



Matunda (Fruits) Bus Services Limited v PAO & MAO (Suing as Representatives of the Estate of the Late MOO) (Civil Appeal 92 of 2019) [2023] KEHC 2181 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 92 OF 2019
HK CHEMITEI, J
MARCH 23, 2023**

BETWEEN

MATUNDA (FRUITS) BUS SERVICES LIMITED APPELLANT

AND

PAO & MAO RESPONDENT

SUING AS REPRESENTATIVES OF THE ESTATE OF THE LATE MOO

(Being an appeal from the judgment of Honourable S.M Wabome (Chief Magistrate), delivered on 30th April 2019 in Molo CMCC NO. 242 of 2018)

JUDGMENT

1. This appeal arises from an accident that occurred on 31st December 2017 or thereabout involving motor vehicle registration number KCC 003A along Eldoret-Nakuru road at Migaa area, where the appellant by itself, servant, agent and/or employee so negligently drove the said motor vehicle that it lost control and got involved in an accident as a result of which it caused the death of the deceased who was lawfully travelling in the said motor vehicle.
2. The respondent filed a suit against the appellant claiming inter alia damages under *Fatal Accidents Act* and *Law Reform Act*, special damages and costs of the suit plus interests. The matter proceeded to its conclusion and the parties herein entered a consent on liability on the ratio of 5:95 against the appellant and the court awarded the respondent damages for pain and suffering Kshs. 20,000/=, Loss of expectation of life Kshs. 150,000/=, Loss of dependency Kshs. 1,292,600/= and special damages for Kshs. 46,300/= together with costs of the suit plus interest until payment in full.



3. Aggrieved by the said judgement, the appellant filed this appeal against the lower courts' Judgement based on the following grounds; -
 - a. That the learned magistrate erred in law and in fact in awarding a higher amount on general damages without considering the evidence and the submissions on general damages given on behalf of the appellant while considering his judgment.
 - b. That the learned magistrate erred in law and in fact in disregarding the evidence adduced by the appellants thereby arriving at a wrong decision as to quantum payable to the plaintiff.
4. When the matter came up for hearing the court ordered that the same be canvassed by way of written submissions, which both parties have complied.

Appellant's Submission

5. The appellant's counsel submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding quantum of Kshs. 1,292,600/= as loss of dependency. That the same was the main contention as it was inordinately high and excessive. Further, that the trial court adopted minimum wage of Kshs. 12,926/=, a multiplier of 25 year and dependency ratio of 1/3 to calculate loss of dependency.
6. The appellant's counsel submitted further that the trial court erred as this case was unsuited to the multiplier/ multiplicand approach in the assessment of damages in respect of lost dependency. That the trial court ought to have adopted the global award approach in determining loss of dependency as the deceased monthly income could not be established.
7. The court's attention was drawn to the cases of *Albert Odawa v Githimu Githenji*; Nakuru HCCA No.15 of 2003 [2007] eKLR and *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR.
8. The appellant's counsel went on to submit that Kshs. 1,292,600/= was excess amount for loss of dependency and he placed reliance on the cases of *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, *Chhabhadiya Enterprise Ltd & Another v Gladys Mutenyo Bitali* (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu- Now (deceased) and *Mwangangi & Another v FKM* (Suing as legal Representative of the Estate of the Late AMK) (Civil Appeal E11 of 2021) [2021] KEHC 291 (KLR) where the courts awarded minors aged 12 years loss of dependency Kshs. 600,000/=, Kshs. 700,000/= and Kshs. 800,000/= respectively.
9. In conclusion, the appellant's counsel submitted that Kshs. 700,000/= was sufficient compensation for loss of dependency. Also, that costs should also follow event as per the provisions of section 27(1) of the *Civil Procedure Act*. He urged the court to allow the appeal as prayed with costs in favour of the appellant.

Respondent's Submissions

10. The respondents' counsel submitted that PW1 testified that the deceased was 12 years old when he died as a result of a road accident on 31st December 2017. That the principles laid down in awarding damages for loss of dependency in case of a minor was cited in the Court of Appeal case of *Sheik Mushtaq Hassan v Nathan Mwangi Kamau & 5 others* (1982-88) 1 KAR, where the court held that in assessing



damages under loss of dependency in case of a deceased minor the goal all the time was the assessment of a fair award in the circumstances of any case.

11. The respondents' counsel while placing reliance on the case of *Kenya Breweries Limited vs Saro* [1991] Mombasa Civil Appeal No. 441 of 1990 (eKLR), submitted that a party was entitled to compensation for the untimely death, regardless of age, under loss of dependency. The respondents' counsel further placed reliance on the case of *Daniel Mwangi Kimemi & 2 others v JGM & Another (The Personal Representatives of the Estate of NK (DCD))* [2016] eKLR where the court awarded Kshs. 1,000,000/= to a minor under the said limb in 2016.
12. Lastly, the respondent's counsel submitted that special damages of Kshs. 45,300 as awarded by the trial court was specifically proven and that the appeal be dismissed with costs in favour of the respondents.

Analysis and Determination

13. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where Sir Clement De Lestang (V.P) stated that:

“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 demeanor of a witness is inconsistent with the evidence in the case generally”.

14. However, in *Peters vs Sunday Post Ltd* [1958] EA 424, the Court held that: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

15. I have perused through the entire record of appeal and considered the submissions by counsel for both parties. I note that liability is not contested therefore the only issue for determination is whether the trial magistrate erred in adopting the minimum wage of Kshs. 12,926/=, a multiplier of 25 year and dependency ratio of 1/3 to calculate loss of dependency at Kshs. 1,292,600/= for a 12-year-old.
16. The appellant's counsel submitted that the trial court awarded quantum of Kshs. 1,292,600/= as loss of dependency which was inordinately high and excessive and the trial court arrived at the said award without any basis or justification. The court's attention was drawn to the cases of *Rosemary Onyango & Another v Mohamed Jenjewa Ndoyo & Another* [2019] eKLR and *H.K M v Francis Mwangela Mabere* [2017] eKLR, where the court awarded Kshs. 500,000/= and 200,000/= respectively for loss of dependency for the estate of a 2-year-old and a 7-year-old.



17. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus case of *Bashir Butt v Khan* Civil Appeal No. 40 of 1977 [1978] eKLR thus;

“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.”

18. Additionally, in the case of *Butler v Butler*, [1984] KRR 225 the court held as follows: -

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong decision.”

19. In the instant case as witnessed above, the bone of contention is in regard to how the trial magistrate arrived at the award of Kshs. 1,292,600/= under the loss of dependency. From the judgment, the trial magistrate arrived at the said award by applying the formula applied in the case of *Abdi Kadir Mohamed & Another v John Walaba* [2019] eKLR. The trial magistrate went ahead to apply the minimum wage of a general worker at Kshs. 12,926.55 x 1/3 x 12 x 25= Kshs. 1,292,600/=.

20. In the case of *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs Gichumu Githenji* Nakuru HCCA No.15 of 2003 [2007] eKLR, the court made the following observation;

“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 and the expected length of the 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.”(Emphasis mine)

21. Further, in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court held as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”



22. Additionally, in *Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR where the court was dealing with a similar issue, it stated:

“(23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

(24) The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

23. In view of the above cited authorities, it is evident that there are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.

24. In the instant case, it is my considered view that the trial magistrate erred in principle in applying the multiplier method instead of awarding a global sum since no proof of monthly, annual or anticipated income for the deceased was produced in court.

25. In *Emmanuel Wasike Wabukesa suing for BWW a Minor Deceased v Munena Ndiwa Durman* C.A. Eldoret C.A. No. 10 of 2017 [2019] eKLR the High court set aside an award of loss of dependency which had been made by the trial court using a multiplier where the deceased was an infant and where an award of KShs.1, 260,000 was substituted with a global award of Kshs. 200,000.

26. In the premises, and taking cue from the above cited authorities and the fact specifically that the deceased was a minor with no known income, a global award is more appropriate in the circumstances.

Therefore, a global sum of Kshs. 1,000,000 will suffice together with the sum of Kshs. 46,975 being proven special damages thus totalling Kshs. 1,046,975 less 5%, (Kshs. 52,348) making a grand total of Kshs 994,627 which shall attract interest from the date of the trials court judgement till payment in full.

28. Each party in this appeal shall bear its own costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 23RD DAY OF MARCH 2023.

H. K. CHEMITEI

JUDGE

