Wareng High School v Metto & another (Suing as administrators to the estate of Joseph Kiptoo) (Civil Appeal E012 of 2021) [2022] KEHC 13129 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CIVIL APPEAL E012 OF 2021

EKO OGOLA, J

SEPTEMBER 27, 2022

BETWEEN

WARENG HIGH SCHOOL .... APPELLANT

AND

MAUREEN JEMUTAI .... 1ST RESPONDENT

PHILOMEN KIPKERING METTO .... 2ND RESPONDENT

SUING AS ADMINISTRATORS TO THE ESTATE OF JOSEPH KIPTOO

((Being an appeal against the judgment and decree of Hon. J. Orwa, Senior Principal Magistrate in Kapsabet CMCC No. 64 of 2020 delivered on 6/9/2021.))

JUDGMENT

1. This appeal challenges the judgment in Kapsabet CMCC No 64 of 2020 delivered on September 6, 2021 in which the respondents who were the plaintiffs had sued the appellant for damages in respect of injuries sustained by Joseph Kiptoo (deceased) on May 12, 2019, while he was lawfully riding motorcycle registration KMED 009J along Kaptel-Chepterit road near Baraton trading centre. According to the respondents, the accident was caused by the appellant's motor vehicle registration number KAR 093L which was being driven in negligent manner thus knocking down the deceased.

2. The appellant filed a statement of defence denying the key averments in the plaint and any liability. Alternatively, the appellant pleaded contributory negligence against the respondent. The suit proceeded to full hearing during which evidence was adduced by the respective parties. In her judgment, the learned magistrate found in the respondents' favour and held the appellant 90% liable for the accident. The court thereafter proceeded to award damages as follows:

   a. Pain and suffering: Kshs 180,000/=

   b. Loss of expectation of life: Kshs 90,000/=

c. Special damages: Kshs 45,000/=

d. Loss of dependency: Kshs 1,872,000/=

e. Costs of the suit.

3. Aggrieved with the outcome, the appellant preferred this appeal challenging the finding on liability and quantum, based on the following grounds: -

    1. That the learned trial magistrate erred in law by solely relying on the respondent's submissions and failing to consider the appellant's evidence and submissions in arriving at her findings against the appellant.

    2. That the learned trial magistrate erred in law and fact in holding that the appellant was 90% liable for the accident without any evidence to that effect.

    3. The learned trial magistrate erred in law and fact in failing to give a well-reasoned judgment on each item pleaded and the evidence adduced by the appellants.

    4. The learned trial magistrate erred in law and fact by failing to dismiss the respondent's case against the appellants with costs.

    5. The learned trial magistrate erred in law and fact in failing to find that the respondents did not prove their case against the appellants.

    6. The learned trial magistrate erred in law and in fact by awarding damages against the appellants.

    7. The learned trial magistrate erred in law and in fact in awarding damages that were inordinately too high in the circumstances and failing to appreciate the evidence by the appellants thereby occasioning a miscarriage of justice.

    8. The learned trial magistrate erred in law and fact in using wrong principles in assessing the damages.

4. The appeal was canvassed by way of written submissions. The appellant's submissions dated June 8, 2022 were filed on June 20, 2022 whereas the respondents' submission dated April 20, 2022 were filed on May 11, 2022.

Appellant's Submissions

5. On liability, the appellant argued that it was incumbent upon the respondents to prove the particulars of negligence on the part of the appellant. Counsel submitted that he who alleges must prove and that the burden of proof lies with the respondents. Counsel for the appellant contended that the trial magistrate entirely relied on the respondent's evidence which was never corroborated and was not sufficient in making the determination on liability.

