Osumbe v Otieno & another (Suing as a Legal Representatives of the Estate of Nelson Odhiambo Otieno-Deceased) (Civil Appeal 97 of 2021) [2023] KEHC 2127 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 97 OF 2021

KW KIARIE, J

MARCH 21, 2023

BETWEEN

STEPHEN OTIENO OSUMBE ..... APPELLANT

AND

EUNIA AKELLO OTIENO ..... 1ST RESPONDENT

SALOME AUMA OTIENO ..... 2ND RESPONDENT

SUING AS A LEGAL REPRESENTATIVES OF THE ESTATE OF NELSON ODHIAMBO OTIENO-DECEASED

(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's SPMCC No. 54 of 2018 by Hon. Celesa Okore–Principal Magistrate)

JUDGMENT

1. Stephen Otieno Osumbe, the appellant herein, was the defendant in Oyugis Principal Magistrate's SPMCC No. 54 of 2018. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCD 779C which was being driven by the appellant at the time of the complained of accident. The deceased was a pedestrian who allegedly was crossing the road at the time he was fatally knocked down. The learned trial magistrate delivered judgment dated 7th October, 2021. She apportioned liability at 60:40 in favour of the respondent. She awarded Kshs. 3,800,000.00 in general damages and Kshs. 99, 4500.00 special damages in favour of the respondents before factoring contributory negligence.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Kimondo Gachoka & Company Advocates. They raised grounds of appeal as follows:

a. That the learned trial magistrate grossly misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.

b. That the learned trial magistrate erred in law and in fact in failing to apportion liability against the plaintiff despite overwhelming evidence to the contrary.

c. That the learned trial magistrate erred in fact and in law in injudiciously, arbitrarily and exorbitantly apportioning and awarding the respondent a sum of Kenya shillings Three Million Seven Hundred and Ninety Nine Thousand Four Hundred and Fifty (3,799,450/-) less contribution to the plaintiff as general damages for fatal injuries suffered which amount was manifestly excessive and high in the circumstances and connotes an erroneous estimate of damage suffered.

d. That the learned trial magistrate erred in la and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.

e. That the trial magistrate erred in law and fact by failing to consider the appellant's evidence and submissions on record.

3. The appeal was opposed by the respondent through the firm of Ochoki & Company Advocates.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. At the trial and in their pleading, the respondents contended that the driver of motor vehicle registration number KCD 779C was to blame for the accident. They however did not call an eyewitness.

6. The appellant in the pleading denied that the accident occurred but in his evidence, he contended in the alternative that the deceased was to blame for crossing the road while drunk. This theory was furthered by Corporal Zakayo Ndago (DW1) who contended that the deceased was drunk and staggered across the road. He however was not an eye witness.

7. Where the evidence on record is not sufficient to draw a conclusion who of the two drivers is to blame for the accident, liability is apportioned equally between the two drivers. The Court of Appeal in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR stated:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

8. What the court of Appeal said about drivers can, in my view, apply between a pedestrian and a driver. In the instant case, there is no evidence that he tried to avoid the accident in any way. I am not persuaded to interfere with the learned magistrate finding on liability.

9. The respondents contended that the deceased was earning Kshs. 20,000.00 per month. This was however not proved. In absence such a proof, the correct approach would have been that of a global award. When Ringera J.(as he then was) was confronted by a similar issue he opined, in Kwanzia vs. Ngalali Mutua and cited D.M.M (Suing As The Administrator And Legal Representative Of The Estate Of L K M vs. Stephen Johana Njue & another [2016] eKLR as follows:

> 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 facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of 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.

10. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In Butt vs. Khan [1981] KLR 349 at page 356 Law JA stated:

> ...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 a figure which was either inordinately high or low.

11. The global approach, in the instant case was the correct one on the head of loss of dependency.

12. At the time of his death, the deceased herein was aged 27 years. In Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another [2020] eKLR the court awarded Kshs. 1,000,000.00 for loss of dependency for a 23years old deceased. I am therefore persuaded to interfere with the award on loss of dependency by the trial court. I set aside the award on this head and substitute it with a global award of Kshs. 1,000,000.00. The awards on the other heads are upheld.

13. The appellant will have half costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE