Aldonai Enterprises Limited & another v Gichuru & another (Legal Representatives of the Estate of the Late Samuel Kimathi Gichuru-Deceased) (Civil Appeal 4 of 2022) [2023] KEHC 1573 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1573 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 4 OF 2022

SM GITHINJI, J

MARCH 6, 2023

BETWEEN

ALDONAI ENTERPRISES LIMITED .... 1ST APPELLANT

DAVID MWANGI MBURU .... 2ND APPELLANT

AND

JANET GACERI GICHURU .... 1ST RESPONDENT

MERCY MAKENA KINOTI .... 2ND RESPONDENT

LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE SAMUEL KIMATHI GICHURU-DECEASED

(Being an appeal against the learned Senior Resident Magistrate's Court of Kenya at Mariakani (Honourable N.C Adalo SRM) delivered on the 7th day of December 2021 in Civil Suit no. 454 of 2017-Mariakani)

JUDGMENT

1. This appeal arises from the judgment and decree of Hon N.C Adalo (SRM) in Malindi PMCC No 454 of 2017 wherein she awarded the plaintiffs a sum of Kshs 3,596,000 for loss of dependency with the defendants held 100% liable.
2. Aggrieved with the judgment, the appellant preferred an appeal based on the following grounds;
    1. That the learned senior resident magistrate erred in awarding to the plaintiff the sum of Kshs 3,596,000 for loss of dependency (on the basis of 100% liability) under the *Fatal Accidents Act* which said sum is so excessive as to amount to an erroneous estimate of the damages payable to the plaintiffs.

2. That the learned senior resident magistrate having held that the only dependant of the deceased was his mother namely Janet Gaceri Gichuru who was aged 54 years at the time of filing this suit in 2018 erred in law and in fact in adopting a multiplier of 31 years whilst assessing damages for loss of dependency.

3. That the learned senior resident magistrate erred in not taking into account the advanced age of the deceased's mother and the vicissitudes and uncertainties of life when he adopted a multiplier of 31 years whilst determining damages payable for loss of dependency under the *Fatal Accident Act*.

4. That the learned senior resident magistrate erred in failing to appreciate that by reason of the advanced age of the deceased's mother she would have been a dependant of the deceased for a limited time only and certainly not for a period of 31 years.

5. That the learned senior resident magistrate erred in law and in fact in failing to hold that the 4 sisters and one brother of the deceased who survived the deceased would look after their mother in the absence of the deceased and further failing to hold that by reason of this, their mother dependency on the deceased would be reduced.

6. That the learned senior resident magistrate erred in not deducting amount awarded by him for loss of expectation of life from the amount awarded for loss of dependency under the *Fatal Accident Act* Since the mother of the deceased who is the only dependant of the deceased under the *Fatal Accident Act*, would be the same person to benefit from both the awards under both the Acts.

7. That the learned senior resident magistrate erred in not deducting the statutory deductions of PAYE, NHIF and NSSF from the deceased's gross salary of 29,000 p.m before making the award for damages for loss of dependency under the *Fatal Accidents Act*.

8. That the learned senior resident magistrate erred in awarding to the plaintiffs the sum of Kshs 80,000 for pain and suffering when there was clear evidence before him that the deceased died a few hours after the accident.

9. That the learned senior resident magistrate erred in making awards under the various heads by failing to take into account the general damages awarded to the plaintiffs would be invested to earn interest. If the learned senior resident magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the plaintiffs under each head.

10. That the learned senior resident magistrate erred in failing:-

    a. To consider or properly consider all the evidence before him and/or

    b. To make any or proper findings in the aspect of quantum of damages on the evidence before him

11. That the learned senior resident magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the 3rd and 4th defendants/appellants.

3. The respondents herein Janet Gaceri Gichuru and Mercy Makena Kinoti the administrators of the estate of Samuel Kimathi Gichuru *vide* the amended plaint dated April 6, 2018 sought damages arising out of a fatal road traffic accident that occurred on August 31, 2016 at Kokotoni along Mombasa-Nairobi Highway.

Evidence at Trial

4. Pw1 Mercy Makena Kinoti produced as Pex1 grant of letters of administration *ad litem*. She told the court that the deceased was her brother who died following the road traffic accident on August 31, 2016 and produced as Pex 2 a copy of the death certificate. She further told the court that the deceased was a 4th year student at JKUAT in the last semester pursuing a degree in commerce. Also, that the deceased was in employment to help take care of the family. That he was employed by Adonai for a monthly salary of Kshs 29,000. She produced as Pex7 an employment letter from Adonai.

