



Mugambi & another v MG ((Sued as the Legal Representative and Administrator of the Estate of CR- deceased)) (Civil Appeal E005 of 2020) [2023] KEHC 18272 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 18272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E005 OF 2020
EM MURIITHI, J
FEBRUARY 16, 2023**

BETWEEN

PETER MUGAMBI 1ST APPELLANT

MUTUMA KENETH MUTURIA 2ND APPELLANT

AND

MG RESPONDENT

(SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF CR- DECEASED)

*(An appeal from the Judgment of Hon. E. Tsimonjero (R.M)
in Meru CMCC No.174 of 2019 delivered on 9/9/2020)*

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 12/6/2019, in which the Respondent herein (the Plaintiff in the trial court) sued the Appellants herein (the 1st and 2nd Defendants in the trial court) seeking special damages of Ksh. 294,413/= plus interest from the date hereof until the date of payment in full, general damages under the Fatal Accident Act and Law Reform Act, costs of the suit and interest at court rates.
2. The gist of the claim was that on or about 14/9/2018, the deceased was lawfully travelling as a fare paying passenger in motor vehicle registration No. KCH 168 U TOYOTA MATATU along Meru-Chuka Road when the 2nd Appellant drove/managed and/or controlled motor vehicle Registration No. KCQ 062 X TOYOTA HILUX so negligently, carelessly and dangerously that an accident occurred involving KCH 168 U and KCQ 062 X occasioning the deceased severe and fatal injuries. It was pleaded that the deceased aged 7 years sustained very severe bodily injuries from which she died,



her life was wrongfully cut short, and the Respondent and other dependants of her estate suffered loss and damage.

3. The Appellants denied the claim by their statement of defence dated on 4/7/2019 and prayed for the Respondent's suit to be dismissed.
4. After conclusion of the trial, the trial court found the Appellants to have been 100% liable for the accident and awarded general damages of Ksh.20,000 for pain and suffering, Ksh.100,000 for loss of expectation of life, Ksh. 1,000,000 for loss of dependency and special damages of Ksh.294,413 totaling to Ksh. 1,414,413 plus costs and interest.

The Appeal

5. On appeal, the Appellants filed their Memorandum of Appeal on 8/10/2020 listing 5 grounds as follows:
 1. The trial magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
 2. The learned trial magistrate erred in law and fact by awarding inordinately high general damages to the Respondent.
 3. The learned trial magistrate erred in law and fact by failing to consider the Appellants' submissions and authorities on quantum and hence, arriving at an erroneous decision.
 4. The learned trial magistrate erred in law and fact by awarding damages that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
 5. The learned trial magistrate's judgment as a whole is not supported by the evidence that was tendered in court by the parties.

Duty of the court

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123). A Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on no evidence or it was based on a misapprehension of the evidence or the judge was shown demonstrably to have acted on wrong legal principles in reaching the finding he did. (See *Sumaria & Anor v Allied Industrial Limited* (2007) 2 KLR 1).

The Evidence

7. PW1 MGR, the Respondent herein, produced the Demand Letter, Limited Grant, Death Certificate, Post Mortem Report, Police Abstract, Bundle of Receipts totalling to Ksh. 280,239/= and Letter from [Particulars Withheld] as exhibits in court. He testified that:

“CR (deceased) was my daughter. She died in a road accident. She was aged 7 years old at the time of her death. She was a pupil at [Particulars Withheld] Class 2. She was a bright pupil. She used to top her class. I spent about Kshs. 294,413 as funeral expenses. I have the receipts. I pray for compensation for the loss of my daughter and the funeral expenses. I also pray for costs. She was ambitious. One of the receipts is labelled as invoice/cash sale from Executive



Funeral Services for Kshs. 120,000/=. They gave us Hearse, Coffin, Flowers and the Public Address System totalling to Kshs. 120,000/=".

8. On cross examination, he stated that:

“The deceased was aged 7 years and some months. She was a pupil at [Particulars Withheld]. She used to top her class. I have a letter from the school but I do not have the report card. The performance of a pupil is recorded in the report card which I do not have in court. The letter was written after the accident and does not indicate the pupil’s performance.”

9. On re-examination, he said:

“The purpose of the letter from the school was to confirm that my daughter was a pupil in the school. The letter is true.”

10. DW1 Peter Mugambi Kiriungu, the 1st Appellant herein, adopted his statement filed on 23/10/2019 as his evidence in chief. He also produced the Medical Report dated 20/12/2019 by Dr. J.K Macharia as DExh. 1. He went on to state that:

“Am the owner of the Motor Vehicle Registration No. KCQ 062 X. Am the 1st defendant. The victims were taken to hospital. The doctor examined the victims. The report by doctor D. Kaare and dated 20th December 2019 is in court. I wish it to be produced.”

11. On cross examination, he stated that:

“I was not present at the scene. My vehicle was carrying Miraa. My vehicle was hit from behind. The police told me that the driver of the Matatu was charged. I do not know the court or the case. I saw the report. I do not know of the police came to court. The police told me to report if I find him. I do not know if the driver of the Matatu was charged. The passenger sustained injuries some died. The 2nd defendant was my driver.”

12. On re-examination, he stated that, “I saw the motor vehicle after the accident. It has been hit from behind.”

Submissions

13. The Appellants fault the trial court for awarding special damages of Ksh. 294,413 yet the Respondent had only proved Ksh. 108,108, and cite the Court of Appeal case of David Bagine v Martin Bundi (1997) eKLR and African Line Transport Company & Another v Sylvester Keitany (2017) eKLR. They urge that the Respondent produced an invoice issued by Executive funeral services, and it is a settled position that invoices are not evidence of payment, as was held in Wakim Sodas Limited v Sammy Aritos (2017) eKLR. They fault the trial court for erroneously adopting a universal amount of Ksh. 1,000,000, which was inordinately high considering that the deceased was only 7 years old with un-established future prospects, and rely on Chen Wembo & 2 others v I K K & Another (Suing as the legal representatives and administrators of the estate of C R K (deceased) (2017) eKLR, Nyamai Petronila & Another v Monica Usyoki & Another (2020) eKLR, Rosemary Onyango & Another v Mohamed Jenjewa Ndoyo & Another (2019) eKLR and Ndirangu Kimani v DKM & AKM (Suing as administrators of the estate of the late MM (deceased) (2019) eKLR. They submit that a total of Ksh. 500,000 for loss of dependency would be enough and sufficient considering the circumstances of the case. They urge that since the deceased died at the scene of the accident, she did not suffer prolonged suffering and therefore an award of Ksh. 10,000 for pain and suffering would suffice. They pray for the



appeal to be allowed with costs and rely on *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (2017) eKLR.

14. The Respondent submits that the award of Ksh.1,120,000 was not inordinately high to warrant the interference by this court as there is no evidence that the trial court acted on the wrong principles of law or made a wholly erroneous estimate of the damages, and relies on the Court of Appeal case of *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR and *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* (2021) eKLR. He urges that although the deceased died at the scene of the accident, there is no doubt that she experienced some excruciating pain, and relies on *Sukari Industries Limited v Clyde Machimbo Juma* (2016) eKLR. He urges that since the deceased was 7 years old and in good health with no history of terminal illness, the award of Ksh.100,000 for loss of expectation of life was fair. He urges that the trial court properly held that the invoice of Ksh.120,000 for funeral services was a receipt for all intents and purposes. He prays for the dismissal of the appeal with costs, as the award of Ksh. 1,414,414 was fair compensation in the circumstances.

Analysis and Determination

15. After considering the grounds of appeal as listed, the issues for determination are two-fold- whether the award made by the trial court was inordinately high; and whether the Appellants' submissions and authorities were considered.

Excessive general damages

16. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470).”

Pain and Suffering

17. Although the deceased died on the spot, it cannot be said that she did not experience any pain, and this court finds the sum of Ksh.20,000 awarded by the trial court under this head to be reasonable in the circumstances.

Loss of expectation of life

18. It is settled that the conventional figure awardable under this head is Ksh.100,000, which is what the trial court awarded, and this court finds no justification to interfere.



Loss of dependency

19. In considering whether there is evidence of dependency, this court respectfully notes the decision of the court in *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* [2017] eKLR (P.J.O. Otieno J) as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

20. PW1 testified that the deceased, who was his daughter “was aged 7 years old at the time of her death. She was a pupil at [Particulars Withheld] Class 2. She was a bright pupil. She used to top her class.” A letter from the said school was produced as an exhibit in court. The letter stated that:

“In the January 2017, lovely C joined standard one (1) having satisfied her teachers in pp(1) and pp(2) where she always topped her class. In standard one, C continued with her sterling academic performance always topping her class with very high marks for the 3 terms. She was not only good at academic work but also other areas like drama, music and she was a very serious class prefect. R joined std 2 in the January of this year, (2018) having fully satisfied her teachers and parent that she was ready for class two (2). She continued doing well and topping her class up to and including term 2.”

21. The Court of Appeal in *Kenya Breweries Limited V Saro* (1991) eKLR held:

“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.....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 not evidence of pecuniary contribution.”

22. This Court had opportunity to consider *Kenya Breweries v. Saro*, supra, and other case law on the law on dependency in *KBT HCCA NO. 04 OF 2015, NyotaTissue Products Versus Benjamin Obonyo Mukati & 4 Ors.* (2020) eKLR.



23. In the present case, the Respondent herein, as every parent, reasonably expected that the deceased, who was undeniably bright and exceedingly excelling in school, would complete her studies and assist him in his twilight years, but that expectation was crudely cut short by the Appellants' negligence. The trial court took into account the age of the deceased and the uncertainty of her future aspirations before awarding the global sum of Ksh.1,000,000 for loss of dependency, and it cannot be faulted for doing so.

Special damages

24. The court will address this issue, for the simple reason that although it was not raised as a ground of appeal, the Respondent had the opportunity to duly respond to it. It is trite law that special damages should not only be specifically pleaded, but also strictly proved. The disputed sum of special damages is Ksh.120,000 for funeral expenses. This court notes the receipt from Executive Funeral Services duped Cash Sale/Invoice for Ksh.120,000. It is this court's finding that the same amounts to a receipt as opposed to an invoice.

Consideration of the Appellants' submissions and authorities

25. The trial court duly considered the Appellants' and the Respondent's submissions and authorities when it ruled as follows:

“Having considered the rival submissions and counter proposals herein, I concur with both parties that this is an appropriate case where the application of the multiplicand/multiplier approach is not suitable as the deceased's earning capacity could not be ascertained in view of her age. Consequently, the most appropriate approach is the global sum approach. Considering the cited authorities as well as the current economic situation, I award Kshs. 1,000,000/= as general damages for loss of dependency.”

Orders

26. Accordingly, for the reasons set out above, the Court finds the appeal is without merit and it is dismissed.

27. The Respondent shall have the Costs of the Appeal to be paid by the Appellants.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF FEBRUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Oteko Advocate for the Appellants

Mr. G.M Wanjohi Advocate for the Respondent

