



Murage v Munene (Personal representative of the Estate of the Late Alfred Munene Salesio) (Civil Appeal 61 of 2018) [2023] KEHC 19286 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 61 OF 2018
FROO OLEL, J
JUNE 14, 2023**

BETWEEN

ELIJAH MURAGE APPELLANT

AND

ALVINA WAMBOGO MUNENE (PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE ALFRED MUNENE SALESIO) RESPONDENT

*(Being an Appeal From The Judgment of Hon. M. Barasa (SRM.)
Delivered on 17th November 2018 In Kerugoya Civil Case No 164 of 2015)*

JUDGMENT

1. The Appellant was the defendant in the primary suit, where he was sued as the registered owner of Motor vehicle registration number KBK 072D (herein after referred to as the 1st suit motor vehicle). It was alleged that on 12th October 2013 at red sea soil area along Mwea- Embu road, the Appellant's motor vehicle in which the deceased was a lawful passenger, was carelessly and recklessly driven/ managed causing it to collide with an Isuzu bus registration number KBS 407K (herein after referred to as the 2nd suit motor vehicle), as a result of which the deceased sustained fatal injuries.
2. The Defendant filed a defence on 27.11.2015 denying all the contents of the Plaint and attributed accident to the deceased negligence.
3. After hearing the suit, the learned magistrate in her judgment delivered on 10th August 2018 apportioned Liability at 100% as against the appellant's and proceeded to award Kshs 50,000 damages for pain and suffering, Kshs.100,000 for loss of expectation of life and loss of dependency of Kshs. 2,611,600. Special damages were also proved to the tune of Kshs. 120,000/= only, plus costs and interest.



4. The Appellant's, being dissatisfied by quantum awarded did file their memorandum of Appeal on 21st November, 2018 and raised several grounds of appeal namely: -
 - a. That the learned trial Magistrate erred in law and fact in finding that the Respondent was entitled to General Damages of Kshs 2,600,000, Special Damages of Kshs 120,000 plus costs and interest at court rate.
 - b. That the learned trial Magistrate erred in law and fact in failing to consider the Appellants' submissions on quantum.
 - c. That the learned trial Magistrate erred in law and fact by awarding damages that were so inordinately high in view of the circumstances of the case.
 - d. That the learned trial Magistrate erred in law by failing to consider conventional awards for similar cases.
5. The Appellant is thus mainly aggrieved by the award of damages/quantum and also requests for costs of the primary suit and costs of this Appeal.

Facts of the Case

6. The Plaintiff called two witnesses. PW1 Alvina Wambogo Munene testified that the accident occurred at Kimbimbi along Meru-Nairobi road. The deceased was her husband, who was the Principal Kangaru Mixed Day Secondary school. On 12th October 2013, the deceased was a passenger on the 1st suit motor vehicle and was heading home from official duty. The 1st suit motor vehicle was involved in an accident with the 2nd suit motor vehicle and the deceased sustained serious injuries. He did not die on the spot and was taken to Kibimbi Hospital for first aid then transferred to Kerugoya District Hospital for treatment. The deceased died in hospital later at about 4.00pm while undergoing treatment.
7. PW1 further testified that they were blessed with two children, but one had died. The 1st born Alex Mugambi Munene was 24 years, while the other child Anne Wawira had died in 2009. Immediately after the accident, her husband had called her and told her that he had been involved in an accident and by the time they rushed to the scene of the accident, he had been taken to hospital. She said the deceased was 47 years old at the time of his death. She could not tell who was negligent and caused the accident as she was not there, but the police did their investigations. She further produced her claim supporting documents as Exhibits.
8. Upon cross examination, she stated that she worked as a County Education Officer. She testified that the accident occurred on 12.10.2013. Her husband called her at about 1.30pm and told her "accident kimbimbi area" he also called the son and told him the same and further told him to call a neighbor. She talked to her son immediately thereafter and they agreed that he goes to the hospital since she was in Meru. Before he could go, he was called by a woman who told him to go to Kerugoya since her late husband had been taken there for X-ray. The accident was reported at Kerugoya police station. The police had done a search to confirm ownership of the 1st suit motor vehicle and her husband passed on at about 4.00-5.00pm the same day. She testified that she was dependent on him financially.
9. Further, the surviving child was an adult by the time the deceased passed away. He had undertaken a parallel degree course, and thereafter pursued a diploma course. Her son was born in 1993 and has completed his education. She had spent money to transport the body from Kerugoya to Kieni and had a right to claim money for funeral expenses. On Re- examination, she testified that as per the police



abstract, Murage was the owner of the 1st suit motor vehicle, where her husband was passenger. Her late husband used to pay for the son's school fees and related expenses.

