In West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR, the court held that an award of Kshs 200,000 was not excessive.

49. In the case of Moses Akumba & Another vs Hellen Karisa Thoya [2017] eKLR, the high court upheld an award of ksh. 200,000 on loss of expectation of life.

50. In the cases of Patrick Kariuki Muiruri & 3 Others vs Attorney General [2018] eKLR the high court awarded ksh. 200,000 under this head of damages .

51. In the light of the above decided cases , I find that of ksh. 200,000 was in line with similar awards for similar loss.

Multiplier

52. The appellant has submitted that taking into consideration the vicissitudes and vagaries of life, the multiplier applied was high. It is further submitted that there was no evidence that the deceased was a peasant farmer . The Appellant further faults the trial magistrate for concluding that the deceased was self- employed when no such a fact was submitted in evidence.

53. The respondent on the other hand submits that it is a fact of common notoriety that farmers hardly keep records of their earnings.

54. I entirely agree with the respondent's submission in this regard. Insisting on strict proof of one's occupation and /or earnings is not practical in a country where most citizen rely on subsistence farming, tea picking in other people's farms, hawking merchandise and other menial jobs. In the case of Jacob Ayiga Makokha & Ano vs Simeon Obayo (2005) e KLR, cited by the respondent the court of Appeal stated as follows: "we do not subscribe to the view that the only way to prove the profession of a person must be by way of certificates and that the only way of proving earnings is equally by production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihoods in various ways. If documentary evidence is available, that is all well and good. But we reject any contention that only documentary evidence can prove these things"

55. In this case, PW1 told the court that the deceased was a peasant farmer. The trial magistrate referred to this as self- employment , and the Appellant has taken issue with this reference. Farming or self - employment can be done past the civil service retirement age of 60 years. The income applied was the minimum wage. Whether the court referred to the deceased as self- employed or a peasant farmer therefore the net effect would have been the same, namely , the likelihood of working past the statutory retirement age in Kenya.

56. Further am of the view that self- employment is a descriptive term to refer to non- salaried employment. It could be poultry- keeping , maize- roasting , fishing or peasant farming , like in this case. For the Appellant to make such description an issue is rather petty and devoid of sincerity.

57. Finally the Appellant has argued that in applying a multiplier of 17 years the court ignored the retirement age and the vicissitudes and vagaries of life.

58. I remind myself that assessment of damages is an act of discretion and as the Appellate court , this court can only interfere with the trial court's discretion if it failed to consider a relevant factor or took into account an irrelevant one .

59. In considering the appropriate multiplier, courts often consider the retirement age, vagaries of life, or both. The courts are not under any obligation to consider the vagaries of life, and therefore it can not be said that the trial court ignored a relevant factor. In other words the trial court can not be faulted for using one factor as opposed to the other, or for applying one factor instead of both.

60. The deceased was 47 years at the time of death as was evident on the death certificate The next question is whether the multiplier of 17 years was too high in any event.

61. In the case of Hussein Sharrif Ali vs Grace Mutia (2021) e KLR the high court upheld a multiplier of 15 years in respect of a deceased aged 48 years.

62. It is also important to remember that the Ages of the dependants left behind by the deceased is also a factor for consideration. (Ref: Grace Kanini vs Kenya Bus Services , Nairobi HCC No. 4708 of 1989 and Beatrice Wangui vs Ezekiel Barnetuny Nairobi HCC NO. 1638 OF 1988(unreported))

The deceased left behind three young children, with the youngest being in class 3 at the time of the deceased's demise. They would otherwise have had to depend on the deceased for roughly 15 years. The dependency of 17 years is therefore not an exaggeration . It is not also too high as to constitute an erroneous estimate of the loss suffered by the dependants of the deceased.

63. The appeal is without merit .It is hereby dismissed with costs to the respondent.

DATED , SIGNED AND DELIVERED THIS 27TH DAY OF JUNE 2024.

S. CHIRCHIR

JUDGE

In the presence of :

Godwin – Court Assistant.