Onyango & another v Kasera (Suing as a personal representative of the Estate of Eliakim Osiro Ondura - Deceased) (Civil Appeal E015 of 2022) [2024] KEHC 877 (KLR) (5 February 2024) (Judgment)

Neutral citation: [2024] KEHC 877 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E015 OF 2022

KW KIARIE, J

FEBRUARY 5, 2024

BETWEEN

ANTHONY OCHIENG ONYANGO ..... 1ST APPELLANT

MOTOROLOGY LIMITED ..... 2ND APPELLANT

AND

AKINYI KASERA (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIAKIM OSIRO ONDURA - DECEASED) ..... RESPONDENT

(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's PMCC No. 189 of 2019 by Hon. B. Omwansa – Senior Principal Magistrate)

JUDGMENT

1. Anthony Ochieng Onyango and Motorology Limited, the appellants herein, were the defendants in Oyugis Senior Principal Magistrate's PMCC No 189 of 2019, where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KCQ 794V and the deceased. The deceased was a pedal cyclist when he was fatally knocked down. The learned trial magistrate apportioned liability at 80:20 in favour of the respondent. The respondent was awarded Kshs 1 500 00.00 in general damages and Kshs 53 700.00 in special damages before factoring in contributory negligence.

2. The appellants were aggrieved by the judgment and filed this appeal through Kimondo Gachoka & Company Advocates. They raised the following grounds of appeal:

    a. The learned trial magistrate erred in law and, in fact, failed to consider and appreciate the applicable principles in assessing damages and thereby arrived at an excessive and unjustified award.

b. The learned trial magistrate erred in law and fact in awarding a global award of Kshs 1,500,000/- being general damages, an amount that was inordinately high, unjustified and contrary to the evidence on record.

c. The learned trial magistrate erred in law and fact by failing to appreciate and find that the deceased was aged 53 years old, thereby applying the minimum wage and multiplier approach, which would have been most appropriate.

d. The learned trial magistrate erred in fact and law by ignoring and/or failing to consider the appellants' submissions on Quantum and the legal authorities relied upon in support thereof.

e. The learned trial magistrate erred in fact and in law in relying on extraneous circumstances not supported by the evidence on record.

f. The learned trial magistrate erred in law and fact by overly relying on the respondent's submissions, which were not relevant and without addressing his mind to the circumstances of the case.

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

3. The respondents opposed the appeal through the firm of Nyatundo & Company Advocates. The respondent contended that it had not been demonstrated that the trial court acted on wrong principles and that the award was not inordinately high.

4. 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.

5. The appeal is on liability and quantum with respect to general damages.

6. Kiplagat Cheboi (PW2) testified that it was indicated in the OB that when the accident occurred, the deceased was crossing the road. This information was attributed to the driver. It was not clear whether he crossed the road at a safe distance or not. This is a case where it was not established who caused the accident. Whenever both parties blame each other for the accident in issue and where the court is not given sufficient evidence to base liability on, both parties are held liable. This was restated by the Court of Appeal in the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR, where it stated:

   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.

7. In the instant case, I am persuaded to interfere with the trial court's finding on liability. I set it aside and substitute it with a liability of 50:50.

8. The appellants contended s that the award to the respondent 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.

9. Rose Akinyi (PW1), the deceased's widow, contended that she was making about Kshs 500/= per day. 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 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.

The learned trial was the most appropriate approach in assessing damages in this case. There is nothing magical in applying the minimum wage and multiplier approach. In any case, there was no proof of the earnings of the deceased for this approach to be used.

10. The deceased herein died at the age of 53 years. The deceased had slightly more than twenty years to be productive. I have perused the decisions relied on by both parties in the trial court and this court. I do not find the award of Kshs 1,500,000/= inordinately high. This award will not be disturbed. I will equally not disturb the award in special damages.

11. 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