Classic Parcel Handlers Limited v Kipyator & another (Civil Appeal 043 of 2021) [2023] KEHC 1426 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1426 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL 043 OF 2021

AN ONGERI, J

FEBRUARY 24, 2023

BETWEEN

CLASSIC PARCEL HANDLERS LIMITED ..... APPLICANT

AND

KABON KIPYATOR ..... 1ST RESPONDENT

JOSEPH YATOR ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. E. W. Karani (SRM) dated 4/11/2021 in Kericho CMCC NO.70 of 2019)

JUDGMENT

1. On or about August 20, 2017 the deceased was carefully walking as a pedestrian along Kericho-Nakuru Road at Brooke Area when the appellant's driver, agent and/or servant drove motor vehicle registration no KBQ 531U Scania Bus/Coach so carelessly, recklessly and/or negligently without due care and attention to pedestrians and as result the said motor vehicle violently hit the deceased causing him fatal injuries.

2. The respondents herein on behalf of the estate of the deceased and on behalf of the dependant (s) of the deceased, instituted a suit *vide* Kericho CMCC No 70 of 2019, which was heard and determined and judgment delivered on November 4, 2021.

3. The instant appeal arises from the Judgment delivered on November 4, 2021 in Kericho CMCC No 70 of 2019 whereby the respondent was awarded Kshs 2,886,855/= in respect of damages in respect of fatal injuries sustained by the deceased.

4. The appellant's are aggrieved by the judgment and they have appealed to this court on the following grounds;

i. That the learned trial magistrate erred in law and fact in finding that the defendant was 100% liable for the accident.

ii. That the learned trial magistrate erred in law and fact by failing to appreciate and consider the applicable principles in assessment of damages and thereby arrived at an excessive, erroneous and unjustified award.

iii. That the learned trial magistrate erred in law and fact by awarding Kshs 2,886,855/= as general damages under the *Law Reform Act* and *Fatal Accidents Act* and special damages an amount that was inordinately high, unjustified and contrary to the evidence on record.

iv. That the learned trial magistrate erred in law and fact in awarding Kshs 100,000/= for pain and suffering while not considering that the deceased died shortly after the accident.

v. That the learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs 200,000/= for the loss of life an amount which was excessive and unjustified.

vi. That the learned trial magistrate erred in law and fact by awarding the estate of the deceased a sum of Kshs 2,331,200/= for loss of dependency that was excessive as to amount to an erroneous estimate of the loss or damages suffered by the estate of the deceased.

vii. That the learned trial magistrate erred in law and fact by applying a dependency ratio of 2/3 notwithstanding the fact that the deceased was not married.

viii. That the learned trial magistrate erred in law and fact by adopting a multiplicand of Kshs 11,656/= as proof of earning when no evidence was adduced to prove the same.

ix. That the learned trial magistrate erred in law and fact by adopting a multiplier of 30 years without considering the fact that the current life is full of misfortunes and that there was no guarantee that the deceased would have lived up to 60 years.

5. The parties filed written submissions which I have considered.

6. The appellant submitted that the respondent did not prove negligence by the appellant on a balance of probability which was compounded by the respondent's failure to call the investigating officer or base commander to testify and produce the OB in court without any reasonable and/or plausible explanation. The appellant contended that the respondent did not prove that the appellant was 100% liable.

7. The appellants contended that for pain and suffering a sum of Kshs 20,000/= would suffice as the deceased died shortly after the accident.

8. The appellants contended that for loss of expectation of life Kshs 100,000/= is considered conventional and thereby proposed a sum of Kshs 100,000/= as being sufficient and adequate.

9. The appellants contended that for loss of dependency a global sum approach would have been more appropriate as opposed to the multiplier approach and thereby by proposed a sum of Kshs 600,000/=. The appellants cited the case of *Gilbert Kimatare Nairi & another (suing as personal representatives of the Estate of Lemaiyan Richard Kimatare (deceased) v Civiscope Limited* [2021] eKLR.

10. The respondent submitted that the respondent proved their case on a balance of probability as required by law, they called two witnesses Pw1 and Pw2 whose evidence remains unchallenged and uncontroverted and that the appellant was 100% liable for the said accident.

11. The respondent reiterated that the trial court took into consideration all the relevant factors and appropriately applied all the principles in awarding the deceased's estate Kshs 2,886,855/= as general damages under the *Law Reform Act* and the *Fatal Accidents Act* and special damages.

12. The respondent contended that the deceased was 30 years at the time of his death and that his payment slip showed he was working as a supervisor at Kaisugu Ltd and earning Kshs 11,656/= per month and further that the trial court adopting a multiplier of 30 years and a multiplicand of Kshs 11,656/= took into consideration the nature of supervision jobs, age of the deceased and the vicissitudes of life. The responent conceded that though the deceased was unmarried he was taking care of some members of his immediate family hence the dependancy ratio adopted by the trial court was reasonable in the circumstances.

13. The respondent submitted that the Kshs 200,000 award for pain and suffering was not inordinately high or excessive, the trial court relied on the medical documents produced which showed that the deceased died 6 days later after the accident after having sustained multiple fractures on the head, ribs and femur among other injuries and hence went through a lot of pain and suffering before succumbing to the said injuries and cited the case of *Beatrice Mukulu Kanguta & another v Silverstone Quarry Limited & another* [2016] eKLR the court awarded Kshs 200, 000/= where the deceased died on the same day of the accident, in support of its case.

14. The respondent submitted that Kshs 200,000/= was not inordinately high or excessive and relied on the case of *Benson Musyoki Munyao & another v Omacha Enterprise Limited & another* [2017] eKLR where the plaintiff was awarded Kshs 200,000/= for loss of expectation of life.

15. The respondent submitted that for special damages, the magistrate relied on the evidence on record, the receipts and invoices produced and awarded Kshs 155,655/= having been pleaded and sufficiently proved.

16. This being a first appeal, the duty by the 1st appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see and examine the witnesses. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated as follows on the duty of the 1st appellate court ; "[a]n appeal to this court from a trial by the High 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 allowances in this respect"

17. The issues for determination in this appeal are as follows;

    i. Whether the trial court was right in finding the appellant 100% liable.

    ii. Whether the award of damages was excessive.

18. On the issue of liability, there is a witness who said the deceased was hit while off the road. I find that the trial court was right in finding the appellant 100% liable.

19. On the issue the quantum of damages. I find that the award is properly computed. In *Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another* [2017] eKLR stated as follows; "while I am in agreement that the multiplier approach is just a method of assessing damages, I wish to note that, it offers sound principles that guide the courts, without which, courts would be completely lost on the approach to employ in assessment of damages. In my view, it is a more reliable method than where a

court awards a global sum without any basis at all. The multiplier method has been used over the years and as long as there are facts to facilitate its application, it is a useful and practical method."

20. In *Yh Wholesalers Ltd & another* (supra) the court held as follows; "considering the vagaries of life, a multiplier of 30 years would be reasonable in the circumstances of this case. In the premises, the total sum is as follows; (a) Special damages – ksh 103,540/=, (b) Pain & suffering – ksh. 50,000/=, (c) Loss of expectation of life – ksh 150,000 (d) lost years ksh 2,400,000/= sub total ksh 2,703,540. "

21. The deceased was a supervisor at Kaisugu earning an income of 11,656 per month.

22. I find no reason to interfere with the assessment of damages.

23. An appellate court can only interfere with the sum awarded where the appellant demonstrates that the award is too high or so low to amount to an outright error in assessment of damages, or that in coming to that assessment the court took into account an irrelevant matter or that it failed to take into account a relevant matter. In *Kemfro Africa Ltd t/a Meru Express & another v A. M. Lubia and another* [1982-88] 1 KAR 727 the Court of Appeal held that in order for an appellate court to disturb the quantum of damages awarded by a trial judge; "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..."

24. These principles have been reiterated innumerable times and I hereby cite the words of the Court of Appeal in *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company Advocates* [2013] eKLR where it was held: "We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled." This principle was adopted with approval by this court in *Butt v Khan* [1981] KLR 349 where it was held: "... 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..."

25. I find that this appeal lacks in merit and I accordingly dismiss it with costs.

26. I uphold the finding on liability and damage awarded.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 24TH DAY OF FEBRUARY 2023.

A. N. ONGERI

JUDGE