Planet Motors Mombasa Ltd & another v Benson (Suing as Legal Representatives of the Estate of Rhoda Sipel Lemungat (Deceased) (Civil Appeal E004 of 2021) [2023] KEHC 18322 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E004 OF 2021

AK NDUNG'U, J

MAY 31, 2023

BETWEEN

PLANET MOTORS MOMBASA LTD ..... 1ST APPELLANT

ALICE WANJIRU GIKONYO ..... 2ND APPELLANT

AND

LEMUNGAT LOITUKU BENSON (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF RHODA SIPEL LEMUNGAT (DECEASED) ..... RESPONDENT

(Appeal from original Decree passed on 25/02/2021 in Maralal PM Civil Case No 9 of 2020 – A Gachie, PM)

JUDGMENT

1. This is an appeal in respect to quantum of damages awarded in the decree of the lower court passed on February 25, 2021. The parties herein consented on liability in the ratio of 75:25 in favour of the Respondent. The matter proceeded for hearing with the Respondent calling one witness and the Appellants opted not to call any witness.

2. The trial court awarded the Respondent damages in the following terms;

   Pain and suffering- Kshs 30,000/-

   Loss of expectation of life Kshs 70,000/-

   Loss of dependency- Kshs 1,920,000/-

   Special damages- Kshs 13,440/-

   Total- Kshs 2,033,440/-

   Total less 25% contribution- Kshs 1,525,080/-

3. Being dissatisfied with the trial court assessment of damages, the Appellant filed the memorandum of appeal dated March 4, 2021 and raised the following grounds;

   i. The learned magistrate misdirected himself in assessing the loss of dependency thereby making an award that was manifestly excessive notwithstanding the evidence on record.

   ii. The learned magistrate failed to properly analyze the evidence on record and especially the admission by the Respondent hence arriving at a decision that was not supported by evidence before him.

   iii. The learned magistrate arrived an erroneous estimate of the award by failing to consider the appellant's submissions and especially on failure by the Respondent to produce evidence in support of the claim of monthly earnings.

   iv. The learned magistrate failed to apply the principles applicable in award of damages in fatal claims.

   v. The learned magistrate failed to discount an award of pain and suffering and loss of expectation of life thereby making an award of double compensation.

4. Parties agreed to canvass the appeal by way of written submissions. I have considered the rival submissions together with the authorities relied thereon.

5. The Appellants' position is that the assessment of damages by the trial court was not justified. From the submissions the issue for determination is only on the award of damages under the following head;

   i. The award on pain and suffering and loss of expectation of life, and;

   ii. Loss of dependency.

Pain and suffering and loss of expectation of life

6. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of *Butt v. Khan* Civil Appeal No. 40 of 1997 thus: -

> "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 arrive at a figure which was either inordinately high or low."

7. It is therefore apparent that this court will only interfere with the trial's court award of damages if the Appellants demonstrate that the same was inordinately high or the trial court proceeded on wrong principles.

8. Under pain and suffering and loss of expectation of life, the trial court awarded the Respondent a sum of Kshs 30,000/- for pain and suffering and Kshs 70,000/- for loss of expectation of life. The Appellants' contention is that the amount awarded was excessive and manifestly high considering the fact that the deceased died shortly after the accident and considering that the deceased was knocked while drunk and dancing on the middle of the road. The Appellants urged this court to award Kshs 10,000/- for pain and suffering and Kshs 50,000/- for loss of expectation of life.

9. The Respondent on the other hand urged this court not to disturb the award for pain and suffering as the same was modest and reasonable. On loss of expectation of life, the respondent faulted the trial

court for awarding Kshs 70,000/- instead of Kshs 100,000/- as in other comparable cases. He urged the court to review the award to Kshs 100,000/-.

