Mutuki alia Meshack Mutuko v Mweu (Suing as the personal representative of the Estate of Julius Mweu Mbiti) (Civil Appeal E001 of 2022) [2024] KEHC 2348 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2348 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E001 OF 2022

FROO OLEL, J

MARCH 6, 2024

BETWEEN

MESHACK ILIA MUTUKI ALIA MESHACK MUTUKO ..... APPELLANT

AND

FREDRICK SENGA MWEU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JULIUS MWEU MBITI) ..... RESPONDENT

(Being An Appeal From The Judgement Of The Hon Martha Opanga, Principal Magistrate Delivered On 14Th December 2021 In Kangundo Pmcc No. 76 Of 2017)

JUDGMENT

A. Introduction

1. The Appellant was the Defendant in the Primary suit, where he had been sued for General damages under the Fatal Accident Act, & *law reform Act* and the Respondent also sought for Special damages arising from a road traffic accident that occurred on 25.02. 2017 along along Kangundo- Nairobi road at Tala Bus Park, where it was alleged that the deceased was lawfully walking off the road when the Appellant, his servant or agent negligently drove, controlled and/or managed motor vehicle registration number KCH 129P Toyota Van, (Hereinafter referred to as the suit Motor Vehicle) that it veered off the road, and violently knocked the deceased as a result of which he suffered fatal injuries.

2. The Appellant filed his statement of defence on 12.09.2019 denying the contents of the plaint and/or occurrence of the said Accident. In the alternative he did contend that, if indeed the accident did occur, then the deceased substantially contributed to the said accident due to his negligence/carelessness, which was particularised. The appellant prayed that the suit be dismissed with costs.

3. The matter proceeded for trial. The respondent did testify and produced documents to support his claim, while the Appellant opted to close his case without calling any witness to testify on his behalf.

The Trial Court considered the evidence adduced and found the Appellant 100% liable for the accident and awarded the respondent damages as follows;

a. General damages under the *Law Reform Act* and *Fatal Accidents Act*;

i. pain and suffering Kshs.50,000/=

ii. loss of expectation of life Kshs.100,000/=

iii. loss of dependency Kshs.800,000/=

b. special damages of Kshs.245,815/=

c. Plus costs and Interest.

4. The Appellant being dissatisfied by this judgment, filed his Memorandum of Appeal dated 03.01.2022 seeking to have the whole judgement on quantum set aside and the same assessed a fresh together with costs of the Appeal. The Appeal is founded on the grounds that;

a. The Learned Trial Magistrate erred in law and fact in disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum.

b. The Learned Trial Magistrate erred in law and fact by holding the defendant/appellant 100% liable in total disregard of the circumstances leading to the cause of the accident.

c. The Learned Trial Magistrate erred in law and fact in not making an award which was within limits of already decided cases of similar nature.

d. The Learned Trial Magistrate erred in law and fact in awarding judgment as follows; pain and suffering Kshs.50,000/=, loss of expectation of life Kshs.100,000/=, loss of dependency Khs.800,000/= and special damages Kshs.245,815/= without showing how he arrived at those figures and in total disregard of the submissions of the defendant on the issue of quantum and liability.

B. Facts of the case

5. At the trial, the respondent herein, adopted his witness statement and further did testify that on 25.2.2017, his sister called and informed him that, she had received a call from Kangundo level 4 hospital informing her that their father had been knocked down by the suit motor vehicle and had sustained fatal injuries . He died at the accident scene in Tala and was taken to the morgue in an ambulance. He stated that his father, (the deceased herein) had left behind 7 children and was a farmer who grew coffee and was a member of Muisuni coffee farmers' co-operative society where he had savings. Further, they had incurred costs of Kshs.244,000/= as funeral expenses.PW1 produced all the documents in the list of document's as Exhibits to support his claim.

6. Upon cross examination PW1 stated that he was not at the accident scene and could not tell how the accident occurred or who was to blame for the accident. The police abstract also showed that the matter was pending under investigation. He further testified that his father was in his 70s and he depended on him for subsistence as he was still in college at the time of his death. PW1 further stated that he had produced a document, which showed that his father earned Kshs.91,000/= from the farmers' cooperative Sacco, but had not produced filed KRA returns.

7. The Appellant opted to close his case without calling any witness.

C. Submissions

8. The Appellant filed his submissions on 13.12.2023 and submitted that the award of loss of dependency given was inordinately high considering that the deceased was 65 years old and no evidence of proof of earnings was submitted in evidence. The Kshs 10,000/= which was adopted by the trial court as the salary/benefits that the deceased earned was unfounded and speculative. It was therefore in such a case more prudent to use the global award approach in determining the appropriate quantum for loss of dependency. Reliance was placed on 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] e KLR , Stanwel Holdings Limited & Another v Rachel Haluku Emanuel & Another [2020] e KLR.

9. The Appellant further relied on the cases of Peter Wainanina & Another vs Lucia Ndulu Muindi & Another [2021] e KLR , China Civil Engineering & Another v Mwanyoha Kazungu Mweni & Another [2019] e KLR ,Dora Mwawandu Samuel (Suing on her behalf and on the behalf of the estate of Samuel Muweliani Jumamosi (deceased) v Shabir M Hassan [2021] e KLR to buttress his submissions on the global award approach and proposed that a sum of kshs 500,000/= would be adequate for loss of dependency.

10. The Respondent on the other hand filed his submissions on 29.05.2023 where, he submitted that this Appeal was premised on the ground that the learned Magistrate erred and misdirected herself in law by misapprehending and misunderstanding the principles applicable is assessing quantum, where no proof of earnings had been proved and therefore awarded an inordinately high amount for loss of dependency so as to constitute an entirely erroneous estimate of the damages given, considering the circumstances of this case.

11. The Appellant had not tendered any evidence before the trial court to rebut the respondent's evidence and in such instances, the court had no option but to believe the respondents version of events. In addition, it was not open of the Appellant to rely on his written submissions to defend his case as that did not amount to evidence in law. Reliance was placed on the cases of Edward Muriga through next friend Stanley Muriga vs Nathaniel D. Schulter Civil Appeal No 23 of 1997, John Katua Mwalula Kivula v Daniel Ibuku Muketi [2021] e KLR,Erastus wade opande v Kenya Revenue Authority & Another Kisumu HCCA No 46 of 2007, Nancy Wambui Gathera v Peter W Wanjere Ngugi Nairobi HCCC NO 36 of 1993 & Ngang'a & Another v Owiti & Another [2008] 1KLR (EP)749.

12. On the issue of liability, the Respondent, submitted that the deceased was lawfully walking off the Kangundo – Nairobi road at Tala Bus Park area where the suit motor vehicle was negligently driven by the appellant and/or his agent servant and/or employee that it knocked down the deceased and fatally injured him. The appellant did not tender any evidence to rebut the respondent's version of events and thus the trial magistrate was right to find that he was 100% liable for causing this accident. Reliance was placed on the case of Kemfro Africa Limited t/a Meru express Service , Gathogo Kanini v A.M Lubia and Olive Lubia [1987] KLR 30, Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] e KLR, Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] Eklr and Monalisa Hotel Limited vs Elizabeth Habin Telephone & another [2020] to buttress this point.

13. Finally, on the issue of quantum, it was submitted that the deceased was 65 years of age, strong and of robust health. He was a farmer earning a monthly income of kshs 10,000/= per month as a member of Muisuni Farmers' cooperative society. The current jurisprudence recognized that not all earning had to be proved by documentary evidence such as bank statement or payment vouchers and thus there was no need to disturb the awards given by the Trial court. To buttress this point, the Respondent

relied on the following cases West Kenya sugar co limited vs Philip Sumba (Suing as the Administrator and personal represnstative of the estate of James Julaya Sumba [2019]e KLR, Hyder Nthenya Musili & Another v China Wu Yi limited & Another [2017]e KLR, Mercy Muriuki and another v Samuel Mwangu Ndiati and another suing as the legal administrator of the estate of the late Robert Mwangi [2019] e KLR , Sukari industries Limited v Clyde Machimbo Juma Homabay [206]e klr, Muthike Muciimi Nyaga (suing as administrator of the estate of James Githinju Muthike (deceased) v Dubai Superhardware [2021] e KLR, , Sokoro Plywood Limited & Another v Njema Wainaina [2007] e KLR and Ainu Shamshi Hauliers Limited v Moses Sakwa & another (suing as the adminsitrators of the estate of te late Ben Siguda Okatch (deceased) [2021] e KLR.

14. The court was also urged not to disturb the award of special damages as it was pleaded and proven. The respondent urged that court to find that this appeal was without merit and prayed that it be dismissed with costs.

D. Analysis & Determination

15. I have considered the, record of appeal, the trial court record, the Memorandum of Appeal and the submissions of the parties. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and satisfy itself that the decision reached was well-founded.

16. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs [2001] 3 SCC 179.

17. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko v Varkey Joseph AIR 1969 Keral 316

18. Accordingly, I have re-evaluated the evidence that was presented before the lower court and I note that as far as the award of liability is concerned, the same is not contested in this appeal and this is rightly so as the appellant did not adduce any evidence before the trial court to rebut the respondent's case. Further special damages too were pleaded and proved. What the Appellant has taken issue with is the quantum as awarded for loss of dependency and it was submitted that it was not proved that indeed the deceased, who was 65 years old at the time of his demise, was earning any salary and/or benefits from Muisuni Farmers' cooperative society and in the circumstance, it would have been more appropriate to use the global award method in assessing loss of dependency.

19. The Respondent on the other hand did contend that the evidence produced in the Trial court remained uncontroverted therefore the award should not be disturbed. From the record, the Appellant did not adduce any evidence before the court. He only filed his statement of defence and at a later stage, after trial filed his final submission. These pleadings were not evidence and therefore their case stood uncontroverted.

20. With regards to interference of the award of damages, it was observed in the case of H. West & Son Ltd v Shephard [1964] AC 326, that:

> " ...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

21. The Court of Appeal in Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 held that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

22. The Principles were also set out by the Court of Appeal in the case of

Southern Engineering Company Ltd. v Musingi Mutia [1985] KLR 730 where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, 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 in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear

a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

23. In this case, the deceased was 65 years of age at the time of his death and had seven children. It was pleaded in the plaint, that he was a farmer who grew coffee and was a member of Muisuni farmers' co-operative society where he had earnings from his coffee deliveries and in the year 2016, had earned Kshs.91,000/=. To prove this fact, the respondent did produce a letter dated 12th October 2017 from the said farmers society showing the deceased earnings from 2010 to 2016. While the respondent did content that there was no evidence of proof of earnings indeed this letter was produced by consent as Exhibit 10. It is therefore not true that no proof of earnings was presented as alleged by the Appellant.

24. As regards loss of dependency, the court awarded a sum of Kshs.800,000/= . The Trial court noted as follows; ".....the deceased was 65 years old when he died was of sound health and energetic. The ceased would have lived up to the age of 80 years were it not for the accident. He was a member of Muisuni farmers co-operative society and earned Kshs.10,000 per month. He left behind seven dependents." and proceeded to compute the award for loss of dependency as follows Kshs.10,000 x12 x 10 x2/3= Kshs.800,000/=.

25. The Appellant proposed that a global award approach be used to determine loss of dependency since the deceased was not salaried. In the instance appeal, it was adequately proved that the deceased had earnings as a coffee farmer and from the letter dated 12th October 2017 (Exhibit 10) it is seen that the deceased earnings from 2010 to 2106 averaged between Kshs.100,000/= to Kshs.160,000/= yearly. This converts to an average earing of Kshs.10,000/=per month and was thus proved. There was no need to assess quantum using the global award method or basis for interference with the award on dependency.

26. I have also considered the case of Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR where the deceased died at the age of 68 years and left one dependent, the court awarded Kshs.800,000/= under this head. Also in the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR the court awarded Kshs.700,000/= for a deceased who died at the age of 79 year old.

E. Disposition

27. The upshot and from analysis of the pleading and the law I do find that this appeal is unmerited and the same is dismissed with costs to the Respondent.

28. The costs of this appeal are assessed at Ksh.150,000/= all inclusive.

29. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF MARCH, 2024.

FRANCIS RAYOLA OLEL

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MARCH, 2024.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant