Omae & another v Ogiki & another (Suing as the Legal Representative of the Estate of Samwel Mokaya) (Civil Appeal E056 of 2021) [2023] KEHC 17796 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17796 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E056 OF 2021

WA OKWANY, J

MAY 25, 2023

BETWEEN

DAVINISIUS MATAGARO OMAE ..... 1ST APPELLANT

SMARTLINE SAVINGS & CREDIT CO-OPERATIVE SOCIETY LIMITED ..... 2ND APPELLANT

AND

ELIJAH NYARIBO OGIKI & EDINA KWAMBOKA GISORE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMWEL MOKAYA) ..... RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. W.C. Waswa - Resident Magistrate dated and delivered on the 10th day of May 2020 in the original Nyamira Chief Magistrate's Court Civil Case No. 80 of 2020)

JUDGMENT

Introduction

1. The Respondent herein was the Plaintiff before the lower court where he sued the Appellant seeking, inter alia, damages under the *Fatal Accidents Act* and the *Law Reform Act* arising out of a road traffic accident involving his son, the deceased herein. The Respondent's case was that on 12th April 2019 the deceased was walking along Kericho - Kisii Road when at Ekerenyo area, the Appellant's motor vehicle registration No. KBU 059K Toyota Matatu veered off the road and knocked him down thus occasioning him fatal injuries. The Respondent attributed the accident to the negligence of the Appellant's driver and/or agent in driving the said motor vehicle.

2. The trial court heard the case and entered judgment in favour of the Respondent in the following terms: -

Damages under the *Law Reform Act*:

a. Loss of Expectation of Life – Kshs. 100,000/=

b. Pain and Suffering – Kshs. 50,000/=

Damages under the *Fatal Accidents Act*

a. Loss of Dependency – Kshs. 1,508,931.20/=

Special Damages – Kshs. 41,000/=

TOTAL = Kshs. 1,699,931.20/=

3. Aggrieved by the said judgment, the Appellant and filed the instant Appeal wherein he listed the following grounds of appeal in the Memorandum of Appeal: -

1. The learned magistrate erred in law and misdirected himself when he failed to consider the Appellants' submissions on both points of law and facts.

2. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.

3. That the learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, Cap 405.

4. The learned magistrate erred in law and fact in finding the Appellant 100% liable in view of the evidence produced before the trial court and in particular the following:

a. That the Plaintiff/Respondent failed to prove his case on liability against the Defendants.

5. The learned magistrate erred in law and fact in awarding the Estate of deceased a sum of Kshs. 50,000/= for pain and suffering while not considering that the deceased passed on the same day.

6. The learned magistrate erred in law and fact by awarding the estate of the deceased a sum for loss of expectation of life when it was not entitled to the same and/or the same was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

7. The learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs. 1,508,931.20/= for loss of dependency considering the fact that there was no evidence on dependency.

8. The learned magistrate erred in fact and in law in failing to consider the Appellants' submissions on Quantum and liability and legal authorities relied upon in support thereof.

9. The learned magistrate erred in law and in fact by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstances of the case.

10. The learned magistrate erred in law and fact in failing to consider conventional awards in cases of a similar nature.

4. The Appeal was admitted for hearing and parties directed to canvass it by way of written submissions.

5. On liability, the Appellant submitted that the Respondent did not prove that his driver was negligent as no eyewitness was called to testify on how the accident occurred. The Appellant cited Section 107 of the *Evidence Act* and relied on the cases of Mary Wambui Kabugu vs. Kenya Bus Services Limited, Civil Appeal No. 195 of 1995 and Bwire vs. Wayo & Sailoki, Civil Appeal No. 032 of 2021 (2022) KEHC7 (KLR) 24 January 2022 where the court discussed the burden and standard of proof.

6. On quantum the Appellant submitted that the award of Kshs. 50,000/= under the heading of pain and suffering was on the higher side considering that the deceased did not suffer for long before succumbing to his injuries. The Appellant proposed an award of Kshs. 10,000/= under this heading. They relied on the case of Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (UR) and Sukari Industries Limited vs. Clyde Machimbo Juma HomaBay HCCA No. 68 of 2015 (2016) eKLR which were both was cited in Francis Odhiambo Nyunja & 2 Others vs. Josephine Malala Owinyi (suing as the Legal Administrator of the Estate of Kevin Osore Rapando (deceased) [2020] eKLR in which the court discussed the principles governing interference with the award of a trial court.

7. The award of Kshs. 100,000/= made for loss of expectation of life was not contested.

8. The Appellant however contested the findings on loss of dependency on the basis that the same was inordinately high. Reference was made to the decision in the case of Kwanza vs. Ngalah Mutua & Another cited in China National Aero-Technology International Engineering Corporation vs. Raphael Lenamboyo [2020] eKLR and Cornelia Elain Wambua vs. Shreeji Enterprises Ltd 7 Others (2012) eKLR cited in the case of Petronila Muli vs. Richard Muindi Savi & Catherine Mwende Mwindu (2021) eKLR where the courts discussed the multiplier approach and the court's discretion in making awards.

9. The Appellant submitted that the allegation that the deceased was a farmer earning Kshs. 15,000/= per month was not supported by any tangible evidence. According to the Appellant, the trial court ought to have adopted the global sum approach instead of the multiplier approach as the occupation and income of the deceased was not established. The Appellant cited the decisions in Geoffrey Obiero & Another vs. Kenya Power & Lighting Corporation Limited & Another (2019) eKLR and Stanwel Holdings Limited & Another vs. Racheal Haluku Emanuel & Another (2020) eKLR where the courts awarded Kshs. 1,200,000/= for a deceased 25-year-old and 1,000,000/= for a deceased 23-year-old

10. The Respondent, on the other hand, submitted that this court should not interfere with the trial court's findings on liability and quantum as the trial court properly considered all the evidence placed before it in arriving at its decision.

11. The Respondent submitted that the finding of 100% liability in his favour was correct because the Appellants' driver owed a greater duty of care to other road users including the deceased. The Respondent noted that the Appellant did not call any witnesses to controvert his evidence and that it was clear that had the driver been driving at a reasonable speed, he would have been able to slow down in order to avoid the accident.

12. The Respondent urged this court to uphold the trial court's award of Kshs. 50,000/= for pain and suffering and cited the cases of Acceler Global Logistics vs. Gladys Nasambu Waswa and Another (2020) eKLR where the court awarded the same amount for pain and suffering and Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (suing as the legal administrator of the Estate of the

late Robert Mwangi [2019] eKLR where the court held that the awards for pain and suffering ranges from Kshs. 10,000/= and 100,000/=.

13. On loss of expectation of life, the Respondent submitted that since the deceased who was 22 years old at the time of his death, he would have lived until the age of 70 years and that a multiplier of 28 years was a fair finding. He referred to the decisions in Gordon Sunda & Another vs. Adan Abdikadir Omar & Another (2019) eKLR where the court determined a dependency ration of 2/3 and Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita & Another, Kisii Civil Appeal No. 68 of 2005 (2011) eKLR where the court held that in the absence of proof of income, the Regulation of Wages (General Amendment) Order of 2005 becomes applicable.

Analysis and Determination

14. I have carefully considered the Record of Appeal and the parties' respective submissions. I am aware of the duty of the first appellate court, which is to re-examine and scrutinize the evidence presented before the trial court afresh in order to arrive at its own independent findings. This duty was restated by the Court of Appeal in the case of Peter M. Kariuki vs. Attorney General [2014] eKLR thus: -

> " We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui VRepublic, (1984) KLR 729 and Susan Munyi V Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."

15. The main issue for determination is whether the trial court arrived at the correct verdict in determining liability and quantum.

