Rono & another v Moseti & another (Civil Appeal 152 of 2018)
[2024] KEHC 17243 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 17243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL 152 OF 2018

TM MATHEKA, J

JULY 12, 2024

BETWEEN

RICHARD KIPKORIR RONO ..... 1ST APPELLANT

SWAN CARRIERS LTD ..... 2ND APPELLANT

AND

SARAH BONARERI MOSETI ..... 1ST RESPONDENT

BATHSEBA MORAA MIRUKA AND 1 OTHERS ..... 2ND RESPONDENT

JUDGMENT

1. In the appeal the issues for determination are whether the learned trial magistrate:
   i. Finding of liability at 70% against the defendants was against the weight of the evidence.
   ii. In finding on liability relied on evidence of persons who were not at the scene.
   iii. Was in error in determining the multiplicand arriving at a wrong finding.
   iv. Used an unauthenticated record to arrive at an inordinately high income and a wrong conclusion.
   v. Used the wrong principles of law in determining the multiplier leading to a wrong finding.
   vi. Failed to take into account defendant's submissions on liability on quantum.
   vii. Failed to find that the plaintiffs had not discharged their evidentiary burden of proving their claim under the *Fatal Accident Act* Cap 32 and the *Law Reform Act* Cap 26 Laws of Kenya as they did not provide sufficient evidence to corroborate their assertions.
   viii. Whether the question on General damages was manifestly excessive or inordinately high.

ix. Whether this court should re-assess the award by the trial court.

2. The plaintiff's case was set out by the PW1 Kennedy Ombira Miruka the brother to the deceased who appeared as the legal representative of the estate. He produced the requisite documents to support the plaintiff's case.

3. The learned trial magistrate analysed the evidence on record and found that on liability the reasonable award was 30:70 in favour of the plaintiffs.

4. On damages the trial court found:Age of the deceased at death – 28 yearsDependants – two wives, six childrenIncome: parties agreed on Kshs.26,169/= (minimum wage of a driver and as per gazette of 16/5/2017)Multiplier – 25 yearsDependency – 2/3

5. Following Kisii High Court Civil Case No. 57/2009 – the court awarded Kshs. 100,000/= loss of expectation of life.

6. And on the strength of *Kemfro Africa t/a Meru Express & Anor –vs- Lubia & Anor* 1987 KLR 30 & High Court Muranga Civil Appeal 225/2013 Put *Sarajevo General Engineer Co. Ltd –vs- Esther Njeri & Other*s proceeded to make the final award –

   i. Claim under *Law Reform Act*Pain and Suffering Ksh. 50,000/=Loss of expectation of life Ksh. 100,000/=

   ii. Claim under *Fatal Accidents Act*: Loss of dependency – Ksh. 5,833,800/=

   iii. Special Damages Ksh. 141,375/= Total 6,125,175/=

   Less 30% 1,837,552.50/= Award 4,287,622.50/=

   The plaintiffs shall also have costs of the suit and interest at court rates.

7. I have carefully considered the submissions by counsel. Both the appellants and the respondents remind this court of its duty as a 1st appellate court. I have been referred to:

   1. *Kemfro Africa Ltd* (above,

   2. *Johnson Evan Gicheru –vs Andrew Morton & Anor* CA 314/2000.

   3. *Mohammed Juma vs- Kenya Glass Works Ltd* CA No. 1 of 1986 (unreported.)

   4. *Abok James Odera t/a as A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR.

8. The authorities are to the effect that this court has the duty to re-evaluate, re-assess and re- analyse the evidence on record and to draw in our conclusions – determine whether or not the determinations of the trial court ought to stand. In addition, that the appeal court should not act on a whim in determining whether or not to disturb the decision of the subordinate court – but on the laid down principles; to be alive the trial court's power to exercise discretion, and to disturb only where that court acted on wrong principles of law or the award is too high or too low.

9. On liability, the appellant, relying, on *Ann Wangare Mwombe & 2 Others v Peter Mukiri Gateri* [2014] e KLR (not supplied) argues-– that there was no evidence to blame the defendant therefor there was no basis for the award.

10. The evidence on record with respect to what happened is that of the police officer who visited the scene. This was No. 233114 IP Joseph Masili. His testimony was that on 29/4/2017 at 0430hrs is when

the accident happened. The deceased was driving motor registration No. KCH 378N Mitsubishi FH lorry, the motor vehicle stalled near Kima junction along the Mombasa/Nairobi Road. The deceased stopped to repair the motor vehicle. The motor vehicle KBN 063N/ZF 5206 Scania driven by the 1st defendant rammed into the back of the lorry. The witness told the court that KCH had a mechanical problem. It was partly on the road. The truck rammed into the lorry which ran over the deceased. It was the view of the witness that the weather was bad and the visibility was poor and it contributed to the accident. He said KCH was "slightly parked on the road". That there were skid marks, and when he visited the scene there were no life savers on the road.

11. On the basis of this the appellants urged the trial court to find that the two drivers were equally responsible for the accident and to apportion liability equally.

12. The Record of appeal does not have the plaintiff's submissions in the trial court.

13. Before me the appellant relies on section 107 and 109 of the *Evidence Act*, Lord Denning in *Miller vs-Minister of Pensions* [1947] All ER 372 on the standard of proof.

14. It is also argued that under section 53(1) & (3) of the *Traffic Act* – the deceased was guilty of the offence of obstruction. On this argument the appellants changed track and now seek the dismissal of the suit.

15. For the respondent it is submitted that nothing has been placed before me to demonstrate any error on the part of the trial court in apportioning liability.

16. My analysis of the record, the learned trial court found that both drivers were to blame – one had parked – the other was in control of his motor vehicle and in poor weather, poor visibility drove at a speed that did not enable him to stop in good time without ramming into the stationery motor vehicle. The police officer did not say that the position of the stationery lorry caused the accident - he actually blamed the weather and the poor visibility. This witness was not a witness for the plaintiff/defendant – he was a witness who was expected to be neutral and he took a neutral stand – blamed the weather. It would appear, from his own evidence the lorry though parked with part of it on the road had not obstructed the road and the person with the greater responsibility was the person driving in that bad weather and this was the 1st defendant

17. Evidently then the two drivers were to blame for the collision of the motor vehicles, the accident, because one had the m/v parked somehow into the road without life savers, while the other proceeded to drive on the same road without good visibility

18. The trail court's assessment of the evidence and apportionment of lability was supported by the evidence on record. I have no good reason to interfere with the finding of the subordinate court that both drivers were to blame.

19. On quantum – the appellant submits that under the *Law Reform Act* – the award of Ksh. 50,000/= for pain and suffering and Ksh. 100,000/= for loss of expectation of life – were on the higher side. The appellants rely on *Harjeet Singh Pandal vs Hellen Aketch Okudho* (2018) e KLR, *Henry Omweri Oroo & Anor vs Samuel Mungai Kahiga & Anor* (2016) – where the court said – that because the deceased died on the spot – there was no awareness of pain and suffering – there was no reason for damages. In my view – there is no way of knowing whether or not the person had no awareness on pain and suffering – even when a person to have died on the spot; in this case there was no evidence that the deceased died on the spot, and even if he had I would not assume that there was no pain. The trial court was guided by authorities that provide for the sums awarded – see *Mercy Muriuki & Anor –vs- Samuel Mwangi Nduati & Anor* (2019) e KLR " The generally accepted principle therefore is that very nominal charges on damages will be awarded on two heads of damages if the death followed immediately after the accident. The conventional award for los of expectation of life is Ksh. 100,000/=

while for pain and suffering the awards range from Ksh. 10,000/= Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before the death".

20. I find no reason to disturb the award of Ksh. 50,000/= for pain and suffering. The same applies to the award on loss of expectation of life.

21. It is submitted that there was no proof of earning to warrant the multiplicand of Ksh. 29,169. It is submitted for the appellant that the trial court ought to have applied the global sum approach an awarded Ksh. 400,000/=. The appellant relies on *John Wamae & 2 Others vs- Jane Kituku Nziva & Anor* [2017] e KLR where the court (Kariuki J) set aside the multiplicand approach of the trial court – and relying on *Mwanzia v Ngalali Mutua* quoted in *Albert Odawa vs Gichumu Githenji* [2007] e KLR "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 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."

22. See also *Mary Khayesi Awalo & Another v Mwilu Malungu & Anor* (1999) e KLR where the court was of the view that where there was no evidence of earnings (bank statements) then it would be better to use the lump sum approach than to estimate the income.

23. It is submitted that even where the court used the minimum wage – the applicable regulations for the appellant were those of 2015 – at the time of his death and the same provided ksh. 5,844/20 for a general labourer.

24. For the respondent it is submitted that both parties had urged the court to consider the minimum wage at Ksh. 29,169.

25. I have perused the appellants submissions in the subordinate court and it is submitted "multiplicand... at the time of his untimely demise the deceased was a driver. As such we propose a basic monthly salary of Ksh. 29,169/= being the minimum government wage ...".

26. The appellants cannot be heard to submit otherwise on appeal/or to impute error or wrong conclusion of the part of the trial court when it is upon their own submissions that the award via multiplicand was made.

27. On the multiplier, the defendant had proposed 10 years and the court awarded 25 years. On appeal the appellant proposed 20 years and a dependency ratio of 1/3.

28. For the respondent it is submitted that the appropriate multiplier would be 32 years yet there was no counter appeal.

29. Looking at the authorities cited by both sides on the multiplier – for the appellant *Joseph Mwangi Kiarie & Anor vs Monicah Lusi Okongo (suing as a personal representative of the Estate of Thomas Otieno Odindo* [2019] e KLR on the proposition that the court must consider the life expectancy of the deceased subject to the vagaries of nature. For the respondent; *Beatrice Wangui Thairu vs- Hon. Ezekiel Barngetuny & Anor* Nrbi HCC 1638/1988 (UR) for the preposition that this "court must bear in mind the expectation of the earning life of the deceased", *West Kenya Sugar Co. Ltd vs Falantina Adungosi Odionyi (suing as the legal representative of Patrick Igwala Odionyi (deceased)* [2020] eKLR for a similar proposition; *David Kimathi Kaburu –vs- Gerald Mwobobia Murungi (suing as the legal representative of James Mwenda Mwobobia (deceased)* [2014] e KLR where an award of 30 years was made for deceased who died at 28 years.

30. Having considered the authorities cited – it is clear to me that there was no error in making the multiplier of 25 years because the trial court followed existing authorities for that and the court had the discretion to choose which one to apply. In this case the court could have chosen higher but settled on 25 years. That award was reasonable.

31. On the ratio of dependency, the appellant cannot change that on appeal without any reason because in their submissions in the subordinate court the appellants submitted a ratio of 2/3 dependency.

32. It is argued that at the time of hearing in the trail court, the deceased's brother who was PW1 did not know the children of the 2nd wife of the deceased. That is not surprising. We are Kenyans , where it is not strange for a man's other family to show up at his burial. I do not know what happened but for the family to say so, then there must have been other children who would claim from their father's estate, and the safest thing would be to mention them everywhere.

33. That notwithstanding the record shows three certificates of both for minor children one of whom was born about a week just before his death. The evidence of the plaintiff's witness PW1 was not controverted in any way and there is nothing to show that the minor children of the deceased were not dependent on him. Again I found no reason to interfere with the finding of the trial court.

34. Having read through the evidence, considered the submissions both in the subordinate court and before me – I am of the view that the answer to all the issues set out at the beginning of this judgment is in the negative.

35. The appeal has no merit. It is dismissed with costs to the respondents.

DATED , SIGNED AND DELIVERED THIS 12TH JULY 2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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