Mutia v Murimi (Suing as Legal Representative and Administrator of the Estate of the Late Simon Murimi Mwaniki) (Civil Appeal 004 of 2021) [2023] KEHC 1455 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1455 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 004 OF 2021

FR OLEL, J

MARCH 2, 2023

BETWEEN

FRANCIS KARITHI MUTIA ..... APPELLANT

AND

ANN WANGECI MURIMI (SUING AS LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE SIMON MURIMI MWANIKI) ..... RESPONDENT

((Being an Appeal from The Judgment and Decree Delivered By Hon. M, Kivuti (MS) (SRM) on 17/December /2020 In Baricho SPMCC No. 98 of 2019))

JUDGMENT

Introduction

1. The appellant was the defendant in the primary suit, where he was sued for compensation arising from a road traffic accident which occurred on November 9, 2018. It was alleged that on the said date the deceased was lawfully riding his motor cycle along Sagana- Mukutano road , when the defendant authorized driver drove, managed, steered and/or controlled motor vehicle KBR 488Y in a negligent and reckless manner thereby permitting the same to cause an accident, which occasioned the deceased fatal injuries..

2. On October 29, 2020 the parties herein did record the following consent;

    a. Judgment be and is hereby entered in favour of the plaintiff as against the defendant in the ratio of 60:40.

    b. The plaintiff witness statement dated June 17, 2019 is hereby adopted as the plaintiff's evidence in chief.

c. The plaintiff's documents dated June 17, 2019 and filed on July 2, 2019 be produced as exhibit 1 to 8.

d. Parties to file submissions

3. The parties did file their submissions and vide a considered judgment dated December 17, 2020 the learned trial magistrate did enter judgment in favour of the plaintiff in the sum of Ksh 2,118,700/= less 40% agreed contributory negligence which brought down the sum to Ksh 1,271,220/=.

4. The appellant, who was the defendant in the primary suit, being dissatisfied by the quantum awarded did file their memorandum of appeal on February 1, 2021 and raised grounds of appeal namely:-

a) That the learned trial magistrate erred in law and fact by awarding damages for loss of dependency in the sum of Ksh 2,000,000/= which award is inordinately excessive taking into account the circumstance of this matter.

b) That the learned trial magistrate erred in law and fact by failing to consider the authorities' supplied on behalf of the appellant which were a useful guide in arriving at a reasonable award for damages for loss of dependency and thereby arrived at an award that is inordinately excessive.

c) That the learned trial magistrate erred in law and fact by failing to lay a basis or base the award of Ksh 2,000,000/= on any existing precedent and thereby ignored the doctrine of stare decisis in arriving at the said award.

d) That the award of the learned trial magistrate on damages for loss of dependency is against the law and weight of evidence on record

5. The appeal herein is thus purely on the issue of quantum of damages as assessed by the trial court.

Facts of the Case

6. At the trial, the parties did not testify. The plaintiffs witness statement was adopted by the court and his documents admitted into evidence as exhibit 1 to 8. The appellant did not testify nor did he produce any document into evidence. The parties agreed that judgment be entered on liability in favour of the plaintiff as against the defendant at a ratio of 60:40.

Submissions

7. The appellant relied on their written submissions filed on August 1, 2022. It was their contention that the respondent did not prove dependency and never tendered any evidence in court to support this allegation. In addition there was no letter of chief or marriage certificate to ascertain the fact that she was married to the respondent. The appellant relied on the case of *Monica Muthoni Mwanga v Peterson Wanjohi & another* [2004] eKLR where it was held that " in absence of proof of dependency, no amount can be awarded for loss of dependency . The court can only make award for pain and suffering and loss of expectation of life."

8. The 2nd issue raised by the appellant was that the global award of Ksh 2,000,000/= was excessive yet the respondent had only pleaded that he deceased was a farmer and failed to adduce any evidence whatsoever to ascertain his actual earnings. The appellant relied on the case of *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* (2020) eKLR, where it was held that courts should be wary to subscribing to a figure to enable it come up with a probable sum to be used as multiplicand.

In such circumstance's it is advisable to apply a global sum approach mode of assessing the loss of dependency.

9. The appellant proposed that the respondent should be awarded a global sum of Ksh 500,000/= as a sufficient award on the heading of loss of dependency since he was 32 years old.

10. The respondent did oppose this appeal by their submissions file in court on October 18, 2022 . on the issue of dependency they submitted that; section 4(1) of the *Fatal Accidents Act* , cap 32 provided that every action brought by virtue of provisions of the said Act shall be brought for the benefit of the wife , husband, parent and child of a person whose death was so caused and subject to provisions of section 7, be brought by and in the name of the executor or administrator of the deceased person.

11. They submitted that this suit was brought by the wife of the deceased as the legal administrator of his estate. The letters of administration were admitted into evidence by consent of the parties and the appellant did not bring any evidence to challenge the same at trial and could thus not be heard to challenge the same. The respondent relied on the case of *Leonard O Ekisa & another v Major K Birgen* [2005] eKLR where the court held that

> " Dependency is a matter of fact. It need not be proved be documentary. Evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances."

12. The respondent also stated that to prove a person's profession one did not need to produce certificates and that the only way of earning need to be by production of documentation. They relied on the case of *Jacob Ayiga Maruja & another v Simeon Obayo* (2005) Eklr. Finally on the global sum awarded of Ksh 2,000,000/= the respondent stated that the sum was justified as the court in assessing damages used the general method approach which appreciated the injuries suffered and comparable awards/

13. The respondent's also stated that awarding general damages is a discretion of the trial court and that the appellate court ought be slow to interfere with such discretion unless exercised on the wrong principles, or that the amount awarded was extremely high or so low as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled. See *Savana saw Mills Ltd v George Mwale Mudomo* [2005] eklr and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

Determination

14. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

15. As held in *selle & another v Associated Motor Boat Co ltd & others* [1968] EA 123 where it was stated that;

> " 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 principals 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 conclusion 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. (Abduk Hammed saif v Ali Mohammed Sholan[1955], 22 EACA 270

16. In *Coghlan v Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

17. Therefore, this court has a duty to delve at some length into factual details and revisit facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

18. In this appeal, the parties did file a consent judgment on liability and the court arrived at its decision by relying on the documents admitted into evidence by consent and the submission's filed by the parties.

19. The first issue raised by the appellant in his submissions is that dependency was not proved. Unfortunately in light of the consent judgment on liability this court on appeal cannot go back to make a determination on this issue as it was deemed concede to when judgment was entered.

20. Secondly the appellant did not in his memorandum of appeal challenge the issue of dependency and only challenge the judgment base on quantum. A such that is the only issue this court will relook into.

21. In this appeal, the Appellant is only challenging the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages 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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors or 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".

22. Similarly, in *Jane Chelagat Bor v Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the appellate court is to interfere, whether on the ground of excess or insufficiency."

23. Further in the case of *West(H) and Sons Limited v Shepherd* [1964] AC 326 at 345 it was appreciated that ;-

> " The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower court, this court must be satisfied that the trial court did not exercise its discretion judiciously".

24. It is thus settled law that the appellate court will not interfere with an award of general damages by a trial court unless;(a) the trial court acted under a mistake of law; or(b) where the trial court acted in disregard of principles; or (c)where the trial court took into account irrelevant matter or failed to take into account relevant matters; or (d) where the trial court acted under a misapprehension of facts; or (e) where injustice would result if the appellate court does not interfere ; or (f) when the amount awarded is either ridiculously high that it must have been erroneous estimate of the damages.

25. The appellants maintained that the global award of Ksh 2,000,000/= was not justified as no concrete evidence of the deceased earning was tendered in evidence. They stated that the global award in such cases should be informed by special circumstances of each case and it should not be arbitrary but seen to be a suitable replacement that correctly fits the gap. see *Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* (2020)eklr,

26. Further they proposed that the award should be reduced to Ksh 500,000/= as sufficient for loss of dependency since the deceased was 32 year old. They relied on the authorities of *Dismus omolo odongo & another v Interior Inspiration Ltd & 2 others* [2017] eklr , *Kenya Power & lighting co v Charles obeyo ogeta (suing as legal represrantive of the Estate of Esther Nyanchoka obegi* [2016] eklr and *Mutiga Kamai v Joshua Kinyua Kamange (suing as administrator and legal representative of the Estate of Elijah Kamange (Deceased)* [2021] eklr

27. The respondent on the other hand urged this court to maintain the award as it is reasonable, there were no wrong principles applied and that the award was comparable with similar awards. Further they also relied on the submission's filed in the lower court which the trial court considered

28. It is trite law that when it comes to assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are unusually similar in terms of nature and extent of injuries sustained. The court of appeal in *Stanley Maroa v Geoffrey Mwenda* [2004] eKLR stated as follows ;

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should

be that comparable injuries should, as far as possible, be compensated by comparable award keeping in mind the correct level of awards in similar cases."

29. Further in the case of *Charles oriwo odeyo v Apollo Justus Andabwa & Ano* [2017] eKLR the court stated that;

> " The court in making an award for damages must always consider prevailing inflation."

30. I have carefully considered all the pleadings filed, and evidence tendered in court and submissions filed on the issue of quantum applicable. It is obvious that in this case there was no satisfactory proof of monthly income and a such it is advisable to apply the global sum approach mode of assessing the loss of dependency

31. In the case of *Moses Maina Waweru v Esther Wanjiru Githae(suing as the personal representative of the Estate of the late David Githae Kiririo Taiti* [2022]eklr the court stated that;

> " loss of dependency is a question of fact. The criteria to be used in determining an award for loss of dependency is the number of dependent's, the age of the dependent's and level of dependency. In my view the award ought to be higher where the dependents are young. The age at which the deceased died is also a relevant factor."

32. In the above citation the deceased was 68 years old and left behind a widow and adult children. The award was reduced from Ksh 2,000,000/= to Ksh 700,000/= given that the adult children did not depend on the deceased and his age.

33. In the case of *Chen Wembo & 2 others v IKK &Ano (suing as legal representative of the estate of CRK (deceased)(supra) , Kitale industries ltd 7 another v Zakayo Nyaende & ano*[2018]eKLR and in *Chabhadiya Enterprises ltd & another v Sarah Alusa Mwachi (suing as legal representative of the estate of the late Fazia Musa(deceased)* 2018 eklr , the courts awarded global sums of Ksh 600,000/= and Ksh 700,000/= respectively.

34. In the case of *Mwangangi & ano v FKM (Suing as legal representative of the Estate of the late AMK]* [Civil Appeal E11 of 2021] [2021] KEHC 291 [KLR] the court did consider the circumstance, where the victim was a child and awarded a global sum of Ksh 800,000/=

Disposition

35. Having considered the quantum awarded under loss of dependency, and comparable awards, the age of the deceased , the level& number of dependent's and inflationary trends, I do find that general damages awarded herein was unreasonably high and warrants interference by this court. I therefore set-aside the award of Ksh 2,000,000/= for loss of dependency and substitute the same with an award of Ksh 1,400,000/= .

36. In doing so, I have considered the deceased age, level of dependency (where the dependents are younger, the award is higher), and inflationary trends in *Moses Maina Waweru v Esther Wanjiru Githae (suing a personal representation of the estate of late David Githae Kirimo Taiti* [2022] KLR the deceased was 68 years and was awarded Ksh 700,000/-. In this case the appellant was 32 years and his dependent were young.

37. The other decisions reacted and considered mainly involved children and these were granted lower quantum.

38. The judgment will be entered as follows ;

Liability plaintiff 40%

Defendant 60%

Pain & suffering Ksh 10,000

Loss of expectation of life Ksh 80,000

Loss of dependency Ksh 1, 400, 000

Special damages Ksh 28,700

Sub total Ksh 1, 518,700

Les 40% liability Ksh 607,480

Total Ksh 911,220**

39. Each party will bear its own cost of this appeal.

Dated, signed and delivered virtually at Machakos this 2nd day of March,2023.

FRANCIS RAYOLA

JUDGE

In the presence of:

Ms Kiremi for Appellant.

Court Assistant - Susan