Onduto & another (Suing as administrators of CMN) v ANO & another (Suing as Administrators of CMN) (Civil Appeal E025 of 2022) [2023] KEHC 3411 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E025 OF 2022

WA OKWANY, J

APRIL 20, 2023

BETWEEN

GODFREY ONDUTO ..... 1ST APPELLANT

EVANS OBARE OGECHI ..... 2ND APPELLANT

SUING AS ADMINISTRATORS OF CMN

AND

ANO ..... 1ST RESPONDENT

PNO ..... 2ND RESPONDENT

SUING AS ADMINISTRATORS OF CMN

(Being an Appeal against the Judgment of Hon. M. C. Nyigei – PM Nyamira dated and delivered at Nyamira on the 11th day of May 2022 in the original Nyamira Chief Magistrate's Court Civil Case No. 52 of 2019)

JUDGMENT

Introduction

1. The Respondents herein, ANO and PNO, sued the Appellants before the Lower Court in Nyamira CMCC 52 of 2019, as the Administrators of the estate of their 14-year-old daughter CMN (deceased). The Respondents' case was that following a road traffic accident that occurred on December 4, 2018, along Kisii – Nyamira Road at Ikoba, the deceased, who was a pedestrian, was knocked down by the Appellants' motor vehicle Registration No KCR 910P. The Respondents attributed the accident to the negligence of the Appellants' driver and/or agent.

2. The Respondents sought judgement against the Appellants for: -

    a. Special Damages.

b. Damages under the *Fatal Accidents Act* and *Law Reform Act*.

c. Costs of the suit and interest.

3. The Lower Court, after hearing the case, entered judgement for the Respondents as follows: -

a. Pain and suffering – kshs 100,000/=

b. Loss of life – kshs 100,000/=

c. Loss of Dependency – kshs 1,200,000/=

Total – kshs 1,400,000/=

Less 30 % Contribution – kshs 420,000/=

d. Special Damages – kshs 88,550/=

Grand Total – kshs 1,068,550/=

4. The Appellants were dissatisfied with the judgement of the Lower Court and lodged the instant appeal on May 25, 2022 in which they listed the following grounds of appeal in the Memorandum of Appeal: -

1. The Learned Trial Magistrate erred in fact and in law by apportioning 70% liability to the Defendant without considering the circumstances of the case.

2. The Learned Trial Magistrate erred in fact and in law by apportioning 70% liability to the Defendant whereas the inquest file blamed the plaintiff.

3. The Learned Trial Magistrate erred in fact and in law by apportioning 70% liability to the defendant whereas DW1 and DW2 gave evidence that the plaintiff was entirely to blame.

4. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on loss of dependency of kshs 1,200,000/= that was overly in excess in the circumstances of the case.

5. That the Learned Trial Magistrate erred in law and in fact in failing to deduct the awards under the *law reform Act* from the award under the *fatal accidents Act*.

6. That the Learned Trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.

7. That the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.

5. The above grounds of appeal can be summarized to the twin issues of liability and quantum which the parties addressed in their respective written submissions to the appeal.

6. On liability, the Appellants submitted that the deceased, who was a child of 14 years, was old enough to know the dangers involved in crossing the road. The Appellants argued that the deceased was largely to blame for the accident as she crossed the road carelessly and abruptly by running without first ascertaining it was safe to cross the road. They added that the driver of the suit motor vehicle tried all that he could to avoid the accident by applying brakes in vain as the said accident was unavoidable.

7. The Appellants noted that the police file contained the outcome of the investigations and recommendations that showed that the pedestrian was to blame for the accident. Reference was made

to the decision in *Patrick Mutie Kimau & Another vs Judy Wambui Ndurumo* [1997] eKLR where it was held: -

> " the respondent, it would seem did not take extra care near the stationary bus before starting to cross the three lanes Racecourse Road in front of the said bus as was necessary under the relevant provisions of the aforesaid clause. Sympathetic as we may be to her plight, the circumstances of the accident in question leads to the conclusion that she was responsible for it. In this regard therefore, we think that the learned trial judge was in error when he held that the appellants were wholly to blame for the said accident and accordingly jointly and severally liable in damages to the respondent. On account of this, we allow this appeal and set aside the judgment entered against by the superior court in the sum of kshs 1,507,275/ = together with costs and interest."

8. The Appellant urged this court to set aside the trial court's finding on liability and dismiss the Respondent's case for lack of proof of negligence.

9. On quantum, the Appellants cited several authorities where the deceased was a minor and argued that the award of kshs 1,200,000/= was on the higher side.

10. They proposed an award of kshs 600,000/= under loss of dependency and kshs 20,000/= for pain and suffering. They further argued that special damages were proved to the tune of kshs 20,000/= only and not kshs 88,550/= that was awarded by the trial court.

11. The respondents, on the other hand, submitted that liability was properly apportioned by the trial court at 70% to 30% based on the evidence tendered before the said court.

12. On loss of dependency, the Respondent submitted that the trial Magistrate correctly took into account the evidence presented before it and the principles governing such awards in determining the quantum payable for loss of dependency, loss of life and pain and suffering.

13. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, the Court of Appeal stated that: -

> " [A]n 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 allowances in this respect"

15. 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"

16. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, the court stated as follows with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

Liability

17. On liability, it was not disputed that the deceased was a pedestrian along Kisii – Nyamira Road when she was knocked down by the Appellant's vehicle. PW1, PC Justus Kipkoech, confirmed that the deceased lost her life in the said accident.

18. PW2, the 1st Respondent herein did not witness the accident. He testified that the deceased was aged 14 years at the time of her death and was a class 6 pupil at [Particulars Withheld] Primary School. He produced Post Mortem Report, Death Certificate and bundle of receipts as exhibits.

19. PW3, Nyabuti Ongera Hesphone, testified that he witnessed the accident which occurred when the deceased was walking along the road on the right hand side.

20. DW1, Cpl Albert Micha, produced the police file containing the details of the inquest over the fatal accident in question. He narrated the circumstances of the case as follows: -

> " On 4/12/2018 at 4.40PM the driver of the motor vehicle Robert Ngere, aged 38 years was driving the motor vehicle from Kisii to Nyamira and on reaching Ikoe, a motor vehicle came from the opposite direction and before they passed, the pedestrian came from behind the other motor vehicle and crossing the road running. The driver tried to brake but she was too close so she was hit. She was rushed to Nyamira Hospital but died while undergoing treatment. The motor vehicle was driven to Nyamira Police Station to await inspection. The motor vehicle had pax on board.
>
> The other motor vehicle was from Nyamira heading to Kisii. The pedestrian emerged from behind the other vehicle while the motor vehicle by passed one another. It was therefore not easy for the driver of KCR to see the other motor vehicle.
>
> Investigating officer – PC Kipkoech
>
> Recommendations of investigating officer – He found the pedestrian to blame for the accident. There is a notice of intended prosecution issued to the driver. An inquest file is pending for hearing on 17/7/2021 before court."

21. On cross examination, DW1 stated that the traffic inquest is still pending in court.

22. DW2, Robert Ngere Nyariki, the driver of the ill-fated motor vehicle, testified that he was driving on the left side of the road when a child suddenly appeared running as she crossed the road from behind a motor vehicle coming from the opposite direction. He claimed that he tried to engage emergency brakes, but still hit the deceased. He blamed the deceased for failing to check the road to ensure that it was safe before crossing the road.

23. On cross examination, he stated that he had nothing to show the point of impact on the road.

24. From the above summary of the evidence presented before the Lower Court, I note that PW3 was the only independent eye witness to the accident. Even though the police record contained an allegation

that the deceased was crossing the road at the time of the accident, the true circumstances surrounding the accident remain unclear as the police did not present a sketch plan to show the actual point of impact on the road.

25. Furthermore, the inquest into the accident had not been concluded so as to conclusively establish if the deceased was to blame for the accident as alleged by the Appellants.

26. The trial court evaluated the evidence and held as follows on the issue of liability: -

> " In the circumstances, I find both parties to blame for the accident. The driver of KCR 910P should however shoulder more blame as he should have exercised more care and attention while on the road. He should have hooted and even swerved so as to avoid hitting the deceased instead of just engaging the emergency brakes. In the circumstances, I find the defendants 70% liable for the accident while the plaintiff shoulders 30%."

27. I am in agreement with the findings of the trial on the issue of liability. I say so because the driver of the motor vehicle had a duty of care to other road users and he therefore ought to have done more than just applying brakes so as to avoid the accident.

28. I uphold the lower court's decision on liability.

Quantum

29. It is trite that the appellate court should not disturb the trial court's findings on quantum. The principles upon which an appellate court can interfere with an award of damages were stated in *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs AMM Lubia & ANo* (1982-88)1 KAR 777 where the Court of Appeal stated as follows:

> " ....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 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."

Pain & Suffering

30. On pain and suffering, I note that the trial court took into account the fact that the deceased did not die instantly as she is reported to have died while undergoing treatment which was about 2 hours after the accident.

31. The trial court awarded the Respondents the sum of kshs 100,000/= for pain and suffering while relying on the decision in *David Kahuruka Gitau & Another vs Nancy Ann Wathithi Gitau & Another* [2016] eKLR where an award of kshs 100,000/= in respect to a deceased who died 30 minutes after the accident. I do not find any error in principle in the award of kshs 100,000/= for pain and suffering and I uphold the said award.

Loss of Expectation of Life

32. I similarly do not find any error in the award of kshs 100,000/= as it was supported by the decision in Petronila Muli vs Richard Muindi Sari & Catherine Mwende Mwinda where under similar circumstances, an award of kshs 100,000/= was made for loss of expectation of life.

Loss of Dependency

33. Under this heading, I note that the trial court took into account the law governing damages for loss of dependency where the deceased is a child together with similar authorities before adopting a global award. The trial court relied on the decision in *Palm Transports & Another vs WMN* [2015] eKLR where the court observed that the best approach in cases involving children would be to award a global sum for loss of dependency.

34. I note that while the Appellant proposed the sum of kshs 600,000/= for loss of dependency before the trial court, the Respondent proposed kshs 1,500,000/=. The trial court considered both proposals together with the comparable authorities before arriving at the award of kshs 1,200,000/=.

35. The exercise of making an award of damages in respect of a minor deceased person has presented a challenge to the courts not only because it involves a fair amount of speculation but also because there are no hard fast rules governing the said assessment. In *Oshivji Kuvenji & Another vs James Mohammed Ongenge* [2012] eKLR, Ngenye J. (as she then was) observed that: -

> "It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor".

36. As I have already stated hereinabove, there are no hard fast rules in the assessment of damages in respect of a deceased minor. The heads global sum or mixed approaches have been applied in the superior courts. What is not in doubt is that irrespective of the age of a deceased child, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents. (See *Kenya Breweries Limited vs Saro* {1999} KLR 408 and *Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporter & 5 others* {1986} KLR 457 {1986} eKLR). In the above cited decisions, the court held that the age of a child must be considered in assessment of damages.

37. The Appellant proposed that an award of kshs 600, 000.00/= would be sufficient compensation under the loss heading of loss of dependency. The Respondents, on the other hand, proposed kshs 1,500,000.

38. In *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit vs N I A (minor suing through her next friend (I A I S) & 3 others* [2018] eKLR the court stated that;

> "...All what the Court has to do is to take into consideration the award made for loss of expectation of life when making awards for loss of dependency."

39. In calculating damages for the loss of dependency, the court is guided by what the deceased would have been likely able to save, spend or distribute after meeting the cost of his living at a standard of her job and career prospects at time of death. This is the position that was taken in the case of *Kenya Breweries Limited vs Saro*, [1991] KLR 408 where it was held that:-

> "the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents."

40. Having noted that there is no standard method of assessing damages in respect to a deceased minor's estate, it follows that a trial court is not necessarily in error just because it opted for one method over another. I have considered the factors that the trial court considered in arriving at the award under loss of dependency including reliance on comparable decided cases. I am of the view that the trial Magistrate did not proceed on a wrong principle by choosing to use the parameter of a global sum in his assessment.

41. This court takes cognizance of the fact that the object of an award of damages is to compensate the plaintiff for his loss and not to punish the defendant for his wrong doing. In this regard, I have considered the authorities cited by both parties before this court and the trial court. I am satisfied that the trial court correctly applied the principles of assessment of damages in arriving at the figure of kshs 1,200,000 for loss of dependency.

42. I find guidance in the decisions in the cases of *SMK vs Josephat Nkari Makaga* Civil Appeal No 66 of 2011 and Civil Appeal No 18 of 2014 *Daniel Mwangi Kimemi & 2 others vs JGM & SMM* where awards of kshs 800,000/= and 1,000,000 were made for loss of dependency in 2017 and 2019 respectively in respect to deceased children aged 6 years and 9 years respectively. In the instant case, the deceased child was aged 14 years and I therefore find that the award of kshs 1,200,000 for loss of dependency cannot be said to be an inordinately high amount taking into account the inflationary trends that have eroded the value of the Kenyan shilling.

43. In the result, I find that this appeal is not merited and I therefore dismiss it with costs to the Respondents.

44. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE