Mohamed v Kazungu & another (Suing as the administrator and/or legal representative of the Estate of the Late Cosmas Iha Thoya (Deceased) (Civil Appeal E117 of 2023) [2024] KEHC 8649 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E117 OF 2023

SM GITHINJI, J

JULY 16, 2024

BETWEEN

MOHAMED ARIF A NOOR MOHAMED .... APPELLANT

AND

PATRICK KITSAO KAZUNGU & KAREN SALAMA KAZUNGU (SUING AS THE ADMINISTRATOR AND/OR LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE COSMAS IHA THOYA (DECEASED) ...... RESPONDENT

(Being an Appeal from the Judgment and/or Decree of the Senior Principal Magistrate Hon J.Ongondo in Malindi Cmcc No.E308 of 2022)

RULING

1. By this appeal, the Appellant herein challenges the whole judgment and decree of Honourable J. Ongondo delivered on 5th July 2023 wherein judgment was entered in the following terms;

    a. Pain and suffering Kshs. 100,000

    b. Loss of dependency Kshs. 1,500,000

    c. Loss of expectation of life Kshs. 69,150

    d. Costs of the suit

2. Aggrieved by the judgment, the appellant lodged the instant appeal on the following grounds;

    1. The learned magistrate erred in law and in fact in disregarding the Defendant's evidence and submissions on record thus arriving at conclusion that was patently one sided.

2. The learned magistrate erred in law and in fact in applying the wrong principles in determining quantum for loss of dependency for a minor thereby arriving at a figure that was inordinately high.

3. That the learned magistrate erred in law and in fact in awarding special damages despite not being (specifically) proved.

Evidence at Trial

3. PW1 Patrick Kitsao adopted his witness statement dated 27/10/2022 as part of his evidence in chief and produced as PEX 1-8 documents as per the list of documents dated 27/10/2022.

4. PW3 Kitsao Kazungu adopted his witness statement dated 27/10/2022. On cross examination he stated that he witnessed the accident. That the deceased was crossing the road.

5. DW1 Mohamed Arif adopted his witness statement dated 13/03/2023 as his evidence in chief. On cross examination he stated that he was convicted on plea of guilty in Traffic Case number 199/2023 and fined Kshs. 15,000 as a result of causing death by dangerous driving.

Analysis and Determination

6. The appeal was canvassed by way of written submissions. I have considered this appeal and the grounds it is set upon, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

7. From the grounds of appeal on the memorandum of appeal there are two issues arising for me to determine;

   1. Whether the trial court erred in determining the quantum for loss of dependency for a minor thereby arriving at a figure that was inordinately high.

   2. Whether the award for special damages was specifically pleaded and proved.

8. The Appellant challenges the award of the trial court of Kshs. 1,500,000/= for loss of dependency as being high or inordinately excessive, without any basis or justification.

9. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the *locus classicus* case of *Bashir Butt v Khan* civil appeal No 40 of 1977 [1978] eKLR thus;

> "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."

10. Further, the Court of Appeal in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another* (No 2) [1985] eKLR held that: -

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court

of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

11. As pointed out, the contested issue is the award of Kshs. 1,500,000 as loss of dependency. In arriving at the said figure, the trial court placed its reliance on the case of Daniel Kimemia & 2 Others v JGM & Another [2016] wherein the court awarded Kshs. 1,000,000 and the trial court indicated that it had taken into consideration the inflationary trends in Kenya.

12. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by Ringera, J (as he then was) in *Grace Kanini v Kenya Bus Services* Nairobi HCCC No 4708 of 1989 where it was held that:

> "The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."

13. Further, the principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* civil appeal No 123 of 1983 [1986] KLR 457; as:(1)Parents cannot insure the life of their children;(2)The death of a victim of negligence does not increase or reduce the award for lost years;(3).The sum to be awarded is never a conventional one but compensation for pecuniary loss;(4)It must be assessed justly with moderation;(5)Complaints of insurance companies at the awards should be ignored;(6)Disregard remote inscrutable speculative claims;(7)Deduct the victim's living expenses during the "lost years" for that would not be part of the estate;(8)A young child's present or future earnings would be nil;(9)An adolescent's would usually be real, assessable and small;(10)The amount would vary from case to case as it depends on the facts of each case including the victim's station in life;(11)Calculate the annual gross loss;(12)Apply the multiplier (the estimate number of the lost years accepted as reasonable in each case;(13)Deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her; and(14)Living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth.

14. In *William Juma v Kenya Breweries Ltd* Nairobi HCCC No 3514 of 1985 it was however appreciated that:

> "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 lump sum figure to compensate parents of young children for pecuniary loss they have suffered or expect to suffer."

15. I agree with Ringera, J (as he then was) in *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 that:

> "In adopting a multiplier the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

16. In light of the authorities above, my view is that the award of Kshs. 1,500,000 is slightly excessive and I substitute the same with an award of Kshs. 1,000,000 as a global sum. In so finding am persuaded by the finding in *Matunda (Fruits) Bus Services Limited v Owino & another (Suing as Representatives of the Estate of the Late John Otieno Odol)* (Civil Appeal 94 of 2019) [2023] KEHC 2179 (KLR) where the court upheld the trial court's award of Kshs. 800,000 for loss of dependency for a 2-year-old. In arriving at the said figure, I have taken into consideration the rate on inflation trending.

17. The Appellant has further challenged the award of Kshs. 69,150 as special damages for not being specifically proven. I have perused the trial court's record. I do note that the special damages were broken down as Kshs. 10,000 for obtaining grant and Kshs. 58,150 as funeral expenses. With regard to obtaining a grant, the Plaintiff had filed a copy of Letters of Administration ad litem. It is trite that there were costs incurred in obtaining the said grant and even in the absence of a receipt, I find that the award of Kshs. 10,000 is reasonable.

18. As regards funeral expenses, the Court of Appeal in the case of *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR, rendered itself as follows;

> "that We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved… We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class."

19. In light of the authority above, I am also of the view that I need not strictly scrutinize the proof of funeral expenses. The pleaded amount in my view is reasonable taking into consideration the costs

involved in planning a funeral which include; coffin, transport and food which may not be receipted. To require such receipts would cause inordinate hardship upon a claimant.

20. The upshot is that the appeal partially succeeds in the following terms; -

1. Pain and suffering Kshs. 100,000/=.

2. Loss of dependency Kshs. 1,000,000/=.

3. Loss of expectation in life Kshs. 69,150/=.

Each party to bear own costs in the appeal.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Anangwe for the Appellant

2. Mr Mweri for the Respondent

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S.M. GITHINJI

JUDGE