Mukopi v MSN & another (Suing as the administrators of the Estate of CWN) (Civil Appeal 35 of 2022) [2023] KEHC 3909 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 35 OF 2022

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

MATTHEW MUKOPI .... APPELLANT

AND

MSN .... 1ST RESPONDENT

GNS .... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF CWN

JUDGMENT

1. This Appeal arises from a suit seeking compensation for the death of a 17 years old boy which arose as a result of a road accident. The Appeal is both against the trial Court's determination of liability and assessment of quantum. In the suit, the Appellant was the Defendant whereas the Respondents were the Plaintiffs.
2. By the Plaint filed on December 19, 2019 in Kimilili Principal Magistrate Court Civil Case No 179 of 2019, the Respondents sued the Appellant seeking general damages, special damages, costs of the suit and interest. The Respondents were the father and mother, respectively, of the deceased. The Plaint was filed through Messrs CM Mwebi & Co Advocates.
3. It was alleged that the accident occurred on September 27, 2017, off the Mumias-Musanda road and involved a motorcycle registration number xxxx which the deceased was riding and the motor vehicle registration number xxxx Mitsubishi Lorry alleged to be owned by the Appellant, that the Appellant's said vehicle (lorry) was carelessly or negligently driven thus causing it to lose control and knock the deceased's said motor cycle and that as a result, the deceased suffered fatal injuries.

4. The Appellant filed his Statement of defence on February 4, 2020 wherein he denied liability and, in the alternative, blamed the deceased for causing or contributing to the accident. The same was filed through Messrs Onyinkwa & Co Advocates.

5. The suit proceeded to full trial wherein the Respondents called 3 witnesses. These were the father to the deceased, an eye-witness and a traffic police officer. On the Appellant's part, the driver testified.

6. After the hearing, the trial Court delivered its Judgment on April 12, 2022 awarding damages to the Respondents in the following terms:

   Liability 50%:50%

   Pain & suffering Kshs 30,000/-

   Loss of expectation of life Kshs 200,000/-

   Loss of dependency Kshs 2,000,000/-

   Special damages

   i. Mortuary fees Kshs 3,000/-

   ii. Post mortem fees Kshs 4,165/-

   iii. Cost of coffin Kshs 20,000/-

   iv. Cost of applying for Grant Kshs 45,000/-

   Sub-Total Kshs 2,572,165/-

   Less 50% contribution Kshs 1,286,082/-

   Total Kshs 1,286,082/-

   Plus costs and interest

7. Aggrieved by the trial Court's said decision, the Appellant filed this Appeal on April 21, 2022. In the Memorandum of Appeal, the following 6 grounds were cited:

   i. That the learned trial Magistrate erred in law and in fact in apportioning liability at 50%:50% in favour of the Plaintiff without taking into account evidence on record.

   ii. That the learned trial Magistrate erred in law and in fact in failing to take into account the evidence on record hence arriving at a wrong decision on liability.

   ii. That the learned trial Magistrate erred in law and in fact by failing to dismiss the Plaintiffs' case with costs in view of the evidence adduced in court.

   ii. That the learned trial Magistrate erred in law and in fact in adopting the wrong principles in making a determination as to the damages payable to the respondent.

   ii. That the learned trial Magistrate erred in law and in fact in awarding excessive damages for loss of dependency/lost years considering the deceased was aged 17 years.

   ii. That the learned trial Magistrate erred in law and in fact in awarding excessive damages to the respondent in the circumstances.

Hearing of the Appeal

8. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant filed his Submissions on January 5, 2023 and the Respondents filed on January 19, 2023.

Appellant's Submissions

9. The Appellant's Counsel faulted the trial Magistrate for holding the Appellant 50% liable. He appreciated the fact that the eye-witness (PW2) had testified that on the material day he (PW2) was travelling from Misikhu general direction heading towards Kitale direction, upon reaching Kimilili junction there were many motorcycles and motor vehicles present, a motorcycle rider (the deceased) from Kimilili general direction stopped at the junction, all of a sudden a lorry approached from Webuye general direction while being driven at high speed and it lost control and subsequently rammed into the motorcyclist who instantly succumbed due to the impact of the accident.

10. Counsel submitted that the evidence of the police traffic officer (PW3) was not helpful since the officer stated that the case was still pending under investigations and that neither was he the investigating officer. Further, the officer did not produce the police file and was thus not in a position to tell exactly who was to be blamed. Counsel also pointed out that the officer confirmed that the deceased was barred by the traffic rules from riding any motor vehicles/cycles since he was a minor.

11. He also submitted that the Appellant's driver (DW1) testified that it is the deceased who rammed into the rear tyre of the Appellant's lorry while joining the main road from the junction. He posed the question; 'how then could the defendant be blamed for having caused the accident unless he was reversing the said motor vehicle? He submitted that based on the testimony of all the witnesses the vehicle (lorry) was not reversing.

12. Counsel submitted that the Appellant's driver (DW1) testified that he was lawfully driving on his left lane along Webuye-Kitale road and on reaching Misikhu centre, a rider (the deceased) abruptly joined the main road at high speed from a junction on the left side facing Kitale and rammed into the rear tyre of the Appellant's lorry. Counsel submitted that it is clear that the accident was 100% caused by the failure of the under-age minor rider (the deceased) who failed to stop at a junction as provided by the law.

13. Counsel submitted that the traffic officer (PW3) could not explain how the accident occurred, he was not therefore helpful in ascertaining liability and his evidence was only limited to producing the police abstract. Regarding the eye-witness (PW2), Counsel submitted that his evidence was not corroborated by the traffic officer (PW3) who never produced the investigations file and that therefore no evidence was tendered in Court to ascertain with precision where the point of impact was, no sketch plan was also produced and the allegation of the Appellant's driver having lost control was a mere allegation that was never proved.

14. On quantum, Counsel faulted the trial Magistrate for applying the wrong principles in awarding damages under the *Fatal Accidents Act*. He submitted that the Court can only interfere in the manner in which an award was assessed where the trial Court factored the award as being too high or too low so as to amount to an erroneous estimate or that the assessment is not based on any evidence. He cited the decision in *Peter M Kariuki vs The Attorney General, Civil Appeal No 79 of 2012*.

15. Counsel submitted that the question of loss of dependency is a question of fact that needs to be proved by way of evidence, the Respondents needed to have marshalled enough evidence to prove to what extent they depended on the deceased prior to his death, the question of dependency is not determined

by parentage and/or family relations but by evidence and proof, in fact it is the deceased who relied on his parents for upkeep as he was still a minor and in cases of minors the most appropriate approach is the global approach since their future income is still unknown.

16. He added that the trial Court was not fair in awarding the sum of Kshs 2,000,000/- under the head of loss of dependency, the same was inordinately high considering the fact that the deceased was still a minor whose future was uncertain.

17. He cited the case of *Chem Wembo & 2 others vs IKK & HMM (2017) eKLR* (Naivasha Civil Appeal No 32 of 2014) where the appellate Court reduced the lump sum payment from Kshs 1,680,080/- to Kshs 600,000/- for a 12-year-old deceased.

18. He also cited *Chabhadiya Enterprise Ltd & Another vs Gladys Mutenyo Mitali (suing as the administrator and personal representative of the estate of Linet Simiyu – deceased (2018) eKLR* (Kakamega Civil Appeal No 10 of 2017) wherein Njagi J set aside the trial Court's award of Kshs 1,200,000/-, faulted the trial Court for adopting a multiplier approach for a deceased who similarly died at the age of 12 years, adopted the global award as being the most appropriate method and substituted it with an award of Kshs 700,000/-.

19. In conclusion, Counsel urged the Court to reduce the loss of dependency award from Kshs 2,000,000/- to between Kshs 700,000/- and Kshs 800,000/-.

