Catholic Diocese of Murang'a v Koirain & another (Suing as the Legal Representatives of the Estate of Derrick Koiraini Karigi (Deceased)) (Civil Appeal 22 of 2020) [2023] KEHC 23127 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL 22 OF 2020

CW GITHUA, J

SEPTEMBER 28, 2023

BETWEEN

CATHOLIC DIOCESE OF MURANG'A ..... APPELLANT

AND

BENSON KARIGI KOIRAIN ..... 1ST RESPONDENT

ROSALINE WANJIRU NJERU ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF DERRICK KOIRAINI KARIGI (DECEASED)

(Being an appeal from the judgement of the Chief Magistrates Court in Murang's CMCC No. 296 of 2017 delivered by Hon. V.A Ochanda (RM) on 22nd July 2020)

JUDGMENT

1. This appeal is against the quantum of damages awarded by the trial court to the respondents in Murang'a CMCC No. 296 of 2017 in a judgement delivered on 22nd July 2020. The respondents, Benson Karigi Koiraini and Rosaline Wanjiru Njeru had sued the appellant, the Catholic Diocese of Murang'a seeking general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* following the death of their son Derrick Koiraini Karigu (herein the deceased) in a road traffic accident involving motor vehicle registration No. KCJ 926Z owned by the appellant.

2. Although the appellant had initially contested liability, the parties subsequently entered into a consent on liability in the ratio of 85:15 in favour of the respondents against the appellant. Hearing thereafter proceeded for assessment of damages which resulted into the impugned award.

3. The award of damages subject of this appeal were made out as follows;

   Pain and suffering Kshs. 10,000

Loss of expectation of life Kshs. 150,000

Loss of dependency Kshs. 3,488,700

Sub total Kshs. 3,648,700

Liability at 85 % Kshs. 3,125,395

Special damages Kshs. 98,500

Total award Kshs. 3,223,895

The respondents were also awarded costs of the suit and interest at court rates.

4. Being dissatisfied with the said award, the appellant filed the instant appeal relying on four grounds of appeal in which it principally complained that the award was excessive and inordinately high as to represent an erroneous estimate of the damages suffered by the respondents and that in making the award, the learned trial magistrate failed to consider the appellants defence and written submissions.

5. The appellant also generally faulted the manner in which the learned trial magistrate weighed the evidence tendered in court. It beseeched this court to set aside the trial court's award and grant it costs of the appeal and in the lower court.

6. The appeal was prosecuted by way of written submissions which were duly filed on behalf of the parties by their respective advocates, namely, Ms. Mbigi Njuguna Company Advocates who represented the appellant and Ms. Kirubi Mwangi Ben and company advocates who represented the respondents.

7. This being a first appeal to the High Court, I am enjoined to re-evaluate the evidence presented before the trial court and arrive at my own independent conclusions in compliance with the duty of the first appellate court which as summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR is 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"

8. This being an appeal limited to a challenge on the quantum of damages awarded to the respondents, it is important to remember that as a general rule, the award of damages is at the discretion of the trial court and an appellate court should be slow to interfere with an award unless it is satisfied that in assessing the damages, the trial court erred by applying the wrong legal principles or considering irrelevant factors or misapprehended the evidence. As a general rule, an appellate court should not substitute its discretion for that of the trial court.

9. The circumstances under which an appellate court can interfere with an award of damages were well captured by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKRL when it stated as follows;-

> " 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 difference 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".

10. In determining this appeal, I will also be guided by the Court of Appeal's decision in *Bashir Ahmed Butt v Ahmed Khan* [1982-88]KAR 5 in which the court held 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".

11. A perusal of the court record and the written submissions filed on behalf of the parties show that in this case, the facts of the case were not disputed and therefore, it is not necessary for me to re-assess the evidence adduced by the plaintiffs. What is left for me to analyze are the written submissions filed on behalf of each party both before this court and in the lower court and all the authorities cited.

12. Having carefully considered the above submissions, I find that the key issue arising for my determination is whether the learned trial magistrate erred in law or fact when assessing damages payable to the respondents or whether the damages awarded in the various heads under the *Law Reform Act* and the *Fatal Accidents Act* were inordinately high as to warrant this court's interference. A secondary issue which also falls for my determination is who among the parties should bear costs of the appeal and the suit?

13. Starting with the first issue, my reading of the written submissions filed by the parties reveal that the award of Kshs.10,000 for the deceased's pain and suffering is not contested and consequently, the amount will remain undisturbed.

    The damages which are strongly contested were those awarded to the deceased's estate for loss of expectation of life and damages for loss of dependency. I will deal with the damages awarded in the two heads separately and sequentially.

14. Turning to the award for loss of expectation of life, the appellant submitted that the award of Kshs. 150,000 was too high and that in making the award, the learned trial magistrate failed to consider its submissions and the authority it had relied on being the case of *Chhabhadiya Enterprise Ltd & Another v Gladys Mutenyo Bitali (Suing as the Administrator and personal representative of Linet Simiyu now deceased* [2018] eKLR in which the court awarded Kshs.100,000 under the same head for a deceased who was 12 years old; that the court should have awarded the conventional sum of KShs.100,000 as was done in the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the Legal Representative of t he Estate of Robert Mwangi* [2019] eKRL.

15. The respondents on their part denied the appellant's claim that the award was excessive and contended that the same was reasonable taking into account that the respondents, in their written submissions had proposed an award of Kshs.200,000 ; that the award was made in the exercise of the trial courts discretion and should not be disturbed.

16. A reading of the trial courts judgement reveal that before making the award of Kshs.150,000, the learned trial magistrate considered the written submissions made by each party; the proposals made therein and the authorities cited in support of the proposal of Kshs.100,000 by the appellant and the proposal of Kshs.200,000 made by the respondents.

    There is therefore no basis for the appellants claim that the learned trial magistrate failed to consider its written submissions when making the impugned award.

17. In my view, the learned trial magistrate cannot be faulted for settling on damages of kshs.150,000 just because the amount exceeded the conventional sum proposed by the appellant. The amount was

reasonable as the deceased died at the tender age of 7 years and had a whole life ahead of him if it had not been cut short by the unfortunate accident. The amount awarded cannot be said to be inordinately high considering that in *Letayoro & Another v JK (Suing as the Legal Representative of the Estate of the CK (Deceased* in Civil Appeal 13 of 2022 {2022] KEHC 1039 [KLR], Korir J (as he then was) declined to interfere with an award Kshs. 300,000 made by the trial court as damages for loss of expectation of life to the Estate of a deceased minor aged only two years. I am thus satisfied that the damages awarded by the trial court in this case under that head was not inordinately high as to justify this courts interference. The award is therefore upheld.

18. On damages for loss of dependency, the appellant urged the trial court to award a global sum of Kshs.400,000 relying on the case of *Palm Oil Transporters & Another v WWN* [2015] eKLR . The respondents on the other hand invited the trial court to exercise its discretion in deciding whether to use the multiplier approach or the global sum approach in assessing damages under that head.

19. Regarding the multiplier approach, the respondent submitted that a multiplier of 50 years would be ideal as the deceased was 7 years old at the time of his death and had he lived, he would have worked till he attained retirement age. For the multiplicand, the court was asked to use the minimum wage for a general worker and a dependency ratio of either 1 or ½. Under the global sum approach, the respondents proposed a sum of Kshs.3,000,000 but did not cite any authority in support of the proposal.

20. After considering the parties submissions, the learned trial magistrate decided to adopt the multiplier approach but gave no reason for choosing to use that approach instead of the global sum approach which in my view was most appropriate or suitable given the facts in this case. It is not disputed that at the time of his demise, the deceased was a standard two pupil aged 7 years and it was impossible for anyone to tell how his life would have turned out, had he lived. To base damages for loss of dependency on the multiplier approach using the minimum wage as the multiplicand was highly speculative since in as much as the deceased may have performed poorly in school and ended up being a general worker as envisaged in the multiplicand adopted by the trial court, it is also possible that he would have scored top grades and eventually become a successful businessman or a highly paid professional.

21. It is trite that where it is impossible to ascertain the deceased's income, age or level of the claimants dependency on the deceased prior to his death with certainty, use of the multiplier approach can cause injustice and must be abandoned. The scenarios in which the multiplier approach was not a suitable method for assessment of damages for loss of dependency were well captured by Koome J (as she then was) in *Albert Odawa v Gichimu Githinji* [2007] eKLR who when quoting Ringera J in *Mwanzia v Ngalali Mutua v Kenya Bus Services (Mbsa) Ltd & Another* stated as follows;

> " ..... The multiplier approach is just a method of assessing damages. It is not a principle of law or 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 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"

22. I also associate myself with the holding of Ngaah J in *Moses Mairua Muchiri v Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased*, [2016] eKLR when he observed that;-

> "....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 circumstances of each particular case"

23. In view of the foregoing, I agree with the appellant's submissions that the learned trial magistrate erred when she chose to use the multiplier approach when it was impossible to tell with any precision how the deceased would have earned, had he lived or what would have been the length or extent of the respondents dependency on him. I find that the learned trial magistrate applied the wrong legal principle in assessing damages for loss of dependency and thereby arrived at a figure which was inordinately high given the facts of this case. The award must be and is hereby set aside.

24. Having found as I have above, I must now seek to determine an appropriate award for the respondents loss of dependency. To accomplish this task, I will be guided by previous awards in cases involving minors of almost similar age as the deceased in this case.

25. In *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased)* [2020] eKLR, the court awarded a global sum of Kshs.900,000 for loss of dependency for a minor who died aged 7 years. This was in the year 2020.

In *Trustees Registered Mauwa Methodist Hospital v Penina Thirindi Koome* [2021eKLR, a global sum of 1,000.000 was awarded for a child aged 6 years.

In *Daniel Mwangi Kimemi & 2 Others v J G M & Another (the Personal Representattives of the Estate of N K* [2016] eKLR, a global sum of Kshs.1,000,000 was awarded for a minor aged 9 years.

26. Taking into account all relevant factors including the years which have passed by since some of the above cases were decided and inflationary trends, and doing the best I can, I find that a global sum of Kshs.2,000,0000 would be fair and sufficient recompense for the respondent's loss of dependency in this case. I thus reduce the amount awarded by the trial court to Kshs.2,000,0000.

27. Lastly, the appellant faulted the trial courts award of special damages in the sum Kshs.98,500 contending that though the damages were pleaded, they were not strictly proved. Reliance was placed on the case of *Kenya Bus Service Ltd v Festus Kibe* HCCA No. 535 of 2002 (NRB) for the proposition that special damages must not only be pleaded but must also be strictly proved. The appellant urged me to set aside the award of special damages and substitute it with an award of Kshs.43,900 which was pleaded and proved. The respondents in their riposte implored me to find that the damages awarded were pleaded and strictly proved and refuse to set them aside.

28. On my part, I have studied the documents produced as exhibits by the 1st plaintiff as proof of the amount pleaded as special damages. And although I agree with the appellant's submission that the receipt produced as proof of the medical expenses incurred when the deceased was undergoing treatment before succumbing to his injuries has a date that does not tally with the date of the accident, it is not disputed that the deceased died at Kimkan Hospital while undergoing treatment. Having just lost their child, the respondents may not have been in a proper frame of mind to check the date on the receipt that was issued to them by the hospital.

29. All the other damages pleaded were strictly proved except the claim of 50,000 for burial and related expenses for which no receipts were availed.

Even though it is a settled legal principle that as a general rule, special damages must be pleaded and strictly proved, over time, courts have created an exception to this general rule in matters related to burial expenses. The Court of Appeal when addressing this subject in *Premier Diary Limited v Amarjit Singh Sagoo & Another* [2013] eLKR stated as follows;

> " .....We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to the bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved."

30. It is not lost on me that the respondents did not produce receipts to prove the amount claimed as funeral expenses. It is however common knowledge and I take judicial notice that the respondents must have incurred some expenses in interring their deceased son and they are entitled to compensation for their financial loss which was a direct consequence of the accident caused by the appellant's driver's negligence. In my view, the amount claimed of Kshs. 50,000 is very reasonable and the learned trial magistrate was right in awarding the same. The award is therefore confirmed.

31. In the end, this appeal partially succeeds to the extent that the award for loss of dependency made by the trial court is set aside and is substituted with an award of Kshs. 2,000,000. All the other awards remain undisturbed.

32. Consequently, the damages payable to the respondents are as follows.

i) Pain and suffering Kshs. 10,000

ii) Loss of expectation of life Kshs. 150,000

iii) Loss of dependency Kshs. 2,000,000

iv) Special damages Kshs. 98,500

2,258,500

Less 15% contribution Kshs. 338,775

Total award Kshs. 1,919,725

33. The award of general damages will attract interest at court rates from today's date until payment in full while the award of special damages will attract interest at the same rate from date of filing suit until payment in full.

34. On costs, the law is that costs follow the event and are at the discretion of the court.

As the appeal has partially succeeded, each party will bear its own costs of the appeal but the respondents are awarded costs in the lower court.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2023.

C . W. GITHUA

JUDGE

In the presence of;-

Mr. Kirubi for the Respondents

Ms. Wangui Wangai holding brief for Mr. Mbigi Njuguna for the Appellant.

Mr. Quinteen Court Assistant