Mzee v Muli (Suing as the Legal Representative of Daniel Muli - Deceased) (Civil Appeal E160 of 2023) [2024] KEHC 8581 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E160 OF 2023

DKN MAGARE, J

JULY 11, 2024

BETWEEN

JOSHUA MZEE ..... APPELLANT

AND

ANDERSON MULI (SUING AS THE LEGAL REPRESENTATIVE OF DANIEL MULI - DECEASED) ..... RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. E. Muchoki (SRM) delivered in Mombasa CMCC No. 969 of 2021 on 13th July 2023)

JUDGMENT

1. This is an appeal from the Judgment delivered by Hon. Muchoki given on 13/7/2023 in Mombasa CMCC 969 of 2021.
2. The Appellant was the defendant in the lower court. The court made the following decision;
    a. Liability against the Appellant- 100%
    b. Pain and suffering Ksh 100,000/=.
    c. Loss of years and loss of expectation of life Ksh 200,000/=
    d. Loss of dependency, Ksh 1,900,000/=
    e. General Expense Ksh 133,400/=
3. The Respondent filed grounds of appeal:-
    a. That the Learned Magistrate erred in Law and in fact in reaching a decision that was contrary to the weight of evidence adduced before the court, and in holding that the Plaintiff had provided his case on a balance of probability on the issue of negligence.

b. That the Learned Trial Magistrate erred in law and in Fact in holding that the Plaintiff had proved his case of negligence by failing to appreciate the proximate cause of the accident and the doctrine of causation and blameworthiness.

c. That the Learned Trial Magistrate erred in Law and in Fact by holding the Defendant was 100% liable contrary to the weight of evidence on record, considered extraneous and irrelevant factors, misunderstood and misapplied the correct law on causation and blameworthiness.

d. That the Learned Trial Magistrate erred in law and in fact in failing to properly evaluate the evidence and consider the appellant's submissions and pleadings while determining the issue of occurrence and blame worthiness for the said accident, and damages thus arriving at erroneous conclusions.

e. That the Trial Court assessment of damages was too arbitrary and did not even consider precedents.

f. That the Learned Trial Magistrate erred in law and in fact in assessing and awarding a quantum of Ksh 1,900,000= as damages for loss of dependency which was too inordinately high hence an erroneous and unreasonable estimate of damages for loss of dependency.

g. That the Learned Trial Magistrate in assessing damages under the *Fatal Accidents Act* Chapter 32 Laws of Kenya viz loss of dependency by failing to apply the correct principles hence arrived at an erroneous assessment of damages.

h. That the Learned Trial Magistrate erred in fact and in law in assessment of damages for loss of expectation of life by arriving at a sum that was inordinately high, excessive in the circumstances, unsustainable in law hence occasioning a miscarriage of justice.

i. That the Learned Trial Magistrate applied the wrong principles of law by taking into account some irrelevant factors and leaving out of account some relevant factors hence arrived at erroneous awards for loss of expectation of life.

Pleadings

4. The Respondent filed suit on 29/6/2021 against the Appellant who was said to be the beneficial and registered owner of Motor Vehicle Registration No. KCG 714D. The said motor vehicle was said to be involved in an accident on 21/9/2020 at Jomvu Kikanjuu Road when at Hakiba area Mikindani. The said Motor Vehicle was driven recklessly resulting in death of the deceased, late Daniel Muli.

5. He left one dependent, a father. He was said to be 27 years old EPZ Director. Prayed for general and special expenses including 133,400/= was made up as hereunder: -

   a. Court fees Ksh. 1,470/=

   b. Advocates fees Ksh. 15,000/=

   c. Funeral expenses Ksh. 133, 400/=

   Total Ksh. 150,420/=

6. He also prayed for general damages, and reasonable funeral expenses.

7. The Appellant filed defence and blamed the deceased. They also denied ownership of Motor Vehicle Registration No. KCG 714D in their defence dated 8/7/2021.

8. The Respondent testified on 19/1/2022 while the PW2 CPL Abdillahi testified on 24/5/2022. The Respondent and the witnesses produced exhibits 1-9.

Evidence

9. The witness stated that he was 63 years while the son was aged 25 years. Of course, the death certificate indicated 27 years. The wife was not indicated in the pleadings, though she was now indicated to be 58 years.

10. Cpl. Abdillahi testified that the said Motor Vehicle Registration Number KCG 714D was heading to Hakika Yard when it hit the deceased from the left side. He stated that the vehicle was supposed to give way. The Appellant took a date for defence hearing.

11. On 19/10/2022, the defence witness adopted his statement. He stated that the deceased hit himself against the frontier. He stated that the security guard gave him a go ahead to go inside. He stated that he was charged for causing death by dangerous driving.

12. The court analyzed the evidence and gave its judgment on 13/7/2023 as aforesaid.

Analysis

13. This is an appeal on both quantum and liability.

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

16. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

17. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

18. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

19. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

21. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

22. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows:

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

23. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

24. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

25. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

26. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

27. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

    c. The award is simply not justified from evidence.

28. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

29. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

30. The respondent had a duty to prove negligence on part of the Appellant. The duty to prove contributory negligence was on the Appellant. The Appellant testified that the vehicle was entering Hakika Yard. He was given a go ahead to enter by a security guard. The security guard was not a witness. In any case his duty is to control entry in the yard.

31. It is reckless to say that he was seeing the road clearly. The road could not have been clear, if the deceased was on the road. The deceased was dragged for a distance. This means the vehicle was speeding. On the other hand, the cyclist should have seen the speeding motor vehicle. He was hit on the left. He should have been able to control his bicycle. He must have been absent minded or on high speed. The dragging for a distance is evidence of negligence. Not being able to take evasive action was contributory negligence.

32. The deceased was therefore to blame to some extent. The court did not consider contributory negligence. In the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, the court of Appeal, O'kubasu, Githinji & Waki, JJ.A stated as follows: -

> " There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment oscanty evidence on record however both the lorry driver and the motorcyf the clist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50

33. Further, the fact that the Appellant was charged does not mean that the deceased did not have negligence of his own. In the circumstances I set aside the award of 100% and in lieu thereof find that the appellant was 70% to blame and the deceased 30%.

34. On quantum, the Appeal is on several limbs which I shall consider one by one. The court awarded Ksh 100,000/- as pain and suffering. While relying on the case of Bidii Muimi & Another versus Patricia Munanie Mutemi & Another 2020 e KLR, where in award of Ksh 100,000/- was made.

35. The deceased was dragged for a long distant and died in hospital while undergoing treatment. He is indicated to have died in Portreitz hospital on 21/9/2020. An award of Kshs. 100,000/- is proper in the circumstances.

36. The damages for pain and suffering were awarded at 50,000/=. The deceased died the following day. The court awarded nominal damages of 50,000/=. In Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W. Musyoka stated as doth: -

> " In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:
>
> [5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that the sum of Kshs 50,000 awarded under this head is unreasonable."

Loss of Expectation of life

37. The court awarded Ksh 200,000/-. The deceased was a young man of 27 years. He had a whole life ahead of him. An award of Ksh 200,000/- is thus within range. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows-

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is

that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

38. In the case of *Kanyi & another v GWS (Suing as a legal representative of the Estate of MNW - Deceased) (Civil Appeal 200 of 2019*) [2023] KEHC 18837 (KLR) (15 June 2023) (Judgment), the court, Mulwa J maintained a sum of 200,000/= for loss of expectation of life.

39. Third limb is loss of expectation of life. The court noted that net salary was Kshs. 19,000/-. The court adopted 25 years as a multiplier and the use of the dependency ratio of 1/3 for a single person with no children in conversion. Thus a dependency ratio of 1/3 is proper. The court can use the multiplier approach or lump sum. In this case the court adopted the multiplier approach.

40. In the case of Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another, where Hon. Ringera, J took the view that:

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency, and the expected length of the dependency are known 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."

41. The court found that the net pay was Kshs. 19,000/-. This was gross pay of 20,569/- less tax. The net pay was actually Kshs. 19,323/- not 19,000/-. However court found that a multiplier of 25 years was ideal. The court used only the age of the deceased. The deceased was 27 with no children. The dependent was 63 and 58 years. Their multiplier of 25 was an excessive award. A multiplier of 10 years will have sufficed. This is because the only pleaded dependency was 63 years, that could be 61 as at the time of death on 21/9/2020.

42. A multiplier of 25 years means that the dependency will be 96 years. It also does not take into consideration vicissitudes of life. It is true that he could have married and had children. However, the wife was non-existent at the time when death occurred and could not lose anything. I therefore set aside the award of 25 years and replace with a multiplier of 10 years. This works out as follows: -

> 19,323 x 12 x 10 x 1/3= 772,920/-

43. Consequently, I set aside the award of Kshs. 1,900,000/- and in lieu thereof enter judgment for Ksh. 772,920/- as loss of dependency.

44. Regarding special damages, funeral expenses of Kshs. 133,400/- was proved. Though other amounts were proved, there is no cross appeal over the amount. The Court of Appeal In Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR had this to say on this issue:

> " We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs

to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/ = was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000/- which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

45. The court did not award other special damages. The court will not delve into the same. In the circumstances, the appeal is partly allowed.

46. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

47. The success was mixed, therefore, each party shall bear their own costs in the appeal in line with Section 27 of the *Civil procedure Act*, which, provides as follows: -

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

Determination

48. Consequently, I make the following orders;

a. Judgment on liability is set aside. In lieu thereof I substitute with a sum of 70:30 against the Appellant.

b. Damages for pain and suffering, loss of expectation of life and burial expenses are maintained.

c. Damages for loss of dependency of Kshs. 1,900,000/- is set aside and in lieu thereof judgment is entered for Kshs. 772,920/-.

d. Each party to bear own costs of the Appeal.

e. The Appellant to bear costs of the suit in the court below.

f. This works as follows;

   i. Liability 70:30 against the Appellant.

   ii. General damages for loss of dependency Kshs. 772,920/-

   iii. General damages for loss of expectation of life Kshs. 200,000/-.

   iv. Damages for pain and suffering Kshs. 100,000/-

   Sub-total Kshs. 1,072,920/- less 30% - 321, 876/-

   Total Kshs. 751,044/-

   Add funeral Expenses Kshs. 133,400/-

   Sum due Kshs. 884,444/-

g. 30 days stay of execution.

h. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

MAGARE KIZITO

JUDGE

In the presence of:-

Kioko for the Appellant

Mr. Mutinda for the Respondent

Court Assistant - Jedidah