16. The Respondent's case was that the Appellant was solely liable for the accident as it is his motor vehicle that caused the fatal accident. Sections 107 and 108 of the Evidence of Act state thus:

> 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

17. In Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that: -

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party

the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

18. The standard of proof in civil cases is on a balance of probabilities. In William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLE 526, the court explained what amounts to balance of probabilities as follows: -

> "In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

19. The burden of proof therefore fell on the Respondents in this case. The Respondent (PW1) testified that he did not witness the accident and only received a phone call from a neighbour informing him that his son, Samuel Mokaya, had been involved in an accident. PW1 produced the deceased's death certificate (P. Exh2) and the burial permit (P. Exh3). He also produced other documents, namely; the Grant of Letters of Administration (P. Exh1), the Police Abstract (P. Exh4), the Post-Mortem Report (P. Exh5), the Demand Letter (P. Exh6), Copy of Records (P. Exh7) and receipts amounting to Kshs. 51,000/= (P. Exh8).

20. PW2 No. 83327 PC Julius Kipkoech, the Investigating Officer, produced the Police Abstract (P. Exh 4) and the Post-Mortem Report (P. Exh. 5) which proved that there was an accident involving a matatu Registration No. KBU 059K and that the victim of the said accident was Samwel Mokaya the deceased. It was therefore not disputed that the deceased died in the accident in question.

21. The main question here is whether the Appellants' driver was liable for the said fatal accident. I have considered the evidence of PW2 the Investigating Officer who stated that there were some animals crossing the road and that in a bid to avoid hitting the said animals, the driver of the matatu swerved onto the right side of the road where he knocked the deceased who was a pedestrian walking by the roadside.

22. On whether the deceased could have been liable, to some extent, for the said accident, I am guided by the case of Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, where it was held that:-

> "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

23. Guided by the principle in the above cited case, it is my view that the driver of the vehicle ought to have taken reasonable care to avoid hitting the deceased. I find that it was incumbent upon the driver to exercise caution on the road and drive at a reasonable speed to enable him slow down whenever necessary so as to avoid causing the accident. In this case, the driver was unable to slow down in time to avoid hitting the animals and was only left with the option of swerving the car, thereby fatally hitting the deceased. It was clear that the vehicle must have been at a high speed otherwise the deceased would not have sustained fatal injuries.

24. From the facts of this case, one can say that the deceased had no control over the vehicle that hit him and that the burden of exercising due care rested solely on the driver. I find guidance in the decision in Rosemary Mwasya vs. Steve Tito Mwasya & 2 Others, Civil Appeal No. 100 of 2017, (2018) eKLR where the Court of Appeal held that: -

> " Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident."

25. I note that the Appellant did not adduce any evidence to contradict the Respondent's account of how the accident happened and I therefore find that even though no eyewitnesses were called to testify, there was no other probable reasons for concluding that the accident could have occurred as a consequence of any other factor other than what the Respondent's witness testified to.

26. I am thus satisfied, on a balance of probability and in the absence of any other explanation as to how the accident occurred, that the Respondents proved their case against the Appellants to the required standard. In arriving at this finding, I rely on the case of Isaac K. Chemjor & Another vs Laban Kiptoo, Civil Appeal No. 7 of 2019 (2019) eKLR where the court observed as follows on paragraph 9:-

> " ...There being no evidence that could lead to any other probability that another person was involved or the cause of the accident, the Court on a balance of probabilities test believes the explanation for the accident as given by the respondent, and there was in it no reasonable hypothesis that another vehicle or person was involved in the cause of the accident. The respondent had discharged his burden of proof under sections 107 and 108 of the *Evidence Act* in showing that the accident was occasioned by the 2nd appellant in his driving fast beyond his ability to control the vehicle when he encountered another road user. There being no evidence of involvement in the cause of the accident by any other person, the Court finds on a balance of probabilities that the events as related by the respondent are more probable than not." (Emphasis mine).

27. I agree with the trial court and uphold the finding of 100% liability against the Appellants.

i. Whether the trial court acted on the wrong principles in making the award of damages and whether the same was inordinately high.

28. It is trite law that the exercise of assessing and awarding damages is premised on judicial discretion and must not be arbitrarily interfered with. In Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR the Court of Appeal set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

> " An appellate court will not disturb an award for general 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..."

29. Similarly, in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal held that: –

> " ...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 when it held as per Law, J.A 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."

