



Omwenga v Omari & another (Suing as the Legal Representatives of the Estate of Brian Onsongo - Deceased) (Civil Appeal E005 of 2020) [2024] KEHC 2775 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E005 OF 2020
WA OKWANY, J
MARCH 7, 2024**

BETWEEN

JAPHETH OMWENGA APPELLANT

AND

WILTER KEMUNTO OMARI & PRISKA NYANCHAMA OMARI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BRIAN ONSONGO - DECEASED) RESPONDENT

(Being an Appeal from the Judgment/Decree in Nyamira CMCC No. 98 of 2019 delivered by Hon. C.W. Waswa, Resident Magistrate delivered on 12th October 2020)

JUDGMENT

1. The Appellant herein was the Defendant before the trial Court where the Respondent sued him seeking damages under both the Fatal Accidents Act and the Law Reform Act following a road traffic accident that occurred on 15th day of June 2018.
2. The Respondent's case was that the deceased, Brian Onsongo, was lawfully performing his chores at home next to Kisii-Miruka road, at Miruka area or thereabouts when the Appellant's motor vehicle Reg. No. KCM 513G Toyota Matatu knocked him down thus occasioning him fatal injuries. It was the Respondent's case that the Appellant's employee, driver and/or agent drove the said vehicle negligently, carelessly and/or recklessly. The Respondent stated that the deceased's estate suffered loss and damage, as a result of the said accident.
3. The case proceeded for trial before the lower court where evidence was presented as follows: -
4. PW1, the Respondent herein, adopted her witness statement dated 7th July 2019 wherein she stated as follows: - That on 15th June 2018, at around 1.00 p.m. she received a phone call from her brother informing her that a vehicle had lost control and driven into their compound knocking her father, son



- and a cow. That she was informed the two were in critical condition so she rushed to the hospital and later reported the incident to the police station where she was issued with a police abstract. That the deceased was a bright child who had dreams of becoming a lawyer in future. That the deceased was helpful at home where he was knocked down while attending to the cows. She blamed the Appellant's driver for the accident. She claimed Kshs. 200,000/= for funeral expenses.
5. PW2, Onyiengo Omari, testified that he was at home, on 15th June 2018, going about his business while his father was tending to their cows and his brother (the deceased) was cutting nappier grass for their cows. He heard a loud bang from the road and saw a Matatu drive through the fence of their home which was next to the road and knock down the deceased before dragging him for some distance until it hit a tree and fell on its side. The deceased died in the accident.
 6. The Defendant (Appellant) did not present any evidence in the trial court.
 7. At the end of the case, the trial court entered judgment in favour of the Respondents as follows: -
Liability at 100% against the Appellant
 - a. Special Damages – Kshs. 80,400/=
 - b. Loss of dependency - Kshs. 700,000/=
 - c. Loss of expectation of life - Kshs. 100,000/=
 - d. Pain and suffering – Kshs. 30,000/=
 - e. Total Net Award - Kshs. 910,400/=
 - f. Costs and interest at current rates
 8. Aggrieved by the decision of the trial court, the Appellant instituted the present Appeal and listed the following grounds of Appeal in the Memorandum of Appeal.
 1. The learned Trial Magistrate proceeded on wrong principles when assessing damages awardable and failed to apply precedents and tenets of the law applicable thereby arriving at an erroneous and excessive award of Kshs. 910,000/=.
 2. The learned Trial Magistrate erred in fact and in law by awarding an award on loss of dependency without appreciating the fact that the deceased was a minor aged 12 years at the time of death.
 3. That the learned Trial Magistrate failed to adequately evaluate the evidence and submissions tendered in support of the defence case and thereby arrived at an erroneous award.
 9. The Appellant now seeks orders to set aside the award made by the trial court. He urged this court to re-assesses the general damages in line with the evidence on record.

The Appellant's Submissions

10. The Appellant submitted that the Respondent did not produce evidence to show that the deceased attended any school and that the global figure approach adopted by the trial court therefore led to an inordinately high award under loss of dependency. It was submitted that the deceased's future was unpredictable as there was no way of ascertaining if he could have become a lawyer as alleged by PW1.
11. The Appellant urged the Court to exercise its discretion and alter the award of damages under the heading of loss of dependency. For this argument, the Appellant cited the following cases; Ogotu vs. Makairo 3Bs Trading Co. Ltd (1985) eKLR, Charles Ouma Otieno & Another v. Benard Odhiambo



- Ogecha (suing as the Brother and Legal Representative & Administrators of the Estate of the late Oscar Onyango Ogecha –deceased) (2014) and Kenya Wildlife Services v Geoffrey Gichuru Mwaura (2018) eKLR where the courts considered the fact that the future uncertainties of the deceased minors were too great to give a definitive approach in assessing damages under loss of dependency.
12. Reference was also made Chen Wembo & 2 Others v I K & Another (suing as the legal representatives and administrators of the Estate of the C R K – deceased) (2017) eKLR; Rosemary Onyango & Another v Mohammed Jenjewa Ndoyo & Another (2019) eKLR and Kenya Power & Lighting Company Limited v Eric Mlongo Owino (suing as the Legal Representative of the Estate of Johnstone Owino – deceased) (2020) eKLR where the courts reduced awards under loss of dependency respectively as follows: Kshs. 1,680,080/= to Kshs. 600,000/= for a deceased 12-year-old; Kshs. 1,000,000/= to Kshs. 500,000 for a deceased 8-year old; and Kshs. 500,000/= upheld for a deceased 10-year old.
 13. The Appellant proposed an award of Kshs. 500,000/= under loss of dependency. He also sought to be awarded the costs of the Appeal.

