



REPUBLIC OF KENYA



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Abass v WGH (Suing as the administrator of the estate of WGH - Deceased) (Civil Appeal E178 of 2021) [2023] KEHC 18019 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E178 OF 2021
EM MURIITHI, J
MAY 31, 2023**

BETWEEN

KALA ABASS APPELLANT

AND

WGH RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF WGH - DECEASED

*(An appeal from the Judgment of Hon. Samuel M. Mungai
(C.M) in Isiolo CMCC No.79 of 2015 delivered on 30/11/2021)*

JUDGMENT

1. Before the trial court was a claim commenced by an amended plaint dated 24/5/2021, in which the Respondent herein sued the Appellant herein seeking general damages under the Fatal Accident Acts and *Law Reform Act*, special damages of Kshs. 172,200 made up as per paragraph 6 above, costs and interest of the suit at present court rates. The Respondent pleaded that on or about 25/9/2012, the deceased was lawfully travelling as a fare paying passenger in motor vehicle registration No. KBR 070 B along Moyale-Isiolo Road near Milma Wamba when the Appellant carelessly and negligently drove the said motor vehicle that it lost control and collided with motor vehicle Registration No. G.K 035 V occasioning the deceased fatal injuries. At the time of his death, the deceased was aged 15 years, full of life, in good health and a bright student at [Particulars Withheld] Boys School-Embu. As a result of the Appellant's negligence, the deceased future dreams of becoming a lawyer were cut short and the Respondent has suffered loss.
2. The Appellant denied the claim by his statement of defence dated 2/9/2020 and prayed for the Respondent's suit to be dismissed.
3. After conclusion of the trial, the trial court found the Appellant to have been 100% liable for the accident and awarded general damages of Ksh.30,000 for pain and suffering, Ksh.150,000 for loss of



expectation of life, Ksh. 1,500,000 for loss of dependency totaling to Ksh. 1,680,000 plus costs and interest.

The Appeal

4. On appeal, the Appellant filed his Memorandum of Appeal on 24/12/2021 listing 7 grounds as follows:
 1. The learned magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on both points of law and facts.
 2. The learned magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 3. The learned magistrate erred in law and fact in awarding quantum of damages inconsistent with injuries pleaded and proved to have been sustained by the Plaintiff.
 4. The learned magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and fact in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.
 5. The learned magistrate erred in assessing an award, hereunder, which was inordinately high and a wholly erroneous estimate of the loss and damages suffered by the plaintiff.
 6. The learned magistrate erred in awarding an excessive sum of the injuries suffered in the face of the evidence adduced and submissions made by the Appellant's Counsel on quantum.
 7. The learned trial magistrate erred in awarding costs of the suit and interest to the Plaintiff.

Duty of the court

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

The Evidence

6. PW1 BGH, the Respondent herein, produced the Limited grant, police abstract, Post Mortem Report, death certificate, certificate of motor vehicle search and receipt, demand notices, letter dated 16/5/2014, death certificate for deceased father, letters from the chief and receipt dated 28/9/2021 as exhibits in court. After adopting her statement dated 24/9/2016, she testified that, "I come from Moyale. I am doing pupillage. I am the plaintiff. The deceased was my brother who died in a road accident. I am filed the suit as my mother died in 2012 and my father in 2014 – 22nd October 2014 the deceased was a form 1 student at [Particulars Withheld] Boys. He was a good performer in school. I have letter from school. I am bringing this case on behalf of our fathers estate and my estate and my two sisters. I have a brother who survived my father."
7. On cross examination, she stated that, "I am sister to the deceased. I have no documents to prove that. The Chief's letter indicates that I am the older sister. I surviving brother is older than me. There is a letter from the school of the deceased, no transcript has been brought to show his performance. The beneficiaries of my fathers estate are myself and my brother."



8. On re-examination, she stated that, “I produce the letters from the chief to show that my brother and are the surviving beneficiaries. One letter has indicated that fact. (P. Exh.9A) read out by the plaintiff). When my brother died he was surviving by our father myself and my brother as a family the deceased was going to help us having brought him up.”

