



Zion Tours Limited & 2 others v Munyao & Muindi (Suing as Administrators of the Estate of Brian Mumo Munyao - Deceased) (Civil Appeal E35 of 2021) [2024] KEHC 3809 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E35 OF 2021
FR OLEL, J
APRIL 12, 2024**

BETWEEN

**ZION TOURS LIMITED 1ST APPELLANT
MULUMBI MUTISO BENJAMIN 2ND APPELLANT
STEPHEN MUNGUTI WAMBUA 3RD APPELLANT**

AND

CAROLYNE NDINDA MUNYAO & CHARLES MWENDWA MUINDI (SUING AS ADMINISTRATORS OF THE ESTATE OF BRIAN MUMO MUNYAO - DECEASED) RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT AND DECREE OF THE HON B.BARTOO (SRM) DATED 25th FEBRUARY 2021 IN MACAHKOS CMCC NO 435 OF 2018)

JUDGMENT

A. Introduction

1. This appeal arises from the judgement/decree of Hon. B. Bartoo (SRM) dated 25th February 2021 delivered in Machakos CMCC No. 435 of 2018, where he found that the Appellant was liable to compensate the respondent to the tune of Kshs.1,530,500/= less 10% contributory negligence, plus costs and interest.

B. Pleadings

2. The respondents herein, being the plaintiffs in the primary suit vide their plaint dated 28th March 2018, had sought for General damages under the Fatal Accidents Act and law reform Act plus special damages of Kshs.130,500/= which cause of action arose from a fatal road accident which occurred on



04.06.2017, along Machakos- Wote Road at Katuaa Area between motor vehicle registration No KBJ 834L Nissan Saloon,(hereinafter referred to as the 1st suit Motor vehicle) and motor vehicle registration No KBK 428X Mitsubishi Bus (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 Macahkos- Wote Road at Katua Area, when the 3rd Appellant negligently, carelessly and/or recklessly drove, controlled the 2nd suit motor vehicle so that he permitted the said motor vehicle to loss control and violently collide with the 1st suit motor vehicle as a result of which the deceased suffered fatal injuries.
4. The Appellants herein, were blamed for causing the said accident and the particulars of negligence pleaded. As a result of the said accident, the respondents averred that they lost a young, strong & promising son, who was 7 years old, a student at Kaseve primary school in standard 3. He was a good student with good prospect of securing employment in the future and supporting his parents. He was survived by Carolyne Ndinda Munyao, his mother & Moses Muuo Munyao his brother. 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 respondents also prayed for special damages of Kshs.130,500/= plus costs and interest of the suit
5. The Appellants, filed their joint statement of defence, wherein they denied all the averments made in the plaint and further denied that the accident which occurred on 04.06.2017 was caused by their agents/driver's negligence and/or carelessness. In the alternative and without prejudice to the above, the Appellants did aver that if an accident occur, it was caused and/or substantially contributed to by the deceased negligence and/or that of the driver of the 1st suit motor vehicle, which details were particularized in the statement of defence. The Respondents did file their reply to Defense, where they traversed all issues raised in the statement of defence .

B. Evidence at Trial.

6. The parties did on 05.03.2020 enter into a consent on liability, where it was agreed that the Appellants would bear 90 % of the liability as against 10% placed on the Respondents. Further the parties agreed that the issue of liability be disposed off by way of written submissions. The learned magistrate considered the evidence tendered and in her considered judgment delivered on 25th February 2021 and awarded the respondents Kshs.50,000/= for pain and suffering, Kshs.150,000/= for loss of expectation of life, Kshs.1,200,000/= under the *[Fatal accidents Act](#)* and Kshs.130,500/= 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 25th March 2021 and raised the following grounds of appeal namely: -
 - a. That the learned trial Magistrate erred in law and misdirected herself when she failed to consider the Appellants submissions on both points of law and facts.
 - b. That the learned trial Magistrate erred in law and in fact in awarding general damages of Kshs.200,000/=, special damages of Kshs.130,500/=, loss of dependency of Kshs.1,200,000/= totaling to Ksh 1,377,450/= an amount that was excessive, unjust in the circumstances considering the nature of the claim, and the conventional awards in relation to such claim.
 - c. That the trial Magistrate erred in fact and in law in failing to consider the Appellants submissions on quantum



- d. That the learned Magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellants and by instead relying on authorities cited by the Respondent which were unrelated to the actual claim by the Respondent.
- e. That the learned trial Magistrate erred in fact and In law in finding that the Respondent was entitled to general damages of Kshs.1,377,450/= which is very high award for the injuries suffered.
- f. That the learned trial Magistrate erred and misdirected herself as to the exact nature of the Respondents injuries and therefore erred in his assessment of damages which are soft tissue in nature.
- g. That the learned Magistrate erred in law and in fact in unduly relying on the evidence adduced in trial

B. Submissions

8. The Appellants did not file their submissions in support of this appeal. On the other hand, the respondents did file their submissions on 31st August 2023, where they submitted that since there was a consent on liability, the only issue for determination was whether the quantum arrived at was adequate. The respondent urged this court to be guided by the principles outlined in *Kemfro Africa limited T/A Meru Epress service, Gathogo Kanini v A.M Lubia & olive Lubia* (1987) KLR 30 , & *Catholic Diocese of Kisumu v Sophia Achieng Tete*, Kisumu civil Appeal No 284 of 2001;(2004) eKLR, where it was held that before disturbing an award on quantum, the trial judge must be satisfied that the trial magistrate, while assessing the damages took into account and irrelevant factor, or left out of account a relevant one, or that the award was inordinately low or so inordinately high that it was a wholly erroneous estimate of damages.
9. The generally accepted principle was that for pain and suffering, the award would be nominal if the death occurred immediately after the accident. Therefore, the award of Ksh.50,000/= for pain and suffering and the award of Kshs.150,000/= for loss of expectation of life as awarded was adequate. Reliance was placed on *West Kenya Sugar Co Ltd v Philip Sumba Julaya (suing as the legal Administrator and personal representative of the estate of James Julava Sumba)* (2019) eKLR , *Hyder Nthenya Musili & Ano v China Wu Yi Ltd & Another* (2017) eKLR
10. The respondents further supported the court award for loss of dependency and the use of the Global award method to assess the same as the deceased was a child and it was not practical to assess the same considering the multiplicand, the multiplier and dependency ratio method. In *Kenya Breweries limited v Saro* (1991) Mombasa Civil Appeal No 441 of 1990(eKLR), it had been held that in assessment of damages, the age of the child had to be considered. So that a thirteen (13) years old boy already going to school and doing well in his studies, the damages to be awarded would naturally be higher than those awarded to a four (4) years old boy, whose abilities were not ascertained.
11. Considering the circumstances of the accident, age of the deceased and similar citations, the award of Kshs.1,200,000/= was adequate and should not be disturbed. Reliance was placed on *Makueni courts Ltd & Another v Felistus Kanini Ndunda (Suing as the legal representative of the Estate of Eric Mutuku)*,(2020) eKLR, *Daniel Mwangi Kememi & 2 others v JGM & Another* (2016) eKLR & *Chabbadiya Enterprises Ltd & Another v Sarah Alusa Mwachi (Suing as legal administrator and personal representative of the Estate of Faiza Musa (deceased))*, (2018) eKLR where awards between Kshs.1,000,000/= to Kshs.1,800,000/= was held to be adequate compensation for children of similar age group.



12. The respondents thus prayed that the court do find that this Appeal was misconceived and proceed to dismiss the same with costs.

B. Analysis and Determination

13. 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 v 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.

14. In *Cogblan v. 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.”

15. In this Appeal, the parties did enter into a consent on liability and had the suit determined on the basis of written submissions. While prima facie this mode of proceeding enables the parties to conclude their case expeditiously, the option of proceeding by written submissions, must be discouraged especially where the parties opt not to call any witness for cross examination to prove nature and level of injuries. What then happens is that on appeal, the court had nothing/no basis of evaluating the evidence tendered since non was proffered- so to speak, and has to fall back on the pleadings filed, which in the strict sense is not proven evidence.

16. Be that as it may, in this instance, once liability was agreed upon, and it was accepted that the deceased died as a result of the accident, which occurred 04.06.2017 the only question which arises is whether, the sum of Ksh.1,530,500/= less 10% contributory negligence being Kshs.1,377,450/= 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 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.”

18. The Court of Appeal in *Sheikh Mustaq Hassan v. Nathaniel 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. The trial court award under *law reform Act*, being Kshs.50,000/= for pain and suffering and Kshs.150,000/= for loss of expectation of life were adequate. Similarly, the global award of Kshs.1,200,000/= for loss of expectation of life cannot be faulted, when considered in light with similar citations, where the accident occasioned fatal injuries. See *Makueni courts Ltd & Another v Felistus Kanini Ndunda (Suing as the legal representative of the Estate of Eric Mutuku)*, (2020) eKl, Daniel Mwangi Kememi & 2 others v JGM & Another (2016) eKLR & *Chabbadiya Enterprises Ltd & Another v Sarah Alusa Mwachi (Suing as legal administrator and personal representative of the Estate of Faiza Musa (deceased))*, (2018) eKLR, where awards between Kshs.1,000,000/= to Kshs.1,800,000/= was held to be adequate compensation for children of similar age group.

B. Disposition

20. 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.

21. The costs are assessed at Kshs.170,000/= all inclusive

22. 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;

No appearance for Appellant



Mr E. Musau for Respondent
Sam Court Assistant

