Rop & another v Omondi & another (Suing as legal representative the Estate of Omondi Ododa) (Civil Appeal 98 of 2018) [2023] KEHC 248 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 98 OF 2018

RN NYAKUNDI, J

JANUARY 25, 2023

BETWEEN

SHADRACK ROP ..... 1ST APPELLANT

SYLVESTER KIPKORIR ..... 2ND APPELLANT

AND

LYDIAH NANYAMA OMONDI ..... 1ST RESPONDENT

JENNIFER ADHIAMBO ODODA ..... 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVE THE ESTATE OF OMONDI ODODA

(Being an Appeal from the judgment and decree of the Hon. Emily Kigen delivered on 20th July 2018 in Eldoret CMCC No. 181 of 2016 between LYDIAH NANYAAAA OMONDI & JENNIFER ADHIAMBO ODODA (Suing as legal Representative the estate of OMONDI ODODA) VS SHADRACK ROP and SYLVESTER KIPKORIR)

JUDGMENT

1. The appellants were the defendants in the primary suit, Eldoret CMCC No 181 of 2016 between Lydiah Nanyaaaa Omondi & Jennifer Adhiambo Ododa (suing as legal representative the estate of Omondi Ododa) v Shadrack Rop and Sylvester Kipkorir. The suit was instituted by way of plaint and the plaintiff alleged that on or about December 3, 2015 the deceased was a lawful pedestrian on . the verge of the road along Eldoret-Langas road when the appellant's driver/agent so negligently drove, managed, and or controlled motor vehicle Reg No KAR 937D that the same was permitted to lose control, veer off the road and knocked down the deceased and as a result of which the deceased sustained fatal injuries.

The matter proceeded to full hearing and upon considering the pleadings, testimonies and evidence before it, the trial court found the appellant 100% liable for the accident; and awarded damages of a total of Kshs,2,638,266/= plus costs of the suit and interest to the respondent herein.

The appellants being dissatisfied with the decision of the trial court filed the present appeal *vide* a memorandum of appeal dated August 27, 2018. The appeal was based on the following grounds;

1. That the learned trial magistrate erred in law and in fact in failing to dismiss the respondents' suit in the lower court as he had proved their case on a balance of probabilities.

2. That the learned trial magistrate erred in law and in fact in framing issues for determination in the suit thereby displaying bias in her decision.

3. That the learned trial magistrate erred in law and in fact in biasedly framing issues for determination of the suit which leads to an erroneous decision.

4. That the learned trial magistrate erred in law and in fact by awarding the respondent a sum of Kshs 100,000/- for pain and suffering while not considering that the deceased succumbed to his injuries on the spot.

5. That that the learned trial magistrate erred in law and in fact by awarding the estate of the deceased a sum of Kshs 100,000/- for loss of expectation of life as they were not entitled to the same and/or the same was excessive so as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

6. That the learned trial magistrate erred in law and in fact in adopting a sum of Kshs 10,000/- per month in awarding the loss of dependency without any legal basis.

7. That the learned trial magistrate erred in law and in fact in applying a multiplier of 29 years while awarding loss of dependency without any legal basis or justification.

8. That the learned trial magistrate erred in law and in fact in applying the 2/3 ratio the ratio calculating while an award under lost years without any evidence or legal basis.

9. That the learned trial magistrate erred in law and in fact in awarding the respondent a sum of Kshs 2,320,000/- for loss of dependency without any legal basis and/or justification.

10. That the learned trial magistrate erred in law and in fact in awarding the respondent a sum of Kshs 2,320,000/- for loss of dependency that was so excessive as amount to an erroneous estimate of loss or damage suffered by the respondent.

11. That the learned trial magistrate erred in law and in fact in the exercise of his judicial discretion on assessment of damages as to abuse and wrong application of principles on award/assessment of damages.

12. That the learned trial magistrate erred in law and in fact in failing to deduct an award of Kshs 100,000/- under the *Law Reform Act* (cap 26) laws of Kenya from the net award thus leaving the estate of the deceased to benefit twice.

13. That the learned trial magistrate erred in law and in fact in failing to consider the appellants' submissions and legal authorities relied upon in support of the defence thereof.

14. That the learned trial magistrate erred in law and in fact by overly relying on the respondents' submissions and legal authorities which were not relevant and not without addressing her mind to the circumstances of the case.

15. That the learned trial magistrates' decision, albeit a discretionary one was plainly wrong.

Appellant's Case

2. The appellants filed submissions dated October 15, 2021. Learned counsel for the appellant submitted that the respondent failed to prove the particulars of negligence listed in the plaint. He stated that at page 120 paragraph 10 of the record of appeal, PW1 police constable Cheserek Kiptoo in his testimony testified that an accident occurred on December 3, 2015 at 2:30pm along Eldoret Kapsabet road involving motor vehicle Reg No KAR 937D Nissan Matatu and a pedestrian. That the said motor vehicle was overlapping when it rammed in the pedestrians. He produced the police abstract as PEXH1. On cross-examination, PW1 testified that he did not have the police file in court which had the witness statements recorded at the police station though he was part of the investigating officers in the case. He concluded that the OB was a summary of the police file and witness statements on re-examination. Learned counsel submitted that a police abstract alone is not a conclusive prove for causation of the accident. He relied on the case of *Kennedy Nyagoya v Bash Hauliers* [2016] eKLR in support of this submission.

3. Learned counsel submitted that PW3 Charles Odour who purported to be the eye witness did not lay any grounds to prove that the appellant was responsible for the accident. Further he did not plainly state at what speed the motor vehicle was being driven prior to the accident and therefore his testimony had no probative value and ought to be disregarded.

4. Learned counsel for the appellant combined grounds Nos 4 and 5 of the memorandum of appeal and submitted that under the *Law Reform Act*, the courts usually award the deceased family for pain and suffering incurred prior to death and loss of life expectations. In this case, the award under the *Law Reform Act* was excessive.

5. On pain and suffering, he submitted that the evidence on record is that the deceased died immediately and therefore it was wrong for the trial magistrate court to award such amount in disregard to the authority relied upon by the appellant and the fact that the deceased died the same day of the accident. There was no evidence that he died undergoing treatment as stated in the judgment and therefore the estate of the deceased ought not to be awarded damages under this head.

6. The appellant disputed the award for loss of expectation of life as it was based on the trial court's opinion. The evidence tendered was that the deceased was 31 years at the time of death and therefore an award of Kshs 80,000/- would have been sufficient.

7. The appellant consolidated grounds No 6,7,8,9,10,11 and 12 of the memorandum of appeal and submitted that the trial court was wrong in applying 29 years as multiplier without justifiable reasons and the authority in support of the same. The deceased was not a civil servant in which it can be presumed that he was to remain active at work to up to 60 years. Looking at the work he was engaged in it is highly unlikely that he was to remain productive to such an age.

8. Trial magistrate court was wrong in adopting a multiplicand of Kshs 10,000/= without any sufficient reasons thereof. The respondent alleged that the deceased was a tailor and earned Kshs 30,000/= per month. From the judgment at page 134 of the record of appeal, the court indicated that PW1 testified that the deceased earned Kshs 20,000/=from his tailoring work. The court proceeded to adopt a multiplier of Kshs 10,000/= without any legal backing.

9. Counsel contended that there was no document produced in court to show that indeed the deceased earned Kshs 20,000/= as was pleaded. Therefore, the trial court failed to find that the respondent failed

to prove that the deceased was earning Kshs 20,000/=. It is wrong for the trial court to award Kshs 10,000/= to the estate of the deceased, the award which was not proved as by law required.

10. On the dependency ratio, counsel submitted that there was no of prove relationship between the deceased and the alleged dependants as no documents were adduced to court to create the relationship link. Further the age of dependants was not disclosed and how the deceased used to help them. He further stated that the trial court erred by using the multiplier approached and submitted that that a global award of Kshs 300,000/= will be adequate compensation in the circumstance. Further, that the respondents are only entitled to compensation under one of the aforesaid acts and not both.

11. On special damages, counsel submitted that it is trite that special damages must be specifically pleaded and proved. the respondents did not plead any funeral expenses. The reason as to why the court proceeded to award the respondents Kshs 20,000/= as funeral expenses was not advanced. The trial court therefore improperly awarded the funeral expenses yet it was not pleaded as by law required hence it ought to be disregarded. This is because parties are bound by their pleadings.

12. The appellant further submitted that that the respondent did not spend the said Kshs 98,266/= pleaded as special damages. PW1 produced invoices from Moi Teaching and Referral Hospital as PEXH 4a and 4b respectively totalling Kshs 26,766/=. He stated that it should be understood that invoices are not proof of payment unless supported by receipt. No receipts were produced to support the respondent's claim. The only receipt were of Kshs 35,000/=, transportation costs, and kshs 3,000/= costs of clothing . No other receipt for special damages was produced in court. The appellant further submits that the said receipts do not bear a KRA stamp to prove that the requisite stamp duty was paid on such receipt as required under the provisions of sections 19 and 20 of the *Stamp Duty Act* for a court of law to attach any probative value on such receipts. As such, the respondents are not entitled to any special damages award.

13. He prayed that the appeal be dismissed with costs to the appellant.

Respondent's Case

14. The respondent filed submissions on May 20, 2022. He submitted that the respondent called two other witnesses in support of their case. PW1 was the police officer and PW3 was the eye witness. PW3 testified that he was walking at the edge of the road together with the deceased when the subject motor vehicle lost control and veered off the road and thereby hitting the deceased from behind. The testimony of PW1 was corroborated by testimony of PW3. PW1 was part of the team who carried out investigation into the accident. He went ahead to produce the police abstract as P Exh 1 as at page 120 of the record of appeal. The said exhibit appears at page 42 of the record of appeal and clearly indicates that the driver was to blame for causing the accident by dangerous driving. The appellants never disputed the production of the abstract.

15. The respondent cited the holding of Justice G. W Ngenye Macharia in *Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi* [2013] eKLR, where the honourable Judge stated as follows;

16. It is trite law that it is a settled principle that an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the judge (and I add magistrate) proceeded on wrong principles or that he misapprehended the evidence in some material respect.

17. According to the death certificate, the deceased was 31 years of age when he died. Your lordship, given that the retirement age in this country is 60 years, the trial court rightly used a multiplier of 29 years. The deceased was working as a tailor earning approximately 20,000/- per month as per the testimony

of PW2 at page 122 of the record of appeal, Your Lordship, being a tailor, there is no retirement age and he could have worked well beyond the age of 60 years. However due to the vagaries and vicissitudes of life, the court adopted a multiplier of 29 years which we humbly submit that this was a fair approach.

18. The deceased left behind a very young family of the widow, a minor and his mother. They all depended on him. The allegations by the appellants that there was no prove of relations or dependence is a misplaced allegation. The same was pleaded at paragraph 9 of the plaint as at page 6 of the record of appeal. The ages of the said dependants is as well clearly stated. The respondents in fact produced a letter from the area chief who confirmed the relations of the deceased and the dependants as pleaded in the plaint as captured at page 19 of the record of appeal. The same was produced as P Exh 3 without any objection from the appellants. The court therefore cannot make a global sum award where the deceased was working and had a family of his own.

19. Damages for loss of dependency under the *Fatal Accidents Act*, would therefore comprise a putative monthly income multiplied by twelve months for a year's salary and by the years of lost earnings amount spent on self. The respondents asked that this court does find that the trial court did not err in its determination of loss of dependency.

20. It is trite law that damages for loss of expectation of life are conventional and therefore not subject to inflation as such. A conventional sum of Kshs 100,000/- awarded by the trial court is reasonable. The deceased died aged 31 years and he was in perfect health at the time. The deceased was admitted to Moi Teaching and Referral Hospital where he succumbed to the injuries while at the facility. He thus must have undergone a lot of excruciating pain, this can be confirmed by the documents from the said hospital produced as exhibit (inpatient invoice) as they appear on page 57 of the record of appeal. The award of Kshs 100,000/- made by the trial court for pain and suffering is justified and ought not be interfered by this honourable court.

21. The appellants herein conceded to all the pleaded amount of the special damages at the trial court in their submissions, save for costs for pursuing succession cause for *ad litem*. They therefore cannot turn around and change their stand in the appeal. This is as per page 60 of the record of appeal.

22. As for the Kshs 25,000/- used for pursuing ad litem, the same was pleaded and proved. The ad litem letters was produced as exhibit 6 and appears on page 22 of the record of appeal. Definitely, this was not done and procured for free.

23. The respondents as well pleaded for funeral expenses. The trial court made an award under this heading while being guided by *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others* [2013] eKLR. The trial court was justified in making an award of Kshs 20,000/- as reasonable award for funeral expenses. The figure is not inordinately high and the court takes judicial notice that in any Africa setting, funeral expenses must be incurred.

24. The respondents concluded by submitting that the appeal is unmerited and sought that it be struck out with costs.

Analysis & Determination

25. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

> " ...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 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..."

Whether the trial court erred in its finding on liability

26. From the evidence on record, it is not in dispute that the deceased was walking along the side of the road when the driver of KAR 937D lost control and rammed into the deceased causing his death. DW1, Meshack Kirwa, confirmed the same in his testimony. PW1, police constable Cheserek Kiptoo testified in court that he was among the team that investigated the matter and after investigations, one Meshack Kirwa was charged with the offence of causing death which case is still pending. He corroborated the evidence of DW1 that the deceased was knocked down on said date by the motor vehicle.

27. Whereas the appellant stated that an abstract is not conclusive proof of causation of an accident the appellant did not object to the production of the abstract. Further, the appellants' witness admitted to knocking the deceased down with his vehicle.

28. In the premises, it is evident that the issue of liability was proved to the required standard.

Whether the trial court erred in its award of damages

29. In dealing with an appeal on quantum I stand 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"

30. The appellant's contention is that the trial court erred in awarding damages under the *Law Reform Act* and the *Fatal Accidents Act*

31. The issue of double compensation under the two acts was explained by the Court of Appeal in *Hellen Waruguru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR where it was held as follows:-

> 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 dependents 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.
>
> 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. 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 dependents 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. The words "to be taken into account" and "to be 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.

32. The appellant's contention that is there was an error on the part of the trial court in awarding damages under the *Law Reform Act* on the basis that the deceased did not undergo any suffering. I have perused the record of appeal and at page 27 there is an invoice for the deceased showing that he was admitted on December 3, 2015 and released on December 18, 2015. The upshot of the foregoing is that the deceased underwent some pain and suffering before succumbing to his injuries. It is not in dispute that he passed away on the date of the accident.

33. In civil appeal No 42 of 2018 *Joseph Kivati Wambua v SMM & Another (suing as the legal representatives of the estate of EMM-Deceased)* paragraph 21 the Hon Odunga J observed:-

> " The appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed 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." (emphasis mine).

34. As the deceased passed away after being taken to hospital, it is evident that he suffered in pain before his death and therefore I find no reason to disturb the award on pain and suffering.

Loss Of Expectation Of Life

35. The deceased was 31 years of age at the time of his death. The conventional award for loss of expectation of life is Kshs 100,000/- as has been awarded by the courts over time. The appellant has not shown that the trial court proceeded on the wrong principles in awarding loss of expectation of life. I find no reason to disturb this award.

Whether the trial court erred in making awards under the *fatal accidents act*

36. The appellants faulted the trial court for making awards under this head. They particularly took issue with the fact that the trial court used a multiplier of 29 years.

37. On the multiplicand, this court takes judicial notice of the statutory regulations on basic minimum wages for the relevant year under section 60 (1) (a) of the *Evidence Act*. Given that the present minimum wage is Kshs. 13,960.80/-I find that the trial court did not err in its use of Kshs 10,000/- as the multiplier.

38. the multiplier, the trial court estimated that the deceased would have worked until the retirement age of 60 years and in the premises used a multiplier of 29 years.In this case in the absence of any debilitating

health concerns the court shall make only a small reduction of four (4) years on the public sector retirement age of 60 so that the multiplier of 25 years is used. This will account for any vagaries or vicissitudes of life that may have befallen the deceased if he had continued with his life.

39. The appellant also took issue with the dependency ration of 2/3 on the basis that the same was not proved but a reading of the letter from the area chief presented as PExh3, which the appellants did not object or rebut is evidence enough that the trial court proceeded on the right principles in determining the dependency ratio.

40. On funeral expenses the appellant's contention was that the respondents did not plead any funeral expenses. The trial magistrate, guided by the *locus classicus* that is Nakuru HCC No 26 of 2005 – *Alice Alukwe suing on behalf of Maureen Alukwe v Akamba Public Road Services Ltd* awarded Kshs 20,000/- as special damages for funeral expenses. However, I do note that the trial court proceeded to make awards for expenses relating to the funeral, being the clothing and the coffin and post mortem and embalming, thereby raising the question as to whether the award for funeral expenses was in order. I find that the trial magistrate erred in awarding funeral expenses as special damages yet the respondents had pleaded specific expenses relating to the funeral.

41. The appellant further contested the award of Kshs 98,266 as special damages. The respondents' rebuttal was that all the special damages were proved. The appellant was adamant that the invoices were not evidence of payment. This issue was addressed in *Total Kenya Ltd formerly Caltex Oil (K) Ltd v Janevams Ltd* (2015) eKLR where the court stated thus;

> " What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word "paid" on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt."

42. I have perused the record of the court and the respondents produced a number of documents as evidence of special damages pleaded. There is an inpatient invoice marked as PExh4a and a receipt marked as P-Exh 4b proving that there was a payment of Kshs 6,966/- for treatment expenses, P-Exh 5a and 5b showing another payment of Kshs 19,800/- for post mortem and embalming. There is also a receipt for clothing of the deceased for Kshs 3,000/-, Kshs 8500 for the coffin. The respondents also produced evidence of the cost of pursuing the succession cause for Kshs 25,000/-

43. In the premises, the appeal partly succeeds to the extent that the multiplier is reduced to 25 years. Further, the award of funeral expenses is set aside as it had not been specifically pleaded and proved. The judgment and decree of the trial court is hereby set aside and substituted as follows;

    1. Liability – 100% as against the defendant
    2. General damages;

       Pain and suffering – Kshs 100,000/-

       Loss of expectation of life – Kshs 100,000/-

       Loss of dependency – 25 x 12 x 10,000 x 2/3 = 2,000,000/-
    3. Special damages;

       Treatment expenses – Kshs 6,966/-

Post mortem and embalming – Kshs 19,800/-

Transportation – Kshs 35,000/-

Coffin - 8,500/-

Suit – Kshs 3,000/-

Total – 2,638,266/-

Costs of the appeal to the appellant.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2023.

.....

R. NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

Omwenga & CO. Adv for the appellants

M/S Alwanga & CO. Adv for the respondents