Submissions

9. The Appellant urges that the sum of Ksh. 1,500,000 awarded for loss of dependency is inordinately high, disproportionate, unfair and incompatible with conventional awards, and cites *Nancy Oseko v Board of Governors Masai Girls High School* (2011) eKLR and *FM (Minor suing through Mother and next friend MWM) v JNM & another* (2020) eKLR. He urges that since the deceased died aged 15 years and was survived by his father and siblings, a sum of Ksh. 800,000 for loss of dependency would be sufficient, and cites *Mwangangi & another v FKM (Suing as Legal Representative of the Estate of the Late AMK)* (Civil Appeal E11 of 2021)[2021]KEHC 291 (KLR) (22 November 2021) (Judgment), *Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu (Deceased)* (2018) eKLR, *Chen Wembo & 2 others v IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased)* (2017) eKLR and *Charles Ouma Otieno & Another v Bernard Odhiambo Ogecha (Suing as brother and legal representative and administrator of the estate of the late Oscar Onyango Ogecha (deceased)* (2014) eKLR. He urges the court to set aside the trial court’s judgment and reassess the quantum based on his submissions herein and in the trial court.
10. The Respondent submits that the trial court applied its judicial discretion judiciously and the award was not high to warrant disturbance by this Court. She relies on *Kenya Breweries Limited v Saro* (1991) eKLR, *Mpaka Muriuki Japheth v HMM & another* (2021) eKLR, *Dadson Maina Mwangi v Simon Ngichiri Mwaka & another (Suing as the Legal Representatives of Estate of Grace Wambui Ngichiri* (2020) eKLR, *DMM (Suing as the Administrator and Legal Representative of the estate of LKM v Stephen Johana Njue & Another* (2016) eKLR, *Winnie Njeru Mburu & Another v KAA (Suing as the legal representative of the late FLA (deceased)* (2020) eKLR, *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) and *Butt v Khan* (1977) 1 KAR in support of her submissions.

Analysis and Determination

11. After considering the grounds of appeal raised by the Appellant, the issues for determination are whether the awards made by the trial court under the various heads were inordinately high; whether the Appellant’s submissions were considered; and whether costs and interest were awardable to the Respondent.

Inordinately high damages

12. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of



damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470).”

Pain and Suffering

13. The evidence on record is that the deceased was travelling together his sister PW1 when they were involved in an accident. Whereas the Respondent was lucky enough to survive, the deceased was thrown out of the bus, as a result of which he instantaneously died. This court finds that the sum of Ksh.30,000 for pain and suffering awarded by the trial court was justified, taking into account the agonizing pain the deceased had to undergo before he succumbed.

Loss of expectation of life

14. Although it is settled that the conventional figure awardable under this head is Ksh.100,000, the trial court awarded Ksh. 150,000 which is fair, considering the current inflation rate, and the bright and promising life of the deceased.

Loss of dependency

15. Dependency is a matter of fact and must be proved by evidence.
16. PW1 testified that, “The deceased was a form 1 student at Nyalwa Boys. He was a good performer in school. I have letter from school.” On re-examination, she stated that, “When my brother died he was surviving by our father myself and my brother as a family the deceased was going to help us having brought him up.”
17. By his letter dated 7/6/2021, the chief of Butiye Location confirmed that the deceased was survived by his father, GHL and his 2 siblings. It is said that the father to the deceased later passed on in 2014, leaving only the Respondent and her brother as the only dependants of the deceased.
18. It is not disputed that the deceased was a form one student at [Particulars Withheld] Boys’ School aged 15 years, who diligently attended his classes as per the letter from the said school dated 5/5/2014.
19. In awarding a global sum of Ksh. 1,500,000 for loss of dependency, the trial court properly found that it would be difficult to know how the life of the deceased would have turned out or how much he would earn.
20. That is the award the appellant alleges to be inordinately high. In *Daniel Mwangi Kimemi & others v Representative of the estate of N.K (deceased)* (2016) eKLR, the court (F. Gikonyo J) reviewed an award of Ksh. 1,530,000 made by the trial court to Ksh.1,000,000 for loss of dependency of a deceased who was aged 9 years. In *China National Aero-Technology International Engineering Corporation v RL* (Suing as the legal representatives of the estate of the late SL (2020) eKLR, the court (R.P.V. Wendoh J) declined to interfere with the trial court’s award of Ksh.1,400,000 for loss of dependency of a deceased who was aged 13 years.
21. Taking into account the age of the deceased, his healthy life and his aspirations to become a lawyer in future, this court finds that the trial court’s award of Ksh.1,500,000 for loss of dependency was reasonable and consistent with past awards.
22. This court would have awarded more in damages had it been the trial court but that is no basis for interfering with the trial court’s award, as “the appellate court is not justified in substituting a figure of



its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance” (see Henry H. Ilanga v. M. Manyoka [1961] EA 705, 713) and, in any event, there was no cross-appeal thereon by the Respondent.

Consideration of the Appellants’ submissions and authorities

23. The appellant alleges that the trial court totally disregarded his submissions. This court has carefully considered the judgment of the trial court and established that the submissions of all the parties were well considered. The fact that the trial court failed to agree with the submissions of the appellant does not mean that they were not considered.

Costs and interest

24. It is trite that costs follow the event and are awardable to the successful party. The Respondent was the successful party and she was thus entitled to an award of costs and interest in accordance with the provisions of Sections 26 and 27 of the *Civil Procedure Act*.

Orders

25. Accordingly, for the reasons set out above, the appeal is unmeritorious and it is dismissed. The Respondent shall have the costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Miss Thanji Advocate for Ms. Laboso Advocate for Appellant.

Mr. Kanyumoo Advocate for Ms. Njeri Gathua Advocate for Respondent.

