Juma & 2 others v Ondieki (Suing as a personal representative of the estate of Lawrence Ochola Owuor - Deceased) (Civil Appeal E081 of 2021) [2023] KEHC 18506 (KLR) (13 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18506 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E081 OF 2021

KW KIARIE, J

JUNE 13, 2023

BETWEEN

HASSAN JUMA ..... 1ST APPELLANT

JOY BAKERS KAREN ..... 2ND APPELLANT

DAVID KIHANG'A MACHARIA ..... 3RD APPELLANT

AND

MARTHA GESARE ONDIEKI ..... RESPONDENT

SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE OCHOLA OWUOR - DECEASED

(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's PMCC No. 110 of 2021 by Hon. B. Omwansa – Senior Principal Magistrate)

JUDGMENT

1. Hassan Juma, Joy Bakers Karen and David Kihang'a Macharia the appellants herein, were the defendants in Oyugis Principal Magistrate's PMCC No 110 of 2021 where the claim was for general damages and special damages following a road traffic accident involving motor vehicle KBU 960S and the deceased. The deceased was a pedestrian along Sondu-Oyugis road when he was fatally knocked down. The learned trial magistrate apportioned liability at 85:15 in favour of the respondent. The respondent was awarded Kshs 3, 200, 00.00 in general damages and Kshs 116, 050.00 special damages before factoring contributory negligence.

2. The appellants were aggrieved by the said judgment and filed this appeal through the firm of Ako Advocates LLP. They raised the following grounds of appeal:

a. That the trial magistrate erred in law and fact as he did, when he failed to properly evaluate the evidence eon record thus reaching an erroneous decision on the issue of liability and damages.

b. That the trial magistrate erred in law and fact as he did, on evaluation of liability.

c. That the trial magistrate erred in law and in fact by basing his decision on irrelevant matters and failing to base his decision on the facts and evidence on record.

d. That the trial magistrate erred in law and fact as he did by basing his decision on irrelevant maters and failing to base his decision on the fact and evidence on record thereby arriving at an excessive award on the issue of damages.

e. That the trial magistrate erred in law and fact as he did, on the assessment of quantum of general damages under the *Law Reforms Act* for pain and suffering loss of expectancy and loss of expectation of life.

f. The trial magistrate erred in failing to follow and uphold legal parameters and binding precedents on assessment of general damages under the *Law Reforms Act* and liability in similar circumstances.

3. The appeal was opposed by the respondents through the firm of Nyatundo & Company Advocates. The respondent contended that it had not been demonstrated that the trial court acted on wrong principles and that the award was not inordinately high.

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 v Associated Motor Boat Co Ltd* [1965] EA 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. The appeal is on liability and quantum in respect of general damages.

6. Corporal Joseph Mogusu (PW2) testified that he was the investigating officer in the complained of accident. He said that he blamed the driver for the accident and that his reason for doing so was because the accident occurred in the middle of the road. This is in spite the fact that he did not get an eye witness. He visited the scene the following day.

7. Juma Hassan (DW1) was the driver of the vehicle which is the subject of this accident. His evidence is that he was driving at 60 KPH. He said the deceased was knocked by the side mirror.

8. No evidence was adduced by either party to indicate the human traffic at the trading centre at the time of the accident. This would have assisted the court to make a finding if the motor vehicle was driven at high speed in the prevailing circumstances.

9. The scene was not preserved and being a busy road, the scene was obviously disturbed by the overnight vehicular traffic.

10. Whenever both parties blame each other for the accident in issue and where the court is not given sufficient evidence on which to base liability on, then both parties are held liable. This was restated by the Court of Appeal in the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR where it stated:

> The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault

> of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

11. In the instant case I am persuaded to interfere with the finding of trial court on liability. I set it aside and substitute it with a liability of 50:50.

12. It was contended by the appellant that the award was inordinately high. 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 v 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.

13. Other than the averment that the deceased was a mason, there was no prove of his earning. In *Albert Odawa v Gichimu Githenji*; Nakuru HCCA No 15 of 2003 (2007), eKLR Justice Ringera expressed himself 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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the 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.

The learned trial was alive to the most appropriate approach in assessing damages in this case.

14. The deceased herein died at the age of 27 years. Certainly he was young and but for the accident, he had many productive years ahead of him. I have perused the decisions relied by both parties in the trial court and in this court. I do not find the award of Kshs 3,200,000/= inordinately high. This award will not be disturbed.

15. The appeal therefore partially succeed on liability. The appellant will be entitled to half costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 13TH DAY OF JUNE, 2023

KIARIE WAWERU KIARIE

JUDGE