



Katei alias Virginia Mukonyo Katei v Muindi & another (Suing as the legal administrators and personal representatives of the Estate of Boniface Munyao Muia – (Deceased)) (Civil Appeal 12 of 2020) [2023] KEHC 17818 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 12 OF 2020
GMA DULU, J
MAY 17, 2023**

BETWEEN

VIRGINIA KATEI ALIAS VIRGINIA MUKONYO KATEI APPELLANT

AND

FLORENCE MUMBUA MUIA 1ST RESPONDENT

DOMINIC MUIA MUINDI 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF BONIFACE MUNYAO MUIA – (DECEASED)

(Being an Appeal from the Judgement and decree of Hon. Otieno. J (Mrs), Resident Magistrate, Makueni Delivered on 13.2.2020 in CMCC No. 56 of 2018)

JUDGMENT

1. In a judgment delivered on 13.2.2020, the trial court entered judgment for the respondents who were the plaintiff in the trial court and awarded Kshs. 3,066,538/= loss of dependency and special damages of Kshs. 291,299/= together with costs and interest.
2. Dissatisfied with the judgment of the trial court, the appellant who was the defendant in the trial court, has come to this court on appeal through counsel K. Itonga & Company Advocates listing the following grounds of appeal:-
 1. The learned Magistrate erred in law and in fact by failing to appreciate and hold that the plaintiff wholly caused or substantially caused the subject accident.
 2. The learned trial Magistrate erred in law and in fact by awarding the plaintiff Kshs. 2,936,538/= for loss of dependency which was inordinately high and based on wrong principles and factors.



3.
 4. The learned trial Magistrate erred in law and in fact by awarding Kshs. 3,357,837/= for general damages which was unreasonably high and reached by relying on the wrong principles and a failure to consider the defendant submissions.
 5. The learned trial Magistrate erred in law and in fact in adopting a multiplier of 25 years for a person aged 30 years and using the gross salary as a multiplier thereby reaching an excessive and oppressive award for damages under the Fatal Accident Act.
 6. The learned trial Magistrate erred in law and fact by wholly relying on the evidence adduced by the respondent and disregarding the appellant's evidence and submissions.
 7. The learned trial Magistrate erred in law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at figures so inordinately high as to represent an entirely erroneous estimate.
 8. The learned trial Magistrate's decision was arrived at in a cursory and perfunctory manner without detailed consideration of evidence on record and the award against the appellant is unjustified, excessive and oppressive.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by K. Itonga & Company for the appellant and the submissions filed by Anne K. Kyusia & Company for the Respondents. I note that the Appellant argued this seven (7) grounds of appeal under appeal as two (2) grounds of liability and quantum respectively.
 4. This is an appeal against both liability and quantum of damages. As a first Appellate court, I have to be guided by the legal principle that I am required to subject the evidence on record to a fresh evaluation and arrive at my own independent conclusion – see *Selle v Associated Motor Boat Company Ltd* (1968) EA 123.
 5. With regard to determining whether this court should interfere with the quantum of damages awarded by the trial court, I have to be guided by the legal principle that assessment of damages is an exercise of discretionary power by a trial court and that as such appellate courts should be slow to interfere on the same. In this regard I rely on the case of *Kemfro Africa Ltd t/a Meru Express Service v AM Lubia & another* (1985) eKLR wherein 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 for 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 wholly erroneous estimate of the damage.’
 6. Coming now to our case, the respondent called three witnesses at the trial. The appellant on his part, testified as DW1 and did not call any other witnesses. Based on the evidence on record, the trial court found the appellant 100% liable for the accident.
 7. I have subjected the evidence on record to a fresh evaluation with regard to liability. PW1 Dominic Muwa Maundu was the father of the deceased Boniface Maundu. He was not at the scene. He said that he was informed about the accident on phone. PW2 James Muthiani Ndaka testified that he was an eye witness to the accident and that the accident occurred at 3a.m. He said that the motor vehicle was



- at high speed, lost control and hit the deceased who was standing to give way. PW3 PC Francis Gitonga was a police officer who stated that the case was still under investigation at the time of hearing.
8. The appellant on the other hand, testified as DW1 and said that the accident was caused by the deceased who joined the road from Kapeo while speeding. He said that the motor cycle had no lights and that the deceased wore a black T-shirt. That he (DW1) was charged with careless driving and was on cash bail of Kshs. 20,000/=
 9. In my view, with the evidence on record, with a collision having occurred at night at a road junction, it cannot be said with certainty that one or the other of the driver of the motor vehicle or the motor cycle rider was 100% to blame. From the evidence however, the appellant was principally to blame for the accident for overspeeding. From the evidence on record therefore, I find that the deceased was not 100% to blame for the accident. I will thus set aside the 100% liability found by the trial court and find that the appellant was 90% liable for the accident and the deceased 10% liable in negligence.
 10. With regard to the quantum of damages awarded, I note that the appellant's Counsel concedes to the amount of Kshs. 100,000/= awarded for loss of expectation of life, but disputes the amount awarded for pain and suffering and also for loss of dependency.
 11. On the award for pain and suffering, Counsel submitted for the appellant that the amount of Kshs. 30,000/= be reduced to Kshs. 10,000/= I will retain the Kshs. 30,000/= award as I am of the view that it is reasonable and within range of current awards. With regard to loss of dependency Counsel contends that the amount of Kshs. 2,936,538/= be reduced to Kshs. 954,112/=
 12. Having evaluated the evidence on record, where it is established that the deceased was 30 years old with no history of bad health, I am of the view that the multiplier of 25 years applied by the trial court was reasonable. As for the multiplicand, an employment letter from the Constituency Development Fund was relied upon. I have seen the letter and note that the employment contract was from 9th August, 2014 for a duration of 3 years renewable. The basic salary was Kshs. 24,662/= per month and house allowance of Kshs. 5,000/= subject to statutory deductions.
 13. In their submissions before the trial court, Counsel for the respondent asked for a multiplicand of Kshs. 29,662/= and dependency ratio of 2/3. Counsel for the Appellant on their part asked for a multiplicand of Kshs. 11,926.40 based on applicable minimum wage and dependency ratio of 1/3. The trial court went by the basic pay of Kshs. 24,662/= contained in the employment letter as the multiplicand and applied a dependency ratio of 1/3. In my view, the trial Magistrate cannot be faulted on the 1/3 dependency ratio as the deceased was unmarried, with no children and thus dependency of 1/3 for dependent parent or parents would be sufficient compensation.
 14. However, with regard to the multiplicand, in my view the Magistrate wrongly considered the deceased's job to be a long term employment contract, while it was a renewable contract of 3 years. The 3 years contract could as well as be renewed after expiry, but there was no such guarantee. In the circumstances of this case, I find that the trial Magistrate erred in finding that the multiplicand should be the basic salary in the employment letter.
 15. I would however not agree with the appellant's Counsel that we apply the minimum wage as the deceased was a skilled worker. Thus in my view being an accounts clerk who was in employment and employable after the 3 years contract, and doing the best I can, I am of the view that a multiplicand of Kshs. 20,000/= per month would be a reasonable multiplicand in the circumstances of this case. I will thus vary the multiplicand to 20,000/=
 16. Counsel for the appellant has also argued on appeal that the amount awarded under the Law Reform Act be deducted from the amount awarded under the *Fatal Accidents Act*. He has relied on a number



of decided cases including the case of *Maina Kaniani v Josephat Muriuki* – Nairobi Civil Appeal Number 14 of 1989 and *Kenfro Africa Ltd v A M Lubia* (No. 2) (1987) KLR 30.

17. In my view, such deduction can only be justified in the case of unjust enrichment due to the cumulative effects of the two limbs of awards. In the present case, there is no evidence of such unjust enrichment. I thus decline the request to deduct the award under the *Law Reform Act*.
 18. The final orders of this court will thus be that the appeal is allowed in part and the orders are be as follows:-
 1. Liability 90% against the appellant and 10% against the Respondent.
 2. Quantum of damages *Law Reform Act*
 - i. Pain and suffering Kshs. 30,000/=
 - ii. Loss of expectation of life
Fatal Accidents Act Kshs. 100,000/=
 - iii. . Loss of dependency
(1/3 x 20,000x12x25) Kshs. 2,000,000/=
 - iv. Special damages Kshs. 291,299/=Total Kshs. 2,421,299/=Less 10% Kshs. 242,129/=
- Kshs. 2,179,170/=

Parties will bear their respective costs of the appeal and the appellate will pay the trial court costs as already ordered, as well as interest until payment in full.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MAY, 2023

GEORGE DULU

JUDGE

In the presence of:-

Mr. Waweru for appellant

No appearance for respondents

Mr. Otolo court assistant