10. The Appellants relied on the case of *Mercy Muriuki & another vs Samuel Mwangi Nduati & another (suing as the legal administrator of the Late Robert Mwangi* (2019) eKLR and the case of *Sukari Industries vs Clyde Machimbo Juma* (2016)eKLR, whereby the court in *Mercy Muriuki* case held that the conventional award for loss of expectation of life is Kshs 100,000/- and for pain and suffering the award ranges from Kshs 10,000/- to Kshs 100,000/-. In the Sukari Industries case, the court had the same views in respect to award of damages for pain and suffering and the judge upheld an award of Kshs 50,000/-.

11. On pain and suffering, the Respondent through the amended plaint dated August 25, 2020 averred that the deceased died while undergoing treatment. The postmortem report produced as Pexhibit 5 revealed that the deceased died on arrival to hospital. It is not clear how long it took before the deceased passed on but it is clear that her death was not instant. Based on that, it cannot be gainsaid that the deceased did experience pain from the time of the accident and her death.

12. The principles applicable while awarding damages under this head is the time that it took for the deceased to pass on after the accident. In Civil Appeal No. 42 of 2018 *Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased)* the court observed that;

> " In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal."

13. I consider the following cases as comparable awards in respect of damages under pain and suffering to place this court in a suitable position of determining whether the award of Kshs 30,000/- was manifestly excessively high or low;

In *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR, the court held;

> ''There is no doubt that the died after sometime which included taking him to different hospitals. Therefore, the deceased must have suffered some considerable pain before dying. This court finds no reason to interfere with the award made by the trial court.-100,000 for pain and suffering.

In *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another* [2021] eKLR where the deceased died 30 minutes after the accident an award of Kshs 100,000/= for pain and suffering was found as not only fair not but reasonable as the court is also enjoined to consider passage of time and inflation.

In *Oyugi Juma Joseph v Grace Omwanda Ogolla & another* [2020] eKLR

The trial court awarded Kshs 20,000 for pain and suffering as the deceased died the same day of accident.

In *Benard Kimeto v Emmy Chebet Koskei (Suing as Administratrix and/or Personal Representative of the Estate of Nixon Kiprotich Koskei (DCD)* [2021] eKLR

The court upheld an award of Kshs 30,000 where the deceased died on the same day of the accident.

14. Having reviewed the award under pain and suffering, the circumstances of the death and comparable awards, I find the award not excessively high and neither did the trial court apply incorrect principles. No good ground is laid for this court to interfere with the award of Kshs 30,000 and I uphold it.

15. The award for loss of expectation of life is normally conventional, and in the bracket of Shs.60,000/= to 200,000/=. Some of the comparable cases are as follows;

In *Kenya Wildlife Services vs. Geoffrey Gichuru Mwaura* (2018) e KLR, a sum of Shs. 150,000/= was granted.

In *Wembo & 2 others vs. TKK* (2017) eKLR, a sum of Shs.100,000/= was awarded.

The court in *Easy Coach Bus Services Ltd & another vs. Henry Charles Tsuma & another* (2019) eKLR, a sum of Shs.80,000/= was awarded.

16. In view of the foregoing, none of the parties has laid down any basis for the court's disturbance of the award under this head. I uphold it.

17. On loss of dependency, the Appellants raised two issues being the ratio of 2/3 that the trial court adopted and the multiplicand and the multiplier the trial court used.

18. On the first issue, the Appellants argued that there was no evidence that the children who were listed on the plaint as children of the deceased were minors. That the Respondent testified that the deceased was survived by six children three of them being in their adult age and three being minors. The Appellants argued that there was no documentary evidence, like birth certificate that was produced before the trial court to show indeed that the three children were minors. That the chief letter did not indicate the age of the deceased children thus dependency was not proved and the trial court wrongly applied dependency ratio of 2/3 without any justification. The Appellants relied on the case of *Abdalla Rubeya Hemed vs Kayuma Mvurya & another* (2017) eKLR where the court held that dependency is a matter of fact to be proved by evidence.

