



Elephant Electricals and Hardware v Mwaniki (Suing as the Administrator and Personal Representative of the Estate of Meshack Nyongesa Walela - Deceased) (Civil Appeal E027 of 2022) [2024] KEHC 5363 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E027 OF 2022**

DK KEMEL, J

MAY 17, 2024

BETWEEN

ELEPHANT ELECTRICALS AND HARDWARE APPELLANT

AND

FLORENCE HELLEN MWANIKI (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF MESHACK NYONGESA WALELA - DECEASED) RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. N.N. Barasa (PM) delivered on 22.02.2022 in Webuye SPMCC No. 8 of 2010)

JUDGMENT

1. The appeal herein arises from the Judgement and decree of Hon. N.N. Barasa (PM) in Webuye SRMCC No. 8 of 2020 delivered on 22.02.2022 wherein the trial court awarded general damages of Kshs 80,000/= for pain and suffering, Kshs 100,000/ for loss of expectation of life, applied a minimum wage of Kshs. 10,954/= per month, a multiplicand of 25 years and a ratio of 2/3 thus awarding Kshs 1,314,564/= for loss of dependency and Kshs 90,030/ for special damages which were to be subjected to a consented contributory negligence of 70:30 in favour of the respondent. The Appellant was ordered to pay the costs of the suit.
2. The cause of action arose as a result of fatal injuries that the deceased sustained during a road traffic accident which occurred on the 30.11.2017 wherein the deceased was a motor cyclist riding motor cycle registration number KMCM 073 G along Brigadier-Naitiri road at Soweto area where he was hit by the appellants' motor vehicle registration number KAV 963M as a result whereof he suffered fatal injuries.
3. Being aggrieved by the said judgement, the Appellant preferred this appeal which is premised on grounds that: -



- a. The quantum of general damages in respect of pain and suffering awarded (Kshs. 80,000/-) was inordinately high, erroneous, oppressive, punitive and amounts to an injustice considering that the deceased died instantly and that the respondent had asked, in her submissions, for a lesser amount.
 - b. The learned trial magistrate erred in law when she applied as the multiplicand(income) the minimum wage of a general worker applicable to such workers in Nairobi, Mombasa and Kisumu, while there was no evidence that the deceased worked in any of those areas.
 - c. The learned trial magistrate erred in law when she applied the minimum wage of a general worker using the Regulation of Wages (General)(Amendment) Order, 2018 which came into force on the 1st May, 2018 long after the death of the deceased instead of applying the minimum wage prevailing at the time of the deceased's death namely the regulation of Wages (General) (Amendment) Order 2017.
 - d. The learned trial magistrate erred in law and fact in applying a multiplier of 25 years without considering the authorities referred to her or taking them into account thereby applying the wrong principles in the assessment of the suitable multiplier and thereby making an award which was so high as to amount to an error in law in this particular case.
 - e. The learned trial magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages and ignoring and/or paying lip service to the appellant's submissions thereon.
4. By this appeal, the Appellant prays that this appeal be allowed with costs and that the Judgment of the learned trial magistrate be set aside, the awards varied and substituted with suitable awards and for costs of the appeal.
 5. The appeal proceeded by way of written submissions. Both parties filed and exchanged their respective submissions.
 6. The respondents in their submissions dated 15.03.2024 submitted that as opposed to the appellants assertions, the deceased died in the hospital while undergoing treatment on the fateful day of the accident and proposed that the award of Kshs. 80,000/= awarded by the trial court was sufficient in the circumstances. Regarding the matter of the minimum wage in question, the respondents asserted that the deceased worked as a motorcyclist within Kitale Municipality. They argued that the trial magistrate appropriately applied Kshs. 10,954/=, which was the wage for a general laborer. They further argued that according to the Regulation of Wages (General) (Amendment) Order 2017, the correct amount should have been Kshs. 11,926.40, which is higher than what the trial magistrate used. Therefore, they concluded that no injustice was caused. Lastly, it was submitted that the deceased was 31 years at the time of the accident and that he was expected to work up to the age of 60 years but since he was in the informal sector, he would have worked longer. They argued that the trial magistrate applied a multiplier of 15 years meaning that the deceased would have worked up to the age of 47 years which they submitted was reasonable.
 7. The appellant filed submissions dated 7th February, 2024 where he submitted that on pain and suffering, the trial court failed to consider the submissions of the respondent who had sought for Kshs. 50,000/= under this head thus fundamentally misdirecting itself. The appellant submitted that the court misused its discretionary powers in unjustifiably granting more in terms of damages. They relied on the case of Denshire Mutetei Wambua Vs. Kenya Power and Lighting Co Ltd (2013)eKLR. They asked the court to reduce the award to Kshs. 50,000/= which is what had been sought.



8. On the issue of loss of dependency, the appellants argued that according to the date of the deceased's death, the Regulation of Wages (General) (Amendment) Order 2017 was the applicable piece of legislation. It was argued that the trial court applied the rate of wages applicable to a general labourer working within cities while the deceased worked in Kitale which is considered as "other areas". They therefore urged that the correct amount should have been Kshs.6,896.15/=, which is lower than what the trial magistrate used. On the multiplicand, the appellant argued that the court despite reaching a conclusion of using a multiplicand of 15 years, in its final calculation used 25 years which resulted to a high and erroneous figure. The appellant in its submission submitted for a revised figure using the proposed multiplier of Kshs. 6,896.15 and a multiplicand of 15 years thus Kshs. 827,538/= (6,869.15 x 12 x 15 x 2/3).
9. In conclusion, the appellant submitted for a figure of Kshs.747,297/=.
10. I have considered the record of appeal and the rival submissions and authorities cited. It is not in dispute that parties had entered into a consent on liability in the ratio of 70:30 in favour of the Respondent as against the Appellant. It is also not in dispute that the Appellant has appealed against all the heads of damage except for loss of expectation of life. Hence, the main issue for determination is whether the awards of damages appealed against were appropriate.
11. The duty of an appellate court in civil proceedings is well known. In words of De Lestang V-P in the Court of Appeal for East Africa case of *Selle V. Associated. Motor Boat Co.* (1968) EA 123, 126: "An appeal to this Court from a trial by the High Court is by way of retrial and the principles 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 conclusions 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..." (*Abdul Hameed Saif v. Ali Mohamed Shalom* (1955), 22, E.A.C.A. 270)."
12. It is indeed the duty of the first appellate court to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its independent findings and conclusion but bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
13. The record reveals that the parties entered into a consent on liability on the 18.05.2021 in the ratio of 70:30 in favour of the Respondent as against the Appellant. It is only the Respondent who tendered evidence. Florence Helen Mwaniki (PW1) adopted her witness statement dated 12.3.2020 as her evidence in chief. She produced a death certificate as Exhibit 1, a post mortem report as Exhibit 2, a Police abstract as Exhibit 3, an introduction letter from her local area chief as Exhibit 4, a grant ad litem as Exhibit 5a, a receipt as Exhibit 5b, a demand letter as Exhibit 6, a receipt for mortuary expenses of Kshs 5,030/= as Exhibit 7a, a receipt for coffin expenses as Exhibit 7b, a receipt for expenses on clothing of the deceased of Kshs.13,500/= as Exhibit 7c, a burial permit as Exhibit 8.
14. It was her evidence that the deceased earned a total of Kshs.12,000/= as a boda boda rider and who gave her Kshs. 6,000/= per month for upkeep. She testified that the deceased left behind three children i.e Descent Simiyu Nyongesa, Eliakim Milimo Nyongesa and Neema Nekesa Nyongesa. PW1 testified that the deceased took care of the school needs of the children and household needs and as a result of his death she has lost his support. She sought for prayers as per the plaint. In cross and re-examination, she testified that the deceased died in hospital on the same day.



15. Both parties thereafter closed their respective cases.
16. As the appellant's appeal is mainly against the quantum of damages, regard must be had in the case of *Butt Vs Khan* [1981] KLR 198 where the court held as follows: "It is trite law that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 at a figure which was either inordinately high or low."
17. Being guided by the above authority, it is now this courts duty to analyze the various awards in contention.

Pain and suffering

18. The Appellant contended that the deceased died instantly and as such the award was inordinately high. He also stated that the Respondent submitted for less and that the trial Magistrate erred in awarding Kshs. 80,000/= .PW1 testified that the deceased died while in hospital albeit on the same date of the accident. This evidence was not controverted by the appellant. In Civil Appeal No. 42 of 2018 *Joseph Kivati Wambua vs SMM & Another* (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed:-

...a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

19. There is no doubt that the deceased died after sometime which included taking him to a hospital. Therefore, the deceased must have suffered some considerable pain before breathing his last. This Court notes that the respondents in their submissions dated 3.06.2021 submitted for Kshs. 50,000/= under this head. However, this court is clothed with discretion to grant awards depending on the circumstances of the case and on consideration of comparable awards. In the case of *Mercy Muriuki and another vs Samwel Mwangi Nduati* (suing as the legal representative of the estate of the late Mwangi) (2019) eKLR the Court held that the prolonged period before the deceased eventually died which was three hours after the accident was sufficient consideration for grant of Kshs. 50,000 as damages for pain and suffering. Guided by the above authorities, this Court is of the view that an award of Kshs. 80,000/= as awarded by the trial magistrate was sufficient in the circumstances noting that the deceased died about 10 hours after the accident occurred. Even if the Respondent had proposed a sum of Kshs 50,000/ under this head, the trial magistrate had the discretion to award any other sum if the circumstances warrant it. In any case, submissions do not take the place of evidence but play the role of persuading a court to take a certain direction when determining a dispute. In the premises, I find the sum awarded under this head was not inordinately high and ought to be upheld.

a. Loss of dependency

20. The appellant took issue with the multiplicand adopted and the multiplier in terms of the lost years. It was contended that the trial court used the 2018 Regulations of Wages (General)(Amendment)Order instead of the 2017 regulations which were prevailing at the time of the deceased's death. They further contended that the trial court applied the minimum wage applicable to general workers in cities while



the deceased was working within Kitale and the wrong regulations. Lastly, they argued that the trial court misdirected itself in applying a multiplier of 25 years despite making a determination for 15 years.

21. From the evidence adduced, it is clear that the deceased died at the age of 31 years while operating as a boda boda rider. Although PW1 stated that the deceased earned Kshs.12,000/= per month, nothing was placed before court in support of that assertion. It can however not be denied that the deceased was bringing in some income to support his family. Looking at the date of his death which is 30.11.2017 the applicable regulations are indeed the Regulations of Wages (General)(Amendment)Order of 2017 which came into operation on 1.05.2017 and which provide for Kshs. 6,896.15/= for a general laborer working in the other regions save for the selected municipalities. The multiplicand of 15 years as determined by the trial court has not been contested by either party, what the appellant contends is the final calculations of the trial court which indicated 25 years. I shall therefore not disturb the determination for 15 years.

22. The dependency ratio of $\frac{2}{3}$ is also retained as the deceased was the breadwinner for his family and hence, the damages for loss of dependency shall therefore be calculated as follows: -

$$6,896.15 \times 12 \times 15 \times \frac{2}{3} = 827,538/=$$

23. As regards special damages, it is noted that the same is not in contention and hence the same shall remain undisturbed.

24. In the result, the appellant's appeal partly succeeds to the extent that the judgement of the trial court will be interfered with to the extent as follows: -

- (a) Liability 70:30
- (b) Pain & suffering – Kshs. 80,000/=
- (c) Loss of expectation of life – Kshs. 80,000/=
- (d) Loss of dependency – Kshs. 827,538/=
- (e) Special damages – Kshs. 90,030/=

Total: Kshs. 1,097,568/=

Less 30% contributory negligence

Grand Total – Kshs.777,297.60,

The respondent shall get the full costs of the suit in the Magistrate's court but for this appeal the order that best commends itself to me is that parties bear their own costs as the appeal has succeeded only in part.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY, 2024

D. KEMEI,

JUDGE.

In the presence of

No appearance Miss Awino for Appellant

Wekesa for Onkangi for Respondent

Kizito Court Assistant

