Kyalo (Suing as the Legal Administrator of the Estate of Samuel Muwo Kyalo - Deceased) v Orangi (Civil Appeal E013 of 2022) [2024] KEHC 5361 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5361 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E013 OF 2022

DK KEMEI, J

MAY 17, 2024

BETWEEN

ESTHER MALINDA KYALO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF SAMUEL MUWO KYALO - DECEASED) ..... APPELLANT

AND

CHARLES OYARO ORANGI ..... RESPONDENT

(Being an appeal from the Judgement and Decree of Hon G.P Omondi (SRM) in Bungoma CMCC No. 271 of 2019 delivered on 2nd February, 2022)

JUDGMENT

1. The Appellant Esther Malinda Kyalo appeals to this Court on quantum awarded from the Judgement of Honourable G.P. Omondi (SRM) delivered on 2nd February, 2022 in Bungoma CMCC No. 271 of 2019, in which parties agreed on liability as between the Appellant and the Respondent in the ratio of 20%:80% in favour of the Appellant vide a consent recorded on 28th October 2020 and proceeded to award the Appellant Kshs. 40,000/= under pain and suffering, Kshs. 500,000/= under Loss of Dependency, Kshs. 64,550/= under Special damages less 20% contributory negligence.

2. The principal claim in the Plaint dated 17th June 2019 is for the award of damages arising out of an accident which occurred on or about 25th March, 2019 when the deceased was lawfully walking on the verge of the road along Malaba-Bungoma road at road block area when the Defendant's (now Respondent's) driver or agent so negligently drove, managed and or controlled motor vehicle registration number KBH 066 V to violently knock the deceased thereby causing him to sustain severe injuries that led to his death.

3. At the end of the trial, the learned magistrate entered judgement for the Appellant as follows:

    i. Liability at a 20% Appellant and 80% Respondents.

ii. Pain and Suffering at Kshs. 40,000/=

iii. Loss of Dependency at Kshs. 500,000/=

iv. Special damages at Kshs. 64,550/=

v. Less 20% contributory negligence

4. Aggrieved by the decision of the trial court on quantum, the Appellant appealed to this court putting forth the following grounds:

i. That the learned trial magistrate erred in law and fact by making no award under the sub heading of loss of expectation of life thereby occasioning miscarriage of justice.

ii. That the learned trial magistrate erred in law and fact by awarding Kshs. 500,000/= under the sub-heading of lost years/Loss of Dependency which amount was inordinately low.

iii. That the learned trial magistrate erred in law and fact by relying on a decision in Kenya breweries ltd versus Saro (1981) eKLR which decision was made over four decades ago.

iv. That the finding by the trial magistrate on quantum was inordinately low.

5. The Appellant prays for the appeal to be allowed, judgement of the lower Court on quantum to be set aside and substituted with a higher award, the Appellant to be awarded costs of this appeal and interest.

6. The appeal was canvassed by way of written submissions. The Appellant filed her submissions dated 6th October 2023. Counsel for the Appellant submitted on two key issues as follows:

i. Whether the learned trail magistrate erred in law and fact by making no award under the sub-heading of loss of expectation of life thereby occasioning miscarriage of justice.

ii. Whether the learned trial magistrate erred in law and fact in awarding the Appellant a sum of Kshs. 500,000/= under the sub-heading of lost years/loss of dependency which amount was inordinately low.

7. On the first issue, Counsel for the Appellant submitted that the trial Court never made any award under the sub-heading on loss of expectation of life due to what is popularly referred to as the double award and that the same was erroneous. He relied on the case of Ainu Shamsi Hauliers Limited vs Moses Sakwa & Another (suing as the administrator of the estate of Ben Siguda Okach (dcd)) where Justice Njoki Mwangi relying on the Court of Appeal case of Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) vs. Kiarie Shoe Stores Limited (2015) eKLR where she held that she was not persuaded that the Respondent should not be awarded damages under loss of expectation of life. She further held that she saw no rationale as to why damages for loss of expectation of life should be deducted from the award under loss of dependency and proceeded to uphold the trial Court's judgement under loss of expectation of life in the sum of Kshs. 90,000/=. Counsel urged this Court to find that the failure to make any award under sub-heading on loss of expectation of life was an error by the trial Court and that it should proceed to give an award of Kshs. 300,000/=.

8. As regards the second issue, Counsel for the Appellant submitted that the trial magistrate erred in law and fact in awarding the Appellant Kshs. 500,000/= for loss of dependency as the same was inordinately low. He further submitted that damages for loss of dependency are usually made for loss the estate of the deceased has suffered. It was his submissions that PW1 testified that the deceased was seven years old at the time of his death and was a school going student with prospects of advancing

his level of education to the university level and eventually getting a job that will earn him a decent living and make it possible for him to assist his parents. Counsel submitted that it was the evidence of PW1 that the deceased minor used to assist his parents with chores prior to his unfortunate demise. The Appellant, in the lower court made it clear as there was no pointer as to what the deceased could have done in life, it would have been speculative to hold that the deceased could have gone through education and secured a form of employment. As such, the Appellant concluded that the award could only be global and went ahead to propose an award of Kshs. 1, 500,000/= factoring the inflationary trends in the country. He relied on the cases of Hassan vs Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457; Daniel Mwangi Kimemia & 2 Others vs J.G.M & S.M.M Meru Civil Appeal No. 18 of 2014 eKLR; Kenya Breweries Limited vs Saro (1991) Mombasa Civil Appeal No. 441 of 1990; China National Aero-Technology International Engineering Corporation vs Raphael Lenamboyo (2020) eKLR.

9. Counsel for the Appellant urged this Court to consider the above cited authorities and make a finding that the trial magistrate erred in law and in fact in awarding Kshs. 500,000/= under lost years and that the same was inordinately low.

10. The Respondents did not file submissions.

11. It is imperative to analyze the evidence tendered before the trial Court. Prior to the case proceeding, the parties entered into a consent on liability in the ratio of 20% to 80% in favour of the Appellant. It was the evidence of PW1, Esther Malinda Kyalo, that the deceased herein was her son and that he was involved in a traffic accident. She proceeded to rely on her recorded witness statement dated 17th June 2019 as her evidence-in-chief. According to her, the deceased was seven years old at the time of his demise which was 25th March 2019. He was a student at (particulars withheld) Primary School to be precise class one. She produced annexures marked as follows: copy of death certificate-PEXH1; Grant-PEXH2; Police Abstract-PEXH3; Post Mortem report-PEXH4; demand notice-PEXH 6a; copy of search record-PEXH 7b.

    On cross-examination, she stated that the accident occurred at around 4.00 PM and that the deceased died on his way to the hospital.

12. The Respondent did not tender evidence in the trial court.

13. I have given due consideration to the appeal herein, the evidence before the trial Court, the grounds of appeal and the submissions by the Appellant in this appeal as well as the parties' submissions in the lower Court. In my humble view, i find the only issue for consideration is whether this Court should interfere with the award of damages by the trial Court.

14. The discretionary jurisdiction of the first appellate Court being judicial is to be exercised on the basis of evidence and sound legal principles. See the case of Shah, Paul v E. A. Cargo Handling Services Ltd 1974 EA 75. I also rely on the Eastern Africa Court of Appeal case Peters –vs- Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." (See also

a) Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA);

b) Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); Virani T/A Kisumu Beach Resort v Phoenix of East

c) Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002)."

15. With this in mind, I have analysed the evidence as this Court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this court in my view:

a) Whether the trial Court's award of Kshs.500,000.00/= for loss of dependency was inordinately low and;

b) If (a) above is answered in the affirmative, which sum would be sufficient compensation?

c) Whether the trial Court erred in law in making no award under loss of expectation of life.

a) Whether the trial Court's award of Kshs.500,000.00/= for loss of dependency was inordinately low

16. In dealing with an appeal on quantum, i stand guided by the decision of the Court of Appeal in Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5 where the court held 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. Further, in the case of Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 the Court of Appeal held that: -

> "We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga V Musila [1984] KLR 257)."

18. It is the law in Kenya that general damages ought to be compensatory. When one looks at the impugned Judgment, it must be fair in the sense of what the claimant suffered. In my view, whether at the trial Court or on appeal, claimants should not aspire to a perfect compensation.

19. The foregoing sets out the law and the guiding principles which I am bound to apply in the determination of this appeal. The key issue for deliberation in this case is whether or not the trial court's award under the Loss of dependency was inordinately low that it amounts to a wholly erroneous estimate of the damages suffered by the Appellant. The fact that this court may have made a different award if it had tried the matter itself is not a ground for setting aside the award.

20. The deceased in this case from the evidence adduced in the trial court was a minor in class one at (particulars withheld) Primary School who dreamed of becoming a source of joy and help to his parents in the future when his life was abruptly cut short by the fatal road accident.

21. This exercise of awarding damages in respect of a minor deceased person always poses a challenge to the courts as it involves a fair account of speculation by the courts and parties regarding the possibility of minors growing up and succeeding later on in life. (See Chen Wembo & 2 others v IKK & Another (suing as the legal representatives and administrators of the estate of CRK (Deceased) {2017} eKLR para 15). In the case of Oshivji Kuvenji & Another -Vs- James Mohammed Ongenge [2012] eKLR, Ngenye J observed that;

> "It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor".

22. However, i stand guided by the principle that there is no golden rule in the assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in the superior courts. What is beyond doubt is that irrespective of the age of a deceased child, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents (See Kenya Breweries Limited v Saro {1999} KLR 408 and Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporter & 5 others {1986} KLR 457 {1986} eKLR).

23. For this, i rely on the decision in the case of Kenya Breweries Ltd -vs- Saro (1981) eKLR 408, where it was held that:

> "We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen-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-year-old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is

because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare". If any legal authority is required in support of our views we would quote this court's decision in Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-

> "In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the *Judicature Act* cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is "outrageous and pernicious" is not well-founded and must be rejected. ..."
>
> "In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution. The High Court authorities which were cited to us, such as Abdullahi v Githenye [1974] EA 110, Maurice Miriti v Feroze Construction Co Ltd HCCC No ... 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In Abdullahi v Githinji, supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded Kshs 8,000/- in 1974. In Miriti v Feroze, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Kshs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the *Fatal Accidents Act*. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred."

24. Applying the above test to this case, it is important to note that the deceased, a class one pupil aged seven years who was attending (particulars withheld) Primary School was a source of help and joy to his parents. It was the evidence of PW1 that though she did not avail the deceased's report cards, he was a clever student who performed brilliantly in his studies. His parents also reasonably expected that he would finish school, enter the job market and help them in their old age. The Appellant submitted that an amount of Kshs. 1,500,000/= would be sufficient compensation under the loss of dependency head.

25. In the case of Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v N I A (minor suing through her next friend I A I S) & 3 others [2018] eKLR the Court stated that;

> "...All what the Court has to do is to take into consideration the award made for loss of expectation of life when making awards for loss of dependency."

26. There seems to be no uniform method both at the High Court and at the Court of Appeal in assessing damages in the case of a deceased minor's estate. A trial court does not necessarily err simply by choosing one method over another. As such, it is my considered opinion that the trial magistrate did not proceed on wrong principle by choosing to use the parameter of a global sum on assessment of loss of dependency. As signalled in Livingstone v Rawyards Coal Co. {1880} 5 APP Cas 25, 29 Lord Blackburn stated:

> "where an injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong."

27. It follows therefore that the agenda of an award of damages is to compensate the claimant for his loss and not to punish the defendant for his wrong doing. In the ultimate analysis, this case turns on a question of principles fundamental in the assessment of damages. Against this background, the argument in favour of the Appellant carries the day that in damages on award for loss of dependency, the parameters applied by the learned trial magistrate eventually occasioned a meagre and inordinately low quantum.

28. Hence, its somewhat necessary to interfere with the award on loss of dependency.

b) Which sum would be sufficient compensation?

29. The award of damages in respect of a deceased minor is not ipso facto evidence that the award is excessive or erroneous. (See Kemfro Africa Ltd t/a Meru Express Services {1976} & another v Lubia & Another (No. 2) {1987} KLR 30). However, having looked at all the evidence before me, it is clear that the trial court did not make any reference to previously decided cases with similar circumstance before arriving at its assessment of damages. In as much as there are differences on what approach a trial court will take to award damages, it is prudent for the courts to have a semblance of consistent decision making with regard to this matter. I find that there are no authorities similar to the circumstances of this case relied upon by the learned magistrate when he expressed himself on the sum of Kshs.500,000/= on loss of dependency.

30. While compensation is the cornerstone of civil suits and indeed a form of healing balm on the wounds occasioned by the death of a minor, it is prudent for courts to refrain from awarding outrageously high general damages that can only be assumed to be punitive on the part of the defendants or meagre awards that discourage the plaintiff. It is therefore my considered view that the total award of Kshs.500,000/= as loss of dependency in the circumstances of this case was meagre.

31. Now to determine how much the award should be, i direct my mind to the most recent decided cases of S.M.K v Josephat Nkari Makaga Civil Appeal No. 66 of 2011 where an award of Kshs.800,000/= was given on appeal under the head of loss of dependency in 2017 for a child aged six years.

32. In the instant case, the Appellant proposed an amount of Kshs.1,500, 000/= as sufficient compensation under that head relying on the case of Daniel Mwangi Kimemi & 2 others v JGM & SMM Meru Civil Appeal No. 18 of 2014 eKLR where Justice Gikonyo awarded the estate of the deceased minor Kshs. 1,000,000/= for loss of dependency for a deceased aged nine years old. I am however inclined to draw a parallel considering that the minor in the present case was only seven years old and too young for his future to be determined and to avoid further speculation.

33. I therefore find that compensation of Kshs.1,000,000/= to be fair and reasonable in favour of the Appellant factoring the inflation rate.

c) Whether the trial Court erred in law in making no award under loss of expectation of life.

34. There are very clear principles on the sums recoverable against the defendant who caused the fatal injuries which caused the death of the deceased under the *Law Reform Act* Miscellaneous Provisions (Section 2) and the Fatal Accident Act under Section 4 and 5 of the Act. The only limitation in awarding damages under both Acts is that the court should avoid double compensation or duplication of the award as the claim on behalf of the estate of the deceased is, "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*". In this respect, i would adopt the words of the Court of Appeal stated in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR where it observed that;

> " [20] This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently, the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise."

35. According to the Plaint, it is evident that the Appellant pleaded his case under both statutes. The Appellant was well within the guiding principles of award of damages making a claim under the *Fatal Accidents Act* and should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication did not arise.

36. On loss of expectation of life, the trial court misguided itself when making no award. Under the head of loss of expectation of life, i proceed to make an award of Kshs. 80,000/= placing reliance on the case of Charles Masoso Barasa & Another vs Chepkoech Rotich & Another (2014) eKLR which made an award of Kshs. 80,000/= under the head of loss of expectation of life. Under this head, this appeal succeeds.

37. In view of the foregoing observations, the appellant's appeal has merit. The same is allowed. The trial court's judgement dated 2.2.2022 is hereby set aside and substituted with judgement on quantum being entered in favour of the Respondent as follows:

i. Pain and suffering.....Kshs 40,000/

ii. Loss of expectation of life..... Kshs 80,000/

iii. Loss of dependency.....Kshs 1,000,000/

iv. Special damages.....Kshs 64, 550/

TOTAL.....Kshs 1, 184, 550/

Less 20% contribution.....Kshs 236,910

Net Amount.....Kshs 947, 640

I find that it is just to order that each party bears their own costs of the appeal while the Appellant shall have full costs and interest in the lower court. The interest on general damages shall be from the date of judgement in the lower court while those on special damages shall be from the date of filing plaint.

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

D.KEMEI

JUDGE

In the presence of:

No appearance Lagat for Appellant

Wekesa for Mukisu for Respondent

Kizito Court Assistant