



**Vertical Construction Limited v Otieno (Civil Appeal E095 of 2021)
[2023] KEHC 335 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E095 OF 2021
JN KAMAU, J
JANUARY 24, 2023**

BETWEEN

VERTICAL CONSTRUCTION LIMITED APPELLANT

AND

EVANS ORUKO OTIENO RESPONDENT

*(Being an Appeal from the Judgment and decree of Hon R.S. Kipsang, (SRM)
delivered at Nyando SPMC No Case No 21 of 2020 on 13th July 2021)*

JUDGMENT

Introduction

1. In his decision of July 13, 2021, the learned trial magistrate, Hon R S Kipngeno, Principal Magistrate, entered judgement in favour of the respondent herein against the appellant herein in the following terms:-
global sum Kshs 1,500,000/=
special damages Kshs 44,700/=
Kshs 1,544,700/=
less 20% contributory negligence Kshs 308, 940/=
Kshs 1,235,760/=
plus cost of the suit and interest at court rates from the date of judgment until payment in full.
2. Notably, on May 11, 2021, parties recorded a consent on apportionment of liability at 80%-20% in favour of the respondent herein. The appellant did not adduce any evidence during the trial.



3. Being aggrieved by the said decision, on August 11, 2021, the appellant filed a memorandum of appeal dated August 9, 2021. It relied on four (4) grounds of appeal.
4. The appellant's written submissions and list of authorities were both dated and filed on May 17, 2022 while the respondent's written submissions were dated June 30, 2022 and filed on July 4, 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 v 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. Having looked at the grounds of appeal and the respective parties' written submissions, it appeared to this court that the issue that had been placed before it for determination was whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court. As the grounds of appeal were related, the court deemed it proper to address them together.
8. The appellant relied on the cases of *Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd* [2013] eKLR and *Arrow Car Limited v Bimomo & 2 Others* [2004] 2 KLR 101 which cited with approval the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M M Lubia & Another* [1982- 88] I KAR 777 at pg 730 amongst other cases where the common thread was that in deciding whether or not to disturb an award for quantum, an appellate court must be satisfied that the trial court took into account an irrelevant fact when assessing the damages, that the damages were inordinately high or inordinately low that it must be a wholly erroneous estimate of the damage.
9. The appellant further submitted that the trial court erred in having failed to consider the authorities it relied upon and in this regard, it referred this court to the case of *Ram Gopal Gupta v Nairobi Tea Packers Ltd & 2 others* [2017] eKLR in which the Court of Appeal interfered with the decision of the trial judge for having failed to make reference to any past decided cases.
10. It also argued that courts ought to award what is fair compensation and keep in mind that the higher the awards, the higher the premiums and higher medical costs that are passed to the public as was observed by Lord Denning Mr in the case of *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1 ALL ER 332 at 339.
11. It relied on the cases of *Kitale Industries Ltd & another v Zakayo Nyende & Another* [2018] eKLR, *Rosemary Onyango & Another v Mohamed Jenjwa Ndoyo & Another* [2019] eKLR, *Seremo Korir & Another v SS (suing as the legal administrator of the Estate of MS)* [2019] eKLR, *Daniel Nderitu v Racheal Njeri Kimani & Another* [2019] eKLR and *Daniel Mwaniki Waitthera & Another v Jemimah Mwikali Moto* [2020] eKLR wherein the different courts therein awarded global sums



- ranging between Kshs 500,000/= - Kshs 600,000/= in respect of deceased children ranging between seven (7) – twelve (12) years.
12. It submitted that the global sum of Kshs 1,500,000/= that the trial court awarded was too excessive and that the trial court appeared to punish it for having deprived Bruno Spencer Oruko (hereinafter referred to as “the deceased”) his life when it stated that the right of life was protected in the bill of rights. It was emphatic that an award for damages was intended to be compensatory and not aimed at punishing the tortfeasor.
 13. It therefore proposed that this court disturb the decision of the trial court and awards the respondent the sum of Kshs 603,000/= made up as follows:-
 - pain and suffering Kshs 10,000/=
 - loss of expectation of life Kshs 100,000/=
 - lost dependency Kshs 600,000/=
 - special damages Kshs 44,700/=
 - Kshs 754,000/=
 - less 20 % contributory negligence Kshs 150,800/=
 - Kshs 603,200/=
 14. On his part, the respondent placed reliance on the cases of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, *Savana Saw Mills Ltd v Gorge (sic) Mwale Mudomo* [2005] eKLR and *Kigaragar (sic) v Agripiana Mary Aya* [1982-88] KAR that also gave the circumstances in which an appellent court could disturb an award of damages by the trial court.
 15. He submitted that the trial court gave a reasonable award and that it exercised its discretionary powers to award him the damages. It was emphatic that there was no arguable appeal and thus urged this court to dismiss the appeal herein with costs to him.
 16. Notably, the Kenyan legal system is based on common law. It places the principle of stare decisis or precedent on a very high pedestal. Indeed, a court is bound by the decisions of courts above it. This is for purposes of ensuring that there is consistency in the decisions that are delivered to provide certainty in the judicial system. Whereas a court has the discretion to decide the amount of damages to award, courts must derive guidance from comparable past decided cases so that the award is as close as possible to damages awarded in other comparable cases. Decisions of courts of equal and competent jurisdictions are merely persuasive and not binding on each other.
 17. A perusal of the post mortem report showed that the deceased was about ten (10) years old at the time of his death. The certificate of birth showed that he was born on April 25, 2008. As at the material time of the accident, to wit, October 30, 2018, the deceased was about ten and a half (10 ½) years. It was not clear from the report form that was adduced during trial in what class he was. Be that as it may, the respondent told the trial court that he was in class three (3) at the material time and had aspired to be an engineer.
 18. Notably, the ambition of a child in class three (3) is not guaranteed in reality. This is because of the vagaries of life such as dropping out from school, ill health, death, unemployment, change of career and many other factors. It was easier to discern the career path of children who are in college or universities. It was for that reason that awarding a global sum for damages in a case where a child of tender years had died as a result of negligence was most reasonable to compensate his estate.



19. Both the appellant and the respondent herein did not object to this mode of assessment of damages. What was in contestation was whether or not the global sum of Kshs 1,500,000/= was inordinately high as had been contended by the appellant herein warranting this court to disturb the same.
20. Any decision that is arrived at by a court must be justifiable and based on some sort of rationale that could be followed and understood by all and sundry. Save for its observation that article 26(1) and (3) of the *Constitution* of Kenya provides that a person shall not be deprived of his life, the trial court did not refer to any past decided cases or give its reasoning of how it arrived at the global sum of Kshs 1,500,000/=. This court thus agreed with the appellant that the trial court erred in this regard.
21. This court was thus persuaded to find and hold that the trial court misapplied the law and misdirected itself thus arriving at an erroneous estimate of the damages necessitating this court to disturb the award of the trial court.
22. Having said so, having had due regard to the cases the appellant relied upon and which were relevant in the circumstances of the case, this court came to the firm conclusion that a global sum of Kshs 600,000/= it had proposed was inordinately low. Taking into account the inflationary trends from the time most of the decisions the appellant upon were decided, it was the considered view of this court that a global sum of Kshs 800,000/= would be adequate compensation to the respondent for the loss of the deceased's life that was cut short due to the negligence of the appellant and/or its driver and/or agent and/or servant.
23. It is important to point out that courts must be cautious not to give exaggerated awards. as was observed by Lord Denning Mr in the case of *Lim Poh Choo v Camden and Islington Area Health Authority*, a school of thought that this court adheres to and ascribes to, there is likelihood of insurance premiums being increased to astronomical amounts if damages that are to be paid by insurance companies are extremely high. Courts therefore ought to cut a reasonable balance to ensure that deceased's estates' are compensated fairly and reasonably while insurance companies are given time and space to thrive economically.
24. It was this court's considered view that once assessment of damages was determined to be global, there was no need to delve into the computation of awards of pain and suffering and loss of expectation of life under the *Law Reform Act* as had been suggested by the appellant herein. The global figure is intended to cover the damages that would ordinarily have been awarded under the *Law Reform Act* and the *Fatal Accidents Act* cap 32 (laws of Kenya).

Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the appellant's appeal that was lodged on August 11, 2021 was partially merited. The effect of this is that the judgment of Kshs 1,235,760/= that was entered by the learned trial magistrate in Nyando in Senior Principal Magistrate's court case No 21 of 2020 on July 13, 2021 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 respondent herein against the appellant for the sum of Kshs 675,760/= made up as follows:-

general damages Kshs 800,000/=

special damages Kshs 44,700/=

Kshs 844,700/=

less 20% contributory negligence Kshs 168,940/=

Kshs 675,760/=



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 interest on the global award of damages will accrue at court rates from the date of judgment until payment in full.

26. As the appellant was partly successful in its appeal, each party will bear its own costs of the appeal herein.

27. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY 2023

J. KAMAU

JUDGE

