Omondi (Suing as the legal representative and administrator of the Estate of Collins Otieno Odhiambo) v Patel (Civil Appeal E003 of 2023) [2023] KEHC 26126 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E003 OF 2023

RE ABURILI, J

NOVEMBER 28, 2023

BETWEEN

JERIDA ATIENO OMONDI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF COLLINS OTIENO ODHIAMBO) ..... APPELLANT

AND

SHYAM DHARNEDRA PATEL ..... RESPONDENT

(An appeal arising out of the Judgement & Decree of the Honourable F. Rashid in the Principal Magistrate's Court at Winam delivered on the 6th December 2022 in Winam PMCC No. 198 of 2021)

JUDGMENT

Introduction

1. The appellant herein sued the respondent for general and special damages for fatal injuries to the deceased Collins Odhiambo that arose following a traffic accident involving the respondent's motor vehicle registration no. KCC 598V, a Ford Ranger and a motorcycle registration number KMDZ 795N that was being riden by the deceased.

2. In her judgement, the trial magistrate entered liability for the appellant against the defendant in the ratio of 60%:40% and proceeded to award the appellant damages as follows:

   Pain & suffering – Kshs. 20,000

   Loss of expectation of life - Kshs. 100,000

   Lost years – Kshs. 1,274,407

   Proven Specials – Kshs. 89,986

Total Kshs.1, 484,393

Less 40% contribution - Kshs. 593,757

Grand Total - Kshs. 890,636

3. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 4th January 2023 on the 17th January 2023 raising the following grounds of appeal;

   a) The learned trial magistrate erred in law and in fact by disregarding the appellant's submissions on the issue of liability and quantum hence occasioning a miscarriage of justice by arriving at an erroneous conclusion.

   b) The learned trial magistrate erred in law and in fact by apportioning liability at 60:40 in favour of the plaintiff irrespective of the glaring evidence that the defendant rammed into the rear of the deceased motorcyclist who was riding in the same direction as the defendant thereby failing to appreciate the principles informing the apportionment of liability in such a scenario.

   c) The learned magistrate erred in law and in fact when she substantially deviated from the pleadings, evidence and submissions of the plaintiff in regard to quantum of damages generally thereby arriving at a grossly low and inordinate award.

   d) The learned magistrate erred in law and in fact by failing to appreciate the principles informing the award on loss of dependency when she applied a multiplicand of Kshs. 7,240.95 which is for other areas in lieu of 13,572.00 which is applicable in major cities like Kisumu where the deceased worked and resided with his family.

4. The parties agreed to file submissions to canvass the appeal.

The Appellant's Submissions

5. On liability, the appellant submitted that the respondent having admitted that he hit the deceased from the rear, the respondent had a duty of care to the vehicles in front of him and further that the fact that it was the deceased's motorcycle that was badly damaged and the deceased and his pillion passenger immediately died demonstrated that the respondent was driving at a high speed contrary to his testimony in court.

6. It was the appellant's submission that as a result of the above, liability should have been apportioned in the ratio 80:20 against the respondent. Reliance was placed on the cases of *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR, where the court having found that the motor vehicle had rammed into the rear of the motorcycle and that it owed the motorcycle that was ahead of it a greater duty of care, proceeded to apportion liability in the ratio of 80:20 in favour of the respondent; the case of *Margaret Wangari Kiambuthi v Jane Njeri Ngugi & Another (Suing for and on behalf of the Dependants and the Estate of Arios Kinyanjui Mukirai (Deceased* [2018]eKLR where the court at paragraph 14 of the judgment observed that the appellant's motor vehicle was more lethal than the bicycle the deceased was cycling and proceeded to hold the appellant 100% liable for the accident and the case of in *Francis K. Righa v Mary Njeri (Suing as the legal Representative of the Estate of James Kariuki Nganga* [2014]eKLR where the court adversely mentioned the duty of a motorist to other road users bearing in mind that a motorist wields a much lethal weapon than any other motorist and hence the higher duty of care expected from the driver.

7. The appellant submitted that accordingly, the lower court's finding that it could not tell the contribution of each party to the accident for lack of sketch maps or motor vehicle inspection reports was misplaced.

8. On loss of dependency, the appellant submitted that the trial court failed to consider the place of residence and work of the deceased who engaged in his plumbing duties in Kisumu and also lived in Nyawita area with his family and that this failure resulted in the court applying a multiplicand of Kshs. 7,240.00 which had no basis as it sufficed nowhere in the minimum wage schedule for 2021 when the deceased died. The appellant submitted that the minimum wage that was applicable as at the time was supposed to be of a general labourer working in Kisumu town and which was Kshs. 15, 120.90.

9. It was submitted that on the issue of the multiplier, the trial magistrate erred in using the case of Embu HCCA No. 27 of 2019 as a yard stick and that the court should have used the multiplier of 26 years. Reliance was placed on the cases of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, where the court applied a multiplier of 24 years where the deceased was 31 years as at the time of death, the case of *J.W.N. v Kassam Hauliers Limited* [2020] eKLR where the court applied a multiplier of 29 years to a deceased who was 31 years old and the case of *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* [2014]eKLR where the court upheld the multiplier of 24 years where the deceased was 31 years old as at the time of death.

10. The appellant also cited the cases of *Peter Wamahiu Waithaka v Wells Fargo Courier Services Ltd & Another*[2019]eKLR where the court upheld a multiplier of 28 years for a deceased who was 27 years old and the case of *Mombasa Maize Millers Limited v George Sylvester J. Khasiani (Suing as Representative of the Estate of Oscar Angolio Khasiani, Deceased) & Another* [2018]eKLR, where the court refused to disturb the findings of the lower court on the multiplier of 28 years for a 27 year old deceased.

11. The appellant thus submitted that the final computation on loss of dependency should have been as follows: 15, 120.00 x 12 x 26 x 2/3 = 3,144,960.00.

The Respondent's Submissions

12. On liability, it was submitted that no concrete evidence was adduced to prove causation or to prove the particulars of negligence as stated in the plaint and that the appellant attempted to adduce evidence through her submissions as the evidence in support of her case was too scanty to support the finding that the respondent was wholly negligent and thus having been confronted with two different versions of the accident, the trial court was right in apportioning liability at 60:40.

13. Reliance was placed on the case of *Ann Wangare Mwombe & 2 Others v Peter Mukiri Gateri* [2014] eKLR where the court held interalia that in the absence of cogent evidence on liability, the same ought to be apportioned 60:40 against the defendant.

14. On loss of dependency, it was submitted that despite the appellant's averments that the deceased worked as a plumber earning Kshs. 15,000 – 20,000 per month, she failed at the hearing to adduce any documents proving that the deceased was a plumber working in Kisumu and thus the same remained unascertainable averments and as such the trial court's approach of using the multiplier approach and the figures prescribed under the *Regulation of Wages (General) (Amendment) Order* 2019 was appropriate in the circumstances.

15. The respondent further submitted that a multiplier of 22 years as applied by the trial court was reasonable in consideration of the visitudes and vagrancies of life. Reliance was placed on the case of Board of Governors of Kangubiri Girls High School supra where it was held interalia that the choice

of multiplier is a matter of court's discretion which discretion has to be exercised judiciously with reason as well as the case of *Mars Logistics Limited v Susan Kavogoi (Suing as the administrator, a dependant and on behalf of the dependants of Evans Imbalia Andiva)* [2021] eKLR where the court set aside a multiplier of 17 years with one of 12 years and the case of *Bernard Kyalo Maithya v Philomena Kyumwa Mbithi & Joseph Mutunga (Suing as the legal representative of the estate of Mutinda Mbithi)* [2019] eKLR where the court set aside an award where the trial court had applied a multiplier of 37 years and substituted it with an award with a multiplier of 26 years for a 24 year old.

Analysis and Determination

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions, as stipulated in section 78 of the *Civil Procedure Act*. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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."

17. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] KLR at 403, where Kneller JA & Hancox Ag JJA held that-

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

18. Having considered the Appellant's Grounds of Appeal and the parties' written Submissions, I find that the issues placed before me for determination are:

    i. Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

    ii. Whether or not the award of quantum as contested was inordinately low in the circumstances of this case so as to warrant interference by this court.

19. This court will deal with the issues under the separate heads shown herein below.

Liability

20. On liability, In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

21. That was the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it

was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

22. In this case, I note that it was only PW3 who testified as to having witnessed the accident. It was his testimony that the deceased's motorcycle was hit from behind. He testified that he did not record his statement at the police station and further that he had never testified in a traffic matter.

23. PW1, the police officer who produced the police abstract as PExh 1 stated that PW3 was not listed as an eye witness in the abstract and further that as per the abstract, the vehicle hit the motorcycle from behind. PW1 further testified that no one had been charged for causing the accident.

24. In his defence, the respondent testified that the deceased failed to stop at a junction and entered the road abruptly on the right side of the road and as a result, the motorcycle hit the defendant's vehicle. In cross-examination, the respondent further testified that he and the deceased were not headed in the same direction.

25. I have perused the police abstract produced by PExh 1 and note that nowhere does it state that the respondent hit the deceased's motorcycle from the back. There were no sketch plans or photographs of the scene produced to aid in shedding a light on how the accident occurred and thus assist the court ascertain who was to blame for the accident. Further, PW3 who claims to have witnessed the accident was not part of the witnesses listed in the Police Abstract and further, I find it suspicious, that in his statement filed on the July 4, 2022 which he adopted as evidence in chief, he stated that he was a pedestrian when he witnessed the accident This is different from his testimony in court on oath where he stated that he was on a motorcycle when he witnessed the accident. In essence, there was no eye witness to the accident.

26. However, the failure of the respondent to either slow down or stop his vehicle and further the fact that the deceased and his pillion passenger died on the spot was also indicative that the respondent was either driving at a speed that was excessive or was not able for other reasons to control his motor vehicle.

27. Taking all the aforementioned into consideration, I find that the trial court did not err when it found that it could not tell how each party contributed to the accident.

28. I thus find no error in principle in the manner that the trial court exercised discretion and apportioned liability as between the parties herein. I decline to interfere with the said discretion and uphold the apportionment of 60:40.

Quantum of damages

29. The appellant did not challenge the award made by the trial court under the *Law Reform Act* but instead challenged the award of the trial court on loss of dependency under the *Fatal Accidents Act*.

30. It was the appellant's case that the trial court failed to consider the place of residence and work of the deceased who engaged in his plumbing duties in Kisumu while applying a multiplicand of Kshs. 7,240.00 which had no basis as it sufficed nowhere in the minimum wage schedule for 2021 when the deceased died and that the minimum wage that was applicable as at the time was supposed to be Kshs. 15, 120.90. Further, that the magistrate further erred on the issue of multiplier by adopting a multiplier of 22 years and that she should have instead used the multiplier of 26 years.

31. In response, the respondent submitted that the appellant failed to produce any documents proving that the deceased was a plumber working in Kisumu and thus the same remained unascertainable averments

and that a multiplier of 22 years as applied by the trial court was reasonable in consideration of the visitudes and vagrancies of life.

32. In *Butt v Khan* [1982-88] KAR 1 it was held that:

> " An appellate court will not disturb an award for damages unless it is 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".

33. From the proceedings of the lower court, the appellant testified that prior to his death, the deceased was a plumber by profession earning about Kshs. 15,000 – 20,000 per month and that he also worked as a motorcyclist in his free time ferrying passengers. That he was married to her and they had two children.

34. This Court notes that no documentary evidence was produced by the appellant to prove that the deceased was working as a plumber earning Kshs. 15,000 – 20,000 per month. The death certificate shows that the deceased was 30 years old and he died as a result of subdural haematoma. His profession is shown to be a plumber.

35. The claim that the deceased was a plumber was not controverted by the respondent before the Trial Court. The deceased's earnings could however not be ascertained. The appellant suggested Kshs. 15, 120.90 in line with the provisions of the *Regulation of Wages (General) (Amendment) Order* 2019.

36. Since no documentary evidence was produced as proof of the deceased's monthly income, the Trial Court could have adopted either the multiplier approach or global sum approach. She adopted the former approach.

37. In the case of *Mwanzia v Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs Gichumu Githenji* [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."

38. In this case, there was no evidence to support the averments of the deceased's monthly income as a plumber or motorcyclist and therefore, I find and hold the view that an award based on the global sum approach would be more appropriate.

39. In the case of *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased)* [2021] eKLR the court upheld the trial court's award of Kshs. 2,000,000 where the deceased was married and had 2 young children aged 6 and 4 years at the time of his death.

40. Further, in the case of *Stephen Murathi v Brenda Makena (Suing as the legal representative of the estate of Andrew Muthuri (deceased)* [2021] eKLR where the deceased was aged 31 years, was a husband and father to three children, the court upheld the trial court award of a global sum of Kshs 2,500,000 for loss of dependency.

41. Based on the aforementioned authorities, I am satisfied that an award of a global sum of Kshs. 2,000,000 for loss of dependency would be sufficient in the instant case taking into consideration the deceased's age as well as the young ages of his children who were 2 years old and 8 months old at the time of the deceased's passing.

42. The upshot of the above is that the judgement and decree of the trial court on liability is upheld. However, the judgment on quantum of damages under the *Fatal Accidents Act* is hereby set aside and substituted as follows:

    Pain & suffering – Kshs. 20,000

    Loss of expectation of life - Kshs. 100,000

    Los of dependency – Kshs. 2,000,000

    Total - Kshs. 2,120,000

    less 40% contribution - Kshs 848,000

    Total -- Kshs 1,272,000

    add Proven Specials – Kshs. 89,986

    Total – Kshs. 1,361,986

    Grand Total - Kshs. 1,361,986

43. The general damages will earn interest at court rates form date of judgment in the lower court until payment in full whereas the special damages will earn interest at court rates from date of filing suit in the lower court until payment in full.

44. As the appellant has only succeeded in her appeal partially on quantum alone, I order that each party bear their own costs of this appeal.

45. The lower court record and this judgment and decree to be returned to the trial court.

46. This file is now closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE