Mwiti & another v FNK (Suing as the legal representative of the Estate of JMM (Deceased) (Civil Appeal E128 of 2021) [2023] KEHC 456 (KLR) (30 January 2023) (Judgment)

Neutral citation: [2023] KEHC 456 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E128 OF 2021

EM MURIITHI, J

JANUARY 30, 2023

BETWEEN

EVANS KARANI MWITI ..... 1ST APPELLANT

LOYFORD MUGAMBI ..... 2ND APPELLANT

AND

FNK (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JMM (DECEASED) ..... RESPONDENT

(n appeal from the Judgment and Decree of Hon. E.W Ndegwa (R.M) in Githongo SPMCC No.E3 of 2020 delivered on 1/9/2021)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaint dated 26/8/2020, in which the Respondent sued the Appellants seeking special damages, general damages under the Fatal Accident Act and *Law Reform Act*, costs of the suit and interest at court rates.

2. She pleaded that on 7/9/2019, the deceased was lawfully riding his motor cycle Registration No. KMEN 916 U along Githongo-Meru Road when the 2nd Appellant's motor vehicle registration number KBN 488 F was so negligently driven, managed and/or controlled by the 1st Appellant that it hit the deceased motor cycle, fatally injuring him and extensively damaging his motor cycle. It was pleaded that the deceased, who was endowed with good health, was an adventurous businessman engaged in the matatu business, operating a motor cycle for carrying fare paying passengers among other various business activities. The average daily earnings of the deceased were Ksh.2,500 which he utilized in providing for himself and his family. As a result of the accident, the vigorous life of the deceased was drastically cut short at the age of 39 years thereby occasioning his estate and dependants loss and damage.

3. The Appellants denied the claim by their statement of defence dated 5/3/2021 and prayed for the respondent's suit to be dismissed.

4. After conclusion of the trial, the trial court found that the Respondent had proved his case on a balance of probabilities, apportioned liability at 50:50 and awarded general damages of Ksh.20,000 for pain and suffering, Ksh.100,000 for loss of expectation of life, Ksh. 3,948,000 for loss of dependency totaling to Ksh. 4,068,000 less 50% contribution = Ksh. 2,034,000 plus costs and interest.

The Appeal

5. On appeal, the Appellants filed their Memorandum of Appeal on 22/9/2021 listing 4 grounds as follows:

    1. The learned trial court erred in misapplying the law and principles to the facts and evidence so as to reach a decision on liability that was erroneous in the circumstances.

    2. The learned trial court erred by failing to consider with a fair measure the submissions of the Appellants in writing the judgment.

    3. The learned trial court erred in the evaluation of evidence before it and disregarded important elements of the evidence, principles and practice thus reaching an award on damages that is so inordinately high in the circumstances.

    4. The learned trial court erred when it wrongly considered irrelevant elements in the evidence before it and or applied wrong principles to the evidence as to reach an award of damages that is inordinately high and unjust in the circumstances.

Duty of the court

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See Selle v Associated Motor Boat Co. & others [1968] E.A. 123).

The Evidence

7. PW1 FNK, the Respondent herein, testified that"

> " JMM (deceased) was my husband. On 7/9/2017, he died. On 26/8/2020, I recorded my witness statement narrating about the accident and how I had lived with my husband. I wish to rely on my statement...On 26/8/2020, I filed a list of documents which I wish to rely on...PEX1-9 are marked as produced in the order they appear. We had 1 child CMM who is 12 years old in WB. My husband was responsible for catering for her needs. I am now supporting my child."

8. On cross examination, she stated that:

> " I blame the 1st defendant for the accident. I did not witness the accident occur. My husband was providing for our family. He had a boda boda that he was operating. He was also a farmer, livestock farmer and operated a boutique. He also had a matatu business. I have not brought any evidence to show he owned a Matatu. He also operated a boda boda. He was driving the Matatu. He was operating the boda boda but we had employed a driver for the matatu. He only drove the matatu on Sundays. I have not tendered any evidence of a driving

licence or evidence of ownership of the motor cycle. I brought a registration certificate of the log book to show he owned the motor cycle. On a daily basis he earned Kshs. 2,500/=. I have produced a bank statement to prove that he was earning this figure on a daily basis. I am sure about that. He had leased land for farming. I have not produced any lease agreement. The boutique business belonged to him. It closed down because he supervised. I did not have any helper and the boutique was in rental premises. I have not brought any licence for a boutique."

9. On re-examination, she stated that:

> " My husband earned about Kshs. 2,500/=. I have brought a bank statement. He told me that was his earning. He would make some savings after he even bought land that is not fully paid for."

10. PW2 Joseph Kimathi Manyara, testified that:

> " I know FNK (plaintiff). I know her since birth. I also knew JMM for a long period of time. He is deceased. He was a farmer and boda boda rider. On 26/8/2020 I recorded my witness statement that I witnessed the accident on 7/9/2019. I wish to rely on my statement as my evidence in chief....I witnessed the accident. The deceased was hit by a vehicle. He did not hit the vehicle. I went and made a report to the police."

11. On cross examination, he stated that:

> " I was at Githongo market when the accident occurred. I was at Abothuguchi Boarding school when I witnessed the occurrence of the accident. I wanted to board a vehicle and go home. I saw the accident take place. I was in a position to see the road. A tractor was in front of the motor cycle which was following the tractor. They were coming towards my direction. I ran to the Police Station after the accident occurred. Police officers came to the scene and prevented the members of public. The lorry hit a person and stopped. It is not the tractor which caused the accident. The lorry remained at the scene after the accident. After the accident the motorcycle was behind the tractor and not lorry. The deceased died on the spot. When the lorry hit him the lorry drove ahead of the body but the motorcycle remained behind the lorry. It is not true that the body and the motorcycle were behind the lorry after the accident. I know that Francis Karani Mwito was charged in a traffic case. I testified in that case. I do not know the outcome of the traffic matter. The deceased was not my friend but a neighbour for quite a long time. I blame the lorry driver Evans Karani for causing the accident. I am not an expert of road traffic accidents."

12. On re-examination, he said:

> " After the accident the lorry drove in front of the body. The motor cycle fell on the road as well as the body. The body lay on the left side facing Githongo direction as well as the motorcycle. The lorry was on the right side facing Githongo."

13. PW3 Corporal Salim Hassan of Kariene police station attached to the traffic department produced the police abstract and testified that:

> " I have a police abstract, police file involving motor vehicle KBN 488 F Isuzu FSR over an accident that occurred on 7/9/2019 and motor cycle KMEN 916 U along Meru githong

Kithirune area. On the abstract, the time of the accident not indicated. The report of the accident was made at Gitongo Police Station. The driver of motor vehicle KBN 488 F was arraigned and charged with careless driving vide TR NO. 343/19. Case was finalized. Accused was acquitted under section 215 of the Criminal Procedure Code. No. 77704 PC Joseph Mwaura conducted investigations and was transferred from the station. I went through the report and then his conclusion the motor cycle was overtaking same with motor vehicle. The motor cycle was hit by the motor vehicle on the rear side by motor vehicle KBN 488 F and as at the rider died. A decision was made to charge the driver. From the report he made a conclusion that the driver of the vehicle was to blame for the accident hence decision to charge him. The point of impact was on the sketch plan which was produced in court. From the statement of the investigating officer the point of impact was on the right side of the road facing Kithirune which is the left side facing Githongo. One Joseph Kimathi recorded his statement as an eye witness. His name is recorded as an eye witness in the police abstract."

14. On cross examination, he stated that:

> "I confirm I was not the investigating officer. I never visited the scene of accident. I do not have the sketch plan with me. The point of impact was on the left side facing Githongo. The motor vehicle was heading towards Kithirune and the motor cycle was heading to the same direction. The point of impact was on the left side. Both of them were overtaking. There was also an unknown motor vehicle. There is no indication that there were bumps on the road. I have not seen any inspection reports of the vehicle/motorcycle in the file. The driver was charged in traffic case 343 of 2019 and acquitted. I do not have a copy of the judgment."

15. On re-examination, he stated that:

> "Joseph Kimathi was at Kiarago slaughter stage walking from Githongo to Kithirune. He said the lorry was being driven from Githongo. I do not have the sketch plan in court."

16. DW1 Evans Karani Mwiti, the 1st Appellant herein adopted his statement as his evidence in chief. He went on to state that:

> "I am a driver of KBN 488 F which was involved in an accident. I was charged in a traffic case and I was acquitted on 14/6/2021...My vehicle was hit from behind by a motor cycle. There was a tractor on the left. All of us were heading the same direction. When I heard a bang after the motorcycle hit my vehicle, I had to stop. I blame the motor cycle rider who was not keeping distance. I was not speeding. There were bumps in front of the tractor."

17. On cross examination, he stated that:

> "I confirm I was the driver of the vehicle on the material date and was employed by Loyford Mugambi. I admit there was an accident. I was driving from Kithirune towards Githongo. After the accident I boarded a motor cycle and went to report the accident. The accident took place on the left lane heading to Githongo. There was a tractor in front of me. I had to step on brakes to avoid hitting the tractor. My vehicle had mirrors. I did not see the motor cycle. I saw it after it hit me. I stopped immediately after the accident. After I alighted the motor cycle never left. I do not know if the officer found them at the same position because I was not there when I went, I did not see anyone after the accident. There was no man at the scene. Two women were far off. The man who testified was a stranger to me. The man

came to the station and found me already there. I was not acquitted because the investigating officer stated that I was driving from Githongo to Kithirune. Joseph Kimathi testified in the traffic case. I do not know the person who was hit by the motor cycle. It was not my first time to ply along Githongo Kithirune road. I know the road very well and the position of the bumps. I got surprised that I was hit from behind."

18. On re-examination, he stated that-

> " Had I seen the deceased from the side mirror, there is nothing I would have done to stop the accident. There was a sign post for the bump. The deceased ought to have seen it."

Submissions

19. The Appellants fault the trial court for wrongfully adopting a multiplicand of Ksh.23,500, yet no documentation was produced to prove the earnings of the deceased, and rely on Dennis Maosa Kibegwa v Ochieng'i Mosero Joyce & another (2019) eKLR, Albert Odawa v Githimu Gichenji (2007) eKLR and Bon Ton Limited v Beatrice Kanaga Kereda suing as Administrator of estate of Richard Alembi Ochenga (Deceased) (2018) eKLR. They submit that an award of Ksh.1,000,000 for loss of dependency would suffice, and urge the court to deduct the award made under the *Law Reform Act* from that made under the *Fatal Accidents Act*, to avoid double compensation. They cite Transpares Kenya Limited & Another v SMM (Suing as Legal Representative for and on behalf of the Estate of EMM (Deceased) (2015) eKLR, Kemfro v A.M. Lubia & Another (1982-1988) KAR 727 and Sukari Industries Limited v Ismael Ombaka Omar & Another (2017) eKLR to buttress their submissions.

20. The Respondent persuades the court to find that in view of the conflict of primary facts between the witnesses who testified, the apportionment of liability at 50:50 was apt, and cites the Court of Appeal case of Michael Hubert Kloss & Anor v David Seroney & 5 Others (2019) eKLR. He urges that the awards under the *Fatal Accidents Act* and the *Law Reform Act* were validly made within the trial court's discretion, as evidence was led that the deceased was an industrious businessman running matatu and motor cycle businesses, thus the trial court was justified in making the assessment it did. He urges the court to uphold the findings of the trial court and dismiss the appeal with costs. He relies on Kennedy Macharia Njeru v Jackson Githongo Njau (2019) eKLR and Richard Matheka Musyoka & Another v Susan Aoka & Another (2019) eKLR in support of his submissions.

Analysis and Determination

21. Before delving into the merits of this appeal, this court wishes to address the issue of double compensation raised in the Appellants' submissions. This court respectfully agrees with the explanation given by the Court of Appeal in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited (2015) eKLR that;

> "....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 issue of duplication does not arise."

22. In addition, the Court of Appeal in Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v. Lubia & Another (No. 2) [1987] KLR 30 guided that what the court is required to do is to

take into account the award under *Law Reform Act* and not necessarily to deduct the same from the award under the *Fatal Accidents Act*, as follows:

> " 6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
>
> 7. The *Law Reform Act* (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
>
> 8. The words "to be taken into account" and "to be deducted" are two different things. The words used 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."

See also this court's decision KBT HCCA No. 1 of 2018, (Formerly Nakuru HCCA No. 147 of 2015) David Kenei Julius Cheretei v. Zipporah Chepkonga (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii - Deceased).

23. The issues for determination are whether the apportionment of liability at 50:50 was proper; and whether the general damages awarded by the trial court under the various heads excessive.

Liability

24. PW2, an eye witness recorded in his statement dated 26/8/2020 that he saw a tractor, a motor cycle and a lorry heading towards the same direction. Suddenly, the lorry emerged from behind the motor cycle and tried to overtake the tractor thus knocking down the motor cyclist. The motor cyclist fell down and the lorry stopped about three metres from the point of impact.

25. When he was cross examined, he stated that -

> " ..I saw the accident take place...A tractor was in front of the motor cycle which was following the tractor. They were coming towards my direction...The lorry hit a person and stopped. It is not the tractor which caused the accident. The lorry remained at the scene after the accident. After the accident the motorcycle was behind the tractor and not lorry. The deceased died on the spot. When the lorry hit him the lorry drove ahead of the body but the motorcycle remained behind the lorry...I blame the lorry driver Evans Karani for causing the accident."

26. PW3 told the court that as per the investigations and the findings in the police file, it was established that the motor cycle and the motor vehicle were both overtaking at the same time, when the motor cycle was hit by the motor vehicle on the rear side and the rider died. He stated that although the driver of the accident motor vehicle was charged with a traffic case, he was subsequently acquitted of the said charges.

27. In his sworn defence, the 1st Appellant acknowledged that he was the driver of the accident motor vehicle at the time of the accident. He narrated that, "I was charged in a traffic case and I was acquitted on 14/6/2021...My vehicle was hit from behind by a motor cycle. There was a tractor on the left. All of us were heading the same direction. When I heard a bang after the motorcycle hit my vehicle, I had to stop. I blame the motor cycle rider who was not keeping distance. I was not speeding. There were bumps in front of the tractor." When cross-examined, he stated that, "..The accident took place on the left lane heading to Githongo. There was a tractor in front of me. I had to step on brakes to avoid hitting the tractor. My vehicle had mirrors. I did not see the motor cycle. I saw it after it hit me. I stopped immediately after the accident."

28. It is clear from the evidence of record that there were 3 different versions of how the accident occurred. While the Appellants maintained that the deceased was wholly to blame for the accident for failing to keep distance thus hitting the accident motor vehicle from behind, the Respondent took the position that the 1st Appellant overtook negligently, suddenly and dangerously thus knocking down the deceased and the police officer, who was not the investigating officer, stated that both the motor cyclist and the driver of the accident motor vehicle were trying to overtake a tractor when the subject accident occurred. The evidence of the police officer can only be taken with a pinch of salt as he was not the investigating officer, he did not visit or witness the accident take place and he did not produce the sketch plan to show the exact point of impact.

29. Faced with the contracting versions of how the accident had occurred as narrated by the eye witness and the 1st Appellant, the trial court opined that it would be just to have the motor cyclist and the driver of the accident motor vehicle equally share the blame, and this court affirms that finding. The 1st Appellant was negligent because he admitted on cross examination that he only saw the motor cycle after it had hit him. If he had been careful enough, he would have seen the motor cyclist in good time to avoid the accident. The deceased was equally at fault as it was not established that he did anything to try and avoid the accident.

Excessive general damages under the various heads

30. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as stated by the Court of Appeal in the case of Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR in the following terms:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see Kemfro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985] KLR 470)"

Pain and Suffering

31. It is not in dispute that the deceased died on the spot. That by itself does not mean that he did not suffer any pain prior to his death, and the trial court was justified in awarding the sum of Ksh. 20,000 under this head.

Loss of expectation of life

32. The trial court, in exercise of its discretion awarded the sum of Ksh.100,000 under this head, after taking into account the fact that the deceased was at his prime age of life, and doing marvelously well business wise. This court finds that the award of Ksh.100,000 under this head was based on precedent and due consideration of the circumstances of the case.

Loss of dependency

33. There must be evidence to support a finding of dependency in the circumstances of the case. I would respectfully agree that Dependency is a matter of fact and must be proved by evidence as was rendered by the court in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR (P.J.O. Otieno J) as follows:-

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."

34. In the present case, PW1 testified that they were blessed with one issue and the deceased catered for her needs. On cross examination, she stated that:

> " ...My husband was providing for our family. He had a boda boda that he was operating. He was also a farmer, livestock farmer and operated a boutique. He also had a matatu business... He was driving the Matatu. He was operating the boda boda but we had employed a driver for the matatu. He only drove the matatu on Sundays...I brought a registration certificate of the log book to show he owned the motor cycle. On a daily basis he earned Kshs. 2,500/ =. I have produced a bank statement to prove that he was earning this figure on a daily basis. I am sure about that. He had leased land for farming...The boutique business belonged to him. It closed down because he supervised. I did not have any helper and the boutique was in rental premises."

Verdict

35. It is this court's finding that the Respondent proved, on a balance of probabilities that the deceased was, besides being a boda boda rider, engaged in the matatu business and also running a boutique. This court is mindful of the fact that the deceased was only 39 years old, at the prime of his life, full of good health which was brutally cut short by the negligence of the Appellants. The court has noted the bank statements on record showing that the deceased made daily deposits in Smart Champions Sacco Ltd between 7/1/2019 to 6/9/2019. There is also a Registration Certificate showing that Motor Cycle Registration No. KMEN 916 U belonged to the deceased. There is no doubt that the deceased was the father of Christine Makena as per the certificate of birth on record. PW1 told the court that the said child was 12 years old in Wesley Boarding.

36. This court finds that the trial court's adoption of a multiplicand of Ksh. 23,500, a multiplier of 21 years and a dependency ratio of $^{2}/3$ for a deceased who was engaged in various income generating ventures with a wife and a school-going child was justified in the circumstances.

ORDERS

37. Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.

38. The Respondent shall have the costs of the appeal to be paid by the Appellants.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JANUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Mwangangi Nzisa Advocate for Appellant.

Mr. Gitari Ringera Advocate for Respondent.