5. It was her testimony that when they received the news of his demise, together with other family members, they travelled to Mombasa and spent money for funeral arrangements amounting to Kshs 163,000.

6. On cross examination, she stated that she did not have receipts for the expenses.

7. Pw2 Janet Gacheri Gichuru the deceased's mother adopted her witness statement dated September 7, 2017 as her evidence in chief and added that the deceased was employed, paying for his studies and send her money for upkeep every month. Further, he also supported his siblings education and since his death they have all been struggling.

8. Pw3 number 236669 IP Mohamed Hassan the officer commanding traffic at Mariakani police station told the court that there was a serious road traffic accident on August 30, 2016 at 10.30 at Kokotoni area involving one Francis Mutuku of Amiran (K) Limited who was driving motor vehicle registration number KBY 884R a Toyota pickup from Mariakani direction towards Mombasa and on reaching at Kokotoni area, he collided with motor vehicle number KBK 825Z/ZC 7909 Mercedez Benz which was from a yard from the left side of the road and was joining Nairobi-Mombasa highway. The Toyota to avoid it, swerved to the left and hit a pedestrian one Samuel Kimathi Gichuhi who was walking off the road. The pedestrian sustained serious injuries, fracture on the right leg and a cut on the head, and was rushed to Mariakani sub-county hospital.

9. Dw1 Francis Munguti adopted his written statement dated September 24, 2019 as his evidence in chief and added that he is a driver employed by Amiran Kenya. He stated that he started his journey from Nairobi heading to Mombasa and when he reached at Kokotoni, a lorry entered the road without taking due care. That it was too sudden and he could not control the vehicle, he hooted and flashed lights but the distance was too short that he hit the rear part of the lorry. As a result, the right tyre busted, his vehicle was damaged, lost control and veered off the road. When the vehicle stopped, he alighted and good samaritans heard a person screaming under the vehicle. They pulled him from under the vehicle and was rushed to the hospital. Later, he learnt that he died. He blamed the driver of the lorry for joining the road without due care and attention to other road users.

10. On cross examination, he stated that he hit the pedestrian because his vehicle lost control and he could not see ahead as the windscreen had crushed and the bonnet was up.

Submissions, Analysis and Determination

11. I have perused the pleadings, recorded evidence, judgment, grounds of appeal, submissions and decisions referred to.

12. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses during the

trial and should therefore make an allowance for that. This duty was well stated in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

13. The discretion of this court to interfere with the determination of the trial court also exercising its discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93 , where he held as follows: -

> "I think it is well settled that this court will not interfere with the exercise of the 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 which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion"

14. After weighing the grounds of appeal, records of the trial court and submissions, I find the issues for determination as follows: -

    1. Whether the trial magistrate finding in blaming the appellant for negligence is against the weight of evidence adduced.
    2. Whether the trial court erred in using a multiplier of 31 years?
    3. Whether the trial magistrate erred in awarding under both the *Law Reform Act* and the *Fatal Accidents Act* and whether the awards are excessive?

Whether the trial magistrate finding in blaming the appellants for negligence is against the weight of evidence adduced.

15. The evidence of the 2nd defendant which is corroborated by Pw3 the police officer, in that the 3rd defendant's vehicle was joining Mombasa-Nairobi highway from the left and towards Mombasa direction, whereas the 2nd defendant was heading towards Mombasa. The 3rd defendant did not ensure the Highway was free of vehicles and safe to join. The 2nd defendant had no breaking distance and swerved hitting the tail end of the trailer and the impact forced the bonnet of the vehicle open obstructing his view causing the motor vehicle lose control, veer off the road, where it hit and killed the deceased. The 4th defendant had a duty of care towards other motorist using the road at the place at that time, of which duty he breached thus causing the accident.

16. Further, given the way the motor vehicle registration number KBY 488R behaved, it must have been driven by the 2nd defendant at unreasonably high speed and therefore carelessly. The trial court

therefore properly analysed the evidence and apportioned blame and liability appropriately. I have no cause to depart from the said finding.

Whether the trial court erred in using a multiplier of 31 years?

17. The appellants herein have faulted the trial court for using a multiplier of 31 years. Their argument is that the trial court ought to have considered the age of the mother of the deceased who was 54 years at the time of instituting the suit. They have stated that given the vicissitudes of life and her advanced age, she would have depended on the deceased for a limited time and certainly not for a period of 31 years. As regards this assertion, of greater consideration is mostly the age of the deceased and the expectation of his earning rather than that of the dependant. I rely on the case of Ghunibai J Patel & another v PF Hayes and another (1957) EA 748,749 where the court held that:

> " In choosing the said figure, usually called the multiplier, the court must bear in mind, the expectation of earning of the life of the deceased, the expectation of life and dependency of the dependants, and the chances of life of the deceased and the dependants. The sum thus arrived must then be discounted to allow the legitimate considerations"

18. In arriving at the multiplier, the trial court observed that;

> " ....he was fairly a young man and had big dreams for himself as he was studying at the university. He could have maybe worked till the retirement age of 60 years and I shall adopt 31 years as the multiplier..."

19. Thus, I am not convinced that I should upset the multiplier adopted by the trial court.

Whether the trial magistrate erred in awarding under both the *Law Reform Act* and the *Fatal Accidents Act* and whether the award were excessive?

20. As to whether an award of loss of expectation of life under the *Law Reform Act* and an award of loss of dependency under the *Fatal Accidents Act* amounts to double compensation, the Court of Appeal in *Hellen Waruguru Waweru (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 Law Reform Act and dependents under the Fatal Accidents 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 issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the *Kemfro case* (supra) which was heavily relied on by Mr Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the *ratio decidendi*. The same case, however, is more fully reported in [1987] KLR 30 as *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another v Lubia & another (No 2)* and the *ratio decidendi* is extracted from the unanimous decision of all three judges. It was held, *inter alia*, that: -
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> > "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. 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 dependents 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. 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." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh 100,000 awarded for loss of life expectation to Sh 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

21. Mindful of the antecedent decisions, I am not persuaded that the respondent should not be awarded damages under loss of expectation of life. I as well find no rationale as to why damages for loss of expectation of life should be deducted from the award under loss of dependency. I therefore uphold the trial court's judgment under loss of expectation of life in the sum of Kshs 120,000/=.

22. In awarding the loss of dependency, the trial court relied on the payslip of the deceased which was produced in court showing that the deceased earned a gross salary of Kshs 29,000. The appellants have faulted the trial court in adopting a multiplicand of Kshs 29,000 as opposed to Kshs 19,802 which takes into account deductions. In the case of *Evaline Chepkirui (suing as the Legal Representatives of the estate of the late Kiprotich Cheruiyot) v Stella Asuga & another* [2021] eKLR, Gikonyo J observed as follows;

23. The appellant has fastened a quarrel with the trial court's ascertainment of the applicable multiplicand. According to the appellant, the trial court ought to have deducted only tax element from the gross salary.

24. I note from the record that the trial court allowed other deductions over and above the tax payable (PAYE). My understanding of this aspect of law is that, not all deductions in a pay slip are discounted in the ascertainment of the multiplicand for purposes of loss of dependency. I should think that, only the tax element is to be deducted from the gross pay. PAYE is tax payable to government. However, statutory and other deductions whose beneficial owner is the deceased and his estate, are not to be discounted when assessing dependency.

25. In light of the above and by the appointment letter dated 11th August where the deceased earned a gross salary of Kshs 29,000, I am of the view that the same is subject to PAYE. The tax band for the year 2016 was 10 % of the gross salary. As such, I find that the correct multiplicand is Kshs 26,100. That being the case, loss of dependency is hereby calculated as; 26,100 x 12 x 31 x 1/3 = 3,236,400.

26. Consequently, the appeal is partially allowed and set aside the award for loss of dependency made by the trial court. As aforestated, I do not interfere with the awards made by the trial court under the other heads. Therefore, the judgment is entered in the following terms;

a. Pain and suffering Kshs 80,000/=

b. Loss of expectation of life Kshs 120,000/=

c. Loss of dependency Kshs 3,236,000/=

d. Special damages Kshs 43,000/=

e. Total Kshs 3,479,400/=

Liability of the 1st and 2nd defendants Kshs 2,435,580/=

Liability of the 3rd and 4th defendants Kshs 1,043,820/=

Since the appeal partially succeeds, the respondents shall have half costs of the appeal.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6TH DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of: -

1. Miss Mwanguo holding brief for Mr Gor for the Appellant.

2. Ms Mathenge for the Respondent

Coram: Hon. Justice S.M Githinji

C.B Gor advocate for the appellants

Jane Kagu advocate for the respondents