Mose v Jalango (Suing as a Personal Representative of the Estate of Peter Jalango - Deceased) (Civil Appeal E044 of 2023) [2024] KEHC 842 (KLR) (5 February 2024) (Judgment)

Neutral citation: [2024] KEHC 842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E044 OF 2023

KW KIARIE, J

FEBRUARY 5, 2024

BETWEEN

KENNEDY MOSE ..... APPELLANT

AND

LINET AKINYI JALANGO (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER JALANGO - DECEASED) ..... RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 109 of 2019 by Hon. R.B.N Maloba – Principal Magistrate)

JUDGMENT

1. Kennedy Mose, the appellant herein, was the defendant in Homa Bay Chief Magistrate's CMCC No 109 of 2019, where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KAV 970P and the deceased. The deceased was a pedal cyclist when he was fatally knocked down. The learned trial magistrate apportioned liability at 50:50. The respondent was awarded Kshs 2 176 5100.00 in general damages and Kshs 26 000.00 in special damages before factoring in contributory negligence.

2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Kimondo Gachoka & Company Advocates. He raised the following grounds of appeal:

    a. The learned magistrate erred in law and misdirected herself when she failed to consider the applicants' submissions on both points of law and facts.

    b. That the learned magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

c. That the learned magistrate erred in law and misdirected himself when she failed to consider the provisions set out in the insurance (Motor Vehicle Third Party Risks) (Amendment, Act), 2013, CAP 405.

d. The learned trial magistrate erred in law and fact in finding the appellants 50:50% liable in view of the evidence produced before the trial court and, in particular, that the respondent failed to prove his case on liability against the appellant in the trial court.

e. The learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs 50,000/- as for pain and suffering while not considering the deceased passed on the same day.

f. the learned trial magistrate erred in law and fact by awarding the estate of the deceased a sum for loss of expectation of life when it was not entitled to the same and/or the same was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

g. The learned magistrate erred in law and fact in awarding the deceased's estate a sum of Kshs 2,000,000/- for loss of dependency that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the deceased's state.

h. The learned magistrate erred in fact and law in failing to consider the appellant's submissions on quantum and Liability and legal authorities relied upon in support thereof.

i. The learned magistrate erred in law and fact by overly relying on the respondent's submissions, which were irrelevant and without addressing his mind to the circumstances of the case.

j. The learned magistrate erred in fact and law in failing to consider conventional awards in cases of a similar nature.

3. The firm of Veronica Migai & Associates Advocates represented the respondent.

4. On November 16th, 2023, the parties involved decided to proceed with the appeal through written submissions. On the 14th day of December 2023, when the matter was brought up again to ensure compliance, both counsel confirmed that they had submitted their respective written submissions. However, when writing the judgment, it was discovered that the respondent had failed to file their submissions. As a result, the judgment did not consider any input from the respondent.

5. This Court is the first appellate court. I am aware of my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.

6. The appeal is on liability and quantum concerning general damages.

7. Mary Atieno Ochieng (PW2) testified that she was a pillion passenger on the motorcycle that the deceased was riding. They were heading in the opposite direction with the motorist when the accident occurred. She, however, did not testify as to how the accident occurred.

8. The evidence of Cpl. Nicholas Muthama (PW3) was that the motorcyclist in the Arujo area turned to join a feeder road on the right. It was in the process that the accident occurred. This evidence tended to blame the motorcyclist for the accident.

9. Sgt. Alice Owino (DW1) testified that she was the investigating officer in the accident, which is the subject of this case. She blamed the motorcyclist for cutting to the right when the motorist was too close.

10. In this case, I have concluded that I must intervene with the trial court's decision regarding responsibility. I hereby replace it with a 70% liability attributed to the deceased and a 30% liability to be borne by the appellant.

11. The appellants contended that the respondent's award was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 on page 356, Law JA stated:

> ...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 a figure which was either inordinately high or low.

12. Linet Akinyi Jalang'o (PW1), the deceased's widow, contended that he made about Kshs 50 000/= per month as a boda-boda rider. There was, however, no proof of his earnings. In *Albert Odawa v Gichimu Githenji*; Nakuru HCCA No 15 of 2003 (2007), eKLR Justice Ringera expressed himself as follows:

> 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 valuable 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.

In the instant case, the global sum approach was the most appropriate in assessing damages in the circumstances.

The deceased herein died at the age of 25 years. He was in informal employment. In life, one cannot predict how fortunes will turn out. I do not find the award of Kshs 2,000,000/= for loss of dependency inordinately high. This award will not be disturbed. The awards of pain, suffering, and loss of expectation of life are within the acceptable range. They will not be disturbed.

13. The appeal, therefore, partially succeeds on liability. The appellant will be entitled to half the costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF FEBRUARY 2024

KIARIE WAWERU KIARIE

JUDGE