The Respondents' Submissions

14. The Respondent did not file any submissions in this Appeal.

The Duty of the Court

15. It is trite that the duty of a first appellate court is to subject the entire evidence of the trial court to a fresh analysis and to arrive at its own findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. In *Sembuya vs Alports Services Uganda Limited* [1999] LLR 109 (SCU), Tsekooko JSC at 11 held thus: -

“.....There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).”

Analysis and Determination

16. I have considered the Record of Appeal and the parties' respective submission together with the authorities that they cited. I find that the main issue for determination is whether the trial court made the correct finding on quantum especially in respect to the assessment of damages under 'loss of dependency'. It is noteworthy that the Appellant did not contest the trial court's finding on liability and assessment of damages under other headings I will therefore confine my determination to the issue of loss of dependency.
17. The principles governing an appellate court when determining whether it can interfere with the trial court's assessment of damages were outlined in the case of *Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others* [2014] eKLR and restated in *Kenya Revenue Authority & 2 Others v Darasa Investments Limited* [2018] eKLR as follows: -

“.....whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest



from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”

18. The above principles require an appellate court to satisfy itself that the trial court acted on some wrong principles or failed to consider a relevant factor or considered an irrelevant fact and therefore arrived at an erroneous estimate when assessing damages.
19. As I have already pointed out in this judgment, the Appellant’s contended that the Respondent did not tender any evidence to show that the deceased, who was aged 11 years at the time of his death, was a school-going child. It was therefore the Appellant’s case that the court had no way of ascertaining if the deceased would have lived to fulfil his dream of becoming a lawyer. It was submitted that the award of Kshs. 700,000/= for loss of dependency was inordinately high.
20. A perusal of the evidence on record shows that the Respondent did not tender any evidence to show that her deceased son attended school. My view, however, is that the mere fact that there was no proof that the deceased was a school-going child does not connote that he was not capable of making non-monetary contributions to his family. Indeed, the Respondent’s testified that her son met his death while tending to their cows in the homestead. I note that this was a demonstration that the deceased was engaged in domestic chores which, I find, was his contribution to the family. In *William Juma vs. Kenya Breweries Ltd. Nairobi HCCC NO. 3514 of 1985* the court held thus: -

“In this country, the courts have taken into account the nature of our society and have correctly held that parents expect financial help from their children when they grow up. It is recognised that in our society children render useful services in the house or in the shamba, which relieves parents from financial expenditure on, say an employed worker. Those free services can be converted into money. The courts therefore have been awarding a lumpsum figure to compensate parents of young children for pecuniary loss they have suffered or expect to suffer.”
21. Guided by the above decision, I find that since the deceased’s contribution to his family was not in the form of monthly income that would have enabled the Court to consider employing the Multiplier approach in assessing damages, the global sum approach was more suitable in the assessment of damages. It is also trite that similar awards ought to be made in cases with comparable injuries. (See *Stanley Maore v Geoffrey Mwenda [2004] eKLR*).
22. I have considered the following cases comparable cases: -
 - a. In *D M (Suing as The Administrator and Legal Representative of the Estate of L K M v Stephen Johana Njue & another [2016] eKLR, Gikonyo J.* set aside an award of Kshs. 700,000/= under loss of dependency and substituted it for Kshs. 1,200,000/= where the deceased died at the age of 16.
 - b. In *Charles Makanzie Wambua v Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased) [2020] eKLR, Odunga J (as he then was)* upheld an award of Kshs. 1,320,000/= where the deceased was 17 years old.
 - c. In *Fredrick Kimokoti Imbali & 2 others v AKW & another (Suing as Legal administrators of the Estate of the late AK (Deceased) [2019] eKLR, Riechi J.* upheld an award of Kshs. 880,000/= for loss of dependency in respect of a deceased 11-year-old minor.



- d. In *Rosemary Onyango & another v Mohamed Jenjewa Ndoyo & another* [2019] eKLR, Korir J. reduced an award of Kshs. 1,000,000/= for loss of dependency to Kshs. 500,000/= in respect of a deceased who was 7 years and 8 months old.
- e. In *Transpares Kenya Ltd & another v S.M.M (suing as Legal Representative) of the estate of EMM (Deceased)* [2015] eKLR the court awarded Kshs. 500,000/= for loss of dependency in the case of a deceased 5 years old child.
23. Guided by the above decisions, I find that the age of a deceased minor is vital in determining the appropriate assessment of damages under loss of dependency. This is to say that in cases where a deceased minor is either already in school or engaging in household activities, the courts would consider higher awards as compared to instances where the deceased is a younger minor. This was the finding, by the Court of Appeal, in *Kenya Breweries Limited v Saro* [1999] KLR 408 where it held thus: -
- “..... the age of a deceased child is a relevant factor to be taken into account so that in the case of say a thirteen (13) year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four (4) year old one who has not been at school and whose abilities are not yet ascertained. That we think is a case of common sense rather than law”
24. In the present case where the deceased was 11 years old, the award would range from Kshs. 500,000/= to 900,000/=. I note that the trial court considered proposals made by both parties and the evidence on record in determining loss of dependency. I find that the award was appropriate and fell within the range of awards made in respect to deceased minors of the same age. I therefore find no justification for interfering with the trial court’s assessment.
25. In sum, I find that this appeal is not merited and I therefore dismiss it with costs to the Respondent which I hereby assess at Kshs. 35,000.
26. Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

W.A. OKWANY

JUDGE

