Rottger v Karisa & another (Suing on behalf of the Estate of Said Thoya) (Civil Appeal E062 of 2023) [2023] KEHC 26981 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E062 OF 2023

M THANDE, J

DECEMBER 18, 2023

BETWEEN

BRIAN ROTTGER ..... APPELLANT

AND

MOHAMED KATANA KAZUNGU ..... 1ST RESPONDENT

JOSLINER MAPENZI KARISA ..... 2ND RESPONDENT

SUING ON BEHALF OF THE ESTATE OF SAID THOYA

(An Appeal from the Judgment of Hon. I. Thamara Resident Magistrate delivered on 17.4.23 in Malindi CMCC No. 211 of 2021)

JUDGMENT

1. The Appeal herein arises from Judgment of Hon. I. Thamara Resident Magistrate delivered on 17.4.23 in Malindi CMCCNo. 212 of 2021. The Respondents instituted the suit in the trial court against the Appellant by way of a plaint dated 27.7.21, seeking the following prayers:
    a. General damages under the *Fatal Accidents Act* and the *Law Reform Act*.
    b. Special damages.
    c. Costs of the suit.
    d. Interest on (a) and (b) above at court rates from the date of filing of this suit until payment in full.
2. The matter proceeded to hearing and the trial court entered judgment in favour of the Respondents in the following terms:
    a. Liability 100%

b. Pain and suffering Kshs. 50,000/=

c. Loss of expectation of life Kshs. 100,000/=

d. Loss of dependency Kshs. 2,504,540/=

e. Special damages Kshs. 60,000/=

f. Funeral expenses Kshs. 100,000/=

3. The Appellant being aggrieved by the said judgment preferred the appeal herein and the summarized grounds of appeal are that the trial Magistrate erred in law and in fact in:

    1. Holding the Appellant 100% liable despite of overwhelming evidence to the contrary.

    2. Assessing damages on wrong principles and failed to apply precedents and tenets of the law applicable.

    3. Holding without evidence, that the deceased had a palm wine business and applying the general minimum wage of Kshs. 12,522.70 as the multiplicand, thereby awarding general damages that were inordinately high and excessive in the circumstances.

    4. Adopting a multiplier of 25 years and failed to take into account the vicissitudes of life thereby awarding inordinately high damages for loss of dependency.

    5. Awarding a total of Kshs. 100,000/= as damages for funeral expenses which were not specifically pleaded and proved.

    6. Failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision that was unsustainable in law.

4. The Appellant prayed that the Appeal be allowed costs and that the judgment in question be set aside in its entirety and that this Court be pleased to substitute the same with its own decision. The Appellant also prayed for any other order and/or relief that this Court may deem fit to grant.

5. Parties filed their written submissions which I have duly considered. The Appellant challenges the judgment both on the finding on liability and the assessment and award of damages. The issues for determination are thus the following:

    i. Whether the trial Court erred in finding the Appellant 100% liable.

    ii. Whether the assessment and award of damages was erroneous.

6. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another –vs- Associated Motor Boat Company Ltd.& Others* (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 made 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 account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif –v- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

Whether the trial Court erred in finding the Appellant 100% liable

7. The Appellant submitted that deceased ought to have been held wholly liable for the injuries sustained. It was submitted that although Josliner Mapenzi Karisa PW2 stated that the Appellant's driver drove motor vehicle KCF 234M on along the Watamu-Turtle Bay Road on 12.3.21, so carelessly that he caused it to collide with motorcycle registration number KMEG 214B which the deceased riding, thereby causing him fatal injuries, she on cross examination stated that she did not know how the accident occurred as she did not witness the same. She further stated that the deceased wore no protective helmet and reflective jacket while on the motorcycle. It was further submitted that the Respondents did not call any eye witness to attest to their claim. The evidence of PW1 Sgt. Jacob Nyamu was not helpful. Although he stated that the Appellant's driver was to blame for the accident, he was not the investigating officer and that the matter was still pending under investigation.

8. The Appellant further submitted the although the police officer PW2 testified that the Appellant's driver was to blame for the accident, he admitted that the accident was still pending under investigations. He conceded that he was not the investigating officer and did not visit the scene of the accident. It is thus the Appellant's contention that there was no witness called by the Respondents to corroborate the testimony of PW1. Without eyewitness evidence on behalf of the Respondents therefore, their evidence is hearsay and inadmissible. The Appellant contends that the deceased is fully to blame for the injuries sustained for having exposed himself to injury that he knew or ought to have known about by failing to put on a protective helmet and reflective jacket in breach of traffic rules. He also rode the motorcycle at high speed without due care and attention for other road users. The Appellant submitted that in the unlikely event that the Appellant is found liable then the deceased ought to bear the greater portion of liability.

9. The Appellant further submitted that it called 2 witnesses. The record however shows that only one witness was called, namely Leslie Mvera Kazani. Notably the Appellant's driver was not called as a witness. DW1 told the Court that he was a pillion rider aboard a motorcycle on his way to fill his gas cylinder opposite Madina palms and there was a stationary matatu ahead of them. Suddenly the motorcycle on which the deceased was riding rode past them and overtook the matatu at very high speed. Since he could not control the motorcycle, he rammed into the Appellant's vehicle which was coming from the opposite direction.

10. For the Respondents, it was submitted that Respondent's testimony confirming the occurrence of the accident was corroborated by PW1 the police officer who produced a police abstract indicating that charges were preferred against the Appellant's driver. It was further submitted that DW1 admitted that the motorcycle had successfully overtaken the stationary vehicle and that he swerved towards the motorcycle occasioning the collision. As such, the Appellant cannot escape liability.

11. In her judgment, the learned Magistrate had this to say on liability.

    27. Despite the fact that PW1 did not visit the scene and did not produce a sketch map he testified that the driver of motor vehicle registration number KCF 234M was to blame for the accident. The abstract indicates that charges were to be preferred against the driver. DW1 could not certainly state who was to blame because according to him his view was blocked by the stationary motor vehicle.

28. I have considered that the Plaintiff has proved on a balance of probabilities that the driver of driver of (sic) motor vehicle registration number KCF 234M had a duty of care and could have avoided the accident but did not. I find that he was solely to blame for the accident.

12. A review of the evidence shows that the Respondents called 2 witnesses, PW2, Eunice Fikiri Dusa the widow of the deceased and PW1, Sgt. Jacob Nyamu. PW2 was not present when the accident occurred and her evidence on how it happened is thus hearsay. As for PW1, he was not the investigating officer and stated that PC Omar who investigated the matter has since been transferred. The Appellant's driver was to be charged with causing death by dangerous driving. The file was pending before the DPP. On cross examination, he stated that PC Omar preferred charges against the said driver. He however stated that he did not have before court, the investigations report court, or the sketch map. The file was with the DPP. He did not also visit the scene of the accident. These deficiencies in the testimony of PW1 have rendered his evidence unhelpful in assisting the court determine liability.

13. DW1 an eyewitness who was himself on a motorcycle behind the stationary matatu stated that he blamed the motorcycle for the accident. On cross examination however, he stated that they had been blocked by the matatu and could not see beyond it. His evidence was thus not very helpful in determining liability.

14. The fact of the accident occurring as a result of which the deceased died is not disputed. The case before me however is one where there was no direct evidence to prove liability on the part of the Appellant. Where liability is not clear, courts have held that both parties are to bear liability equally. In this regard I am duly guided by the holding in the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR, where the Court of Appeal stated:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of Barclay – *Steward Limited & Another v Waiyaki* [1982-88] 1 KAR 1118, this Court said:-
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> > "The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."
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> The Court went on to state:
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> > "The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

15. In the present case, there are 2 conflicting versions as to how the accident in question occurred. Each party insists that the other is to blame. None was however able to establish the fault of the other. Accordingly, I apportion liability to each party equally.

Whether the assessment and award of damages was erroneous

16. It is the Appellant's contention that the award of Kshs. 2,504,540 for loss of dependency is excessive and that the same should be reduced to a lump sum of Kshs. 800,000/=. The Appellant contends that no evidence was adduced by PW2 to support the claim that the deceased was engaged in palm wine business from which he earned Kshs. 3,000/= per day. In the premises, the multiplier approach should not be adopted in making an award for loss of dependency. The Appellant thus submitted that the trial Magistrate erred in applying a multiplicand of Kshs. 12,522.70 and a multiplier of 25 years.

17. For the Respondent, it was submitted that during trial, it was evident that the deceased used to sell palm wine in the village for a living. That in such rural areas, like any other village in Kenya, it is hard to have receipts or proof of such trade or even keep books of account.

18. I have looked at plaint. Paragraph 9 reads as follows:

> At the time of his death the deceased was aged 29 years and of good health and was running a successful motor cycle business tapping making approximately Kes 3,000 per day with very high expectations in life.

In her statement however, she stated:

> At the time of his death the deceased was aged 30 years and of sound health and was running a successful business tapping and selling palm wine making approximately Kes 3,000 per day with very high expectations in life.

19. In her testimony, PW2 adopted her witness statement. She stated stated that she did not know if the deceased who was her husband, had a driving licence. She stated that she had no document to show he earned Kshs. 3,000/=. It is not clear whether the deceased was in the motor cycle business or the palm wine business. The Respondents' submission that the deceased sold palm wine in the village, the name of which is not given, and further that in rural settings receipts and books of accounts are not kept is not supported by any evidence. The Respondents' submission in this regard is accordingly rejected.

20. In the case of *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR, cited by the Respondents, Wendoh, J. stated:

> Without any evidence to the contrary, I am persuaded that the deceased was a carpenter. It is not uncommon for people in the rural areas to practice such trade without evidence of qualification or proof of practice by keeping of books of accounts. I would have graded the deceased as an ungraded artisan I do not know why the trial court adopted Kshs. 15,000/=as multiplicand but Guided by Legal Notice No. 116 of 2015 which provides the minimum wages for skilled and semi-skilled employees, this court shall adopt the sum of Kshs. 11,279.50 per month being monthly earnings for ungraded artisan.

21. The troublesome issue of where multiplicand cannot be accurately ascertained has been the subject of many a court case. In *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased)* [2016] eKLR, Ngaah, J. stated:

> 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 award

that will always be subject to the circumstances of each particular case. In *Gammel versus Wilson* (1981) 1 ALL ER 578 Lord Scarmanspoke of the assessment of damages in such circumstances; he said:-

> "The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.(see page 593)."

And back home, while referring to this question in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* which was quoted with approval in *Albert Odawa v Gichimu Gichenji* NKU HCCA No. 15 of 2003[2007] eKLR Justice Ringera was of the following view:-

> " 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."

22. From the cited authorities and the jurisprudence from our courts, where a deceased's earnings cannot be ascertained the trial court may at its discretion, adopt either the multiplier approach or global sum approach. The trial Magistrate applied the latter approach, having found, and rightly so, that there was no proof that the deceased earned Kshs. 3,000/= daily from his palm wine business. She thus applied the minimum wage as at March, 2021 of Kshs. 12,522/70 for unskilled labours in the former municipalities and town councils.

23. In her finding, the learned Magistrate was guided by the holding in the case of *Dickson Simon Nyambori v Justus Omondi Obura* [2018] eKLR, where Mrima, J. stated:

> I have previously dealt with this issue and held that whenever a court is charged with the duty of assessing general damages for loss of future earnings and the claimant fails to prove the income relied on, the court should be guided by the requisite wages approved by the Ministry of Labour and duly gazetted. I still hold that position. In this case there was no proof of income.

24. The adoption of the of the multiplier approach fell within the discretion of the learned Magistrate. Accordingly, she cannot therefore be faulted for exercising her discretion in the manner that she did.

25. On the multiplier and dependency ratio, the record shows that the deceased died at the age of 29 years and was survived by a wife and 3 minor children aged between 2 years and 5 years. The learned Magistrate applied a multiplier of 25 years and a dependency ratio of 2/3, which in my view is reasonable. Accordingly, I find no basis for interfering with the finding of the learned Magistrate in this regard.

26. I now turn to the contention that the trial Magistrate erred in awarding damages under the *Fatal Accidents Act* and the *Law Reform Act*, which is not allowed under Section 2(5) of the *Law Reform Act* and that the estate of the deceased cannot benefit twice. Reliance was placed on the case of *Kemfro v CAM Lubra and Olive Lubia* (1982-1988) KAR 727 to buttress this submission.

27. The Respondents countered this by arguing that the Appellants submissions were based on a misapprehension of the law.

28. Section 4(1) of the *Fatal Accidents Act* provides as follows:

> Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
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> Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

29. Section 2(5) of the *Law Reform Act* provides:

> The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act* (Cap. 32) or the *Carriage by Air Act*, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

30. Under the *Fatal Accidents Act*, every action brought by virtue of the provisions thereof shall be for the benefit of the spouse, parent and child of the person whose death was caused as a result of a fatal accident. The *Law Reform Act* is explicit that the rights conferred thereunder for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act*.

31. The Court of Appeal had occasion to consider the issue of double compensation under the 2 Acts in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, the Court explained as follows:

> 20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.
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> 21. The confusion appears to have arisen because of different reporting of the *Kenfro case* (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2)* and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-
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> > 6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
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> > 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
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> > 8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."
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> 22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial

to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

32. Duly guided by the Court of Appeal, I find that the submission by the Appellant in this regard is without merit and the same thus fails.

33. The Appellant has further faulted the learned Magistrate for awarding Kshs. 100,000/= for funeral expenses. It was submitted that the award was made without proof, noting that special damages must be specifically pleaded and proved. The Appellant urged that the said award be set aside as there was no proof of the expenses.

34. The Respondent cited the case of *J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School* [2018] eKLR, and submitted that funeral expenses are awarded even in the absence of receipts. In that case, Gikonyo, J. stated:

> (37) In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.The court has awarded this where there were no receipts provided. In *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others* [2013] eKLR the plaintiff was awarded Kshs. 30,000/- for funeral expenses. The Court of Appeal in the case of *Jacob Ayiga Maruja & another Vs. Simeon Obayo* [2005] eKLR awarded the plaintiff Kshs. 60,000/-. While in *Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong* [2015] eKLR the plaintiff was awarded Kshs. 50,000/-. I will take a big gamble in view of the circumstances of this case and award a sum of Kshs. 60,000 for funeral expenses over and above the pleaded special damages of Kshs. 40,100. The total shall be Kshs. 100,100 in special damages. It is so awarded.

35. I associate with the sentiments of the learned Judge and further take useful guidance from the wisdom of the Court of Appeal in the case of *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR, that

> We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.

36. Flowing from the cited authorities, it is a matter of common notoriety that funeral expenses which include coffin, transport costs, food may not be receipted. To require such receipts would cause inordinate hardship upon a claimant. In light of this, I too loosen the requirement for strict proof and uphold the award by the trial Magistrate on funeral expenses, which she found to be reasonable.

37. The upshot is that the Appeal partially succeeds. The learned Magistrate's finding on liability is hereby set aside and in its place and the Court apportions liability at 50:50. For clarity, the award of damages is upheld less 50% contribution. Each part shall bear own costs.

DATED AND DELIVERED IN MALINDI THIS 18TH DAY OF DECEMBER 2023

M. THANDE

JUDGE