Kanyangi v Ndire & another (Civil Appeal E033 of 2023) [2024] KEHC 7661 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7661 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E033 OF 2023

KW KIARIE, J

JUNE 26, 2024

BETWEEN

ERASTUS OYOO KANYANGI .... APPELLANT

AND

ELIJAH NDIRE NDIRE .... 1ST RESPONDENT

EVERLYNE ATIENO OKECH .... 2ND RESPONDENT

(Being an Appeal from the judgment and decree in Ndhiwa Magistrate's PMCC No. 70 of 2019 by Hon. B.W. Murangasia – Resident Magistrate)

JUDGMENT

1. Erastus Oyoo Kanyangi, the appellant herein, was the defendant in Ndhiwa Principal Magistrate's PMCC No. 70 of 2019, where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KTCB 033J Massey Ferguson tractor on which the deceased was riding. The learned trial magistrate apportioned liability at 50:50. The respondent was awarded Kshs.3,605,984.00 in general damages and Kshs.300,000.00 in special damages before factoring in contributory negligence.

2. The appellant was aggrieved by the judgment and filed this appeal through the Kanyangi & Company Advocates. He raised the following grounds of appeal:

    a. That the learned trial magistrate erred on facts and law, deciding the case on insufficient evidence.

    b. The learned trial magistrate erred on facts and law that he found in favour of the respondents, yet they did not prove their case on a balance of probabilities as required.

c. That the learned trial magistrate erred on facts and law in awarding the respondents excessive amounts in loss and damages, considering the circumstances of the matter of the case in totality.

d. That the learned trial magistrate erred in law and fact in not finding that the respondents had not been dependents of the deceased.

e. That the learned trial magistrate erred in law and fact in not finding that one of the parties had long died and was incapable of participating in the trial of that case.

f. That the learned trial magistrate erred in law and fact by ignoring the defence given by the defendants and his witnesses.

g. that the learned trial magistrate erred in law and fact by deciding the case against the weight of the evidence on record.

3. The firm of Veronica Migai & Associates Advocates represented the respondents.

4. On the 8th day of April 2024, directions were taken to canvass the appeal through written submissions.

5. This Court is the first appellate court. I am aware of my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co. Ltd*. [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.

6. The appeal is on liability and quantum concerning general damages.

7. None of the two witnesses who testified for the respondents was an eyewitness. In a nutshell, there was no explanation as to how the accident happened from the respondents' side. The court was called to invoke, albeit tacitly, the doctrine of res ipsa loquitur. The doctrine was explained in the case of *Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita* [2019] eKLR, as follows:

> The doctrine of res ipsa loquitor is one in which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have happened, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances, does not have to show any specific negligence but merely indicates that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.

8. The appellant called the driver of the tractor, which is alleged to have run over the deceased. He is Samuel Okuku Odiu (DW2). He testified that he was driving slowly since the road was terrible. He was alerted that the deceased had fallen from the trailer. He went on to say that the deceased was a loader, and he saw him lying down and alerted the driver to stop.

9. Irene Odhiambo (DW4), whose ballast the tractor was ferrying, testified that the tractor was not driven fast because the road was terrible.

10. The Court of Appeal in *Kiema Mutuku vs Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 stated that:

> There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.

11. In the instant case, the respondents did not discharge their burden of proof of the appellant's fault.

12. The appellants contended that the respondent's award was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs. Khan* [1981] KLR 349 on page 356, Law JA stated:

> ...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 a figure which was either inordinately high or low.

13. Had the respondents proved fault on the part of the appellant, the best approach would have been a global sum approach. This is because the deceased was a casual employee who would not be lucky to get work daily. In *Albert Odawa vs Gichimu Githenji*; Nakuru HCCA No.15 of 2003 (2007), eKLR Justice Ringera expressed himself as follows:

> The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.

14. I would have set aside the trial magistrate's award and substituted it with an award of Kshs.60,000 special damages were proved, and a global sum of Kshs.1,000,000.00 general damages. However, the respondents did not prove their claim. The appeal is allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE

JUDGE