Matunda (Fruits) Bus Services Limited v Owino & another (Suing as representatives of the Estate of the Late Martin Odolkendo) (Civil Appeal 82 of 2019) [2023] KEHC 2347 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2347 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 82 OF 2019

HK CHEMITEI, J

MARCH 23, 2023

BETWEEN

MATUNDA (FRUITS) BUS SERVICES LIMITED ..... APPELLANT

AND

MILLICENT AKOTH OGITO ..... 1ST RESPONDENT

PHOEBE ACHIENG OWINO ..... 2ND RESPONDENT

SUING AS REPRESENTATIVES OF THE ESTATE OF THE LATE MARTIN ODOLKENDO

(Being an appeal from the judgment of Honourable S.M Wahome (Chief Magistrate), delivered on 30th April 2019 in Molo CMCC NO. 299 of 2018)

JUDGMENT

1. This appeal arises from an accident that occurred on December 31, 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 where 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. 3,072,000/= and special damages for Kshs. 46,000/= 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. The Learned Magistrate erred in law and fact in awarding a sum of Kshs, 3.072,000/= as damages for loss of dependency by using a multiplier and multiplicand with no basis.

    b. The trial Magistrate erred in fact and in law in awarding special damages which were never pleaded and proved in accordance with the law.

    c. The Learned Magistrate erred in law and in fact in failing to accord due regard to the Appellant submissions on quantum on applicable principles for assessment of damages.

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 Submissions

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. 3,072,000/= as loss of dependency. That the same was the main contention as it was inordinately high and excessive. Further, that the trial court used a multiplier of 16 years for 44-year-old, multiplier of Kshs. 24,000/= without proof and dependency ratio 2/3.

6. The appellant counsel submitted further that it had been pleaded in the plaint that the deceased was a contractor and he earned Kshs. 3,000/=. That however, PW1 testified that the deceased was working as a painter but no evidence was adduced to prove the earnings. Therefore, that the trial court erred in law and in fact by adopting a multiplicand of Kshs. 24,000/= without any proof.

7. It placed reliance on case of *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa0 Ltd & Another* as quoted in *Jackson Chege Kamau & Another v James Theuri Wachira (Suing as the Administrator of the Estate of John Mwaniki Theuri (Deceased)* [2020] eKLR, where the court held that the multiplier approach was only practical where factors such as amount of annual or monthly dependency are known.

8. The appellant's counsel went on to submit that in the absence of proof of earnings, the trial court should have used a minimum wage of a general labourer of Kshs. 12,926.50/= as per the *Regulation of Wages (General) (Amendment) Order* 2017. That the multiplier of 8 years would be reasonable in consideration of vicissitudes of life and therefore the computation of loss of expectation of life would be Kshs. 12,926.50 x 12 x 8 x 2/3 = Kshs. 827,296/=. The appellant's counsel urged the court to substitute the award of Kshs. 3,072,000/= as damages under the fatal Accident Act with the sum of Kshs. 827,296/=. He also urged the court to allow the appeal with costs in favour of the appellant.

Respondents' Submissions

9. The respondents' counsel submitted that the deceased died at the age of 44 years and was a painter. That the appellant in its lower court submissions submitted under the Fatal Accident Act, while applying the multiplier multiplicand method which approach was also used by the court and it. Therefore, that the appellant could not lay claim that the trial court erred by using a multiplier multiplicand approach yet they supported the same. They draw the court's attention to the case of *Chania Shuttle v Mary*

Mumbi [2017] eKLR which quoted the case of *Jacob Ayiga Maruja & Another v Simeon Obayo* CA 167/200[2005], on the principle in awarding multiplicand.

10. The respondents' counsel submitted further that the trial court did not err in awarding Kshs. 24,000/= for multiplicand which was arrived at by taking into account the fact that the deceased could work for 2 or 3 days a week and earning Kshs. 3000/= per day. That the same translated to 6,000/= a week and Kshs. 24,000/= a month. Therefore, the trial court did not err by adopting the 16 years as the deceased died at the age of 44 years and if he would have worked under the Government regulations then he would have worked up to 60 years. They urged the court to uphold the award under the heading of loss of dependency as was held by the lower court and calculated at 24,000 x 16 x 12 x 2/3= Kshs. 3,072,000/=.

11. Finally, the respondents' counsel submitted that the trial court awarded Kshs. 46,000/= as special damages which was specifically proven and had a KRA revenue stamp affixed. They urged the court to dismiss the appeal with costs in their favour and to uphold the trial court's judgment.

Analysis and Determination

12. 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".

13. 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"

13. 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 quantum award of Kshs. 3, 072,000/= as loss of dependency was inordinately high in the circumstances.

14. The appellant's counsel submitted that the trial court awarded quantum of Kshs. 3,072,000/= as loss of dependency which was inordinately high and on arrival of the same used a multiplier of 16 years for a 44-year-old, multiplier of Kshs. 24,000/= without proof and dependency ratio of 2/3. The appellant's counsel submitted further that the multiplier of 8 years would be reasonable taking consideration of

vicissitudes and vagaries of life. He urged the court to adopt a computation of Kshs. 12, 926.50 x 12 x 8 x 2/3= Kshs. 827,296/=.

15. 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 *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."

13. Further, the Court of Appeal in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* [1985] eKLR held that: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

13. 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."

13. In the instant case, the bone of contention is in regard to how the trial magistrate arrived at the award under the loss of dependency. The trial magistrate considered Kshs. 24,000/- per month as appropriate. According to the trial magistrate, a multiplier of 16 and 2/3 was an appropriate dependency ratio noting that both parties were in agreement of the same. On the expected years the deceased would have worked, the trial magistrate was of the view that the deceased would have worked up to the age of 60 years. It is not disputed that the deceased was 44 years old at the time of his death.

14. The formulae proposed by Ringera J. (as he then was) in *Beatrice Wangui Thairu -vs- Hon. Ezekiel Barngetuny & Another* Nairobi HCCC No. 1638 of 1988 (UR) stated: -

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow

the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

21. According to appellant's counsel, in the absence of proof of earnings, the trial court should have used minimum wage of a general labourer of Kshs. 12,926.50/=, as per the *Regulations of Wages (General) (Amendment) Order* 2017.

22. The respondents' advocate on the other hand submitted that PW1 testified that the deceased was the bread winner of the family, that he used to be a painter and could go to work for three days in a week where he could earn Kshs. 3,000/= a day. That the deceased had worked for 20 years and died at the age of 44 years. Further, that the appellant could not lay a claim that the trial court erred by using a multiplier multiplicand approach without basis yet it also applied the said approach. Reliance was placed in the case of *Chania Shuttle v Mary* (*supra*) as quoted in the case of *Jacob Ayiga Maruja & Another v Simeon Obayo* (*supra*).

23. It is only when there is absence of income that the trial magistrate will apply the *Regulations of Wages Order* as held by Asike-Makhandia J. in *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another* Kisii Civil Appeal No. 68 of 2005 [2011] eKLR. In the absence of receipts of income like in this case, I concur with the appellant's counsel's submission that the *Regulation of Wages (General) (Amendment) Order*, 2017 which at the time placed wages for a general labourer at Kshs. 12,926.55 as monthly earning. This will be the multiplicand figure.

24. The deceased was not in employment and therefore there is a possibility that he would have worked for more than 60 years but taking into consideration the uncertainties of life, the trial magistrate was correct to apply 16 years as the multiplier. The dependency ratio is not disputed therefore the amount on loss of dependency will work out as 12, 926.55 x 12 x 16 x 2/3= Kshs. 1,654,598.40/=.

25. The ground on special damages cannot stand as there was evidence enough that the amount was incurred.

26. In the premises, the appellant's appeal partly succeeds on the issue of the multiplicand. Consequently, the trial court's judgement on quantum dated April 23, 2019 is set aside and substituted with judgement as follows:

    a) Pain suffering.....Kshs. 20,000.00/-

    b) Loss of expectation of life.....Kshs. 150,000.00/-

    c) Loss on dependency.....Kshs. 1,654,598.40/-

    d) Special damages.....Kshs 46,300.00/-

    SUB TOTAL.....Kshs. 1,870,898.00/-

    Less 5% contribution.....Kshs. 93,544.90/-

    Net Damages.....Kshs. 1,777,353.10/-

27. Interest shall be computed from the date of the judgement of the trial court. Each party shall bear its own costs.

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

H. K. CHEMITEI

JUDGE