Nginyo & another v Mengo & another (Suing as Administrators of the Estate of David Mutiso Kathima (Deceased)) (Civil Appeal E390 of 2024) [2024] KEHC 11184 (KLR) (Civ) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11184 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E390 OF 2024

JM OMIDO, J

SEPTEMBER 24, 2024

BETWEEN

DANIEL KAMAU NGINYO .... 1ST APPELLANT

VINCENT OBURA .... 2ND APPELLANT

AND

JUDY NJERI MENGO .... 1ST RESPONDENT

JACKSON MENGO KATHIMA .... 2ND RESPONDENT

SUING AS ADMINISTRATORS OF THE ESTATE OF DAVID MUTISO KATHIMA (DECEASED)

(Being an Appeal from the Judgement and Decree of Hon. S.M. Muchungi, Principal Magistrate delivered on 8th December, 2023 in Milimani Commercial Courts CMCC No. 995 of 2020)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. S.M. Muchungi delivered on 8th December, 2023 in Milimani Commercial Courts CMCC No.995 of 2024.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 18th March, 2024 upon which it seeks to partly upset the judgement and decree of the lower court, are as follows:
   1. The trial court erred both in law and fact when it adopted a dependency ratio of 1/3 in the absence of material evidence to the required standard of proof that the deceased supported the parents and siblings.

ii. The learned Magistrate erred in law and in fact and applied wrong principles in adopting a multiplier of 33 years without considering the ages of the dependants thereby awarding general damages that were so excessive as to amount to abuse of discretion.

iii. The learned Magistrate erred in law in failing to take into account the award made under the *Law Reform Act* while making an award under the *Fatal Accidents Act*.

3. In her judgement delivered on 8th December, 2023, the learned trial Magistrate entered judgement in favour of the Respondents and against the Appellants jointly and severally as follows:Liability – at 100%.Damages under the *Law Reform Act* – 1/3 (dependency ratio) x 12 months x Ksh.28,000/- (multiplicand) x 33 years (multiplier) = 3,696,000/-.Pain and suffering – Ksh.150,000/-.Loss of expectation of life – Ksh.200,000/-.Special damages – Ksh.35,935/-.

4. From the grounds set out above, what is effectively challenged is the findings of the trial court on the dependency ratio, multiplier and ultimately the award under the *Fatal Accidents Act* Cap 32, Laws of Kenya. The Appellants do not challenge the findings of the court on liability, the awards made under the *Law Reform Act*, Cap 26 Laws of Kenya (under the heads of pain and suffering and loss of expectation of life) and the award on the head of special damages. They have also not challenged the trial court's finding on the multiplicand.

5. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions. Both parties filed their respective submissions.

6. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Sielle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

7. In Sielle, Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanour of a witness is inconsistent with the evidence in the case generally."

8. The claim before the lower court, as per the plaint dated 18th December, 2020, was one based on tortious liability (negligence) arising out of a road traffic accident that occurred on 29th February, 2016 in which the deceased sustained fatal injuries.

9. With regard to the grounds of appeal, the Respondents pleaded in the plaint that the suit was filed by the two Respondents who were the father and mother of the deceased, in their capacity as the deceased's dependants.

10. In that respect, the relevant evidence is that of the 1st Respondent who testified before the trial court as PW1. The 1st Respondent adopted the contents of his statement that he recorded on 28th October, 2019 in which he stated that the accident was caused by the negligence of the Appellants and that the two Respondents obtained a limited grant ad litem pursuant to which they filed the suit in the

lower court as administrator and administratix, respectively, of the deceased's estate, seeking to recover damages.

11. Upon being cross-examined, the 1st Respondent told the trial court that the deceased was his son and that before his demise, the deceased would assist the Respondents to pay school fees for their last-born daughter PS. He further stated that the Respondents depended on the deceased to cater for their food, clothing and medication.

12. The Respondents called three other witnesses. Two of these witnesses were Police Constable Jessy Mwololo Gachoka (PW2), a traffic police officer and one Boniface Kyalo (PW3) who was an eye witness to the accident. Their testimonies were in respect of liability, which as I have stated above, is not challenged in the present appeal. The other witness was Charles Mwanza (PW4) who produced the deceased's letter of employment dated 3rd January, 2023, whose contents and import are not challenged in this appeal.

13. The Appellants, who were the Defendants in the trial court, did not call any witnesses.

14. I have considered the grounds of appeal as set out in the Memorandum of Appeal dated 18th March, 2024, the submissions by the parties herein and the record of the lower court. The issues for determination, as discernible from the record are as follows:

    a. Whether the trial court erred when it adopted a dependency ratio of 1/3.

    b. Whether the trial court fell into error and applied wrong principles in adopting a multiplier of 33 years.

    c. Whether the trial court fell into error in failing to take into account the award made under the *Law Reform Act* while making an award under the *Fatal Accidents Act*.

15. With regard to the first issue, the learned trial Magistrate observed as follows:

> " For loss of dependency, I will adopt the dependency ratio of 1/3 since he was not married and did not have children. It was said that he only supported the parents and the siblings".

16. Under Section 4(1) of the *Fatal Accidents Act*, Cap 32 Laws of Kenya, an action brought by virtue of the provisions of the statute shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. Such action cannot be brought for the benefit of the siblings of the deceased.

17. The Court of Appeal guides me well by its decision in Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR in which it was held that children are expected to provide for their parents when they are in a position to do so.

18. In the instant case, the evidence of the Respondents was that the deceased who was their son provided for them in purchasing food, clothing and medication and further assisted them in paying school fees for his younger sister.

19. In the above authority, the judgment of Nyarangi JA is germane, where the court observed as follows:

> " In general, in Kenya children are expected to provide and do 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 community is well-nigh 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 customs is well within the tenets of the great religions 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. I would say a judge should be very slow to criticize any particular custom, of people. There always is a purpose for the practice of a custom."

20. The monthly income of the deceased, as per the trial court's findings was Ksh.28,000/-. The evidence of the 1st Respondent was that the deceased would provide for the Respondents by purchasing food, clothing and medication and further assist them in paying school fees for their last-born daughter. The proposition that he spent one third of his earnings on his parents as aforesaid is in my view a reasonable portion, in the circumstances.

21. The Court in the case Joseph Wachira Maina & another v Mohammed Hassan [2006] eKLR considered the principle that should guide an appellate court in considering the trial court's assessment of damages as follows:

> " The principles to be considered by this court when deciding on the issues raised on this appeal was laid down in the case of Ali v Nyambu T/A Sisera Stores [1990] KLR 534 at page 538 quoted with approval the principles laid down by the Privy Council in Nance v British Columbia Electric Railways Co. Ltd [1951] AC 601 at page 613 where it held that:
>
> > 'The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint v Lovell [1935] 1KB 354) approved by the House of Lords in Davis v Powell Duffryn Associated Collievers Ltd. [1941] AC 601."

22. With that principle in mind and noting that the learned trial Magistrate gave a basis for the finding on the dependency ratio of 1/3, I cannot fault him. The Appellants have not persuaded me that the learned trial Magistrate fell into error as to attract interference of his finding by this court.

23. The second issue for determination is whether the trial court fell into error and applied wrong principles in adopting a multiplier of 33 years.

24. The Respondent produced a post mortem report which indicated that the deceased met his demise at the age 27. The contents of the report were not challenged and the finding of the trial court that he died at 27 was therefore sound.

25. PW4 produced a letter of employment of the deceased which indicated that he was formally employed and earned Ksh.28,000/- monthly.

26. In reaching and adopting a multiplier of 33 years, the learned trial Magistrate expressed herself as follows:

> " For the multiplier, I find 33 years to be appropriate based on the age he met his death, the fact that he was in some formal employment and would have been expected to retire at 60 years and the vagaries of life."

27. In considering the trial court's assessment and findings on the multiplier, I opine that the principles discussed in the case of Joseph Wachira Maina (supra) are applicable. In Kenya, the retirement age is 60 years, and therefore going strictly by consideration of the retirement age the applicable multiplier for a 27-year-old deceased is 33 years. As the deceased would possibly have worked for another 33 years, the multiplier arrived at by the learned trial Magistrate was appropriate. The trial court based its assessment on the mathematical calculation of active working life. I would not fault this as the premises for calculations are legal retirement age.

28. In precis, the Appellants have not demonstrated that the trial court in exercising its discretion in determining the multiplier acted on wrong principles of law, failed to take into consideration matters which ought to have been considered or considered matters which ought not to have been considered or that the resulting multiplier is so excessively high (or low) as would reflect an erroneous application of the applicable principles. I have no basis, therefore for interfering with the multiplier.

29. The last issue for this court to determine, as I understood the Appellants is that the learned trial Magistrate failed to deduct the award made under the *Law Reform Act*, Cap 26 Laws of Kenya from the award made under the *Fatal Accidents Act*, Cap 32 Laws of Kenya.

30. The relevant provisions in this respect are Section 4 of the *Fatal Accidents Act* and Section 2(5) of the *Law Reform Act*. Let us read the two provisions:

31. Section 4 of the *Fatal Accidents Act* provides as follows:

    (1). Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

    Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

(2). In assessing damages, under the provisions of subsection (1), the court shall not take into account –

(a). any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;

(b). any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.

32. Section 2(5) of the *Law Reform Act* provides:

The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act* (Cap 32) or the the *Carriage by Air Act*, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

33. As I have stated hereinbefore, under the *Fatal Accidents Act*, every action brought by virtue of the provisions of the Act shall be for the benefit of the spouse, parent and child of the person whose death was caused as a result of a fatal accident.

34. On the other hand, the *Law Reform Act* makes provisions that the rights conferred under the Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act*.

35. The principle that applies is that where the beneficiaries under the *Law Reform Act* and the *Fatal Accidents Act* are the same; and the court has made awards under the *Law Reform Act*, the award is deducted as a person cannot benefit twice from same accident.

36. In the case of Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) [1987] KLR 30 the Court of Appeal in its unanimous decision held as follows:

" 6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.

7. The *Law Reform Act* (Cap 26) Section 2(5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.

8. The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4(2) of the *Fatal Accidents Act* are "taken into account". The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act*

for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

37. In line with the decision in Kemfro (supra) all what the court has to do is to take into consideration the award made under the *Law Reform Act* when making an award under the *Fatal Accidents Act*. There is no requirement that the former award must be deducted from the latter award.

38. There are however situations, such as is the case in the instant matter, where the beneficiaries of the deceased's estate under the *Fatal Accidents Act* and dependants under the *Law Reform Act* are the same. What is the court expected to do in such a situation?

39. In the case of Karanja & another (Suing as the Legal administrators for the Estate of) *Peter Ritha Muharu - Deceased) v Njuguna & another (Civil Appeal E053 of 2022*) [2023] KEHC 22151 (KLR) (12 September 2023) (Judgment), the court, while citing with approval the case of Hellen Waruguru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR held as follows:

> "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 *Fatal Accidents Act* and dependants under the *Law Reform 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 issues of duplication does not arise." (Underlined emphasis).

40. Just like in the above quote from the decision of Hellen Waruguru (supra) the cases of Sukari Industries Limited v Ismael Ombaka Omar & another [2017] eKLR; Endege & another (Suing as the Legal Representatives in the *Estate of John Madede Endege - Deceased) v Benard & another (Civil Appeal 38 of 2020*) [2024] KEHC 622 (KLR) (19 January 2024) (Judgment); and Dismas Muhami Wainarua v Sopon Kasirimo Maranta (suing as administrator and or personal representative of the estate of Partinini Supon (Deceased) [2021] eKLR all provide the jurisprudence that where the beneficiaries of the deceased's estate under the *Law Reform Act* and the dependants under the *Fatal Accidents Act* are the same, a deduction ought to be made of the award under the *Law Reform Act* from the award under the *Fatal Accidents Act*.

41. It therefore follows that the sum of Ksh.200,000/- awarded under the head of loss of expectation of life and the sum of Ksh.150,000/- awarded under the head of pain and suffering, making a total of Ksh.350,000/- under the *Law Reform Act*, ought to be deducted from the sum awarded under the *Fatal Accidents Act* to give a net figure of Ksh.3,346,000/- worked out as follows:-

    Ksh.3,696,000/- (loss of dependency) – Ksh.350,000/- (pain and suffering & loss of expectation of life) = Ksh.3,346,000/-.

42. To that extent then the appeal succeeds. All the other awards shall remain as per the findings in the judgement of the trial court.

43. Each party shall bear their own costs of this appeal in view of the fact that the appeal has only partially succeeded.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24TH DAY OF SEPTEMBER, 2024.

JOE M. OMIDO

JUDGE

For Appellant: Mr. Ongeri.

For Respondent: Mr. Munyoki.

Court Assistant: Ms. Njoroge.

Mr. Ongeri: I seek 30 days stay to enable payment of the balance.

Mr. Munyoki: There is one issue the court did not address in the judgement. We will be filing an application for review. We will file within two days.

Court: Stay of execution for 7 days. Mention on 1st October, 2024 to confirm filing the application for review.

JOE M. OMIDO

JUDGE.