



Mutunga v Nyamasyo (Suing as Administrator and Personal Representative of the Estate of Liam Mutunga - Deceased) (Civil Appeal E177 of 2022) [2024] KEHC 3816 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E177 OF 2022
FR OLEL, J
APRIL 12, 2024**

BETWEEN

HUGH MAKAU MUTUNGA ALIAS MAKAU MUTUNGA APPELLANT

AND

VICTORIA MUENDI NYAMASYO (SUING AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF LIAM MUTUNGA - DECEASED) RESPONDENT

(Being An Appeal From The Judgement And Decree Of The Hon M.E Analo (Srm) Dated 2 Nd November 2022 In Macahkos Cmcc No 660 Of 2021)

JUDGMENT

A. Introduction

1. This appeal arises from the judgement/decree of Hon. M.e. Analo (SRM) dated 2nd November 2022 delivered in Macahkos Cmcc No. 660 of 2021, where he found that the Appellant was liable to compensate the respondent to the tune of Kshs 822,272.50/= less 5% contributory negligence, plus costs and interest

B. Pleadings

2. The respondent herein, being the plaintiff in the primary suit vide her plaint dated 30th November 2021, had sought for General damages under the *Fatal Accidents Act* and *law reform Act* plus special damages of Kshs 45,550/= arising from a fatal road accident which occurred 18.09.2019 on , along Nairobi- Mombasa Road At Kanani Area between motor vehicle registration No KBR 906A Toyota Mark II,(hereinafter referred to as the 1st suit Motor vehicle) and motor vehicle registration No KBN 256R Toyota Matatu (herein after referred to as the 2nd suit Motor vehicle).



3. It was alleged that on the said date, the deceased was lawfully travelling as a passenger on the 1st suit motor vehicle along Nairobi - Mombasa Road At Kanani Area, when the Appellant and/or his driver/employee negligently, carelessly and/or recklessly drove, controlled the 1st suit motor vehicle so that he permitted the said motor vehicle to loss control and violently collide with the 2nd suit motor vehicle as a result of which the deceased suffered fatal injuries.
4. The Appellant herein, were blamed for causing the said accident and the particulars of negligence pleaded. As a result of the said accident, the respondent averred that she lost a young, strong son aged nine (9) months and was survived by the respondent, who was her mother. The family had suffered as a result of his painful death and prayed for damages under the *fatal accidents Act* and *law Reform Act*. The respondent also prayed for special damages of Kshs.45,550/= plus costs and interest of the suit.
5. The Appellant, filed his statement of defence dated 25th February 2022, wherein he denied all the averments made in the plaint and further denied that the accident which occurred on 18.09.2019 was caused by him, or his agent/driver's negligence and/or carelessness. In the alternative and without prejudice to the above, the Appellant did aver that if an accident did occur, it was caused and/or substantially contributed to by the deceased negligence, which details were particularized in the statement of defence. The Respondent did file her reply to Defense, where she traversed all issues raised in the statement of defence.

B. Evidence at Trial.

6. The parties did on 01.09.2022 enter into a consent on liability, where it was agreed that the Appellant would bear 95 % of the liability as against 5% placed on the Respondent. Further the parties admitted all the respondent documents by consent and agreed that the issue of quantum be disposed off by way of written submissions. The learned magistrate considered the evidence tendered and in his considered judgment delivered on 2nd November 2022 awarded the respondent Kshs.20,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs.700,000/= under the *Fatal accidents Act* and Kshs.45,550/= for special damages plus cost and interest of this suit.
7. The Appellant being dissatisfied by the award did file their memorandum of Appeal on 1st December 2022 and raised the following grounds of appeal namely: -
 - a. That the learned trial Magistrate erred in law and in fact by failing to consider the age of the deceased minor and the relevant precedents thereof hence came to a wrong assessment of damages.
 - b. That the learned trial Magistrate erred in law and in fact by failing to provide the basis for his award of Kshs 700,000/= as loss of dependency in the circumstances.
 - c. That the trial Magistrate erred in awarding a global sum in respect of damages which was inordinately high in the circumstances and was excessive occasioning miscarriage of justice.
 - d. That the learned Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
 - e. That the learned trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent, if any and failed to apply precedents and tenets of the law Applicable.
 - f. That the learned trial Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.



8. The Appellant therefore prayed that this Appeal be allowed and the Judgement of the trial court dated 2nd November 2022 be set aside.

B. Submissions

9. The Appellant did file his submissions dated 1st September 2023 where he urged the court to find that the award of Kshs.700,000/= under the heading of loss of dependency was inordinately high and therefore warranted the intervention of this Honourable court. Reliance was placed on *Kemfro Africa Limited Vrs Lubia & Ano* (1987) KLR 30 Further the trial magistrate was faulted for failing to consider the Appellants submissions yet the same were filed therefore occasioning miscarriage of justice. Considering similar awards, a Global sum of Kshs 400,000/= would have been appropriate and adequate. Reliance was placed on *GKN & Ano (Suing as personal representatives of the Estate of GNL (Deceased) vs Civiscope Limited* (2021) eKLR & *John Okumu Juma Vs Godfrey orono Wesonga* (2021) eKLR.
10. The respondent on the other hand filed their submissions dated 18th September 2023 in opposition to this Appeal. She submitted that the award arrived at by the trial court was reasonable and not excessive under the circumstances and the same was arrived at after the court had considered all the relevant factors of the case. There was therefore no basis of interfering with the said award. The Appellant was further faulted for filing his submissions late after the prescribed time and therefore could not blame the trial court for his own mistake.
11. The respondent further placed reliance on the case of *GKN & Ano (Suing as personal representatives of the Estate of GNL (Deceased) vs Civiscope Limited* (2021) eKLR & *Gitobu Imanyara & 2 others Vs Attorney General* (2016) eKLR where the courts held that it was a firmly established principle that the appellate court will not disturb the finding of a trial judge as to damages merely because they think that they would have awarded or arrived at a different award. Before interfering with an award of the trial court, the court had to be convinced that the sum arrived at was excessively high or low so as to make it entirely erroneous estimate of damages or that the trial judge made the award based on some wrong principle and failed to take into consideration matters which it ought to have taken and in doing so arrived at a wrong figure.
12. The award of Kshs.700,000/= for loss of dependency was adequate and reasonable under the circumstance and the respondent thus urged the court not to interfere with the same. Reliance was placed on *Mombasa Maize Millers Ltd & Ano Vrs John Kaingu & Another* (2020) eKLR & *Emmanuel Wasike Wabukesa Vrs Muneria Ndiwa Burman* (2019) eKLR where similar awards were made.
13. The respondent therefore pray for this court to find that this Appeal was misconceived and proceed to dismiss the same with costs.

B. Analysis and Determination

14. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions of the parties herein. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor, however the court will analyze the evidence before it and arrive at its own independent conclusion. I am therefore guided by the case of *Selle & Another Vs Associated Motor Boat Company Limited & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270.

15. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

16. In this Appeal, the parties did enter into a consent on liability and had the suit determined on the basis of written submissions. Once liability was agreed upon, and it was accepted that the deceased died as a result of the accident, which occurred 18.09.2019 the only question which arises in this Appeal is whether, the sum of Ksh 700,000/= awarded for loss of dependency was adequate and/or was excessive under the circumstance.

17. With regards to interference of the award of damages, it was observed in the case of *H. West & Son Ltd vs. 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.”

18. The Court of Appeal in *Sheikh Mustaq Hassan vs. 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...”

19. For similar awards as shown in *Mombasa Maize Millers Ltd & Ano Vrs John Kaingu & Another* (2020) eKLR & *Emmanuel Wasike Wabukesa Vrs Muneria Ndiwa Burman* (2019) eKLR *GKN & Ano (Suing as personal representatives of the Estate of GNL (Deceased) vs Civiscope Limited* (2021) eKLR & *John Okumu Juma Vs Godfrey orono Wesonga* (2021) eKLR for minor children the court usually adopt the global award method in assessing damages for loss of dependency, which is basically compensation, to the family for loss of a loved one/child.
20. The appellant has not shown that the trial magistrate used the wrong principles or misapprehended the evidence in some material aspect. As regards the award, the law is clear that the appellate court will be disinclined to disturb the finding of a trial court as to damages merely because they think that if they had tried the case in the first instance, they would have given a large or lesser award.
21. The award of Ksh.700,000/= is not inordinately high so as to make it entire erroneous estimate of damages to which the respondent is entitled to and is clearly within the range of similar awards as shown in *Mombasa Maize Millers Ltd & Ano Vrs John Kaingu & Another* (2020) eKLR & *Emmanuel Wasike Wabukesa Vrs Muneria Ndiwa Burman* (2019) eKLR

B. Disposition

22. The upshot and from analysis of the pleading and the law I do find that this appeal lacks Merit and the same is dismissed with costs to the Respondent.
23. The costs are assessed at Kshs.120,000/= all inclusive.
24. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 12TH DAY OF APRIL, 2024.

In the presence of;

Ms Kosgey for Appellant

Ms Muthoki for Respondent

Sam Court Assistant

