Thuo v Wandabwa (Suing as the Administrator & Personal Representative of the Estate of Justus Wandabwa Baringo - Deceased) & another (Civil Appeal E029 of 2023) [2024] KEHC 11936 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11936 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E029 OF 2023

REA OUGO, J

SEPTEMBER 26, 2024

BETWEEN

JOHN WAITHAKA THUO ..... APPELLANT

AND

VIOLET WANJALA WANDABWA (SUING AS THE ADMINISTRATOR & PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTUS WANDABWA BARINGO - DECEASED) ..... 1ST RESPONDENT

MOSES SIKUKU BARINGO (SUING AS THE ADMINISTRATOR & PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTUS WANDABWA BARINGO - DECEASED) ..... 2ND RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. D. Ogal (SRM) delivered on the 29th day of March 2023 in Kimilili PMCC No 180 of 2019)

JUDGMENT

1. The respondent's claim at the lower court was filed under the Fatal Accident Act and the *Law Reform Act*. The deceased on 1st December 2017 was a pedal cyclist along Kamukuywa-Kimilili road when it was knocked by the appellant's vehicle KCF 196A which lost control and veered off the road. The deceased sustained fatal injuries. The deceased is survived by his widow and 7 children all of whom were minors.

2. It was averred that the deceased at the time of his death was 43 years old working as a mason earning Kshs 15,000/- per month. As a result of his death, his estate suffered loss and damage. The appellant was awarded general and special damages, costs of the suit and interest.

3. After conducting a hearing, the trial court found the appellant 100% liable for the accident. He made the following award of damages:

a. Pain and suffering Kshs 50,000/-

b. Loss of expectation of life Kshs 100,000/-

c. Loss of dependency Kshs 1,384,136/-

d. Special damages Kshs 107,715/-

Total Kshs 1,641,851/-

4. The appellant aggrieved with the trial magistrate's judgment, now seeks to set aside damages and has urged the court re-assess damages. The memorandum of appeal dated 7th April 2023 is based on the following grounds:

1. That the learned trial magistrate erred in law and in fact by proceeding on wrong principles when assessing the damages payable to the respondents for loss of dependency under the Fatal Accident Act.

2. That the learned trial magistrate erred in law and in fact by awarding Kshs 50,000/- for pain and suffering contrary to the evidence on record as the deceased died on the spot.

3. That the learned trial magistrate erred in law and in fact by awarding Kshs 1,384,361/- as general damages which award was inordinately high in the circumstances thus representing an erroneous estimate of an award of general damages vis-à-vis the respondent's claim and thus the award constituted miscarriage of justice.

4. That the learned trial magistrate erred in law and in fact in failing to take into account the vicissitudes and vagaries of life in view of the deceased nature of job hence applying a multiplier of 13 years which is manifestly excessive.

5. That the learned trial magistrate erred in law and in fact by adopting a multiplicand of Kshs 13,309/- from an ungraded artisan instead of a multiplicand of Kshs 7,967.95 for a stone cutter whereas a mason is a person skilled in cutting, dressing and laying stones in a building.

6. That the learned trial magistrate erred in law and in fact by awarding Kshs 107,715/- as special damages whereas the receipts produced as exhibits during trial total Kshs 51,615/-.

7. That the learned trial magistrate erred in law and in fact by failing to consider the authorities cited by the appellant in his written submissions in quantum more specifically on the issue of loss of dependency thereby arriving at a determination on quantum which is wholly erroneous.

5. The parties were directed to file written submissions and they have both complied.

Analysis and Determination

6. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

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

7. The appellant submits that the deceased died on the spot however the trial court awarded Kshs 50,000/- which is excessive. On the other hand, the respondent argues that a considerable amount of pain was experienced and the award of Kshs 50,000/- was very reasonable.

8. In *Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* [2021] eKLR, the court held that:

> " ...what determines the award under that head is how long the deceased took before he either passed away or lost consciousness. In the instant case, there was no cross-examination of the witnesses in order to bring out this evidence. A distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometime 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..."

9. In this case the trial magistrate awarded Kshs 50,000/- as damages for pain and suffering. The trial court considered the decision of the court in *Sukari Industries Limited v Clyde Machimbo Juma*, Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where the court held that the conventional award for pain and suffering ranges between Kshs 10,000/- to Kshs 100,000/-. The court in *Mwaura v Asingo & Yugu (Suing as Administrator and Personal Representative of the Estate of Maurice Oketch Asingu - Deceased)* [2024] KEHC 7842 (KLR) held that to insist that the award should remain at Kshs 10,000 in line with conventional awards is to ignore the realities of inflationary trends over the years. Having regard to the recent pronouncement by courts on the award on pain and suffering, I find that the award by the trial magistrate under this head was not excessive.

10. The appellant also submitted that a global award of Kshs 400,000/- was awarded to a deceased person who was 59 years old in *Dora Mwawandu Samuel (suing on her behalf and behalf of Samuel Muweliani Jumamosi- Deceased) v Shabir M. Hassan* [2021] eKLR. A global amount of Kshs 500,000/- was awarded in *Rishi Hauliers Limited v Josiah Boundi Onyancha* [2015] eKLR. The appellant in his submissions has urged the court to apply 5 years as the multiplier. The appellant in his submissions also urged the court to make a global award.

11. However, in this case, the occupation of the deceased was known. Pw1 testified that the deceased was a mason and the death certificate also captured his occupation. The appellant closed its case without calling any witness and in this regard the respondent's evidence was unchallenged. There was no evidence that the deceased was a stone cutter and, in any event, the same was introduced by the appellant in his submissions at the trial court. It is well established that submissions do not take the place of evidence, and without any evidence showing that the deceased was a stone cutter, the trial magistrate was correct in disregarding the appellant's submission on the deceased's occupation.

12. No certification was provided to establish that the deceased was a mason. The trial court rightly noted that a mason lacking certification could be classified as an ungraded artisan. It is quite common for individuals in rural areas to engage in such trades without formal proof of qualification (see *Caleb Juma Nyabuto v Evance Otieno Magaka Charles Oyugi Amuomo (Suing as legal representatives of the estate of James Magak Kawere (Deceased)* [2021] KEHC 7614 (KLR)). Therefore, the multiplicand of Kshs 13,309 adopted by the trial magistrate for an ungraded artisan was proper.

13. On the multiplier, the appellant in his submissions argued that the deceased was 50 years old and urged the court to consider the case of *Mary Wanja Ndungu & another v Samuel Kariu Kagone* [2011] eKLR where a multiplier of 5 was adopted in respect to a deceased aged 50 years.

14. On the other hand, the respondent argues that the deceased was a trained mason, therefore the trial court's awarding of Kshs 13,309/- as the minimum wage and applying a multiplier of 13 years was reasonable.

15. The appellant cited the case of *Mary Wanja Ndungu & another v Samuel Kariu Kagone* [2011] eKLR where a multiplier of 5 years was applied. However, in that case, the deceased was the driver at the City Council of Nairobi aged 50 years and the age of retirement at the time was 55 years, therefore the court applied the multiplier of 5 years. The multiplier used in the *Mary Wanja Ndungu & another v Samuel Kariu Kagone* [2011] eKLR cannot apply to this case. The deceased was 50 years old, employed in the informal sector and could work way beyond the formal retirement age of 60. Therefore, I see no error when the trial magistrate applied the multiplier of 13.

16. The appellant submitted that there was a double award under the *Law Reform Act* and the Fatal Accident Act. I urge the appellant to carefully read the Court of Appeal decision in *Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited* [2015] eKLR where the Court of Appeal held that

> " 19. Finally, on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law."
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> 20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issues of duplication does not arise.
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> 25. The words 'to be taken account' and 'to deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." [Emphasis added]

17. There is no requirement to deduct the award made under the *Law Reform Act* from the award under the *Fatal Accidents Act*. There was no double compensation in this case.

18. On special damages, the appellant submitted that the trial court proceeded to award a sum of Kshs 107,701 yet the receipts produced amounted to Kshs 52,516/-. The respondent argues that on 4/11/2021 the respondent produced receipts amounting to Kshs 52,615/= while the rest were produced as MFI 9(a) to (f). The total sum in the receipts amounted to Kshs 148,115/-.

19. The respondent, Pw1, produced the receipt issued for the legal fees in obtaining the grant of letters of administration which was Kshs 45,000/- and the receipt for the post mortem which was in the amount of Kshs 7,615. The receipts for tents, chairs and transport; dressing; coffin and hearse; and purchase of foodstuff and a cow were marked as MFI 9(a) –(f). Pw1 was recalled and noted that the receipts for the funeral had not been produced and were marked as MFI9(a)-(f). Pw1 when recalled only produced birth certificates marked as Exhibit 10 (a-e). Therefore, the only special damages for Kshs 52,615/- were proved.

20. After considering the appeal in its entirety, I find that the appeal partly succeeds. The trial magistrate's award on special damages of Kshs 107,715/- is set aside and substituted with an award of Kshs 52,615/- as special damages. The appellant shall have 1/3 costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF SEPTEMBER 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Njuguna h/b Miss Nanjira . For the Appellant

Respondent - Absent

Wilkister -C/A