**Coast Bus Safaris & 2 others v Omboyo (Suing as the legal representative of the Estate of the Late Hezron Ochieng Omboyo (Deceased) (Civil Appeal 77 of 2013) [2023] KEHC 20026 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20026 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL 77 OF 2013**

**DKN MAGARE, J**

**JULY 4, 2023**

**BETWEEN**

**COAST BUS SAFARIS ..... 1ST APPELLANT**

**COASTLINE SAFARI ..... 2ND APPELLANT**

**COAST BUS (MOMBASA) LIMITED ..... 3RD APPELLANT**

**AND**

**WHYILLIS OMUSINDE OMBOYO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE HEZRON OCHIENG OMBOYO (DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. I am shocked that a simple appeal has stayed in court for 10 years. This matter is an appeal from the Judgment of H. Onzere given on 19/1/2013, in 484 of 2009.

**Duty of the first Appellate court**

2. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

3. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

4. In the case of *Peters vs Sunday Post Limited* [1985] EA 424, where the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

5. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

6. The Court is to bear in now that if need her seen the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. The court granted extension of time on 5/3/2013, by a ruling given by rtd Lady Justice Mary Kasango. Both parties filed submissions. The memorandum of appeal raises 6 grounds of Appeal.

    a. The Learned Magistrate erred in law and in fact in entering judgment against the appellants on liability when there was no proof that the deceased was a passenger in motor vehicle registration number KAR 059P as a condition precedent to apportionment of liability as per the consent dated 19/7/2011.

    b. The learned Magistrate erred in law and in fact to assert that the Appellant's apportionment of liability was proved, when the deceased's proof of passenger hood did not evidence the deceased as a passenger aboard motor vehicle registration number KAR 059P on 23/12/2007.

    c. The learned magistrate erred in-law and in fact by applying an erroneous standard of proof and failed to appreciate that the Respondent had failed to discharge the burden of proof on a balance of probability.

    d. The learned Magistrate erred in law and in fact by granting the sum of Ksh 877,392/= in respect of General damages which was inordinately high taking into account the cause of death was as a result of respiratory failure due to pneumonia, as evidenced by the death certificate and not accident related.

    e. The learned Magistrate erred in law and in fact in failing to appreciate the evidence before him and the submissions made on behalf of the Appellants.

    f. The learned Magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him.

8. The plaint dated 27/2/2009 sought damages under Law Reform and *Fatal Accidents Act*. The accident is said to have occurred on 23/12/2007 where the deceased was a fare paying passenger. There was negligence attributed to the 1st, 2nd, and 4th Defendants.

9. The 4th defendant is not a party to the appeal herein. Liability had been agreed in terms of 15:70:15 against the plaintiff; 1st, 2nd and 3rd defendants.

10. This disposes of grounds 1, 2 and 3 of the appeal. Liability is set out at page 99. The appeal is from the consent order is consequently dismissed. The next issue was that a sum of Ksh 877,392 was inordinately high as to amount to an erroneous estimate of damages.

11. The deceased was only 32 years old. He left behind a mother aged 63, brothers 29 and 26. The Court awarded the pain, suffering, loss of expectation of life the court awarded a sum of Ksh. 130,000/=, pain and suffering, 100,000/=. However, this was discounted since the deceased's estate filed suit 11 months after being granted letters of administration. There was no cross appeal on this. It shall therefore be.

12. On loss of dependence the court applied a multiplier of Kshs. 12,186, a dependency ratio of 32 years and a multiplier of 18 years. This worked out to Kshs. 877,393.

13. The deceased was only 32 years. A multiplier of 18 years is reasonable. This is so since there is no award given under the Land Reform Act.

14. In that contraction there is no taking into consideration award under the Land Reform Act as there is none.

15. In the case of *Wachira Joseph & 2 others v Hannah Wangui Makumi & another* [2021] eKLR, the court stated as follows; -

> " In *Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another* [2019] eKLR, court stated as follows:
>
> "Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents. From the foregoing, I am persuaded that a dependency ratio of 2/3 is warranted."

16. The court in the case of *Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti* [2022] eKLR stated as below; -

> "
>
> " 19. The question of double compensation under the two Acts was explained by the Court of Appeal in *Hellen Waruguru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited* [2015] eKLR where it was held as follows:-
>
> This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependents under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of

expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.

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. 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 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. The words "to be taken into account" and "to be deducted" are two different things. The words 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."

17. The court notes that in *Leonard Ochar Otieno v Mathews Mwanza Wanga (Suing as the legal administrator of the estate of Kennedy Owino Wanga (deceased)* [2020] eKLR, the court awarded a multiplier of 30 years for a 21 year old.

18. The award of 18 years for a 32 year old is proper.

19. The award is therefore not inordinately high. In the circumstances:

    a. I find no merit in the Appeal.

    b. I dismiss the same with costs of 85,000/= to the Respondent.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Mutugi for the Respondent

Ogutu for the Appellant

Court Assistant - Brian