



Tsusho Capital Kenya Limited & another v Munyui & Nyanjau (Suing as the Administrator of the Estate of Dennis Wanjau Mburu - Deceased) (Civil Appeal 161 of 2019) [2024] KEHC 8993 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 161 OF 2019
MA OTIENO, J
JULY 19, 2024**

BETWEEN

TSUSHO CAPITAL KENYA LIMITED 1ST APPELLANT

NJUGUNA JEREMIA 2ND APPELLANT

AND

**ELIUD MBURU MUNYUI & SERAH WANJUHI NYANJAU RESPONDENT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF DENNIS WANJAU
MBURU - DECEASED**

(Being an appeal from the Judgment of Hon. Stella Atambo Senior Principal Magistrate (SPM) delivered on 2nd October 2019 in Kiambu CMCC No.174 of 2017)

JUDGMENT

1. This appeal arises from the decision in Chief Magistrate's court civil case No. 174 of 2017 wherein the Respondent had sued the Appellant seeking for compensation under the Law Reform Act and Fatal Accidents Act. The Respondent also sought for special damages in the sum of Kshs. 19,550 and costs of the suit as well.
2. The claim arose from a road traffic accident which occurred on 25th December 2015, wherein one Denis Wanjau Mburu (the deceased) was said to have been hit by a motor vehicle registration No. KCC 985N, driven by the 2nd Appellant and owned by the 1st Appellant. As a result of the accident, the deceased suffered fatal injuries.
3. At the conclusion of the hearing, the trial court rendered its decision on 2nd October 2019 and entered judgment in favour of the Respondent, finding the Appellant 100% liable for the accident. The Magistrate thereafter proceeded to award damages as follows; -



- i. Damages under the *Law Reform Act* (Chapter 26 of the Laws of Kenya)
 - a. Pain and suffering Kshs. 50,000/-
 - b. Loss of expectation of life Kshs. 100,000/-
 - ii. Damages under the *Fatal Accidents Act* (Chapter 32 of the Laws of Kenya)
Lost Dependency Kshs. 1,130,688/-
4. The plaintiffs were also awarded costs of the suit and interest from the date of judgment.
 5. Aggrieved by the decision of the trial court, the Appellants filed this appeal against the Judgment raising six grounds in the memorandum of appeal. The grounds are mainly that the learned trial magistrate erred and misdirected herself by failing to properly assess the conflicting evidence of the two eye witnesses, thereby finding the Appellants 100% liable. Further, that the learned trial magistrate erred in awarding damages for loss of dependency when there was no evidence to support income by the deceased.
 6. The appellants urged this court to allow the appeal with costs, and set aside the judgment of the trial court dated 2nd October 2019 and the consequent decree.

Submissions

7. The appeal was canvassed by way of written submissions. The Appellants submissions are dated 27th July 2023 while the Respondent's submissions are dated 15th September 2023.
8. On the issue liability, the Appellant in their submissions argued that the trial Magistrate erred by failing to find that the evidence of the police officer who testified at trial as PW2 was hearsay and therefore could not be relied upon. According to the Appellants, the Respondent had failed to prove their case to the standards required under section 107 of the *Evidence Act*.
9. It was the Appellant's position that he was merely a good Samaritan who found the deceased already injured and that he only offered to take him to the hospital. Consequently, according to the Appellants, they ought not to have been found liable for the accident in the manner that the trial magistrate did.
10. On their part, the Respondents countered the Appellant's argument on liability, taking the position that the evidence of the police officer taken together with that of PW3 who was an eye witness to the accident, proves to the required standards, not only the occurrence of the accident, but also the fact that the same was caused by the negligence of the Appellants herein.
11. On the issue of quantum on damages, the Appellant raised as a ground of appeal that the award of loss of dependency by the trial court was erroneous since there was no evidence adduced at trial by the Respondents, demonstrating that the deceased was earning any income. However, in their submissions filed in court, no arguments were advanced by the appellants regarding this issue.
12. The Respondents on their part argued that the damages awarded by the trial magistrate was in the circumstances of the case reasonable, legal and in consonance with the evidence tendered at trial.

Analysis and determination

13. Being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at the trial court with a view of reaching my own conclusion on the issue of liability and on quantum. I am however cognizant that in doing so, I need to bear in mind that unlike the trial court, I did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. I will



therefore give due allowance for this. See the Court of Appeal decision in *Peters v Sunday Post Limited* [1958] EA where the court stated that; -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

14. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that: -

“...I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial courtis by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”

15. On the issue liability, the Appellant argued that the trial magistrate erred by failing to find that the evidence of the police officer who testified at trial as PW2 was hearsay and therefore could not be relied upon. According to the Appellants, the Respondents failed to prove their case to the standards required under section 107 of the *Evidence Act*, Cap. 80 Laws of Kenya.
16. It was the Appellant’s position in this appeal that he was merely a good Samaritan who found the deceased already injured and only offered to rush him to the hospital and consequently, he ought not to have been found liable for the accident in the manner that the trial magistrate did. The Appellants cited the case of *PAS v George Onyango Orodí* [2020] eKLR, in support of their position in this appeal.
17. I have perused the court record and note that PW3, Ibrahim Boru Liban who was an eye witness to the accident testified that he actually saw the accident happen, that the accident was caused by the motor vehicle registration No. KCC 985N. He further testified that after knocking down the deceased, the driver tried to run away and that the driver was only stopped by the people who around the scene.
18. Further, DW1, Mr. Njuguna Jeremiah, who is the 2nd Appellant herein, in his testimony before the trial court also testified that he stopped the vehicle at about 50 meters from the accident scene. This testimony by DW1, to my mind, lends more credence and kind of corroborates the testimony by the PW3 that DW1 who was the driver, after knocking down the deceased tried to escape from the scene and was only stopped by the members of the public who were around the scene of the accident.
19. I note that at trial, the Appellants relied heavily on the testimony by DW2, one Ms. Mary Waigwa in seeking to prove that the 2nd Appellant did not cause the accident. However, when weighed against the evidence of the plaintiff, I find the testimony by DW2 less reliable.
20. In her testimony before the trial court, DW2 stated that she was driving around 20 meters behind the Appellant’s vehicle and that that she could see vehicles ahead swerve to the right. However, the same DW2 in cross-examination, by the counsel for the Appellant stated that she could not clearly see what was directly ahead of her. Again, I find the evidence by DW2 contradictory and therefore less believable, when weighed against the evidence of PW3.



21. In view of the above I agree with the finding of the trial magistrate that on the basis of the evidenced adduced at the trial, it was proved on a balance of probabilities that the accident was caused by the 2nd Appellant and that the appellants were therefore 100% liable for the accident.
22. On the issue of quantum on damages, the Appellants raised as a ground of appeal that the trial magistrate erred in awarding damages for loss of dependency when no evidence of any income by the deceased had been adduced by the Respondents at the trial. However, no arguments were advanced by the Appellants in their submissions in support of this ground. I will therefore treat this ground of appeal as abandoned.
23. The above notwithstanding, I perused the proceedings and the Judgment by the lower court and noted that the trial magistrate computed loss of dependency based on the Regulation of Wages (Agricultural Industry) Amendment Order 2015. This was because the trial court was not convinced that the Respondents had approved to the required standards, the deceased's father's testimony that the deceased being a hawker, was earning Kshs. 1,500.
24. It is trite that where terms of employment or income is not clear, section 48(1) of the *Labour Institutions Act* can be applied in determining the minimum wages of workers in various categories. The section provides as follows; -

“ 48 (1) Notwithstanding anything contained in this Act or any other written law—

 - (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;”
25. This limb of the appeal being one on quantum, I am aware that as an appellate court, I can only interfere with the trial court's discretion in assessing damages where it is demonstrated that in exercising that discretion, the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong, which resulted in injustice. See the holding in *Mbogo & another v Shah* (1968) EA and *Mkuba - v - Nyamuro* 1983 KLR 403.
26. In the circumstances of this case and taking into account the evidence on record, I find the trial court in relying on the Regulation of Wages (Agricultural Industry) Amendment Order 2015 exercised its discretion reasonably and within the law. Consequently, I find no reason to disturb the same.
27. In view of the above, I find the appeal unmerited and is hereby dismissed with costs to the Respondent.
28. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Mr. Makori h/b for Wandago for the Appellant.

Ms. Bwire for the Respondent.

