Muthuri v Njagi & another (Suing as Legal Representatives of the Estate of Michael Waiganjo Ngare - Deceased) (Civil Appeal E020 of 2021) [2023] KEHC 24224 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24224 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E020 OF 2021

FN MUCHEMI, J

OCTOBER 25, 2023

BETWEEN

PHINEAS MAWIRA MUTHURI ..... APPELLANT

AND

PETER MURIUKI NGARI ..... 1ST RESPONDENT

ROSE KAGENDO NJAGI ..... 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF MICHAEL WAIGANJO NGARE - DECEASED

(Being an Appeal from the Judgment and Decree of Hon. P. M. Mugure (PM) delivered on 17th May 2021 in Wang'uru PMCC No. 68 of 2018)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Wang'uru Principal Magistrate in PMCC No. 68 of 2018 arising from a road traffic accident whereas the plaintiff was hit by the appellant's motor vehicle and sustained fatal injuries. By consent, liability was apportioned at the ratio of 25: 75 with the appellant bearing 75%. The respondents were awarded damages as follows:-

    a. Pain and suffering Kshs. 100,000/-

    b. Loss of expectation of life Kshs. 200,000/-

    c. Loss of dependency Kshs. 3,040,127/-

    d. Special damages Kshs. 31,755/-

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 11 grounds of appeal summarized as follows:-

   a. The learned trial magistrate erred in law in awarding damages for loss of dependency at Kshs. 3,040,127/- which amount is manifestly excessive;

   b. The learned trial magistrate erred in fact and in law by failing to give the legal basis of the particular multiplier adopted;

   c. The learned trial magistrate erred and misdirected herself in law and in fact and misapplied the precedent of *Elizabeth Chelagat Tanui & Another v Arthur Mwangi Kanyua* (2013) eKLR thereby arriving at an erroneous dependency ratio.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that although the deceased was survived by three beneficiaries being his wife, four children (minors) and an uncle, the respondents did not provide any proof of dependency in the form of birth certificates, baptismal cards, marriage certificate pursuant to Section 4(1) of the *Fatal Accidents Act*. the appellant further relies on the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR and *Stella Nasimiyu Wangila & Another v Raphael Oduro Wanyamah* [2016] eKLR and submits that dependency is a matter of fact that ought to be proved by evidence and thus since the respondents did not prove the same, the trial court ought to have adopted the ratio of 1/3.

5. The appellant submits that the respondents testified that the deceased was 32 years and working as a casual labourer earning Kshs. 30,000/- per month. The appellant argues that since the respondents did not provide any documentary evidence of the deceased's employment or his earnings, they proposed that the trial court adopt an income of Kshs. 13,572/- as per Regulation of Wages (General) Amendment Order 2018. Conversely, the appellant states that he proposed that court to rely on the legal Notices No. 116 & 117 of 2015 in which the legal wage of a casual labourer was Kshs. 5,436/- per month. The trial magistrate in her judgment opined that the deceased was a mason earning a gross salary of Kshs. 13,572/- and adopted the said sum as a multiplicand. The appellant thus argues that the learned trial magistrate erred by determining that the deceased earned a gross income of Kshs. 13,572/- without offering any legal justification of that finding. The appellant further argues that the said amount is not justifiable as the deceased died in the year 2016 and therefore the appropriate and applicable order is the Regulations of Wages (General) (Amendment) Order 2015.

The Respondents' Submissions

6. The respondents submit that the deceased died on the same day and therefore a sum of Kshs. 100,000/- is sufficient for pain and suffering. The respondents rely on the cases of F.M.M. & Another v Joseph Njuguna Kuria & Another (2016) eKLR and Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others [2013] eKLR and submit that Kshs. 100,000/- is justified as the deceased suffered head injuries as a result of the said accident and he must have gone through a lot of pain before he succumbed.

7. The respondents rely on the cases of Isaac Michael Okenye v Lacheka Lubricants Limited & Another [2017] eKLR and F.M.M. & Another v Joseph Njuguna Kuria & Another (2016) eKLR and submits that an award of Kshs. 200,000/- for loss of expectation of life is sufficient as the deceased was young, healthy and would have lived a long and happy life. The respondents further argue that the deceased was 32 years old yet his life was cut short at an early age and he had a very young family.

8. On loss of dependency, the respondents submit that the deceased was 32 years old with a young family and an extended family that depended on him. He was a mason making an average of Kshs. 30,000/- per month, 2/3 of which went to his wife and other family members for their upkeep. The respondents further argue that he would have lived to the age of 70 years and being self-employed, he could work till the age of 75 years. Thus the respondents propose the court adopt a multiplier of 28 years.

9. The respondents contend that no pay slip was adduced and thus urges the court to exercise its discretion. They further state that the lack of documentary evidence does not mean that the deceased was not earning a living. They therefore urge the court to adopt Kshs. 14,658.85/- as provided in the Regulation on Wages General Order (Minimum Wages). The respondents submit that there is no evidence to controvert the assertion that the deceased was a mason.

Issue for determination

10. The main issue for determination is whether the trial court erred by awarding an inordinately high award for loss of dependency.

The Law

11. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another v Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

12. It was also held in Mwangi v Wambugu [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

13. Dealing with the same point, the Court of Appeal in Kiruga v Kiruga & Another [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual 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."

14. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the trial court erred in awarding an inordinately high award for loss of dependency.

15. The Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages 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 won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant 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."

16. Similarly in Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

17. The Court of Appeal in Chunibhai J. Patel & Another v P. F. Hayes & Others [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

> The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

18. In the instant case, the appellant faults the trial court for adopting a dependency ratio of 2/3 and a multiplicand of Kshs. 13,572/-. Dependency is a matter of fact and must be proved by evidence as was held in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR as follows:-

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.

19. Further in Rahab Wanjiru Nderitu v Daniel Muteti & 4 Others [2016] eKLR the court held that:-

> The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the

deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same.

20. The respondents in this case produced a letter from the Chief Makima location which indicated that the deceased married the respondent and they had four children. The said letter of the chief is what the respondents successfully used to file for letters of grant ad litem in P & A Cause No. 24 of 2018 Wang'uru. The respondent testified that the deceased left behind a family of four children who depended on him. She was the wife of the deceased. Her name and those of her four children are contained in the letter of the area chief. There was no evidence to controvert the respondent's evidence on loss of dependence. It is my considered view that dependency was proved.

21. On the issue of the multiplicand, the respondents pleaded in their plaint that the deceased was 32 years old, employed as a casual labourer earning Kshs. 30,000/- per month. While submitting on assessment of damages in the court below, the respondent stated that the deceased was a mason as indicated in the death certificate and proposed an income of Kshs. 13,752 pursuant to the Regulation of Wages (General) (Amendment) Order 2018. It was submitted that there was no documentary proof of the deceased's income and urge this court to adopt Kshs. 14,658.85/-. The appellant faulted the trial court in adopting the multiplicand of Kshs. 13,752/- with no basis, as the respondents did not prove by way of documentary evidence, the deceased's earnings. Furthermore, the appellant argued that the deceased died in 2016 and therefore the applicable order is the Regulations of wages (General) Amendment) Order 2015. It is evident that the respondents did not produce any documentary evidence to show the work the deceased did and how much he earned. The respondents said that the deceased was a mason in their submissions. The respondent introduced new evidence in their submissions on income which is unacceptable. In my considered view, the correct thing was to rely on the gazette wages for unskilled workers as at the time of the deceased's death. The deceased herein died in September 2016 and the gazette minimum monthly wage for unskilled workers in Regulation of Wages (General) (Amendment) Order, 2015 was Kshs. 5,436/-.

22. Evidently, the trial court erred by adopting the multiplicand of Kshs. 13,572/- without any legal basis. This is a situation that justified interference with the trial court's finding on the award of loss of dependency. As both parties have not disputed the adoption of the multiplier of 28 years, the award on loss of dependency shall work out as follows:-

    5,436 x 28 x 12 x 2/3 = 1,217,664/-

Conclusion

23. In view of the foregoing, I find that the appeal has merit. The award of Kshs. 3,040,127/- on loss of dependency is hereby set aside and substituted with an award of Kshs. 1,217,664/-.

24. The awards in the other items remain undisturbed.

25. the total award payable by the appellant to the respondents is Kshs.1,549,419/- less 25% contribution equals to Kshs.1,162,064/-.

26. Each party will meet their own costs of this appeal.

27. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October, 2023