Bande & another v Morira (Acting as legal representative of the Estate of Malaki Manoti Mmiluka – Deceased) (Civil Appeal 110 of 2022) [2024] KEHC 1084 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1084 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 110 OF 2022

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

ANTHONY MWANGI BANDE ..... 1ST APPELLANT

CHARLES NYAMIRA OSORE ..... 2ND APPELLANT

AND

ELDER KWAMBOKA MORIRA (ACTING AS LEGAL REPRESENTATIVE OF THE ESTATE OF MALAKI MANOTI MMILUKA – DECEASED) ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Honourable Wahinya Kugira R M delivered on 14/12/2022 in Kisii CMCC 683 of 2021. The Appellants were the defendants in the lower court. The Appellant filed 5 grounds on quantum It is unnecessary to set the same herein verbatim.

Pleadings

2. Given that the appeal is on quantum, it is unnecessary to set out the entire pleadings. The Respondent pleaded that the deceased was 44 years earning approximately 20,000.

3. Particulars of dependants were set out in paragraph 6 of the Plaint. There is no dispute in that respect. Special damages were set out in paragraph 7 of the plaint.

4. The defendant in their defence dated 2/9/2021 denied liability.

Evidence

5. The Respondent adopted their statement dated 7/6/2021 indicating the expenses spent and the children left behind and the widow. The particulars of their ages were set out in the client's letter dated 24/8/2021. The oldest child was 1 year while the eldest 15 years old. The widow was 31 years old.

Though her name was Elder, she was barely out of the twenties. She appears to have been a teenage mother who has now the sole responsibility over the 5 children.

6. At first I was confused since the cause of death was indicated to be sudden death. The post mortem report at page 16 arraigned my fears.

7. The Court entered judgment for the respondent as doth: -

   a. Pain and suffering Ksh. 100,000/=

   b. Loss of expectation of life Ksh. 100,000/=

   c. Loss of Dependency Ksh. 2,016,900/=

   d. Special damages Ksh. 123,000/=

Duty of the first Appellate Court

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its 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.

9. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

10. The duty of the first appellate Court was settled in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

12. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

13. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth: -

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

14. The duty of the Court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and insured public must be at the back of the mind of the trial Court.

15. The foregoing was settled in the cases of William J Butler v Maura Kathleen Butler [1984] eKLR where the Court of Appealed held as follows: -

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders [1971] EA (CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA) March 30, 1983. The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
>
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
>
> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
>
> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA) March 30, 1983."

16. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

17. The High Court, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

18. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

19. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

20. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

21. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

Appellant's submissions

22. The appellants filed submissions on 23/10/2023. They set out the duty of the court as held in Gitobu Imanyara & 2 Others – v s- Attorney General (2016) eKLR as doth: -

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 make due allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L.
>
> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -
>
> > "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

23. On the aspect of pain and suffering they relied on Damaris Ombati v Moses Mogoko Levis & another [2019] eKLR;

> " General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that:
>
> > Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

24. They rely on the fact that the deceased died at 11:30 pm on 4/8/2020. They place reliance on Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017] eKLR;

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life.

25. On application of multiplicand they state that 12,000/= was not proved. They place reliance on Gachoki Gathuri – to the effect that where there is no proof of income, the court will adopt the minimum wage provided in the Regulations of Wages (General Amendment) Order.

26. They urge the court to adopt Kshs. 7,544.65 for an unskilled worker. I have not seen the basis for the pleadings. If the Appellant wished to show that the Deceased was an unskilled worker, then they need to plead so, under order 2 Rule 4, which provides as doth: -

> " 4.
>
> > (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality — (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raises issues of fact not arising out of the preceding pleading."

27. They state that the deceased died at the age of 44 and had only 16 years in active employment. They suggested 8 – 10 years. Of course, these are not serious submissions since the dependency is not tied to employment. At no point did the Respondent plead that the deceased was an employee. He had a one-year-old child. If we are to agree with 8 years, then the child will be 9 years old. I dismiss this kind of submission for lack of clarity.

28. They relied on 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, which stated as doth: -

> " 15. On the multiplier, again there was no explanation given by the trial court as to why it picked on the 17 years although there is nothing to suggest that the deceased was of frail health. However, certainly given the nature of work he was performing on a daily basis, prone to accidents and brushing shoulders with death on the road was always a close call. Apart from that there is the level of life expectancy in the country which currently stands at, and coupled with the other vagaries of life, then I think to conclude that the deceased would have worked up to age 60 (being the statutory retirement age, was rather ambitious!! I think a multiplier of 12 years is more reasonable. I therefore set aside the figure of 17 years and substitute it with 12 years."

29. They urge me to reduce awards as follows: -

    a. Pain and suffering Ksh. 10,000/=

    b. Multiplicand Ksh. 12,000

    c. Multiplier 8 years

    d. They pray for costs of the Appeal.

Respondent's submissions

30. The respondent filed submission on 4/12/2023.They stated that the respondent's evidence was unrebutted. They also recap the testimony on the ages of the dependents on the day evidence was tendered. The most important date is at the time of demise. They relied on the decision of Peters – v s- Sunday Post Butt – v s- Khan. Jacob Aviga Maruja is Simeon Obago Nyago – v s- Dubai Super Hardware.

31. In these they argue that proof of profession is not through certificate. Further proof of earnings is not through documents. In a well written submission they addressed each of the issues seriatim. On pain and suffering they rely on the fact that there was uncontroverted evidence that the deceased was hit and dragged under a motor vehicle for a distance of up to 200 meters. They state that the Deceased was an adult with a family of 4 and 3 of whom are minors.

32. On the correct principles to apply they relied on the Catholic Diocese of Kisumu – vs – Sophia Achieng Fele (2004) 2 KLR where the court stated as doth: -

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

33. They also relied on the case of Jane Chelagat Bor vs Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA47 where the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

34. They also relied on Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] eKLR to canvass the same submission.

35. On loss of dependency they relied on Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J, as he then was, held at page 248 that:

> " 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 purchases. 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 dependants and the chances of life of the deceased and dependants. 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."

36. On multiplicand, they stated that the appellant did not tender evidence to discover a sum of 20,000. They rely on Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR.

37. On the aspect of 21 years they relied on 3 including James Mutunga Mbinda v Stephen Mwalula Mulwa & another (Suing as the Legal Representatives of the Estate of Winfred Mbatha Mwalula (Deceased)) [2021] eKLR where the Court stated as follows:

> " Upon perusal of the judgement, I note that the court adopted a multiplier of 16 years not 10 years. Respondent's counsel placed reliance on the decision of Innocent Ketie Makaya Denge vs Peter Kipkore Cheserek & Anor [2015] eKLR where Githua J. upheld a multiplier of 26 years for a deceased aged 34 years. The learned Judge noted that there was evidence that the deceased was of good health prior to his death.

38. The Court of Appeal in Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR added that;

> " To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life."

Analysis

39. The Appeal is in respect of 2 issues only: -

    i. Pain and suffering

    ii. Loss of Dependency

Loss of dependency

40. The question was dealt with byte court. It debunked the aspect of lying on the post. The court found that it is true that the deceased died on the same day. However, he was dragged for almost 500 metres. This must have been so excruciating. The court awarded Ksh. 100,000/= for the same.

41. In the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, Justice Musyoka stated as doth: -

> "On damages for pain and suffering, the court, in Acceler Global Logistics vs. Gladys Nasambu Waswa & another [2020] eKLR, observed:
>
> "It is settled law that the personal representative of a deceased person can recover damages that the deceased could have recovered had he survived and which were a liability on the wrong doer at the date of death. This was enunciated in the celebrated decision of Lord Green in Rose vs. Ford. [26]
>
> 37. It is not in dispute that the deceased sustained serious injuries and that the deceased died on the spot. This raises a fundamental question of what each unit of pain and suffering is worth. This question has in my view been authoritatively discussed in an article in the International Review of Law and Economics [27] entitled "Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards" by W. Kip Viscussi who argues that: -
>
> > "Pain and suffering is generally recognized as being legitimate component of compensation but one for which we have no accepted procedure of measurement ... Pain and suffering is by no means a negligible component of awards ... The general implication is that pain and suffering awards are not entirely random or capricious."
>
> 38. The position laid down in Rose vs. Ford [28] is that where the period of suffering is short, only nominal damages are awarded. That was in 1935 and 500 pounds was awarded for a two days suffering. I am persuaded that the amount of Ksh. 50,000/= awarded under the said head is not in my view excessive nor has it been shown to be erroneous or unreasonable."

42. The Court continued in the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (supra) matter as doth: -

> " 13. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:
>
> > "[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."
>
> 14. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed:
>
> > "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

43. The recorded history shows that the former prime Minster of DRC, Patrick Lumumba was dragged for a long period while chained to the back of a vehicle. The deceased herein went through a lesser of the same but extremely excruciating. The damages that are evident from the post mortem cannot be ignored. I therefore do not find any merit in this ground of Appeal. The pain suffered was both excruciating and needless.

44. On the second issue, the Appeal was on the loss of dependency the Appellant has two subsets. These are: -

a. The multiplicand

b. The multiplier

45. The widow was barely 31 and with 5 children. She was unlikely to remarry. She was to be with the man to ripe old age of 70. Normal vicissitudes of life barred. She had a whopping 39 years to have with the man and depend on him. The youngest was 1 year old. He could have depended on the father till 21 years of age.

46. The age of majority, is just that, age of majority. The two could have attracted a higher figure than 21 years awarded by the court. However, there is no cross Appeal. I find the award on the multiplier to be proper.

47. The Court used Ksh. 12,000/= as the multiplicand. The Appellant has invited the court to use the minimum wages. hence the ages (Amendment) Order 2022. They state that the minimum wage is Ksh. 7,544.65. They do no lay basis for the use minimum wage as multiplicand.

48. The question is, what is the basis for use of the minimum wage as the m There is no law requiring that we use the multiplier multiplicand of even the minimum wage. Looking at the figure Ksh. 2,016,000/ = it is within the normal awards for the evidence tendered. The Deceased was not a worker. He was a farmer, earning his own money and capable of paying unskilled workers. The award of Ksh. 12,000 is low but not inordinately low. It is not definitely high.

49. The Court of Appeal in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR held that –

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:
>
> 'An appellate court will not disturb an award of 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."

50. From the evidence tendered it will be unjust to equate a farmer to an unskilled worker. Secondly there was no evidence that he was unskilled. Being a farmer himself, is a skill. Therefore, a proper award of the court were to use a minimum wage for a skilled artisan, the minimum for an artisan is Ksh. 21,107. I cannot find the basis for the request for the Ksh. 7,544.65 suggested by the Appellant.

51. Nevertheless, the court has not been moved by the Respondent to substitute the award with a higher award.

52. In the circumstances, I find no merit in the Appeal. I dismiss the same in limine with costs of Ksh. 155,000/= to the Respondent.

Determination

53. The upshot of the foregoing is that: -

    a. The Appeal lacks merit and is consequently dismissed with cost of Ksh. 155,000 to the Respondent.

    b. There be 30 days stay of execution, in default, execution do issue.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Nyabuto for the Appellant

No appearance for Respondent

Court Assistant - Brian