Respondents' Submissions

20. The Respondents' Counsel opposed the appeal and submitted that the trial Magistrate's findings on liability was fair given the circumstances. He stated that although they would have wished the Appellant to bear more liability of at least 70% they nevertheless support the trial Magistrate's finding of 50%:50%. He referred to the case of *Menengai Oil Refineries vs Peter Omboko Mirikwa (Suing as the administrator and personal representative of the estate of Richard Mirikau Andanje) & Anor – Kakamega HCCA 44 of 2016* where the Court cited various other decisions and held that where there is no concrete evidence to determine who is to blame between road users, both should be held equally liable

21. On loss of dependency, Counsel submitted that in this instant case, the deceased was a 17-year-old pupil. He cited the case of *Zachary Abuse Magawa vs Julius Asiago Ogenleto & Jane Kerubo Asiago – Kisii HCCA No 74 of 2019* where for a deceased aged 18 years old, the Court awarded Kshs 1,500,000/- for loss of dependency. He therefore argued that the award of Kshs 2,000,000/- given by the trial Court was reasonable, the same be upheld and the appeal be dismissed.

Analysis & determination

22. The duty of an appellate Court was set out in *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*, where the Court stated as follows:

> ' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

23. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether the trial court erred in its apportionment of liability at 50:50

ii. Whether the trial Court's award for loss of dependency was excessive.

24. I now proceed to analyse and determine the said issues.

i. Whether the trial Court erred in its apportionment of liability

25. It is trite law that an appellate Court will only interfere with the Judgment of the lower Court if the decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro [1983] LLR at 403*, where Kneller JA & Hancox Ag JJA where it was held that as follows:

> ' A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.'

26. I have considered the evidence of the witnesses as to how the accident occurred and one thing is clear, they contradict each other. The eye-witness (PW2) who was a pedestrian, testified that he was coming from Misikhu town heading to Kitale direction, when he reached the junction leading to Kimilili he stopped to allow vehicles to pass, a boda boda rider (cyclist-the deceased) came from Kimilili direction and he too stopped beside the Webuye-Kitale road, a short while later a lorry (Appellant's vehicle) came from Webuye side, it was being driven in a zig-zag manner, it then knocked the deceased-motorcyclist who had stopped the motor-cycle on the left side of the road and the rider died on the spot.

27. In cross-examination, PW2 maintained that he was walking off the road, the deceased-motorcyclist had stopped the motorcycle off the road on the left side heading to Kitale and was about 1 metre from the tarmac

28. On the flipside, the Appellant testified that he was driving on the main road from Webuye heading to Kitale, he was on the left lane facing Kitale, he was in the middle lane, the cyclist was from Kimilili joining the main road and it is the cyclist who hit the left rear tyre of the lorry.

29. In Re-examination, he stated that the deceased was the one who was joining the road, it was therefore the deceased who was supposed to give way and it is the deceased who hit the rear left tyre of the lorry meaning that the lorry had already passed.

30. The conundrum as to how the accident occurred was further compounded by the failure of the police investigating officer to testify. Further, the police traffic officer who testified (PW3) did not even produce the police file. There was also no sketch plan produced and the traffic officer who testified did not even visit the scene. The officer also testified that the case was still pending under investigations. The only thing that all parties agreed upon was that the accident occurred.

31. In the case of *Valley Bakery Ltd & another Musyoki [2005] eKLR*, Kimaru J pronounced himself as follows;

> ' This Court will resolve the contradiction apparent in the evidence adduced by the 2nd Appellant and the Respondent by apportioning liability on a 50:50 basis. The Appellants and the Respondent will therefore share the blame equally for the said accident. I therefore reverse the finding of the trial magistrate on liability and substitute the said decision with the finding of this court apportioning liability at the ratio of 50:50.'

32. In the case of *Platinum Car Hire and Tours Limited –Vs- Samuel Arasa Nyamesa & Another (2019) eKLR* where the DS Majanja J stated the following:

> ' Given that there were two versions that emerged from the testimony of PW1 and PW2 that left open the possibility that either party was to blame, neither the appellant nor 2nd respondent took the opportunity to call any evidence to support its case. No doubt in coming to the conclusion that both parties were to blame the trial magistrate had in mind the decision of the Court of Appeal in Berkley Steward Limited V Waiyaki [1982-1988] 1 KAR where it cited with approval the decision in Baker V Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472, 1476 where Denning LJ, observed inter alia as follows:'

'Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them.'

In other cases, where the court is unable to determine who is to blame it has apportioned liability equally as illustrated by the Court of Appeal in *Hussein Omar Farah –Vs- Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR* where it observed that:

> ' In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.'

33. From the testimonies of the rival witnesses in this instant case, it is evident that, like in the foregoing authority, there were also two versions that emerged from the evidence that left open the possibility that either party was to blame. In the circumstances and upon considering the facts of the case and the above relevant authorities, it is my considered view that the trial Magistrate did not err in apportionment of equal liability in the circumstances.

ii. Whether the trial Court's award for loss of dependency was excessive

34. On the issue of quantum, I rely on the decision in *Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR*, where the Court of Appeal held as follows:

> ' It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court 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 low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v Khan [1981] KLR 349.'

35. An appellate Court will not therefore 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.

36. On the method adopted by the trial Court in awarding damages under the head of loss of dependency, the Court used a global sum approach.

37. In regard thereto, in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR*, Ngaah J held as follows:

> ' It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.'

38. In this case, the deceased was 17 years old who most likely was not yet earning any income considering that he was still below the age of adulthood. For this reason, even a multiplier could not be ascertained. In the circumstances and considering the said authority, the trial Magistrate was right in adopting the global award method.

39. Regarding the amount awarded, I note that in faulting the trial Magistrate, the Appellants relied on the decisions in Chem Wembo & 2 others vs IKK & HMM (2017) eKLR (Naivasha Civil Appeal No 32 of 2014) where Meoli J reduced the lump sum of Kshs 1,680,000/- to Kshs 600,000/- for a 12-year-old and Chabhadiya Enterprises Ltd & Another vs Gladys Mutenyo Butali (suing as the administrator and personal representative of the estate of Linet Simiyu – Deceased (2018) eKLR, Civil Appeal No 10 of 2017 where Njagi J set aside the trial Court's award of Kshs 1,200,000/- for a 12-year-old and substituted it with one for Kshs 700,000/-.

40. However, the above cases are not quite comparable to the present suit since the age of the deceased in the present suit (17 years) was much older than the deceased in the authorities cited and therefore the same cannot not be considered as comparable awards.

41. In *Francis Odhiambo Nyunja & 2 others vs Josephine Malala Owinyi (Suing as the legal Administrator of the Estate of KOR (Deceased) [2020] eKLR*, the deceased was, as in this instant case, aged 17 years and was in Form 3 in high school. By the Judgment delivered in December 2020, W Musyoka J found a global sum of Kshs 1,500,000/- as being sufficient compensation.

42. Similarly, in *Muli & another v Nzioka & another (Suing as the Administrators of the Estate of the Late Michael Makau Nzioka) (Civil Appeal 98 of 2019) [2022] KEHC 224 (KLR)* (17 March 2022) (Judgment), where the deceased was also a 17 years old Form 4 student, Muigai J reduced a global award of Kshs 3,000,000/- under loss of dependency to Kshs 1,500,000/-.

43. In light of the said awards, I find the sum of Kshs 2,000,000/- for loss of dependency as awarded by the trial Magistrate to be considerably high and substantially excessive to justify interference by this Court. Accordingly, I set aside the award of Kshs 2,000,000/- and substitute it with an award of Kshs 1,500,000/-.

Final Orders

44. In the premises, I make the following orders:

    i. On loss of dependency, the award of Kshs 2,000.000/- made by the trial Court is set aside and substituted with an award of the reduced sum of Kshs Kshs 1,500,000/-.

    ii. The rest of the findings by the trial Court, including on liability, remain undisturbed.

    iii. Since the Appeal has only partly succeeded, each party shall bear its own costs thereof.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

JOHN R. ANURO WANANDA

JUDGE