30. This Court is, therefore, duty bound to consider the award of the trial court under the *Law Reform Act* and the *Fatal Accidents Act* and determine whether the trial court erred in any way. In so doing, I am cognizant of the fact that a comparison must be made with already-determined cases in arriving at an appropriate award. This principle was aptly espoused by the Court of Appeal in Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR as follows: –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

31. In John Kipkemboi & another vs. Morris Kedolo [2019] eKLR the court outlined the applicable principles in making an award of damages as follows: -

a. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

b. The award should be commensurable with the injuries sustained.

c. Previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts.

d. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

e. The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR)"

32. Bearing the above principles in mind and turning to the present case, I note that the trial magistrate made an award of Kshs. 100,000/= for loss of expectation of life and Kshs. 50,000/= for pain and suffering under the *Law Reform Act*. It was the Appellants' case that the award under pain and suffering was excessive. He proposed the sum of Kshs. 10,000/=. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR the court observed that:-

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/- while pain and suffering the awards range from Kshs.10,000/- with higher damages being awarded if the pain and suffering was prolonged before death."

33. In Joseph Kivati Wambua vs. SMM & Another (suing as the Legal Representatives of the Estate of EMM (Deceased) Civil Appeal No. 42 of 2018 it was held:-

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. 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." (Emphasis added).

34. Similarly in Joseph Muthuri vs. Nicholas Kinoti Kibera [2022] eKLR, it was held: -

> " All the parties herein are in agreement that the deceased died on the spot, and there is no evidence that he endured a lot of pain before breathing his last. I will thus award Kshs. 30,000 for pain and suffering and Kshs.100,000 for loss of expectation of life."

35. In Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another [2017] eKLR, the court stated as follows: -

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death." (Emphasis added).

36. Guided by the above-cited cases, it follows then that where a deceased person dies instantaneously from an accident, the award under the head of damages will range between 10,000/= and 100,000/=. It is my view that the award of Kshs. 50,000/= made by the trial court was not excessive and I therefore uphold it.

37. On loss of dependency, I note that the trial court employed the multiplier method and awarded Kshs. 1,508,931.20/=. It was the Appellants' contention that since no evidence was adduced to prove the age of the deceased and his monthly earnings, then a global sum approach ought to have been employed in assessing damages under this heading.

38. Under the *Fatal Accidents Act* Cap 32, damages are assessed taking into account the multiplicand, the multiplier and dependency ratio. However, it is not a method that is cast on stone. In Mwanzia vs. Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR, the court made the following observation:-

> " 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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the 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."

39. In this case PW1 merely testified that his son was a farmer who earned Kshs. 15,000/= per month. However, the Respondents did not tender any evidence on the age of the deceased or his monthly earnings. In Jacob Ayiga Maruya & Another vs. Simeon Obaya [2005] eKLR the Court of Appeal held thus:-

> " We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail."

40. In the instant case, I note that the trial court adopted a multiplicand of Kshs. 6,736.30/= which is the minimum wage, based on the guidelines provided under the Legal Notice No. 3, The Regulation of Wages (Agricultural Industry) (Amendment) Order, 2018 when considering the award for loss of dependency. The question which begs an answer is whether this court should interfere with the trial court's award for loss of dependency.

41. The principles for determining whether to disturb a trial court's decision were aptly stated by Kneller J.A. in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.m. Lubia and Olive Lubia [1985] thus: -

> " 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."

42. Guided by the above decision, it is my view that the trial court correctly applied the minimum wage of Kshs. 6,736.30/=as the appropriate mode of assessing the award under loss of dependency. (See Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR). The trial court also considered a multiplier of 28 years and a dependency ratio of 2/3 which I find appropriate under the circumstances of this case. I therefore find no reason to disturb the award under loss of dependency.

43. Lastly, I have perused the trial Record of Appeal and noted that the Respondents produced receipts in respect of the purchase of a coffin, transport costs and legal fees to obtain a Grant of Letters Ad Litem which all amount to Kshs. 41,000/=. I find that the special damages were specifically pleaded and adequately proved.

44. In the end, I find that the appeal lacks merit and I therefore dismiss it with costs to the Respondent.

JUDGMENT SIGNED, DATED AND DELIVERED IN CHAMBERS AT NYAMIRA THIS 25TH DAY OF MAY, 2023.

W. A. OKWANY

JUDGE