19. The Appellant urged this court to adopt a dependency ratio of 1/3.

20. It is trite law that dependency is a matter of fact and must be proved. It must be demonstrated that persons for whose benefit the proceedings are brought under the *Fatal Accidents Act* were dependent on a deceased prior to his death. In *Samuel Mutitu Nderitu (Suing on his own Behalf and as Legal Representative of the Estate of Gladys Muringi Nderitu- Deceased) v Erastus Mutahi Mugambi* [2021] eKLR the court held that dependency is a matter of fact and must be proved by evidence as was held in the case of *Abdalla Rubeya Hemed vs Kayuma Mvurya & another* [2017] eKLR: -

> " 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."

21. From the record, the Respondent through the amended plaint averred that the deceased left six dependents. The Respondent did not indicate whether there were minor children or not. The Respondent however testified in court that three children of the deceased were adults and three were minors. This was not controverted by the Appellants. The chief's letter also indicated that four of the

deceased's children had taken out their identification card meaning that four were adults and two were minors.

22. Such a rigid approach may not do justice to claimants in the special circumstances of the Kenyan population and their families. As held in *Tipper Hauliers Limited v Gladys Nanjala Namulata & another (Suing as the Legal Representative of the Estate of the Late Peter Wafula Kisache)* [2020] eKLR different circumstances may lead to dependency long after the age of majority. In that case the court held;

> " I agree with the mode of establishing both the dependency ratio and the multiplier, as stated in the above decision. The deceased's wife was a house wife and the deceased took care of the children's financial wellbeing. It is not uncommon in Kenya to have children in school up to 25 years and beyond. It is also not uncommon to have children unemployed, or not engaging in income generating ventures even at 30 years old, with the youth unemployment statistics in the country. I therefore find and hold that the deceased was the sole bread winner of his wife and the younger children, three of whom were 21 years old having been triplets."
>
> I find the dependency ratio adopted by the trial court as appropriate.

23. The second issue is on the adoption of Kshs 15,000/- as the deceased's earning. The Appellants submitted that the evidence on record revealed that the deceased was a casual labourer and there was no evidence to support the deceased's income. The Respondent testified in court that the deceased would engage in casual jobs and would earn Kshs 1,000/- a day. That the deceased was unmarried and that she raised them single handedly using the said money.

24. The trial magistrate in his judgment noted that a casual worker in Maralal earns Kshs 500/- a day and adopted Kshs 500/- as the deceased's income. The Appellants argued that the rationale used by the trial magistrate was unjustified. The Appellants urged this court to adopt the minimum wage regulation approach or a conventional figure approach. The Appellants suggested Kshs 10,000/- as a conventional figure.

25. The Court of Appeal in the cases of *Board of Governors of Kangubiri Girls High School& Another v Jane Wanjiku* Civil Appeal No. 35 of 2014 eKLR pronounced itself as follows:

> " In the instant case, on the issue of multiplier, we adopt the following findings by Nambuye, J.A in Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others- H.C.C.C No. 754 of 2005:-
>
> 'This court has given due consideration to the afore set out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles:-
>
> a. The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.
>
> b. ...'

26. Looking at the myriad of cases, our courts have adopted different approaches for example In *Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* [2020] eKLR the court held that;

> " In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances,

it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency." ...the global sum approach would be an estimate informed by the special circumstances of each case. "

27. The minimum wage approach was adopted in *Catholic Diocese of Kisii v Peter O Isaboke & another (suing as legal representatives in the Estate of Evans Isaboke Mokua (Deceased)* [2019] eKLR, the court held that;

> " In cases where there is no proof of earnings, the courts will resort to the minimum wage for unskilled labourers to determine the multiplicand. The Regulation of Wages (Agricultural Industry) 2008 provided for Kshs 5,000/= for unskilled employees."

28. A different example is *Guyo Jillo & another v Lilian Kanyua* [2019] eKLR where the court gave a conventional figure. The court held that;

> " Having observed that the respondent did not prove that the deceased was earning Ksh.60,000 monthly, I do find that a multiplicand of Kshs 22,000 is reasonable."

29. In *Basari Company Limited v Peter Mwamburi Wangio & another* [2018] eKLR, the learned judge upheld the trial court conventional figure approach. The court held that;

> " Here even though the trial court did not give any reason for settling on a multiplicand of Ksh.10,000/= there was evidence that the deceased was a mason or a casual labourer. According to the Regulation of Wages Order availed to court, the lowest earnings at the material time was Kshs 9,780.95. I do find that the choice of Kshs 10,000/= as a monthly earning, even without reason being assigned, was not a misdirection or an error to warrant an interference."

30. In *MNM & another vs Solomon Karanja Githinji* (2015) eKLR, this court adopted the lump sum approach and held that;

> " ...though I am satisfied on balance that the deceased was indeed carrying out a butchery business at the time of his death, there is absolutely no evidence upon which I can attempt to assess his income. Such an exercise will be highly speculative. I therefore consider this an appropriate case where to award a lump sum."

31. In our instant suit, I note there was no evidence on the earnings of the deceased. Guided by the decision in *Catholic Diocese of Kisii v Peter O Isaboke & another (suing as legal representatives in the Estate of Evans Isaboke Mokua (Deceased)* [2019] eKLR, I would resort to the minimum wage for unskilled labourers to determine the multiplicand. It is my view that an approach based on an assumption of the earnings of a casual labourer in a certain locality is highly speculative and prone to error. The trial court thus applied a wrong principle and good ground exists to warrant interference with the multiplicand adopted.

32. The third issue was on the multiplier the trial court adopted. It is not in dispute that the deceased was 44 years old at the time of her death. The trial court adopted a multiplier of 16 years based on the retirement age of 60 years. The Appellants submitted that this was unreasonable as the trial court did not consider the vicissitudes of life which would have shortened the deceased's life and considering that the deceased was engaged in informal sector which would have reduced her lifespan. The Appellants relied on the case of *Monica Njeri Kamau vs Peter Monari Onkoba* (2019) eKLR. The Appellants suggested a multiplier of ten (10) years.

33. The deceased was 44 years old. Our courts have variously pronounced themselves on the considerations that determine the applicable multiplier in award of damages.

34. In *James Mutunga Mbinda v Stephen Mwalula Mulwa & another (Suing as the Legal Representatives of the Estate of Winfred Mbatha Mwalula (Deceased))* [2021] eKLR- the learned judge adopted a multiplier of 16 years for a 44 years deceased.

35. In *Hillary Tom Mboya v Jane Wangechi Njihia & another* [2022] eKLR the learned judge upheld the trial court multiplier of 17 years for a 43-year-old driver.

36. In *Wilson Karuta Gatana v Beth Nyaruiru Karega* [2021] eKLR the learned judge while adopting a multiplier of 16 years for a 44-year-old held that;

> " In so far as the multiplier is concerned, there are chances that the deceased would not work up to the official retirement age of sixty due to uncertainties of life. Unskilled workers tend to engage in heavy work which may contribute in reducing their life span. In respect of the deceased herein, a multiplier of 16 years is reasonable."

37. There is no evidence on record that the deceased suffered from any ill health before her demise. Following on the trend in the authorities above, the multiplier of 16 years adopted by the trial court was reasonable.

38. The gazetted minimum wage applicable to unskilled labourers at Mararal in 2021 was Kshs 7240.95 with an additional 15% for house allowance totaling to Kshs 8327.1. Loss of dependency would thus calculate as 8327.1 x 12 x 16 x 2/3= 1,065,868.80.

39. The total award would be in the following order and totals;

    a. Pain and suffering 30,000

    b. Loss of expectation of life 70,000

    c. Loss of dependency 1,065,868.80

    d. Special damages 13,440

    Total 1,179,308.80

    Less 25% contribution 294,827.20

    Amount awarded 884,481.60

As the Appellant has only been partially successful, each party is to bear its costs of this appeal.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 31ST DAY OF MAY, 2023

AK NDUNGU

JUDGE