New Adatia Wholesalers Limited v Simiyu & 3 others (Suing as a Legal and Personal Representative of the Estate of the Late Alex Wanjala Wekesa - Deceased) (Civil Appeal E69 of 2023) [2024] KEHC 8107 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8107 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E69 OF 2023

REA OUGO, J

JUNE 25, 2024

BETWEEN

NEW ADATIA WHOLESALERS LIMITED ..... APPELLANT

AND

DELPHINE NASAMBU SIMIYU ..... 1ST RESPONDENT

BENEDICT KHISA WEBANDA ..... 2ND RESPONDENT

STEPHEN BARASA WEKESA ..... 3RD RESPONDENT

GEOFFREY SIMIYU WEKESA ..... 4TH RESPONDENT

SUING AS A LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE ALEX WANJALA WEKESA - DECEASED

(Being an appeal against the decision and judgment of the Honourable J.O Manasses (RM) delivered on 15/6/2023 in Sirisia CMCC No E016 of 2022)

JUDGMENT

1. This appeal is against the decision of the subordinate court following a claim by the respondents filed under the Fatal Accident Act and *Law Reform Act*. According to the respondents on 10/12/2021 the deceased was lawfully riding a motorcycle along Bungoma-Chwele road when the appellant's agent drove motor vehicle registration no. KBW 116T in a negligent manner causing the deceased to sustain fatal injuries. They averred that the deceased was 33 years old, working as a security guard and farmer and he earned Kshs 30,000/- per month. The respondent sought general damages and consortium; special damages of Kshs 118,550/-; costs of the suit; and interest.

2. The appellant filed its statement of defence denying the claim by the respondents. In the alternative without prejudice, it averred that if the accident occurred then the same was wholly caused by the negligence on the part of the deceased while riding the motorcycle.

3. The trial magistrate after conducting the hearing and considering the evidence and submissions by the parties entered judgment in favour of the respondent:

    a. Liability assessed at 100%

    b. Pain and suffering Kshs 50,000/-

    c. Loss of expectation of life Kshs 300,000/-

    d. Loss of dependency Kshs 3,240,000/-

    e. Special damages Kshs 118,550/-

    Total Kshs 3,708,000/-

4. The appellant dissatisfied with the finding of the trial court has filed this instant appeal on the following grounds:

    1. That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable and/or at all in view of the evidence on record

    2. That the learned trial magistrate erred in law and in fact by failing to apportion liability on the part of the respondent in view of the evidence adduced

    3. That the learned trial magistrate erred in law and in fact by failing to take into account the evidence on record hence arriving at a wrong decision on the issue of liability and quantum

    4. That the learned trial magistrate erred in law and in fact to consider the submissions of the appellant

    5. That the learned trial magistrate erred in law and in fact in adopting the wrong principles in assessment of damages payable to the respondent both under *Fatal Accidents Act* and the *Law Reform Act*

    6. That the learned trial magistrate erred in law and in fact in awarding excessive damages for pain and suffering in view of the evidence on record

    7. That the learned trial magistrate erred in law and in fact in awarding excessive damages for loss of expectation of life in view of the evidence on record

    8. That the learned trial magistrate erred in law and in fact by failing to take into account the vagrancies and vicissitudes of life in adopting the maximum multiplier of 27 years

    9. That the learned trial magistrate erred in law and in fact in adopting a multiplicand of Kshs. 15000/=.

Analysis And Determination

5. This being the first appeal, the Court must reconsider and re-evaluate the evidence and draw its conclusion. However, the Court must make due allowance with respect to the fact that it has neither

seen nor heard the witnesses. These principles were set out in *Selle and another – v- Associated Motor Boat Company Ltd.& Others* (1968) EA 123:

> An appeal to this court from a trial by the High Court is 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 made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif –v- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

6. PC Jackline Were (PW1) produced the police abstract. She testified that the accident was between motor vehicle registration no. KBW 116T and motorcycle registration no. KMFL 557V. The rider of the motorcycle was injured and died. On cross-examination, she testified that she did not visit the scene of the accident and that she was not the investigating officer. Anthony Khaemba Wekesa (PW4) adopted his witness statement as his evidence in chief. He testified that on 10/12/2021, he was at the Kibabii shopping centre. PW4 then saw the motorcycle approaching from Chwele heading to Bungoma. The appellant's vehicle was behind the motorcycle. As the car approached Kibabii centre, the driver decided to overtake the motorcycle but soon realised there was an oncoming motor vehicle. The driver realized there was an imminent danger of a head-on collision and swerved back to the left, veered off to the pedestrian lane, and rammed into the motorcycle. PW4 testified that the point of impact was on the pedestrian section and the car stopped 60 meters from the point of impact. PW4 blamed the appellant's driver for causing the accident. PW4 in his witness statement indicated that he referred to the vehicle as a canter. On cross-examination, he testified that the victim fell on the side of the road.

7. Evans Simiyu Wasolo (DW1) adopted his witness statement as his evidence in chief. He testified that at around 5:30 p.m. while in Kibabii area, an oncoming motorcycle was carrying a sack protruding on both sides. There was another motorcycle behind his car. The motorcycle from behind tried to overtake and in the process rammed into the motorcycle that was carrying the sack. DW1 testified that the impact caused by the collision caused the motorcyclist to hit the rear side of his car and he immediately fell. DW1 stopped 20 meters from where the accident had occurred. DW1 blamed the deceased for causing the accident. On cross-examination, when asked about the other motorcycle, DW1 testified that the owner ran away.

8. The trial magistrate found the appellant 100% to blame for the accident after considering the evidence of PW1. The appellant now submits that the PW1 was not the investigating officer, did not visit the accident scene, and had no witness statement. The appellant submits that based on the testimony of DW1, the deceased was the author of his misfortune.

9. PW1 did not witness the accident. The only direct witnesses were PW4 and DW1, who gave two different accounts of the accident. According to the evidence of PW4, the appellant's driver was trying to overtake but because of an oncoming vehicle swerved back hitting the deceased. DW1 on the other hand testified that it was the deceased who was overtaking and had a head-on collision with another motorcycle. However, according to the police abstract, motor vehicle KBW 116T and the motorcycle KMFL 557V were the only vehicles involved in the accident. The version of DW1 is therefore unsupported by the police abstract. PW4 in his evidence was clear that the accident was between the car and the motorcycle. In the circumstances, I am inclined to believe the version of PW4.

The fact that PW4 testified that the vehicle managed to stop 60 meters from the point of the accident/ impact suggests that the car was being driven at high speed. The trial court was correct in assessing 100% of the liability to the appellant.

10. I now turn to consider the award of quantum.I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

> " An appellate Court will not 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 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"

11. Geoffrey Simiyu Wekesa (PW2) testified that the deceased was his brother. He was informed of his death and went to the mortuary to view his body. He paid Kshs 7,400 towards mortuary expenses, Kshs 3,000 for the post-mortem, Kshs 35,000/- to transport the deceased's body and Kshs 40,000/- to purchase a coffin. He testified that the deceased was a security guard and a farmer earning Kshs 30,000/-. On cross-examination, he testified that he was at home in Kibabii when the accident occurred.Delphine Simiyu (PW3) testified that the deceased was her husband and that she arrived at the scene after he died. She used Kshs 40,000/- to obtain a grant ad litem. On cross-examination, she testified that she was informed on the phone that the deceased had died.

12. On the head pain and suffering, it was submitted that an award of Kshs 10,000/- was appropriate and cited the case of *Harjeet Singh Pandal v Hellen Aketch Okudho* (2018) eKLR. The respondent urged the court to uphold the award of Kshs 50,000/-. In my view, I find no reason to interfere with the trial court's award as the court in the case of *Sukari Industries Limited v Clyde Machimbo Juma* Homa Bay HCCA No 68 of 2015 [2016] eKLR stated:

> " 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."

13. On loss of expectation of life, the appellant argued that the court ought to have adopted a conventional sum of Kshs 100,000/-. On the other hand, the respondent argued that the award was appropriate and cited the case of *Daniel Kuria v Nairobi City Council* [2013] eKLR where the court made an award of Kshs 210,000/- under this head.In *Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased)* (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment) the court observed as follows:

> " 44...I note that *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR, Hon Emukule J, reasoned that:

...In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering ..... determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years

currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death...."

45. That was in 2013. Thereafter, in the case of *Citi Hoppa Bus Limited & Another v Maria Clara Rota* [2021] eKLR an award of Kshs 200,000/= was made for loss of expectation of life where the deceased was aged 33 years old."

14. In this case, it was not disputed that the deceased was 33 years old and the sum of Kshs 200,000/- would be most appropriate under this head.

15. On loss of dependency, it was not in dispute that the deceased was 33 years old. PW3 and PW2 testified that the deceased had a wife and children. This was also captured in the chief's letter. The trial court applied a 2/3 dependency ratio, which in my view, was not excessive considering that the deceased had a family.

16. The respondent's case was that the deceased was a security guard or farmer earning Kshs 30,000/. The trial magistrate applied the Regulation of Wages (General) (Amendment) Order 2022 and adopted Kshs 15,000/- as the deceased's minimum wage. He also considered that the deceased would have worked until the retirement age of 60 and applied the multiplier of 27 years.The appellant submits that the deceased's occupation entailed many security risks and the multiplier of 10-15 years was sufficient. They relied on the case of *Alex Koech & Another v Mary Odhiambo* HCCA (2018) where the court adopted a multiplier for a 35-year-old. The appellant did not make any submission of the multiplicand.

17. It cannot be disputed that the occupation of a security guard has its risks. The court in *South Sioux Farms Ltd & 2 others v Selina Robi Mwita (suing as legal representative of the Estate of the Late Julius Bonare Chacha* [2021] eKLR considering the multiplier for a security guard who died at the age of 28 had this to say:

> " I note that the deceased died at the age of 28years, the court applied a multiplier of 30 years taking into account that he had 32 years to attain age of 60 which is the statutory retirement age. Whereas I agree that the deceased's nature of work would allow him to work beyond 60 years, it is important to consider the fact there are risks involved in the work of security guard besides other vulgaries of life which include illness and there are chances that a person may die before attaining the age of 60 or may be alive but unable to engage in active employment. In my view award of 30 years as multiplier is on the higher side and I am inclined to reduce to 22 years."

18. Therefore, there is a need to interfere with the trial court's award on loss of dependency which is hereby worked out as follows: Kshs 2,640,000/- (15,000 x 12 x 22 x 2/3).

19. In the end, I find that the appeal is meritorious and the judgment awarded as follows:

    a. Liability assessed at 100%

    b. Pain and suffering Kshs 50,000/-

    c. Loss of expectation of life Kshs 200,000/-

    d. Loss of dependency Kshs 2,640,000/-

    e. Special damages Kshs 118,550/-

Total Kshs 3,008,550/-

20. The appellant is awarded the half cost of the appeal. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT BUNGOMA THIS 25TH DAY OF JUNE 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Muresia - For the Appellant

Respondent - Absent

Wilkister/ Diana -C/A