John & 2 others v Jepkorir & another (Suing as Administrators or Personal Representatives of the Estate of Emmaculate Chepkirui) (Civil Appeal 94 of 2018) [2023] KEHC 18436 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 18436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 94 OF 2018

MS SHARIFF, J

APRIL 28, 2023

BETWEEN

KERIENYE JOHN ..... 1ST APPELLANT

GREEK TOURS & TRAVEL LIMITED ..... 2ND APPELLANT

BILAL JAMIL ..... 3RD APPELLANT

AND

MARY JEPKORIR ..... 1ST RESPONDENT

MOSES KIPYEGON CHERUIYOT ..... 2ND RESPONDENT

SUING AS ADMINISTRATORS OR PERSONAL REPRESENTATIVES OF THE ESTATE OF EMMACULATE CHEPKIRUI

(An appeal from the judgement and decree of Hon P.Olengo P.M in Nyando PMCC No. 214 of 2014 delivered on 6th September, 2018)

JUDGMENT

A. Case backdrop

1. By plaint dated September 4, 2014, the respondents sued the appellants claiming damages from an accident which occurred on November 25, 2012 claiming the life of Emmaculate Chepkirui (hereinafter the deceased). It was pleaded that the appellants' motor vehicle registration number KBQ 323M rammed onto motor vehicle registration number KAX 862W in which the deceased was travelling in and the respondents therefore attributed the accident to the appellants' negligence.

2. Upon service, the appellants duly entered appearance and filed their statement of defence denying the occurrence of the accident, the fact of ownership of motor vehicle registration number KBQ 323M

and or the negligence attributed to the 3rd respondent. In the alternative, the appellants attributed the occurrence of the accident, if any, to the driver of motor vehicle registration number KAX 862W.

3. The trial court thereafter proceeded to hear the matter in which evidence was adduced as follows;

4. PW-1, Moses Kipyegon Cheruiyot stated that he was informed by his wife of the accident and went to Jaramogi Oginga Odinga Teaching and Referral Hospital where he identified the body of his daughter who had died on the spot. That at the time of accident, his daughter was 19 years and a first-year student at university pursuing a bachelor of laws degree. He blamed the appellants' driver for the accident.

5. Liability was eventually settled by consent of the parties at 70:30 in favour of the respondents against the appellants.

6. The parties' respective cases were then closed and the trial magistrate proceeded to make awards on quantum under the different heads as follows;

    i. Pain and suffering Kshs 20,000/=

    ii. Loss of expectation of life Kshs 120,000/=

    iii. Funeral expenses Kshs 40,000

    iv. Loss of dependency Kshs 4,000,000/=

    Sub-Total Kshs 4,180,000/=

    Less 30% contribution Kshs 1,254,000

    Total Kshs 2,926,000

B. Appeal

7. The appellants were aggrieved by the award on quantum and moved this court via memorandum of appeal dated October 6, 2018 raising the following grounds;

    i. The quantum of general damages in respect of lost dependency is inordinately high, erroneous, oppressive and punitive and amounts to a miscarriage of justice.

    ii. The learned trial magistrate ignored and or paid lip service to the appellant's submissions and especially the precedents cited therein.

    iii. The learned trial magistrate erred in law when he held without any reference to any precedent or legal basis that the appropriate award was Kshs 4,000,000/=.

    iv. The learned trial magistrate erred in law and fact in making an inordinately high award without considering and applying the principles enunciated in the authorities referred to him or to the evidence before him, or taking them into account.

    v. The learned trial magistrate applied the wrong principles in the assessment of the award which was arbitrary, unjust and was high as to amount to an error in law in this particular case.

C. Submissions

8. By the directions of this court, the appeal proceeded by way of written submissions. Only the appellant complied.

9. The appellant submits on the issue of loss of dependency that the deceased was 19 years old and bachelor of laws student. That the court did not take into account the fundamental principles in

assessment of damages and the approach to be adopted as was set out in *Mohamed Mahmoud Jabane Vs Highstone Butty Tongoi Olenja* (1986) eKLR, *Multiple Hauliers (EA) Limited & another Vs William Abiero Ogeda (suing as the representatives of Christine Arglera Abiero (deceased) and 2 others* (2016) eKLR, *Chan Wembo & 2 others vs IKK and HMNO* (2017) eKLR, *Moses Mairua Muchiri Vs Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)* (2016) eKLR, *Florence Mumbua Ndoo & Francis Kioko (suing as the administrators of the estate of the late Alfred Safari) Vs Ezra Korir Kipngeno & another* (2017)eKLR, *MM (suing as the administrator and legal representative of the estate of LKM) vs Stephen Johana Njue & another* (2016) eKLR, *Board of Governors, Friends School Kamusinga & another vs MNS (suing as the administrator of the estate of IKS (deceased)* (2015) eKLR and *Daniel Mwangi Rugano vs Julius G. Macharia (suing as the legal representative of the estate of Humphrey Maina Macharia)* (2018) eKLR.

10. It is submitted that despite the submissions filed in the subordinate court showing that where the deceased is a college student, the sum to be awarded is in the region of Kshs 2,000,000/=, the trial court did not consider such thus factors thus falling into error. That the trial court did not state what he used to arrive at the sum of Kshs 4,000,000/= in contravention of authorities cited by the parties.

11. Basing their argument on the authorities in *Joshua Mungania & another Vs Gregory Omondi Angoya* (2018) eKLR and *Richard Osoro Jindiga Vs Alex Thangei & another* (2013) eKLR, the appellant submits that even if the subordinate court had applied the multiplier principle, the award should have been between Kshs 2-3 Million.

12. On the issue of failure to consider the submissions and the authorities cited, the appellant refers to the authorities in *Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd* (2013) eKLR and *Ram Gopal Gupta Vs Nairobi Tea Packers Limited & 2 others* (2017) eKLR for the proposition that in failing to consider them, the appellate court is entitled to interfere with the award. On the contention that similar injuries attract comparable awards, counsel cites the authorities in Denshire Muteti (supra) and Simon Taveta Vs Mercy Mutitu Njeru (2014) eKLR.

13. The appellant further submits that the proper award for the respondents should have been between the sum of Kshs 1-2 million grounded on the authorities in *Teresia Wanjiru Githinji Vs Lucy Kanana M'rukaria & another (suing as the legal representative of Ernest Gutura Nabea (deceased)* (2021) eKLR, *Maingi Celina Vs John Mithika M'itabari (suing as the administrator of the estate of Erastus Kirimi Mithika (deceased)* (2018) eKLR, *Zachary Abusa Magoma Vs Julius Asiago Ogentoto & Jane Kerubo Asiago* (2020) eKLR and *Robert Nyakundi Mandieka (suing as father and legal representative of the estate of Winnie Nyanchama Nyakundi) Vs Benard Masita Nyakundi & another* (2019) eKLR.

D. Analysis and determination.

14. The duty of the first appellate was stated in *Peters V Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

15. Looking at the grounds of appeal and the submissions, it is clear to this court that the appellant is aggrieved with the quantum of damages awarded more specifically the award under the head of loss of dependency.

16. The evidence on record shows that the deceased was aged 19 years old, unmarried and had no child left behind. Clearly, she was unemployed and therefore had no income upon which the trial could form a basis for calculating the award under that head.

10. Dependency is a matter of fact and must be proved by evidence yet no evidence was tendered before the trial court to prove dependency. In the case of *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* [2017] eKLR the court rendered itself 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."

17. It is trite law that an award of damages is a discretionary exercise by the trial court and the appellate court is only entitled to interfere with such an award when it is shown that the same was arrived at in ignorance of material facts and or based on no evidence at all or that the award is obviously excessively low or high as to form an erroneous estimate of the same. This legal position has been pronounced in a number of judicial authorities for instance in *Butt v. Khan* [1981] KLR 349 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."

18. In yet another case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730, Kneller J.A. held:-

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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.

19. In *Gicheru V Morton and Another* (2005) 2 KLR 333, it was held that:

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

20. For purposes of this appeal, the above principles will guide me while bearing in mind that no amount of money can replace a shattered and battered frame and what the courts strive to do in the circumstances

is to award sums consonant with judicial precedent that can be sustained by the economy. In *H West & Sons Ltd vs Shepherd* (1964) AC 326 at Page 364, the court stated:-

> " The court has to perform the difficult task of converting into monetary damages the physical injury and deprivation and pain to give judgment for what it considers to be a reasonable sum. It does not look beyond the judgment to the spending of damages."
>
> Money cannot renew a physical frame that has been battered and shattered. All that Judges can do is to award sums which must be regarded as giving reasonable compensation."

21. There is debate as to whether in the circumstances of this case, the proper approach would have been an award of global sum or the use of the multiplier approach. The appropriate circumstances to deploy either approach was discussed in *Albert Odawa Vs Gichimu Gichenji*, (2007) eKLR where the court held that:

> 'The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.'

22. The trial court while appreciating conflict posed by the 2 approaches observed;

> I think the global approach is the best in the circumstances of this case. I therefore consider into account the fact that she was 19 years old and was a law student. I would therefore find Kshs 4,000,000/= will suffice under this heading.

23. I am also of the view that the facts presented by the suit was proper for deployment of the global sum approach as opposed to the multiplier approach. The remaining issue then is what sufficed in the circumstances. The appellant while relying on a number of authorities urged the court to award kshs 2,000,000 while the respondents urged the court to adopt a multiplier approach and award kshs 44,550,000/=. I must say that the respondent's proposed amount was extremely high in the circumstances.

24. Having determined that the global approach was the best in the circumstances, I have considered similar authorities in support of this award bearing in mind the deceased's age, the level of dependency and the fact that she was a student at the material time and was not earning any income.

25. I find that the appellants' authorities resonate well with the prevailing awards and I proceed to award the respondents the sum of Kshs 2,000,000/= under the head of loss of dependency.

26. Consequently, the trial court's award under the head loss of dependency is hereby set aside and substituted with the sum of Kshs 2,000,000/= while the other heads as awarded by the trial court remain intact.

27. As the appeal is partially successful to the above stated extent, each party shall bear its own costs on the appeal while the respondent is awarded costs in the subordinate court.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 28TH DAY OF APRIL 2023.

MWANAISHA. S. SHARIFF

JUDGE