10. PW2, Sergeant James Nasio stated that he was a traffic officer based at Kerugoya traffic department. On 12.10.13 when the accident occurred, he was based at Likoni. He testified that a report was made and recorded vide OB No. 4 that an accident has occurred along Embu- Mwea road. The accident report was made at about 2.08pm and police proceeded to the scene at 2.10pm and came back at 5.10pm. The report was about an accident that involves a bus registration number KBS 407 K Isuzu belonging to St. Judith Academy Nairobi heading from Nairobi to Mwea. On board were 37 passengers' children and teachers at the school. The other motor vehicle was KBK 072 D Toyota Matatu heading from Nairobi to Mwea with 17 passengers on board plus the driver. Among the passengers were 4 minors.
11. He further testified that according to their records, the accident occurred when the 1st suit motor vehicle driven by James Waweru tried to overtake other vehicles and collided with the bus when turning right to join a feeder road. As a result, the 1st suit motor vehicle, rolled severally and the passengers were injured. Hellen Njoki perished on the spot, Alfred Munene Selasio died on arrival at Kerugoya General Hospital, the driver James was admitted for 3 days at Karira Mwea Hospital and discharged on 14th October 2013. The other passengers were treated at Kerugoya General Hospital and Karira Mwea Hospital and discharged.
12. The body of Alfred Munene was transferred to Embu and post mortem done at Kieni mission hospital. Investigations were conducted and the investigating officer concluded that the matatu driver be charged with causing death by dangerous driving but he disappeared. The registered owner of the 1st suit motor vehicle was indicated as Elijah Murage. The file was marked as pending arrest of accused. PW2 also produced the Police abstract.
13. In Cross examination, PW2 stated that he was not the investigating officer and that he knew the owner of the motor vehicle based on the statement of drivers and the police abstract. The investigating officer had indicated that the 2nd suit motor vehicle had slowed down but the matatu was speeding and tried to overtake. He recommended the matatu driver be charged. Further, that a notice of intended prosecution was issued and is normally issued to any driver involved.

Appellant Submissions

14. The Appellant filed submissions on 24.7.2023. He submitted that the court erred in assessing damages that were not pleaded in the plaint and that the suit ought to be dismissed. Reliance was placed on the case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR as quoted in Dan Onyango Dwalo v South Nyanza Sugar Co. Limited [2020] e KLR.
15. On the issue of dependency, it was submitted that the award was too high since the deceased was already 47 years old and the respondent failed to particularize dependents. The Appellant relied on the case of Denshire Muteti Wambua v Kenya Power & Lighting company Limited [2013] e KLR, Dora Mwawandu Samuel (suing on her behalf and on behalf of the estate of Samuel Muweliani Jumamosi-deceased) v Shabir M. Hassan [2021] eKLR, Moses Wetangula & Another vs Eunice Tikita Rengetiang [2018] eKLR.
16. It was further submitted that there was a double award under the *Law Reform Act* and the Fatal Accident's Act and that there was no indication that the trial magistrate considered the award under the fatal accident's vis a vis the award under the *Law Reform Act*. That the award should take into account the two acts to remedy the double award that has been occasioned. The court was urged to award Kshs 500,000 as a global sum.



17. Reliance was placed on the case of Hellen Warungu Waweru (Suing as the legal representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] e KLR, Seremo Korir & another v SS (suing as the legal representative of the estate of MS, deceased) [2019] e KLR and Dismas Muhami Wainarua v Sapon Kasirimo Maranta (suing as the administrator and or personal representative of the estate of Partinini Supon (Deceased)[2021] eklr.
18. The Appellant prayed for costs of the appeal as costs follow the event. He placed reliance on section 27 (1) of the *Civil Procedure Act*.

Respondent's Submissions

19. The Respondent filed submissions on 24.01.2023. It was submitted that the total general damages awarded was Kshs. 2,881,600 and not Kshs 2,600,000. It was submitted that the award given was reasonable. The evidence as to the cause of death, the deceased's earning and the dependency were not challenged by the Appellant during the hearing and the Respondent produced documents before the trial support the claim for payment of damages.
20. It was submitted that the deceased was proven to be a civil servant and was aged 47 years old at the time of his death and would have worked for another 13 years given the retirement age for public servants has been set for 60 years. The court applied the multiplicand of 1/3 after considering all the dependents. The respondent urged this court not to disturb the award.
21. Secondly, on whether the Appellant's submissions were not considered during the hearing, it was submitted that on 3rd August 2018, when the matter came up for defense hearing, the appellant did not attend court and the court directed that submissions be filed and judgment was set for 10th August 2018. That judgment was delivered and a subsequent application for setting aside was allowed and the defence hearing was set for hearing for 26th September 2018. The hearing did not proceed then or on the next date of 10th October 2018. On 7th November 2018 the Appellant counsel, informed the court that he wished to close their case without calling any evidence and the court reinstated the judgment that had been delivered on 10th August 2018. The court did not have any defence evidence or submissions to consider. The respondent thus urged this court to dismiss this appeal and to order for release of the money that was deposited in court as security for the Appeal.

Determination

22. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
23. 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 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 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 E.A.C.A 270.

24. Also it has been held by the court of appeal in *Ephantus Mwangi and Another v Duncan Mwangi* Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278 that;

“A member of an appellate court is not bound to accept the learned judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance’s or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

25. 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”.

26. 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.”

27. 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”.

28. The total award by the trial court was a s follows;

- a. Pain and suffering Kshs 50,000
- b. Loss of expectation of life Kshs 100,000
- c. Loss of Dependency Kshs 2,611,600
- d. Special Damages Kshs 120,000



Total Kshs 2,881,600

e. Costs and Interest.

29. The Appellant only took issue with the award of loss of dependency where the trial court awarded Kshs 2,611,600. The formula for calculation of the dependency ratio was discussed by Ringera J in the in Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR) where he stated as follows;

The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependent's and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

30. As per the evidence adduced, the deceased was the principal at Kangaru Mixed Day Secondary and was employed by T.S.C. The letter of appointment dated 5.01.1991 and pay slip for September 2013 were produced into evidence. The gross pay of the deceased was Kshs 65,290/=, while the net pay was Kshs 58,281. The trial court erred in assigning less years as regards the multiplier, as the deceased was a civil servant who would have worked until he was 60 years old thus find a multiplier of 13 years to be reasonable. The court also erred to use the gross pay instead of net pay of the deceased. I will therefore calculate the loss of dependency with the net income which is what is what would be available to the estate. That is Kshs 58,281 x 12 months x 13 years x 1/3 = Kshs 3,030,612.
31. As regards the issue of double award, the Appellant submitted that under the *Law Reform Act* and the Fatal Accident's Act, there was no indication that the trial magistrate considered the award under the fatal accident's vis a vis the award under the *Law Reform Act*. The Court of Appeal in Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v. Lubia & Another (No. 2) [1987] KLR 30 provides a guide as to what the court is required to do, that is to take into account the award under *Law Reform Act* and not necessarily to deduct the same from the award under the *Fatal Accidents Act*, as follows;

- "6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
7. The *Law Reform Act* (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party is entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
8. The words "to be taken into account" and "to be deducted" are two different things. The words used in section 4(2) of the *Fatal Accidents Act* are "taken into account". The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows



that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

32. Guided by this decision and my perusal of the Trial Court judgment, the two awards under the Law Reform Act and the Fatal Accidents were considered in close proximity as to indicate that the court did have in mind and took into account its award for non-pecuniary damages for loss of expectation of life and pain and suffering when considering the damages under the Fatal Accidents Act.
33. There is therefore no merit in the appeal challenging quantum as awarded. Further since there is no cross appeal I will not interfere with the award on loss of dependency, which otherwise I would have enhanced to Kshs.3,030,612.

Disposition

34. Having exhaustively analyzed all the issues raised in this appeal I do find that this appeal has no merit. I do thus make the following orders;
 - a) This appeal lacks merit and the same is dismissed with costs to the Respondent.
 - b) The costs of this appeal are assessed at Ksh. 250,000/= All inclusive.
 - c) The sum deposited in court as security for the Appeal be released to the Respondent.
35. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 14TH DAY OF JUNE 2023.

In the presence of;

.....for Appellant
.....for Respondent
.....Court Assistant

