Maweu & another v Kinyanjui (Suing as the Legal Representative and Administrator of the Estate of the Late Wambui Kinyanjui - Deceased) (Civil Appeal 331 of 2019) [2024] KEHC 7584 (KLR) (Civ) (24 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7584 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 331 OF 2019

DKN MAGARE, J

JUNE 24, 2024

BETWEEN

JOSEPH MAKAU MAWEU .... 1ST APPELLANT

CALVIN IMODIA MUKURVI .... 2ND APPELLANT

AND

LUCY NJOKI KINYANJUI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE WAMBUI KINYANJUI - DECEASED) .... RESPONDENT

JUDGMENT

1. This is from the judgment and decree of the Hon. D.W. Mburu given on 7/6/2019 in Nairobi CMCC 6966 of 2018. The Appellant was the defendant in the court below.
2. The matter was disposed off via written submissions. Liability was agreed by consent of 85:15 in favour of the Respondent.
3. The matter proceeded by documents only. The court entered judgment as follows:-
   a. Pain and suffering Kshs.150,000/-
   b. Loss of expectation of life Kshs.200,000/-
   c. Loss of dependency Kshs.14,364,000/-
   d. Special damages Kshs.35,150/-

4. The Appeal arises from a fatal road traffic accident involving motor vehicle registration No. KAX 948N near Manyani area which resulted into injuries to the vehicle and some persons. This particular matter related to the late Ritah Wambui Kinyanjui – deceased. She was an 18 years old student at Egerton University studying Bachelor of Science. The statement indicated that they are now survived by the mother and sister.

5. Upon perusing the documents, the court awarded the amount aforesaid from which the appellants appealed. They set out the following grounds of appeal:-

    a. That the learned magistrate erred in law and in fact in awarding general damages to the Respondent amount to Kshs.14,364,000.00 with costs and interest thereon.

    b. That the quantum of general damages is excessive and an erroneous estimate of the general damages that may be awarded to the Respondent with due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.

    c. That the learned magistrate misdirected himself by failing to consider the submissions by the Appellants while arriving at the judgment.

Analysis

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

9. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

10. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " 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...But 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..."

11. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

12. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

13. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

14. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

15. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

16. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure

of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance…"

17. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

18. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

19. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

20. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

21. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

22. In general the appeal relates to general damages. It is not known how old the Respondent was from the Pleadings. Particulars pursuant to statute were not given. They are supplied in the witness statement.

23. In arriving at the final judgment the court relied on notional salary for ICIPE for a bio Statistician to be between Kshs.130,000 – 250,000. This was not the salary that the deceased was receiving but what she could have received had she completed school and gotten employed. There was no evidence that she was working or had a standing contract at ICIPE or any international organization.

24. By going into notional salary, the court fell deep into error by entering the field of speculation. It is true that in future the minor could get employed. However, dependents change. There are also vagaries of life that cannot be predicted on.

25. The deceased was a student at the time of death. She should be treated as such. However, she had a promise. The promise does not promise that there could be employment. It is just that for the Respondent, she is holding on to hope that was dashed. In the case of Betty Ngatia (Administrator

of the estate of Gladys Waithira Ngatia v Samuel Kinutia Thuita [1999] eKLR, Justice Rtd. A.G.A. Etyang', posited as doth: -

> "These parents feel that it is their responsibility to pay for their children's education so that these children may get gainful employment for their own financial support in this competitive life and also for the financial support of the parents in old age. Parents therefore do have hope in their children. After investing heavily in the education of their children, the parents expect these children to reciprocate and give them some financial support, assistance and care in their old age. Upon the death of that child a parent's hope and expectations are dimmed and that financial support is obliterated. It is for this reason that courts do condemn tortfeasors to pay the estate of such a child, for the benefit of his or her parents and other beneficiaries, money for lost years. That is money which such a child, if she or he had lived and worked, would have earned for the period that she or he would reasonably have been expected to be in the income-yielding employment."

26. Money may not return the deceased or even change the frame of the bodies for those injured. Damages are, however not a tortfeasor. The damages must reflect the circumstances of the insuring public and the loss suffered, however immense. In the case of H West and Son Ltd v Shepherd (1964) AC 326 the House of Lords in England stated that:-

> "... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ..."

27. In this case, it was singularly inapplicable to use an amount of salary to be earned as set by an international organization as a basis for award of damages. Further, both parties were wrong in relating the multiplier to the deceased only. Regard must be heard to both the deceased and the dependent.

28. Had I been using a multiplier 20 years will be the highest I could give due to the age of the dependents. I also note that the particulars of the dependents were not given. However, they are in the witness statement.

29. I find proceeding without testimony limiting so much. Parties should at least hear the plaintiff. I do not agree that the court should award minimum wages. This is because the deceased was not a minimum wage earner but a bright young lady with immense potential. A potential the Appellant's driver nipped in the bud. No amount of damages will compensate the empty nest and dreams the Respondent is feeling.

30. I am aware that the duty of the court in general damages were settled in *Butt vs Khan CA 40 of 1977* and restated by the Court of Appeal in *Mariga vs Musila, Civil Appeals Nos. 66 of 1982* and 88 of 1983 (1984) KLR as follows: -

> "The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not

what the appellate court would award but whether the lower court judge acted on wrong principles."

31. In this case the Deceased was 18 years without income but with a potential. Using income not earned is speculation. A lump sum or global figure is ideal. In in Seremo Korir & Another vs. SS (Suing as The Legal Representative of the Estate of MS, Deceased) [2019] eKLR, the court said:

> "22. In the lower court's judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased's school and that the deceased was 12 years old, a fact that was not contested. It was the appellants' submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method...
>
> 27. In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the 'global sum', 'separate heads', or 'mixed' approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/ lump sum approach"

32. In the case of Gammel v Wilson (1981) 1 ALL ER 578 Lord Scarman at page 593 that: -

> "Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim."

33. In the matter in the court below no evidence was led on the prospects of employment. The parties opted to use documents. Further, the lower court did not have an advantage of hearing parties and forming a definite finding on demeanor. In the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018*) [2023] KECA 202 (KLR) (17 February 2023) (Judgment), Kiage JA, stated as follows: -

> "I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the learned magistrate out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified.I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary."

34. In Fidelity Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and
>
> profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

35. The use of documents removes from the court personalized view of the case. However, as hitherto stated, a lump sum will be ideal in the circumstances. Consequently, an award of Ksh 2,500,000/= as a global figure will suffice.

36. In the end I set aside the award of Kshs. 14,364,000/= as loss of dependency and substitute therewith a sum of Kshs. 2,500,000/=. This is based on the length of dependency, the age of the deceased and the age of the dependents. This is further augmented by the promising nature of the deceased.

37. I do not find any issue with loss of expectation of life as the deceased had the entire future to himself.

38. There was no appeal on special damages.

39. Lastly on pain and suffering the court awarded Kshs.150,000/=. The accident occurred on 28/8/2015. The death occurred on Nairobi – Mombasa road. The same was due to cardio pulmonary arrest due to massive intracerebral haemorrhage. The death therefore occurred instantly. An award of Kshs.150,000/= is on the higher side.

40. In the case of In Retco East Africa Limited v Josephine Kwamboka Nyachaki & another [2021] eKLR, the court awarded 100,000/- for a deceased who died 30 minutes later. It stated as doth: -

> " The court heard that the deceased died after 30 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed: -
>
> "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

41. An award of Kshs.50,000/= is ideal for the death that occurred almost on the spot. In the circumstances I allow the appeal as aforesaid.

42. On costs the Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the

preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

43. As regards costs, Section 27 of the *Civil Procedure Act* provides as follows: -

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

44. Pursuant to Section 27 of the *Civil Procedure Act* provides that the court can provide for costs.

Determination

45. The upshot of the foregoing is that I enter Judgment for the Appellant against the respondent as follows: -

a. The appeal on loss of expectation of life is dismissed.

b. I set aside the award of Kshs.150,000/= for pain and suffering and in lieu thereof award a sum of Kshs.50,000/=.

c. I set aside the award of Kshs.14,364,000/= as damages for loss of expectation of life and substitute with a sum of Kshs. 2,500,000/=.

This makes the following:-

a. General damages = Kshs. 2,500,000/=

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

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

Sub-total = Kshs.2,750,000/=

Less 15% = Kshs.412,500/=

Total = Kshs.2,337,500/=

Add Special damages = Kshs.35,150/=

Total = Kshs.2,372,650/=

d. Interest on general damages from 7/6/2019.

e. Each party to bear their own costs in the Appeal.

f. The Respondent to have costs in the court below.

g. Interest of special damages from the date of filing suit in the lower court, that is 1/8/2018.

h. 30 days stay of execution.

i. The special damages are not subject to contribution.

j. Each party to bear their own costs in the suit.

k. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 24TH DAY OF JUNE, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Mrs. Shah for the Respondent

Court Assistant - Jedidah