Mwangangi & another v FKM (Suing as Legal Representative of the Estate of the Late AMK) (Civil Appeal E11 of 2021) [2021] KEHC 291 (KLR) (22 November 2021) (Judgment)

Neutral citation: [2021] KEHC 291 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E11 OF 2021

MW MUIGAI, J

NOVEMBER 22, 2021

BETWEEN

KINAMA MWANGANGI ..... 1ST APPELLANT

KATWANYAA SECONDARY SCHOOL (SUED THROUGH THE B.O.G CHAIRMAN) ..... 2ND APPELLANT

AND

FKM (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE AMK ..... RESPONDENT

(An appeal from the judgment and Decree of the Senior Principal Magistrate's Court of Kenya at Kangundo (Hon. M. Opanga) delivered on the 17 th day of November, 2020)

JUDGMENT

Background

1. By a Plaint dated 6th August,2019 and filed on 21st September,2019 the Respondent suing as the Father and Personal Representative estate of AMK (Deceased) sought general damages under the *Fatal Accident Act* and the *Law Reform Act*, special damages of Kshs. 36,645/-plus the costs and interest.

2. The Respondent at paragraph 6 of the Plaint pleaded that on or about 12th February,2017 at about 2000 hours along Tala-Kangundo Road at Tala Town, the 1st Defendant carelessly and/or negligently drove, managed and/or controlled motor vehicle Reg No KBB 782S Isuzu Bus that he caused the same to lose control, veer off the road and knocked down the deceased who was lawfully standing on the road side as pedestrian. As a consequence of the accident the deceased sustained and succumbed fatal injuries.

3. Under the Particulars pursuant to the Statute, the Respondent pleaded that the deceased was a class 4 pupil aged 12 years old and would have lived to the age of 80 years were it not for the accident.

According to the Respondent, the deceased would have completed school and worked as a teacher or any other profession and earned a salary of Kshs.15, 000/- per month. The Respondent pleaded that the deceased would have been very useful to his parents by providing food, shelter and clothing, so the estate of deceased has suffered loss and damage.

4. In opposition, the Appellants filed their joint Memorandum of Appearance and Statement of Defence on 8th October, 2019. The Appellants denied the particulars of the fatal injuries, particulars pursuant to the statute and special damages. The loss and damage alleged to be suffered by the deceased estate was/is denied. The Appellant urged the Trial Court to dismiss the suit with costs.

5. On behalf of the Respondent, a Reply to Defence was filed on 15th October, 2019 reiterating the averments in the Plaint. The Respondent urged the Trial Court to strike out the Statement of Defence and enter judgment in terms of the Plaint and relied on the doctrine of res ipsa loquitor and vicarious liability.

6. The Trial Court after hearing the matter gave its judgment on 17th November ,2020 which is the subject of the appeal herein.

Memorandum Of Appeal

7. Aggrieved by the judgement, the Appellants have appealed citing the following grounds:-

(1) THAT Hon. Learned trial magistrate erred in law and in fact and misdirected herself in using the multiplier method of computing loss of dependency when there was no evidence to support a finding on the appropriate multiplier and multiplicand thereby giving an inordinately high award.

(2) THAT Honourable Learned trial magistrate misdirected himself in law and in fact in adopting the minimum wage of Kshs.7, 270/- as per the Regulation of Wages Amendment Order, 2018 applicable to a general worker within Nairobi, Mombasa and Kisumu cities as the multiplicand for income applicable to the deceased contrary to the evidence adduced by the Plaintiff that the deceased died on 12th February, 2017 while still as student thereby giving an inordinately high award.

(3) THAT Honourable Learned trial magistrate erred in law and in fact in making findings on the multiplier and multiplicand applicable not supported by the pleadings and evidence on record.

(4) THAT Honourable Learned trial magistrate erred in law and in fact in adopting a multiplier of 48 years to the deceased aged 12 years without considering vagaries of life and contrary to the evidence adduced by the Plaintiff, thereby giving an inordinately high award.

(5) THAT Honourable Learned trial magistrate erred in law by giving an inordinately high and manifestly excessive award as loss of dependency which award is unsupported by law so as to amount to an erroneous award in the circumstances of the case

(6) THAT Honourable Learned trial magistrate erred in law and in fact by taking into account irrelevant considerations/factors while awarding general damages.

(7) THAT Honourable Learned trial magistrate erred in law and in fact by failing to deduct the award under the Fatal Accident Act from that awarded under the *Law Reform Act*.

(8) THAT Honourable Learned trial magistrate further erred in law and in fact by failing to appreciate consider and take into account the Appellant's submissions on the quantum of damages awardable in the circumstances.

(9) THAT Honourable Learned trial magistrate further erred by making decisions on quantum that was erroneous, without proper basis and against the weight of evidence.

Evidence

8. PW1, FKM stated that he was a shoe shiner. The deceased was his child. He relied on his witness statement as his evidence in chief. He produced a death certificate as exhibit 1, postmortem as exhibit 2, police abstract as exhibit 2, grant of letter of administration ad litem and payment receipt of Kshs. 1095 as exhibit 4(a) and (b), bundle of receipts for funeral expenses of Kshs.35,000/- as exhibit 5, copy of records and payment invoice of Kshs.550/- as exhibit 6(a) and (b), Chief's letter as exhibit 7, letter to the Attorney General as exhibit 8, demand letter and certificate of postage as exhibit 9(b) and copy of her Identity Card as exhibit 11.

9. PW1 stated that the deceased was 12 years, a student at Tala Boys Primary also known as St. Mary's Boys. According to PW1, the deceased was a bright student, jovial hardworking boy who aspired to be a teacher.PW1 produced a school report book as exhibit 10. PW1 asked for general damages, special damages plus costs and interest.

10. In cross-examination by Mr. Kaminza, in response to the questions posed to him, he stated that he was a shoe shiner. He did not witness the accident. He found the deceased dead at the hospital. The deceased was a student.

Defence

11. The Appellants case was closed without calling any witness.

Trial Court's Judgement

12. Based on a consent judgement, the trial magistrate entered liability in favor of the Respondent in the ratio of 75:25 against the Appellants.

13. On quantum the trial magistrate awarded damages for:

Pain and suffering of Kshs. 30,000/-,

Loss of expectation of life of Kshs.100,000/-

Loss of dependency

(Kshs.7,240/-x48x1/3x12)=Kshs.1,390,080/-,

special damages of Kshs. 36,645/-

Total Kshs. 1,556.725/-

Less 25% contribution Kshs. 389,181.25

Net total – Kshs 1,167,543.75/=

plus costs and interest.

14. The Appellants have urged the court to:-

    a. Allow Appellant's appeal;

    b. Set aside the Judgement and Decree on quantum of damages;

    c. Quash in entirety the award on quantum of damages;

    d. Adjust the quantum of damages to reflect fair amounts justifiable by law and evidence and in accordance with conventional awards in previous similar cases

    e. Appellant do have costs in the lower court and in appeal.

Appellants Submissions

15. On behalf of the Appellants, it is submitted that the trial magistrate erred in using multiplicand of Kshs.7,270/- per month under the Regulations of Wages General Amendment Order, 2018 without cogent evidence. According to the Appellants, the deceased did not have any source of income. It is submitted that as per the Plaint, it is pleaded that the accident occurred on 12th February, 2017 hence under Regulations of Wages General Amendment Order, 2017 wherein the wage for an unskilled worker like the deceased herein was Kshs.5,436.90/-. Reliance is placed in Philip Musyoka Mutua vs. Veronica Mbula Mutiso (2013) eKLR.

16. It is submitted that the trial magistrate did not consider the vagaries and uncertainties of life when adopting a multiplier of 48 years to a child of 12 years. According to the Appellants, the trial magistrate placed the deceased in a class of public service employee where retirement age is 60 years yet the deceased was student and not working. Reliance is placed in Chabhadiya Enterprises Ltd & another vs. Sarah Alusa Mwachi (Suing as the legal Administrator and Personal Representative of the Estate of late Faiza Musa – (Deceased) [2018] eKLR.

17. According to the Appellants, the deceased was aged 12 years and performing poorly at school, a global sum of Kshs.600, 000/- was fair and reasonable. Reliance is placed in *Chabhadiya Enterprises Ltd & another vs. Sarah Alusa Mwachi (Suing as the legal Administrator and Personal Representative of the Estate of late Faiza Musa – (Deceased)* (supra), in *Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR* and in *David Mwaniki Waithera & another v Jemimah Mwikali Moto [2020] eKLR*.

18. It is submitted that the award for loss of dependency if based on the multiplier approach, would have been awarded as follows; Kshs.5,436.90 x 12 x 20 x1/3= Kshs.434,952.00/-

19. According to the Appellants, the trial magistrate erred for not failing to deduct the award under the Fatal Accident Act from the award under the *Law Reform Act* to avoid double compensation. Reliance is placed in *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v. A.M. Lubia (1982-1988)1 KAR 727* and in *Charles Omwenga Ongiri & another v Daniel Muniko [2017] eKLR*.

20. The Appellants have urged the court to find that the appeal has merit and should be allowed as they have prayed.

Respondent's Submissions

21. On behalf of the Respondent, it is submitted that the awards were reasonable and commensurate with the current court awards for similar cases. Reliance is placed on the court decision relied on before the trial court. It is submitted that the trial court judgement was based on evidence tendered in court.

According to the Respondent, the deceased suffered fatal injuries. It is urged that the court should not interfere with the trial court award, dismiss the appeal and uphold the trial court judgement. The Respondent relied on 9 decisions listed in the submission.

Determination

22. I have considered the written submissions filed on behalf of respective parties.

23. In this appeal, the Appellants have challenged the trial court award on quantum of damages under the Fatal Accident Act and *Law Reform Act*.

24. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:-

> Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

25. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff's claims. This burden is well captured under Sections 109 and 112 of the same Act as follows:

> Section 109
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> Section 112
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

26. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR*, the Judges of Appeal held that:-

> " Denning J, in Miller vs. Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

27. I find the issues for determination suggested by the Appellants proper for determination and the issues are:-

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

b. Whether the trial court erred by failing to deduct the award under the Fatal Accident Act from the award under the *Law Reform Act*

28. The Appellants have urged this court to set aside and quash quantum of damages in entirety for being inordinately high and manifestly excessive. According to the Appellants the awards are unsupported by the law hence erroneous. The Court finds the setting aside of quantum to be uncalled for as the parties through respective Counsel already agreed by consent on liability at ration 75/25 in favor of the Plaintiff against the Defendant. Consequently, there was no legal obligation to provide evidence of the accident after the Consent. The consent depicts that the Defendant /Appellant shouldered 75% liability.

Quantum

29. This court is guided by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR* where the Court set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

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

30. In the case of *Southern Engineering Co. Ltd vs. Musungi Mutia [1985] KLR 730*, the court held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case..."
>
> Whether the trial court erred in awarding an inordinately high award for loss of dependency

31. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another vs. P. F. Hayes and Others [1957] EA 748, 749*, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

> " 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 dependants, 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 dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. (Emphasis added)"

32. The Appellants fault the trial magistrate for adopting a multiplicand of Kshs. 7,270/- and multiplier of 48 years when the deceased as class 4 pupil aged 12 years and not earning any income. According to the Appellants, a global sum award was the proper award since where a minor is involved, the multiplier method is speculative.

33. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in A*lbert Odawa vs. Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR*, where 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."

34. In the same breath, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR*, held as follows-

> "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."

35. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR* where the court was dealing with a similar issue, it stated:

> (23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.
>
> [24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

36. There are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.

37. In *Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and Another NRB HCC 1638 of 1998(UR)* Ringera J (as he then was) stated:

> "The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

38. In *Emmanuel Wasike Wabukesa suing for BWW a Minor Deceased v Munena Ndiwa Durman C.A. Eldoret C.A. No. 10 of 2017 [2019] e KLR* where the High court set aside an award of loss of dependency which had been made by the trial court using a multiplier where the deceased was an infant and where an award of KShs.1, 260,000 was substituted with a global award of KShs.200,000. The Court of Appeal cited several of the past decisions where it made awards on loss of dependency using global sums i.e. *Kenya Breweries Ltd v Saro [1991] e KLR* where the Court of Appeal awarded KShs.100,000 for loss of dependency to a parent of a child and stated that: "damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution."

39. The Respondent is in support of the Trial Magistrate award based on the multiplier method. Based on the above decisions, the court is convinced that the Trial Magistrate erred in principle to apply the multiplier method instead of awarding a global sum. The deceased was still in school. The deceased school report book did establish that the deceased was an average student. In this case a school report was produced that indicated that the deceased was an average student. At one point the deceased failed and was not promoted to the next class. The report indicates that he was always told to improve. It would not be practically possible to determine without speculating whether the child would have lived to the age of 60-80 years, after successful completion of education and employment or business and would hold what position, profession and what amounts of monies he/she would earn. The court's view is that it would be difficult to determine what the deceased would have turned out to be in life.

40. The Court relies on the case of *Chen Wembo & 2 others vs. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR* where Hon. Meoli J stated:-

> " Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables. The speculative nature of the matter renders the court's exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants"

41. The Court is fortified by the awards in Chen Wembo & 2 others vs. IKK & Another (suing as the legal representative of the estate of CRK (deceased) (supra), *Kitale Industries Ltd & another vs. Zakayo Nyende & another [2018] eKLR* and in Chabhadiya Enterprises Ltd & another vs. Sarah Alusa Mwachi (Suing as the legal Administrator and Personal Representative of the Estate of late Faiza Musa – (Deceased) [2018] eKLR where the courts awarded global sums of Kshs.600,000/- and Kshs.700,000/- respectively.

42. It is an accepted fact of life in the African society that even young children once they become adults they are expected to and do invariably take care of their aged parents as stated by the *Court of Appeal in Kenya Breweries Limited vs. Saro, [1991] KLR 408* supra.

43. Considering a global sum was not awarded by the Trial Magistrate, where the victim was a child, taking into account inflation and the awards in the above-cited court decisions, the Court finds a global sum of Kshs. 800,000/- reasonable. The same is awarded.

> Whether the trial court erred by failing to deduct the award under the Fatal Accident Act from the award under the *Law Reform Act*

44. The award under the *Law Reform Act* comprises the award for pain and suffering and loss of expectation of life. The Trial Magistrate awarded Kshs.30, 000/- as damages for pain and suffering and Kshs.100,000/- as damages for loss of expectation of life. The Appellants submitted that the awards

ought to have been deducted from the award under the Fatal Accident Act (Loss of dependency) to avoid double compensation and not that they are excessive. In any case the court's view is that they are within the range.

45. Was the award supposed to be deducted? I find the position has been settled by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Ltd [2015] eKLR* where the court noted the confusion in regard to the concept of double compensation put across by Kemfro Africa Limited case. The learned Judges expressed themselves as follows:-

> "
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> "21. 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 Kemfro 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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> 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.
>
> 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 damage.... there is no compulsion in law to make the deduction." See Majanja J.in Richard Matheka Musyoka & another vs Susan Aoko & another (suing as the administrators' ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR and Chen Wembo & 2 others vs. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) (supra).

46. In *Peres Wambui Kinuthia & Anor vs S.S Mehta & Sons Ltd [2015] eKLR* the Hon. Mabeya J interpreted the holding in Kemfro Africa vs Meru Express Services & Anor vs Lubia& Anor (1976) No2 (1987) thus;

> Accordingly, what is required in order to avoid double compensation is for the Court to have in mind and therefore take into account the award under the *Law Reform Act* when making an award under the *Fatal Accidents Act*. In [his] view, this is the better way of construing Section 4 (2) of the *Fatal Accidents Act* & Section 2(5) of the *Law Reform Act*. Otherwise there [would] be no need of having to bring the suit under both statutes only for the award to be deducted from the award made in the other.

The Court finds the Appellants' argument to be is not borne out by the law. The failure to deduct the award was not error in law. The ground fails.

47. Accordingly, the award that ought to have been made to the Respondent was as hereunder:-

(a) Pain and Suffering Kshs. 30,000/-

(b) Loss of expectation of life Kshs. 100,000/-

(c) Loss of dependency Kshs. 800,000/-

(d)Special damages Kshs. 36,645/-

Less 25% Kshs. 966,645/-

Total award Kshs. 724,983.75

48. The Appellants shall only have the costs of the appeal and the Respondent costs of the suit in the Trial Court.

49. The general damages shall attract interest at court rates from the date of judgment of the lower court while special damages will attract interest from the date of filing the suit.

Judgment accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 22nd DAY OF NOVEMBER 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE