Miyogo v Muhindi (Suing as legal representatives of the Estate of Boaz Owuor Opuge (Deceased) & another (Civil Appeal E024 of 2020) [2023] KEHC 292 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 292 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E024 OF 2020

JN KAMAU, J

JANUARY 24, 2023

BETWEEN

JOHNSTONE MOKORO MIYOGO ..... APPELLANT

AND

JULIET ADEMA MUHINDI (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF BOAZ OWUOR OPUGE (DECEASED) ..... 1ST RESPONDENT

JAMES WABWIRE OSANYA ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and decree of Hon R. S. Kipngeno, Senior Resident Magistrate (SRM) delivered at Nyando in Senior Principal Magistrate's Court Case No328 of 2019 on 15th December 2020)

JUDGMENT

Introduction

1. In his decision of July 13, 2021, the Learned Trial Magistrate, Hon R. S. Kipngeno, Senior Resident Magistrate, entered judgement in favour of the 1st Respondent herein against the Appellant herein in the following terms:-

    Pain and Suffering Kshs 50,000/=

    Loss of Expectation of Life Kshs 100,000/=

    Loss of Dependency Kshs 3,312,000/=

    18,000 x 12 x 23 x 2/3

    Special Damages Kshs 176,300/=

    Kshs 3,638,300/=

Less 20% contributory negligenceKshs 727,770/

Kshs 2,910,640/=

Plus costs thereon.

2. Notably, on October 13, 2020, parties recorded a consent on apportionment of liability at 80%-20% in favour of the 1st Respondent herein. The Appellant did not adduce any evidence during the trial.

3. Being aggrieved by the said decision, on December 18, 2020, the Appellant filed a Memorandum of Appeal dated December 16, 2020. He relied on six (6) grounds of appeal.

4. The Appellant's Written Submissions and List of Authorities were both dated May 6, 2022 and filed on May 9, 2022 while the 1st Respondent's Written Submissions were dated May 30, 2022 and filed on May 31, 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein rendered itself 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 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..."

7. Notably, the Appellant did not contest the award of loss of expectation of life and the dependency ratio. This court did not therefore disturb the same. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

   a. whether the Judgment of the Trial Court was valid; and

   b. whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

8. The court therefore deemed it prudent to address the pertinent issues under the separate and distinct heads shown hereunder.

I. *Law Reform Act* Cap 26 (laws Of Kenya)

Pain And Suffering

9. The Appellant averred that Boaz Owuor Opuge (hereinafter referred to as "the deceased") died on the same day he was involved in an accident. It submitted that the award of Kshs 50,000/= for pain and suffering was arbitrary, defective and unsupportable as the Trial Court did not analyse the evidence and the cases that were cited.

10. He argued that a sum of Kshs 10,000/= for pain and suffering was reasonable and relied on the cases of Gerishon Mwangi Muthemba (suing as one of the administrators of the Estate of Ibinson Maina Mwangi- Deceased) vs Crystal Industries Ltd & Another [2020] eKLR, Samuel Kimutai Korir (suing as personal and legal representative of the Estate of Chelangat Silevia vs Nyanchwa Adventist Secondary School & Another [2016] eKLR and William Kinyanjui & Another (suing as the Legal Representative of the Estate of Jane Florence Njeri Kinyanjui (Deceased) vs Bernard M Wanjala & Another [2015] eKLR where the courts therein awarded a sum of Kshs 10,000/= for pain and suffering.

11. On his part, the 1st Respondent relied on the case of Catholic Diocese of Machakos & Another vs Janet Munaa Mutua & Another [2021] eKLR where the appellate court upheld the award of Kshs 100,000/= for pain and suffering.

12. According to Michael Otieno Blolo (hereinafter referred to as "PW 2"), he testified that he was one of the people who assisted to put the deceased in Motor Vehicle Registration Number KCE 436U (hereinafter referred to as "the subject Motor Vehicle") that hit the deceased and that he was informed that the deceased died on his way to the hospital.

13. The 1st Respondent's evidence was that the deceased was rushed to Jaramogi Odinga Oginga Teaching and Referral Hospital (JOOTRH) where he succumbed to his injuries. The deceased must have suffered a lot of pain before he died.

14. The sum of Kshs 10,000/= that the Appellant proposed was low bearing in mind the inflationary trends since 2015 and 2016 when two (2) of the cases it relied upon were decided. Notably, the case of Gerishon Mwangi Muthemba (suing as one of the administrators of the Estate of Ibinson Maina Mwangi- Deceased) vs Crystal Industries Ltd & Another (Supra) was merely persuasive as the same was decided by a court of equal and competent jurisdiction such as this court and hence its decision did not bind this court.

15. Whereas the Trial Court erred in not having relied on any past decisions to justify how it arrived at the sum of Kshs 50,000/= for pain and suffering, the said award under this head was fair and reasonable as the deceased did not die on the spot.

16. As was held in the case of Kiwanjani Hardware Limited & another v Nicholas Mule Mutinda [2008] eKLR, an appellate court will not disturb an award of damages unless the same was inordinately low or high so as to represent an erroneous estimate or was based on an entirely wrong principle.

17. In the cases of Acceler Global Logistics v Gladys Nasambu Waswa & Another [2020] eKLR and Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR as quoted in the case of Wachira Joseph & 2 Others v Hannah Wangui Makumi & Another [2021] eKLR , the courts therein awarded a sum of Kshs 50,000/= for pain and suffering.

18. In the case of Nancy Ann Wathithi Gitau & Another [2016] eKLR, the court therein awarded a sum of Kshs 100,000/= where the deceased died thirty (30) minutes after the accident.

19. This court was thus not persuaded that it should disturb the award of Kshs 50,000/= that was made by the Trial Court under this head as the same was fair and reasonable in the circumstances of the case.

II. *Fatal Accidents Act* Cap 32 (laws Of Kenya)

A. Multiplicand

20. The Appellant pointed out that the 1st Respondent testified that the deceased was a tailor at Ahero Market earning Kshs 38,000/= and not Kshs 40,000/= as had been pleaded in Paragraph 7 of the Plaint. He averred that she did not adduce any documentary evidence such as a business permit or license or lease agreement to show that the deceased had leased a shop for the tailoring business. He added that the Certificate of Death did not also show what the deceased's occupation was. He submitted that the deceased's income was just the 1st Respondent's bare word.

21. He objected to the sum of Kshs 21,1775.15 the 1st Respondent had argued was a minimum wage for a tailor. It was his submission that the Trial Court ought to have adopted a minimum wage of a general worker in all areas in accordance with the Regulation of Wages (General) (Amendment) Order, 2018 that was in force as at April 2019 because there was no proof that the deceased was a tailor in a city of former municipality or township. He asserted that Ahero Market was never proved to have been a municipality or township under the Local Government Act. He therefore faulted the Trial Court for having adopted a multiplicand of Kshs 18,000/= without justifying the basis of the said figure.

22. In Paragraph (7) of the Plaint and 1st Respondent's Witness Statement both dated December 17, 2019 and filed on 18th December 2019, it was indicated that the deceased was a tailor and used to earn a sum of Kshs 40,000/= which he used to pay fees for his three (3) children and to cater for the family's upkeep. When she was cross-examined and re-examined, the 1st Respondent told the Trial Court that the deceased earned a sum of Kshs 38,000/= in his work as a tailor.

23. She did not know if he had taken out a Single Business Permit or had training certificates from Tailoring School and she did not proof of his earnings as a tailor. Notably, in informal employment, it is not uncommon for business people not to keep records. That did not mean that they did not eke a living that sustained them and their families. Insisting on documentary proof for this cadre of employees in what is referred to as the "Jua Kali" sector would be a travesty of justice.

24. This court had due regard to the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated as follows:-

> "We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand will do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

25. In the absence of any contrary evidence from the Appellant, this court was persuaded to believe the 1st Respondent's testimony that the deceased was a tailor plying his trade at Ahero Market.

26. As was correctly submitted by the Appellant, there was nothing to show that Ahero Market was a municipality or a former municipality or a township. Indeed, in the Regulation of Wages (General) (Amendment) Order, 2018, areas were categorised as Nairobi, Mombasa and Kisumu cities, all former

municipalities and Municipal Councils of Ruiru, Mavoko and Limuru and all other areas. This court agreed with the Appellant that the applicable category herein was "all other areas".

27. Having accepted the 1st Respondent's evidence that the deceased was a tailor, the applicable monthly contract per month under the Regulation of Wages (General) (Amendment) Order, 2018 for "all other areas" was Kshs 18,881.20. The Trial Court did not therefore err or misdirect itself when it adopted a multiplicand of Kshs 18,000/= but it erred for not having given reasons why it adopted the same. It ought to have demonstrated how it arrived at the figure of Kshs 18,000/= so as not to appear to have plucked the figure from the air.

28. As the 1st Respondent did not challenge the said multiplicand of Kshs 18,000/=, this court did not disturb the same.

B. Multiplier

29. The Appellant argued that whereas the choice of a multiplier was within the discretion of a court, the same must be exercised in accordance with established principles by considering comparable awards, age of the deceased, nature of the profession, possibility of retirement, departure for greener pastures, possibility of death through natural causes as was held in the case of Board of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku Muriithi & Another [2014] eKLR.

30. He averred that the Trial Court did not justify and/or cite any authority to support the multiplier of thirty three (33) years for a deceased who was aged thirty seven (37) at the time of his death. He argued that a multiplier of fifteen (15) years would have been adequate.

31. He placed reliance on the cases of Naomi Wanjiru Njuguna & Another vs Swan Carriers Ltd [2004] eKLR, Jane Wangui Kamau & 2 Others vs Alice Atandi Mugamangi & Another [2004] eKLR, Swan Carriers Ltd vs Damaris Wambui (suing as the Legal Representative of the Estate of Maritim Mwangi Ngirigasha [2019] eKLR amongst others where the age of the deceased persons therein ranged between thirty six (36) years and thirty seven (37) years. In those cases, the different courts adopted multipliers that were between twelve (12) and fifteen (15) years.

32. On his part, the 1st Respondent submitted that the working life of a Kenyan was sixty (60) years being the normal retirement age and that the Trial Court was justified in having adopted a multiplier of thirty three (33) years as the deceased's children would have depended on him for a further twenty three (23) years.

33. In determining whether or not the Trial Court exercised its discretion judiciously, this court had due regard to the case of Patrice Ombogo Bundi & Another (suing as the Personal representatives of the Estate of Douglas Bundi Ombogo) vs The Guardian Coach Limited [2022] eKLR that it had also dealt with. The deceased therein was aged thirty six (36) years. This court adopted a multiplier of sixteen (16) years.

34. In arriving at the said conclusion, this court had had due regard to the cases of Joseph Njuguna Mwaura vs Builders Den Limited & Another [2014] eKLR where the court adopted a multiplicand of seventeen (17) years where the deceased was aged thirty five (35) years at the time of death.

35. Going further, this court considered the case of James Njiiri & 2 Others vs FPU & Another [2019] eKLR where the deceased therein was aged twenty nine (29) years at the time of his death. The appellate court therein adopted a multiplier of thirty one (31) years, a holding that this court wholly associated itself with.

36. Taking into account all the past decisions relating to the issue of a multiplier, this court found and held that the multiplier of thirty three (33) years where a person was aged thirty seven (37) years at the time of his death was disproportionate and was not comparable to past decisions where the persons died at the same age as the deceased herein.

37. It took the view that the multiplier of fifteen (15) years the Appellant herein proposed was fair and reasonable. This court therefore found and held that the Trial Court misdirected itself in having adopted a multiplier of thirty three (33) years and there was therefore merit in disturbing the said figure.

III. Validity Of The Award

38. The Appellant submitted that the Trial Court did not give its reasons for its decision contrary to the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules. It therefore argued that this called for interference of the decision by this court.

39. It placed reliance on the case of Timsales Ltd vs Samuel Kamore Kihara [2016] eKLR where the appellate found the judgment did not comply with the provisions of Section 25 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) but instead of remitting the matter to the trial court, it assumed the role of the subordinate court and rendered its decision on merit.

40. It also relied on the cases of Awili Nelson vs Purity Achieng Ochieng [2021] eKLR, South Nyanza Sugar Co Ltd vs Omwando Omwando [2011] eKLR and Joseph Karisa Baya vs Cefis Giorgio & Another [2020] eKLR where the common thread was that a decision must contain reasons.

41. The Kenyan legal system is adversarial in nature. All parties must be given an opportunity to present their cases. Trial is never by ambush. As was correctly submitted by the 1st Respondent, the question of defectiveness of the decision was not a Ground of Appeal and the same was therefore not an issue for determination by this court. This court wholly agreed with the 1st Respondent in this regard.

42. Having said so, this court deemed it necessary to pronounce itself on the style of judgment writing by the Trial Court. A perusal of the said decision showed that it did not give reasons for arriving at the figures that it adopted. This was contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules which stipulates as follows:-

> "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

43. In its two (2) page decision, the Trial Court rendered itself as follows:-

> "I have read and considered the pleadings, witness testimony and submissions on record herein and annexed authorities. I note the Plaintiff's evidence remains uncontroverted. In the circumstances, I will allow compensation as follows with costs to the Plaintiff.
>
> Pain and Suffering Kshs 50,000/=
>
> Loss of Expectation of Life Kshs 100,000/=
>
> Loss of Dependency Kshs 3,312,000/=
>
> 18,000 x 12 x 23 x 2/3
>
> Special Damages Kshs 176,300/=
>
> Kshs 3,638,300/=

Less 20% contribution Kshs 727,770/

Grand Total Kshs 2,910,640/=

44. Whereas each court has its own style of writing decisions, the decision must meet the threshold set out in Order 21 Rule 4 of the Civil Procedure Rules. For all intents and purposes, this decision that was rendered by the Trial Court was an invalid decision that lended itself to being set aside and the matter remitted for re-trial before another court other than to that court.

45. However, as the appellate court has both original and appellate jurisdiction under Section 78(1) of the *Civil Procedure Act* and bearing in mind that Section 1A of the Civil Procedure Rules that stipulates that the overriding objective of the *Civil Procedure Act* and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and further the court shall, in the exercise of its powers under the said Act or the interpretation of any of its provisions seek to give effect to the overriding objective specified in subsection (1), this court deemed it prudent to cloth itself with original jurisdiction and re-evaluate and/or re-assess the evidence that was tendered during trial and come to its own conclusion of the matter in dispute.

46. Indeed, as provided in Section 1B of the *Civil Procedure Act*, for the purpose of furthering the overriding objective specified in Section 1A of the *Civil Procedure Act*, the court shall handle all matters presented before it for the purpose of attaining the several aims amongst them the just determination of the proceedings and the efficient disposal of the business of the court.

47. It was for those reasons that this court proceeded as the court did in the case of Timsales Ltd vs Samuel Kihara (Supra) to bring this matter to its logical conclusion as opposed to ordering a re-trial.

48. Going further, this court also noted that the Trial Court did not address itself to the question of interest. Section 26(1) of the *Civil Procedure Act* states that:-

> " Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

49. The Trial Court did not give any reason why it did not award interest on the damages and special damages. This court did not see any plausible reason to deny the 1st Respondent interest.

Disposition

50. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on December 18, 2019 was partially merited. The effect of this is that the Judgment of Kshs 2,910,640/= that was entered by the Learned Trial Magistrate in Nyando SPMCC No 328 of 2019 on 15th December 2020 be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the 1st Respondent herein against the Appellant herein for the sum of Kshs 1,982,740/= made up as follows:-

Pain and Suffering Kshs 50,000/=

Loss of Expectation of Life Kshs 100,000/=

Loss of Dependency Kshs 2,160,000/=

2/3 x 18,000 x 12 x 15

Special Damages Kshs 176,300/=

Kshs 2,486,00/=

Less 20% contributory negligence Kshs 497,260/=

Kshs 1,982,740/=

Plus costs and interest thereon. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit while damages under the *Fatal Accidents Act* Cap 32 (Laws of Kenya) and the *Law Reform Act* Cap 26 (Laws of Kenya) will accrue interest at court rates from the date of judgment until payment in full.

51. As the Appellant was partly successful in his Appeal, each party will bear its own costs of the Appeal herein.

52. It is so ordered.

DATED and DELIVERED at KISUMU this 24th day of January 2023

J. KAMAU

JUDGE