Makomele v Mmbesu (Suing in his Own Capacity and as the Administrator of the Estate of Joash Avedi Ombese - Deceased) (Civil Appeal E001 of 2021) [2023] KEHC 25948 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E001 OF 2021

JN KAMAU, J

NOVEMBER 29, 2023

BETWEEN

JOYCE ATUO MAKOMELE ..... APPELLANT

AND

HARUN MWACHI MMBESU (SUING IN HIS OWN CAPACITY AND AS THE ADMINISTRATOR OF THE ESTATE OF JOASH AVEDI OMBESE - DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. M. Ndombi (SRM) delivered at Vihiga in Principal Magistrate's Court Case No 128 of 2017 on 12th February 2021)

JUDGMENT

Introduction

1. In her decision of 12th February 2017, the Learned Trial Magistrate, Hon R. M. Ndombi, Senior Resident Magistrate found both Joash Avedi Ombese (hereinafter referred to as "the deceased") and the Appellant herein to have been equally to blame for the accident that occurred on16th October 2016 and entered judgment in favour of the Respondent herein as follows:-

   Loss of Dependency Kshs 1, 763,160.00

   Pain and Suffering Kshs 100,000.00

   Loss of Expectation of Life Kshs 100,000.00

   Special damages Kshs 84,975.00

   Kshs 2,047,955.00

   Less 50% contributory negligence Kshs 1,666,375.00

Kshs 1,666,375.00

Plus costs and interest.

2. Being aggrieved by the said decision, on 10th March 2021, the Appellant filed a Memorandum of Appeal dated 5th March 2021. She relied on six (6) grounds of appeal.

3. Her Written Submissions and List of Authorities were both dated 3rd December 2021 and filed on 7th December 2021 while those of the Respondent were dated 25th January 2022 and filed on 26th January 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the Learned Trial Magistrate but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Although this court noted the Respondent's complaints that the Appellant duped him into recording a consent and not settling the matter out of court, this court could not revisit the issue of apportionment of liability as the parties herein had already recorded a consent apportioning liability equally amongst themselves.

7. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the quantum that was awarded herein was excessive due to excessive damages for pain and suffering and adopting the wrong multiplicand and multiplier.

8. This court addressed the said issued under different separate and distinct heads shown hereinbelow.

I. Multiplicand

9. Grounds of Appeal Nos (1) and (6) were dealt with together as they were related.

10. The Appellant submitted that the deceased who was a conductor worked in Keveye and Chavakali which were not municipalities or former town councils and thus fell outside the areas shown in column four (4) of the Regulations of Wages (General Amendment) Order 2015. She submitted that the Learned Trial Magistrate erred in having adopted a sum of Kshs 10,954.70 for persons working in Nairobi, Mombasa and Kisumu. She thus urged this court to apply the multiplicand of Kshs 5,844.20.

11. On the other hand, the Respondent submitted that the deceased would travel from one place to another transporting and collecting fare from passengers. He pointed out that the accident occurred along Kakamega-Kisumu Road and because Kisumu was one of the cities provided in column two (2) of the Regulations of Wages (General Amendment) Order 2015, it was reasonable for the Learned Trial Magistrate to have adopted a multiplicand of Kshs 10,494/=.

12. In her decision, the Learned Trial Magistrate stated as follows:-

> " That the deceased worked as a driver but PW 1 did not know how much the deceased earned. Counsel for the plaintiff Mr Osango submitted for Kshs 10,495/= as per gazette Notice Supplementary Regulation Number 19 dated 26/6/2015- P Exb- 14...The computation for loss of dependency under the *Fatal Accidents Act* becomes 10,495 x 21 x 12 x 2/3 = Kshs 1,763,160/="

13. Notably, the Learned Trial Magistrate adopted the minimum wage for a person working in Nairobi, Mombasa and Kisumu cities as indicated in the Regulations of Wages (General Amendment) Order 2015. She did not, however, give her reasons for having arrived at the said conclusion. It is important that reasons are given for each determination so that the appellate court is able to understand the reasoning of such decision. The mandatory provision of Order 21 Rule 4 of the Civil Procedure Rules, 2010 that stipulates as follows:-

> "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

14. The Respondent testified that the deceased was a freelancer plying along Kakamega – Kisumu Road and at the material time of the accident, he was hit while coming from the direction of Kakamega heading to Kisumu. There was no evidence that showed that he worked in Kisumu. In the absence of any evidence to the contrary, this court took the firm view that the applicable multiplicand would be of a person working in other areas other than the cities of Nairobi, Mombasa and Kisumu, all former municipalities and Mavoko, Ruiru and Limuru Town Councils where the minimum wage was Kshs 5,844.20 that was proposed by the Appellant herein. The Learned Trial Magistrate therefore erred in having adopted a multiplicand of minimum wage for persons working in cities of Nairobi, Mombasa and Kisumu.

15. Grounds of Appeal Nos (1), (5) and (6) were merited and the same be and are hereby allowed.

II. MULTIPLIER

16. Grounds of Appeal Nos (2) and (4) were dealt with under this head.

17. The Appellant submitted that the Learned Trial Magistrate erred in having applied a multiplier of twenty one (21) years where the deceased was thirty nine (39) years. It was her contention that a multiplier of twelve (12) years would have been suitable.

18. She relied on several cases amongst them the following:-

    1. Jane Wangui Kamau & 2 Others vs Alice Atandi Mugambi & Another [2004] eKLR where the court adopted a multiplier of thirteen (13) years where the deceased was thirty seven (37) years.

    2. Leonard Wanganga Ngara & 2 Others vs Joyce Warurii Ndung'u & 2 Others [2020] eKLR where the court applied a multiplier of fifteen (15) years where the deceased was thirty seven (37) years.

19. On his part, the Respondent pointed out that the retirement age in Kenya is sixty (60) years and that for people in private business or other occupations, they could work beyond the retirement age as was acknowledged in the case of Benedeta Wanjiku Kimani vs Chengwon Cheboi & Another (eKLR citation not given) and Kiranga Gatimu vs Layo Abdi Aziz (Suing as a personal representative of the

Estate of the late Abdi Aziz Roba [2017] eKLR. He thus submitted that the Learned Trial Magistrate did not err when she adopted a multiplier of twenty one (21) years.

20. In her decision, the Learned Trial Magistrate stated as follows:

> "I have considered the authorities by both the plaintiff and defendant's counsel. I have considered the fact that the deceased was of good health and therefore find a multiplier of the proposed 21 years would suffice. I rely on Kimunya Abednego vs Musyoka & Another [2019] eKLR."

21. This court looked at the cases the Appellant relied upon during trial and agreed with her that indeed, the Learned Trial Magistrate did not make any reference to the many cases that she relied upon and instead opted to rely on the case of Kimunya Abednego vs Musyoka & Another (Supra).

22. While courts are called upon to make reference to cases that support a party's case to avoid a perception of bias by the losing party, there is no legal obligation on a trial court to comment on each and every case. Indeed, there is a tendency for parties to inundate courts with numerous cases when a point can be made by relying on only one case.

23. This court perused the Record of Appeal and noted that the Appellant herein relied on so many authorities which could have overwhelmed the Learned Trial Magistrate. She could not therefore have been faulted for not having cited the cases that the parties herein had relied upon and it sufficed for her to state that she had considered the cases that had been relied upon by the parties. In any event, it was not unlawful and/or outside the norm for a trial court to rely on other cases not cited by the parties with a view to coming to a just determination of the dispute before it.

24. Notably, this court was not bound by the decision of Kariuki J in the case of Kimunya Abednego vs Musyoka & Another (Supra) where he applied a multiplier of twenty (20) years where the deceased was aged forty one (41) years at the time of his death as he was of equal and competent jurisdiction of this court.

25. Having considered the cases the parties herein relied upon and other cases, this court came to the firm conclusion that although the application of a multiplier is a matter of the discretion of the trial court, it must be comparable to similar cases.

26. The Learned Trial Magistrate did not err when she adopted a multiplier of twenty one (21) years as she was guided by the decision of a High Court. Exercising its discretion in this matter, this court found the multiplier of twenty one (21) years for a deceased person who was aged thirty nine (39) years to have been on the higher side. It was its considered view that a multiplier of fifteen (15) years would be fair in the circumstances of the case herein.

27. In arriving at the said conclusion, this court had due regard to the following cases:-

    1. Kiranga Gatimu vs Layo Abdi Aziz (Suing as a personal representative of the Estate of the late Abdi Aziz Roba (Supra) where the appellate court upheld a multiplier of thirteen (13) years where the deceased was aged thirty nine (39) years.

    2. Benedeta Wanjiku Kimani vs Changwon Cheboi & Another (Supra) where the court adopted a multiplier of sixteen (16) years where the deceased was aged forty four (44) years of age at the time of his death.

3. Bash Hauliers vs Dama Kalume Karisa & another [2020] eKLR where the appellate court upheld a multiplier of twenty (20) years where the deceased therein was aged thirty two (32) years at the time of his death.

4. Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR where this very court applied a multiplier of twenty (20) years where the deceased was aged thirty five (35) years at the time of his death.

28. In the premises foregoing, this court found and held that Grounds of Appeal Nos (2) and (4) were merited and the same be are hereby upheld.

III. PAIN AND SUFFERING

29. Ground of Appeal No (3) was dealt with under this head.

30. The Appellant argued that since the deceased died immediately, the sum of Kshs 10,000/= was reasonable in the circumstances of the case. She distinguished this case from that of Benedeta Wanjiku Kimani vs Changwon Cheboi & Another (Supra) where the deceased died four (4) months after sustaining injuries. She relied on several cases amongst them Gerishon Mwangi Muthemba (Suing as one of the administrators of the estate of Ibinson Maina Mwangi (deceased) vs Crystal Industries Limited & Another [2020] eKLR where the courts awarded a sum of Kshs 10,000/= for pain and suffering.

31. On his part, the Respondent relied on the case of Benedeta Wanjiku Kimani vs Changwon Cheboi & Another (Supra) where the court awarded a sum of Kshs 200,000/= for pain and suffering and hence urged this court not to interfere with the award of Kshs 100,000/= that the Learned Trial Magistrate had awarded under this head.

32. The Respondent told the Trial Court that he was informed that the deceased died while undergoing treatment. He must have suffered greatly before he died. Considering the passage of time and the inflationary trends, the sum of Kshs 10,000/= that the Appellant herein proposed did not reflect the current awards. In this respect, this court found and held that an award of Kshs 50,000/= for pain and suffering was not only fair but the same was reasonable where a person had died on the spot.

33. Indeed, this court came to a similar conclusion in the case of Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) (Supra).

34. Bearing in mind that the deceased died as he was receiving treatment by which time he must have been in pain, this court found and held that the sum of Kshs 100,000/= that the Learned Trial Magistrate awarded under this head was not unreasonable and hence did not interfere with it.

35. In the premises foregoing, Ground of Appeal No (4) was not merited and the same be and is hereby dismissed.

Conclusion

36. This court reached a determination that the Respondent herein was best compensated by a sum of Kshs 493,139.50 made up as follows:-

Loss of dependency Kshs 701,304.00

2/3 x 5844.20 x 12 x 15

Loss of expectation of life Kshs 100,000.00

Pain and suffering Kshs 100,000.00

Special damages Kshs 84,975.00

Kshs 986,279.00

Less 50% contributory negligence Kshs 493,139.50

Kshs 493,139.50

DISPOSITION

37. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 5th March 2021 and filed on 10th March 2021 was partially merited. The effect of this is that the Judgment of Kshs 1,666,375.00 that was entered by the Learned Trial Magistrate, Hon R.M. Ndombi (SRM) in Vihiga PMCC No 128 of 2017 on 12th February 2017 in favour of the Respondent herein against the Appellant be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondent herein against the Appellant herein for the sum of Kshs 493,139.50 made up as follows:-

    Loss of dependency Kshs 701,304.00

    2/3 x 5844.20 x 12 x 15

    Loss of expectation of life Kshs 100,000.00

    Pain and suffering Kshs 100,000.00

    Special damages Kshs 84,975.00

    Kshs 986,279.00

    Less 50% contributory negligence Kshs 493,139.50

    Kshs 493,139.50

    Plus costs and interest. Interest on special damages will be at court rates from the date of filing suit until payment in full while interest on damages for loss of dependency, pain and suffering and loss of expectation of life will be at court rates from the date of judgment of the lower court until payment in full.

38. As the Appellant was partly successful in her Appeal, each party will bear its own costs of the Appeal herein.

39. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29 TH DAY OF NOVEMBER 2023.

J. KAMAU

JUDGE