



REPUBLIC OF KENYA



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South Nyanza Sugar Company Limited v Odhiambo & another (Civil Appeal E001 of 2020) [2023] KEHC 22778 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E001 OF 2020
RPV WENDOH, J
SEPTEMBER 29, 2023**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPELLANT

AND

MONICA ATIENO ODHIAMBO 1ST RESPONDENT

**BILLY OGONJI OLOGI (SUING AS THE PERSONAL REPRESENTATIVES OF
FREDRICK ODHIAMBO OGONJI (DECEASED)) 2ND RESPONDENT**

*(An Appeal from the Judgement and Decree of Hon. R.K. Langat (PM)
dated and delivered on 17/9/2020 in Rongo SRMCC No. 302 of 2019)*

JUDGMENT

1. This appeal arises from the judgement and decree delivered on 17/9/2021 in Rongo SRMCC No. 302 of 2019 Monica Atieno Odhiambo & Billy Ogonji Ologi (Suing as the personal representatives of Fredrick Odhiambo Ologi (Deceased) (hereinafter the respondents) vs South Nyanza Sugar Company Limited (hereinafter the appellant).
2. The respondents (formerly the plaintiffs) instituted a suit by a plaint dated 2/11/2019 seeking special damages, general damages pursuant to the *Law Reform* and *Fatal Accidents Act*, costs of the suit, interest and any other relief. The respondents pleaded that the appellant was the registered, insured, equitable and/beneficial owner of motor vehicle registration number KBT 975N (suit motor vehicle) which was in lawful control of its authorized driver, servant and/or agent.
3. It was further pleaded that on or about 21/8/2018 the deceased was on board motorcycle registration number KMCW 529W travelling along Kanyimach Awendo road near Bonde, when the appellant's driver, servant, agent or employee negligently, recklessly drove the appellant's suit motor vehicle and caused it to violently collide with the motorcycle which the deceased was on board and as a



- consequence, he suffered fatal injuries. The respondents prayed that the appellant be held vicariously liable for the tortious acts or omissions occasioned on the deceased.
4. The respondents particularized the negligence on the part of the appellant's assignee, driver, servant, employee and/or agent, the particulars under the *Fatal Accident Act*, the *Law Reform Act*, special damages and particulars of the general damages under the *Fatal Accident Act* and *Law Reform Act*. The respondents sought to rely on the doctrine of res ipsa loquitor.
 5. The appellant (formerly the defendant) filed a statement of defence dated 16/3/2020. It denied liability and put the respondents to strict proof. The appellant further particularized and attributed negligence to the deceased and averred that the suit was statute barred under the Limitations of Actions Act and the plaint does not disclose any cause of action. The appellant asked the trial court to dismiss the suit with costs.
 6. The suit proceeded for hearing. Billy Ogonji Ologi testified as PW1 on behalf of the respondents and produced documents in support of their case. The appellant did not present any witness in defence of its case.
 7. The trial court delivered its judgement in favour of the respondent by awarding damages under each head pleaded amounting to a total of Kshs. 1, 728,320/=. The respondents were also awarded costs of the suit and interest.
 8. Being aggrieved by the decision of the trial court, the appellant commenced this appeal and preferred five grounds of appeal which mainly faulted the trial court's assessment of damages under the following heads:-
 - i. Damages for pain and suffering.
 - ii. Damages for loss of expectation of life under the *Law Reform Act*.
 - iii. Damages for loss of dependency under the *Fatal Accidents Act*.
 9. Directions were taken that the appeal be canvassed by way of written submissions. Both parties complied.
 10. Under the head of pain and suffering, the appellant submitted that the award of Kshs. 150,000/= was excessive and only a nominal award was due; that the police abstract (PEX5) stated that the accident occurred on 21/8/2018 and it confirms that the deceased died afterwards; that the post mortem report shows that the deceased died from injuries sustained from a road traffic accident, but the report is inconclusive; that from the date of the accident to the deceased's death, there was an effluxion of time of 43 days but there is no evidence that the deceased was being hospitalized during that period.
 11. The appellant submitted that since there was no evidence that the deceased experienced pain in the period between the accident and his death, nominal damages would suffice. Reliance was placed in the case of *Motrex Company Limited vs Anna Jelimo & Taraley Cheruto (suing as the legal representatives of the estate of Simon Kipkoeb - deceased)* (2020) eKLR where the court considered this issue and held that damages under this head are determined by the length of time the deceased endured pain and suffering before death.
 12. On damages for loss of expectation of life, it was submitted that the award depends on the age of the deceased; that the younger the deceased, the greater the award and vice versa; that the deceased was 47 years old and a sum of Kshs. 100,000/= would suffice.



13. On the damages for loss of dependency, the appellant submitted that a global sum of Kshs. 800,000/= would be just and proportionate; that the deceased's wife was not listed as one of the dependants and the first three children of the deceased had a shorter dependency time as they were nearing adulthood; that the last two children's expectancy was longer. The appellant relied on the case of *Ongundo & Another vs Omwocha & Another (Suing as the Legal Representative of James Omwocha Nyamasege)* where the court was of the opinion that if the deceased persons' income is unclear, the best approach would be to adopt a global award.
14. The respondents submitted under the same heads. On pain and suffering, they submitted that the deceased died 43 days after the accident and he endured a lot of pain and on that basis, the trial court awarded Kshs. 150,000/=. The respondents relied on the case of *Josephine Nzisa vs Michael Mutabi Gitbiga* (2017) eKLR where the court awarded a sum of Kshs. 150,000/= where the deceased died after 4 days.
15. On the loss of expectation of life, it was submitted that the deceased was 47 years old at the time of his death; that he had no ill health and the award of Kshs. 150,000/= was reasonable; that in the case of *Caroline Leah Awino vs Stephen Mibeso Abikoyo* (2014) eKLR the court upheld an award of Kshs. 150,000/= where the deceased died at the age of 74 years.
16. On the loss of dependency, it was submitted that the trial court considered that the deceased had a young family in awarding the global sum of Kshs. 1,800,000/= who solely depended on the deceased for upkeep. Reliance was placed in the case of *Ainu Shamsi Hauliers Limited vs Moses Sakwa & Another (suing as the administrators of the estate of Ben Siguda Okach (deceased))* where the court upheld a global award of Kshs. 2,000,000/=. The court considered that the deceased had two young children between the age of 6 and 4 and a wife of 29 years. The respondents urged the court to uphold the decision of the trial court in its entirety.
17. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
18. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”
19. Guided by the above principles, I have considered the record of appeal, the proceedings in the trial court and the submissions by both parties. The main issues for consideration are:-
 - a. Whether the trial court applied the correct principles in assessment of damages under the different heads.
20. The issue on liability was settled by the parties by a consent entered on 9/7/2020. The consent on liability was entered at 80% : 20% in favour of the respondents.



21. This court will address itself on the general damages awarded under each head. In *Mbogo & Another vs Shab* (1968) E.A. 93, it was held: -

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”

22. On pain and suffering, it is now a well settled principle that the degree of pain a deceased person endured will be the determining factor in making an award on pain and suffering. If the deceased died instantly, the pain would be less and therefore, the award would be nominal. If the deceased died after a considerable amount of time, the damages for pain and suffering would not be nominal in the circumstances.

23. In *West Kenya Sugar Co. Limited vs Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)* (2019) eKLR the court observed that:-

“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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

24. In Civil Appeal No. 42 of 2018 *Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased)* (2021) eKLR Odunga J (as he was then) held: -

“...a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times 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.”

25. In the case of *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.”



26. The evidence on record is that the accident happened on 21/8/2018. The deceased died on 4/10/2018. This is approximately 43 days after the date of the accident. After the examination, the doctor who performed the post mortem report opined the death was caused by:-

“Hypovolemic shock and internal bleeding multiple crash injury consistent with RTA”

27. The appellant did not prefer a different report to controvert the post mortem report on the probable cause of the death of the deceased. There was also no evidence led to show that the deceased was suffering from any other ailment which would have been remotely associated to his death. Therefore, the only conclusion which this court is inclined to believe is that deceased died from the injuries sustained from the accident which occurred on 21/8/2018.

28. The deceased must have endured a lot of pain in the 43 days period leading up to his death. This court is persuaded by the findings in *West Kenya Sugar Co. Limited (supra)*, *Joseph Kivati Wambua (supra)* and *Hyder Nthenya Musili (supra)* on the principles of awarding of pain and suffering. It is this court’s finding that the trial Magistrate did not err in awarding Kshs. 150,000/= for pain and suffering.

29. On damages for loss of expectation to life, the general acceptable conventional award is Kshs. 100,000/= . Again, this is dependent on the time the deceased took before he died. I find that the sum of Kshs. 150,000/= for loss of expectation to life is reasonable.

30. On the damages for loss of dependency, the uncontroverted evidence is that the deceased had 5 children as dependents ranging between 1 year to 17 years. The appellant contended that the two older children aged 15 and 17 years, would soon become adults and they would not be deemed as dependents. In this court’s view, it is a known fact that in the African Society and Culture, a child’s dependency does not necessarily terminate at the age of 18 years. The child will continue to depend on the parents for college, tertiary and/or university education and even daily subsistence. Therefore, it is not possible to rule out their dependency without leading evidence on the possibility of them having some form of employment after they turn the age of majority.

31. PW1 testified that the deceased was employed by Sony Sugar earning a sum of Kshs. 21,000/= per month. However, PW1 did not produce pay slips or any other form of document to prove this fact. Therefore, the only fall back a court will have to award damages is to use the global sum as opposed to multiplier approach. In *Mary Khayesi Awalo & Another -vs- Mwilu Malungu & Another* (1999) eKLR Nambuye J. (as she was then), stated that: -

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

32. In *Chen Wembo & 2 others vs. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased))* (2017) eKLR Meoli J stated: -

“Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables. The speculative nature of the matter renders the court’s exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants.”

33. The deceased died at the age of 47 years. Taking into account the normal retirement age of a person in the labour market is 60 years, the deceased had another 13 years of service in the labour market. However due to the variages of life, he may have worked until 55 years of age and lived for another 8 years. The



deceased was not known to have any other life threatening diseases and/or conditions. Therefore, it would not be far-fetched to conclude that the deceased would have perhaps ventured into other self-generating income activities. The trial court found that a global sum of Kshs. 1,800,000/= for loss of dependency would be appropriate and this court is inclined to agree with that finding. This court finds no reason to interfere with the said award.

34. On special damages, the trial court was satisfied that the respondents proved the same and awarded a sum of Kshs. 60,400/=.
35. In making its final award, the trial Magistrate factored in the liability agreed upon by the parties and awarded a sum of Kshs. 1,728,320/= which is hereby upheld. The award of interest on both the general and special damages is also hereby upheld.
36. The upshot, therefore, is that the appeal is devoid of merit and the same is hereby dismissed with costs to the respondents.

DATED DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023.

R. WENDOHO

JUDGE

Judgement delivered in the presence of:

Mr. Odero for the Appellants.

No appearance for the Respondent.

Emma & Phelix Court Assistants.