6. The appellant submitted that PW1 claimed that the deceased was a farmer and a rider earning approximately Kshs 30,000/= but no evidence was produced to support the claim. Counsel further submitted that PW1 was never at the scene of the accident and therefore not a credible witness. The appellant submitted that although PW2 PC Cheserek Kiptoo No 84068 had produced the police abstract in court, he was never at the scene of the accident and neither was he the investigating officer and therefore not a credible witness in this case. The appellant further submitted that, since the occurrence of the accident, the appellant's driver has never been charged with any traffic offence. The appellant's counsel further submitted that DW1 being the appellant's driver had testified that he was a professional driver and that on the date of the accident he was heading to Chepterit at Baraton

shopping centre when the deceased who was riding the suit motorcycle suddenly appeared from the left side, hit the tyre of the bus and fell on the ground. DW1 blamed the deceased for the accident stating that he was careless and without due regard to the traffic rules while driving the said motorcycle. The appellant submitted that DW2 CPL Miriam Waitima No 83826 had told court that she was among the investigating officers in this case and that on the date of the accident she had visited the scene and that the deceased was the one on the wrong as he had suddenly entered the road from the left side and as a result of which he hit the front tyre of the bus and due to the impact he fell down thereby sustaining fatal injuries.

7. The appellant contended that the trial magistrate erred in both law and fact to conclude that the police abstract which was not supported by any other documentary evidence was enough evidence to hold the appellant 90% liable for the occurrence of the said accident.

8. Under pain and suffering, the appellant submitted that PW1 Philemon Kipkering had testified that the deceased died shortly after the accident and was pronounced dead upon arrival the hospital. The appellant proposed that the award of Kshs 10,000/= who be sufficient in light of the pain and duration that the deceased might have endured before he succumbed.

9. On loss of expectation of life, the appellant faulted the trial magistrate for making the award of Ksh 90,000/= which the appellant contended was not justifiable and was never founded on any legal principles. The appellant proposed that in view of the deceased being 29 years old at the time of his death the award of Kshs 60,000/= would be sufficient.

10. The appellant's counsel submitted that under the *Fatal Accident Act*, an award is made for loss of dependency, that the deceased's estate had suffered. They are made pursuant to the following subheadings; multiplier, multiplicand and dependency ratio. Counsel for the appellant submitted that the trial court had applied a multiplier approach and had adopted a multiplicand of Kshs 10,000/=, multiplier of 12 years and a dependency ration of 2/3.

11. The appellant submitted that from the evidence on record the multiplier approach is not applicable in determining damages awardable under this limb as applied by the trial court because there was no documentary evidence that the deceased used to earn Kshs 30,000 as alleged; there was only one dependant from the pleadings while during the hearing, it was stated that the deceased had left behind six dependants; that there were no birth certificates produced to prove the relationship between the deceased and the alleged dependants. The appellant further submitted that in situations where income and dependency ratio is uncertain courts have always applied the global sum approach. The appellant urged court to adopt the global sum approach in awarding under this limb. Counsel for the appellant proposed that a global award of Kshs 300,000/= would be adequate compensation in the circumstances of this case.

12. The award on special damages is not contested by the appellant. In the end the appellant urged court to apportion liability in the ration of 80:20 in favour of the appellant.

Respondents' Submissions

13. The respondents opposed the appeal. On the issue of liability the respondent submitted that: both the deceased and the driver of the appellant's motor vehicle were heading in the same direction; the suit motorcycle was ahead of the appellant's motor vehicle; the deceased rider indicated to turn to the right when he was knocked down by the appellant's motor vehicle and that the deceased rider was knocked from behind by the appellant. The respondents submitted that these facts were in fact confirmed by PW1 PC Cheserek Kiptoo and PW3 Alfred Ambale, who were eye witnesses and who was at the scene of the accident. The respondents submitted that DW2 CPL Miriam Waitima had told court during

cross-examination that the deceased rider was in front of the appellant's motor vehicle prior to the accident and that further the deceased rider was off the road, ahead of the appellant's motor vehicle when the accident occurred. The respondent further submitted that DW2 had told court that the appellant's driver should have kept 70 metres distance from the deceased rider who was ahead of him prior to the occurrence of the accident.

14. The respondent contended that it was the appellant's driver who failed to observe and keep the required safe distance between the appellant's motor vehicle and the deceased's motorcycle that was ahead of him.

15. The respondent urged court to revise the finding of liability and find that the appellant was 100% liable for the occurrence of the said accident.

16. On the award on pain and suffering, the respondent argued that the accident occurred at 6:00pm, the deceased is likely to have died in the next 3 to 4 hours of the accident. The respondent further submitted that the deceased sustained severe head injuries which turned out to be fatal and was in great pain from the time of the accident and while he was being taken to hospital. The respondents urged court not to disturb the trial court's award of Kshs 180,000/=.

17. On loss of expectation of life, the respondent submitted that the trial court's award of Kshs 90,000/= was reasonable.

18. On loss of dependency, the respondent submitted that the deceased died at the age of 29 and was in good health. The respondent further submitted that the deceased was a motor cycle rider as well a as a small-scale farmer and or business man who would have lived to the age of 60 years or even more. It was submitted that the trial court's multiplier of 26 years having taken into consideration the vagaries and the vicissitudes of life, was reasonable.

19. On the multiplicand adopted by trial court, the respondent submitted that the deceased was a motorcycle rider as well as a small-scale farmer and or business man and would make approximately Kshs 30,000/= per month. It was submitted that the trial court had employed Kshs 10,000/= as the multiplicand and urged this court not disturb the same.

20. On the dependency ratio, the respondent submitted that the deceased was married, had a wife and daughter and also supported his mother. That position was also confirmed by chief's letter.

21. The respondents urged the court to dismiss the appeal.

Determination

22. I have carefully considered the evidence adduced before the trial court by both parties, the grounds of appeal and submissions together with the authorities cited by the parties. It is this court's considered view that the following are the issues for determination:

    a. Whether the court erred in apportioning liability at 90:10

    b. Whether the court erred in awarding Kshs 180,000/= for pain and suffering

    c. Whether the court erred in awarding Kshs 90,000/= for loss of expectation of life

    d. Whether the court erred in adopting a multiplicand of Ksh 10,000/=

    e. Whether the court erred in adopting a multiplier of 26years

23. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the

witnesses testify and make allowance for the said fact. 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 reanalyse 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."

24. 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] LLR 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."

25. Whether the court erred in apportioning liability at 90:10

It is well settled that where a trial court has apportioned liability according to the fault of the parties, that 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

The fact that the deceased died as a result of an accident involving his motor cycle and the appellant's vehicle is not disputed. The appellant's argument however is that the deceased is to blame for the occurrence of the said accident. DW1's evidence was that while driving the appellant's motor vehicle registration number KAR 093L from Kaptel heading to Cheptiret at Baraton shopping centre, the deceased suddenly appeared from the left side, hit the tyre of the left side of the bus and fell on the road, causing the accident. PW1 PC Cheserek Kiptoo No84068 who gave evidence for the respondents' case did not witness or investigate the accident and his evidence in favour of the respondents' case was weak at best. However, DW2 CPL Miriam Waitima No 83826 who gave evidence for the appellant's case blamed the deceased for the accident but during cross-examination conceded that the deceased rider was ahead of the appellant's motor vehicle and that the appellant's motor vehicle had knocked the deceased from behind. PW3 Alfred Ambale Masiolo an eye witness told court that he was at the filing station in Baraton trading centre when the appellant's driver hit the deceased who was ahead of him. PW3 further told court that both vehicles were travelling towards the same direction when the accident occurred.

The court finds and holds that the trial magistrate's apportionment of liability at 10% to the respondent was reasonable in the circumstances. The challenge on liability therefore fails.

Whether the court erred in awarding Kshs 180,000/= for pain and suffering

26. The trial court awarded Kshs 180,000/= for pain and suffering. The appellant proposed an award of Kshs 10,000/= for pain and suffering. The trial magistrate observed that the accident occurred at about 6:00pm-6:30pm and that the deceased had suffered an injury on the head. The trial court further observed that the deceased was rushed to Kapsabet County Referral Hospital where he succumbed at about 9:00pm. The trial court noted that between 6:30pm and 9:00pm the deceased had felt immense pain before awarding his estate the sum of Kshs 200,000/= less 10% for contributory negligence hence Kshs 180.000/=.

27. The appellant proposes that since the deceased died on the same day, the award for pain and suffering should be less. I have perused witness statement by DW1 James Mutai which was adopted by the trial court in evidence and I note that DW1 testified that the accident had occurred on May 12, 2019 at around 6:00pm. I further note that DW1 testified that he had learnt of the deceased's demise on the night of the said accident. This court takes the view that the deceased did not die instantaneously. The deceased suffered some pain as he was being transferred from the scene of the accident to Kapsabet County Referral Hospital.

In civil appeal No 42 of 2018 *Joseph Kivati Wambua v SMM & another (suing as the Legal Representatives of the Estate of EMM-Deceased)* paragraph 21 the Hon Odunga J observed: -

> "The appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal."

28. The deceased herein suffered from a head injury. There is no doubt that the deceased died after sometime which included him being taken from the scene of the accident to hospital. Therefore, the deceased must have suffered some considerable pain before dying. This court finds no reason to interfere with the award made by the trial court.

Whether the Court erred in awarding Kshs 90,000/= for loss of expectation of life

29. The trial court assessed loss of expectation of life at Kshs 90,000/=. On loss of expectation of life, this court is guided by the decisions in *Lucy Wambui Kohoro v Elizabeth Njeri Obuong* (2015) eKLR and in civil appeal No 113 of 2012 *Makano Makonye Monyanche v Hellen Nyangena* (2014) eKLR in which the learned judge R N Sitati held:

> "I find no reason to interfere with the award on loss of expectation of life under *Law Reform Act* as the same is always awarded at Kshs 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries."

30. This court finds no good ground adduced to disturb the award made under the loss of expectation of life.

Whether the court erred in adopting a multiplicand of Ksh 10,000/=

31. This court has perused the judgment of the trial court and observes that the basis of adopting the multiplier of Kshs 10,000/= was that the deceased used to earn a living as motorcycle rider. The court used the minimum wage applicable for such persons in arriving at the figure of Ksh 10,000/=.

32. The appellant claims that the respondents did not produce any materials or documents to prove this earning. The appellant contends that the global sum award should be awarded since there was no proof of dependency. The trial court observed that although it was alleged that the deceased used to earn Kshs 30,000/= monthly, the same was not supported by any documentation. The court found that the

deceased was not a skilled person before adopting the sum of Kshs 10,000/= as the deceased's monthly income. The trial court further noted that the deceased was survived by a widow, child and mother and that his family was still young. The court is very much alive to the fact a large percentage of Kenyans in the jua cali informal industry earn their bread without there being proper records and documentations. The motor cycle business is one of the vast businesses in our country today. This court thus agrees with the findings made by the trial magistrate that proof of earnings is not limited to production of documents and certificates. See the case of *Jacob Ayiga v Simon Obayo (suing as personal representatives of the estate of Thomas Ndaya Obayo)* (2005) eKLR and the case of civil appeal No 155 of 2019 *Hussein Shariff Ali v Grace Karea Mutia (suing as the legal representative of the estate of John Mutua (deceased)*.

33. This court will not therefore disturb the court's findings on the multiplicand of Kshs 10,000/=

Whether the court erred in adopting a multiplier of 26 years

34. The deceased died at the age of 29 years. Being a motorcyclist and a small-scale farmer in the private sector, who would have worked well up to the age of retirement, 60 years old, meaning he would have been able to work for a further 31 years. There was no evidence adduced to the effect that the deceased was of ill health or was impaired in any manner. However, taking into account the vicissitudes of life, the trial court used its discretion and adopted a multiplier of 26 years. This court finds that the multiplier of 26 years was justified.

35. In the end the appeal fails. Accordingly, the court enters judgment as follows:

    i. Liability is apportioned at 90:10 in favour of respondents

    ii. Pain and suffering: Kshs 200,000/=

    iii. Loss of expectation of life: Kshs 100,000/=

    iv. Special damages: 45,000/=

    v. Loss of dependency: 2,080,000/=

    vi. Less 10% liability

    2. Costs of this appeal as well as the cost in trial court.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE