Mutiso v Kimuyu (Civil Appeal 26 of 2019)
[2023] KEHC 760 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEHC 760 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL 26 OF 2019

GMA DULU, J

FEBRUARY 2, 2023

BETWEEN

TIMOTHY WAMBUA MUTISO ALIAS TIMOTHY GIDEON WAMBUA MUTISO ..... APPELLANT

AND

EUNICE MWENDE KIMUYU ALIAS RUKIA MUTINDI ..... RESPONDENT

(Being an appeal from the judgment and decree delivered by Hon. C.A Muchoki (SRM) sitting at Tawa Law Courts on 11/03/2019)

JUDGMENT

1. This appeal arises from the judgment of the trial court at Tawa delivered on March 11, 2019 in a case wherein the deceased a fare paying passenger died in a road traffic accident on August 20, 2016 in motor vehicle KCA 041K on the Machakos – Kitui road, when it collided with motor vehicle KBL XXXQ.

2. Liability was agreed by consent at 85:15 in favour of the plaintiff. No oral evidence from witnesses was tendered. Instead, parties' counsel agreed to proceed by filing written submissions on quantum of damages.

3. In the judgment, the trial magistrate noted that the deceased was a child aged 1 ½ years and concluded as follows with respect to liability and quantum of damages –

   Liability 85:15

   Special damages Kshs 7,000/=

   Pain and suffering Kshs 20,000/=

   Loss of expectation of life Kshs 120,000/=

   Loss of dependency Kshs 400,000/=

Total FKshs 547,050/=

Less 15% contribution Kshs 464,992.50

Plaintiff is awarded costs of suit plus interest

4. Aggrieved by the quantum of damages awarded by the trial magistrate, the appellant who was the defendant in the trial court, has come to this court on appeal through counsel J Maluki & Company Advocates on 9 grounds, as hereunder –

    1. The honourable learned trial magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing general damages on loss of expectation of life and loss of dependency and thereby giving an inordinately high and manifestly excessive award unsupported by law so as to amount to an erroneous award in the circumstances of the case.

    2. The honourable learned magistrate erred in law and fact and misdirected herself in awarding a disproportionately high award on loss of expectation of life and loss of dependency.

    3. The honourable learned magistrate erred in law and in fact in awarding general damages for loss of expectation of life of Kshs 120,000.00 for the deceased minor aged one and half (1 ½) years as at the time of death which is inordinately excessive given the circumstances of the case.

    4. The honourable learned magistrate erred in law by giving an award for loss of dependency for the deceased minor aged one and half (1 ½) years as at the time of death which award is unsupported by law so as to amount to an erroneous award in the circumstances of the case.

    5. The honourable learned magistrate erred in law and fact by taking into account irrelevant considerations/factors while awarding general damages for loss of expectation of life and loss of dependency.

    6. The honourable learned magistrate erred in law and fact by failing to deduct the award under the *Fatal Accident Act* from that awarded under the *Law Reforms Act*.

    7. The honourable learned magistrate erred in law and in fact in proceeding on the wrong principles vis-à-vis the evidence before her and laid down principles of law thus arriving at a judgment that was erroneous in the circumstances.

    8. The honourable learned magistrate further erred in law and fact by failing to appreciate, consider and take into account the appellant's submissions on the quantum of damages awardable for loss of expectation of life and loss of dependency in the circumstances.

    9. The honourable learned magistrate erred by making a decision on quantum of damages awardable for loss of expectation of life and loss of dependency that was erroneous, without proper basis and against the weight of evidence.

5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by J Maluki & Company advocates for the appellant, and the submissions filed by Ann W Thoronjo Advocate for the respondent.

6. This is an appeal challenging he quantum of damages awarded. As stated in the case of *Bhutt v Khan (1982 – 88) 1 KAR* –

> " 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."

7. I note that the appellant's counsel identified only one issue for determination – as whether the court awarded inordinately high award for loss of expectation of life and loss of dependency.

8. Under loss of life expectancy, the appellant's counsel submits that the award was high and cited cases such as *Jeffrey Brown v Castle Forest Lodge Ltd (2018) eKLR* wherein Kshs 50,000/= was awarded. Counsel however, does not suggest any figure, and does not give the reasons for the reduction of the award.

9. I find no basis for interfering with the trial court's award, as there is no demonstration from the appellant that it is inordinately high.

10. With regard to loss of dependency, learned counsel for the appellant also relied on the same case of *Jeffrey L Brown (suing on his behalf and as administrator of the Estate of Sharon Mary Brown & MCB v) Castle Forest Lodge Ltd & 2 Others (2018) eKLR* where he contended that the court stated that:-

> " As for CMB, she was only a year old and going by the House of Lords decision in *Gammel v Wilson* her estate is not eligible for an award under this head. As noted Lord Scarman was specific that: "in the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a conventional award should ordinarily be made."

11. On the other hand, counsel for the respondent relies on case of one such being *Kenya Breweries Ltd v Saro (1991) eKLR*, in which the Court of Appeal stated:-

> " But the issue of damages being payable in both cases is no longer an open question in Kenya. This is because in Kenyan society, at least as regards Asians and Africans, the mere presence in a family of a child of whatever age and whatever ability is itself a valuable asset which the parents are proud of and children do help in the family, say by looking after cattle or caring for younger followers, and once children become adults they are expected to and do invariably take care of their aged parents."

12. Having considered the submissions on both sides, I am guided to go by the principle that awards for loss of dependency for young children can be made by courts especially when there is no evidence of ill health or disability of the child. As the multiplicand/multiplier method is not appropriate in such cases, in my view a reasonable global figure can and should be awarded.

13. In the present case, the global award of Kshs 400,000/= assessed by the trial court under this head is reasonable. I will uphold the same.

14. In regard to the complaint that award under the *Law Reform Act* be deducted from awards under the *Fatal Accidents Act*, appellant's counsel has not pursued that point. On my part, I find that there is no universal rule for such deduction.

15. I thus find no merits in the appeal. I dismiss the appeal with costs to the respondent.

DELIVERED, SIGNED & DATED THIS 2ND DAY OF FEBRUARY, 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

Judge