Mbukinya Success (K) Ltd & another v Lumwaji (Suing as the legal representative of the Estate Julia Kenyani Kisia (Deceased) (Civil Appeal E018 of 2022) [2023] KEHC 21410 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21410 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E018 OF 2022

JN KAMAU, J

JULY 25, 2023

BETWEEN

MBUKINYA SUCCESS (K) LTD ..... 1ST APPELLANT

SAMUEL KIMATHI KIUNGA ..... 2ND APPELLANT

AND

KENNETH UBWIRU LUMWAJI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE JULIA KENYANI KISIA (DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M. Ochieng (PM) delivered at Hamisi in Principal Magistrate's Court Case No 89 of 2018 on 17th June 2022)

JUDGMENT

Introduction

1. In his decision of 17th June 2022, the Learned Trial Magistrate, Hon M. Ochieng', Principal Magistrate, found the Appellants to have been fully liable for the death of Julia Kenyani Kisia (hereinafter referred to as "the deceased"). She entered Judgment in favour of the Respondent herein against the Appellants jointly and severally as follows:-

   Loss of Dependency Kshs 3,465,600/=

   Pain and Suffering Kshs 100,000/=

   Loss of Expectation of Life Kshs 100,000/=

   Special Damages Kshs 407,000/=

   Kshs 4, 072,600/=

   Plus costs and interest

2. Being aggrieved by the said decision, on 4th July 2022, the Appellants filed a Memorandum of Appeal dated 1st July 2022. They relied on five (5) grounds of appeal.

3. Their Written Submissions were dated 6th December 2022 and filed on 13th December 2022 while those of the Respondent were dated 22nd February 2023 and filed on 24th February 2023. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

7. The court deemed it prudent to address the issue under the following distinct heads.

I. Fatal Accidents Act Cap 32 (laws Of Kenya)

8. The Appellants submitted that this court was bound by Section 78 of the Civil Procedure Act Cap 21 (Laws of Kenya) to re-assess and re-evaluate the evidence adduced before the Trial Court and arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify in the first instance as was held in the case of Kenya Ports Authority vs Kushton (K) Ltd (2009) 2 EA 212.

9. They submitted that the burden lay on the deceased's dependants to demonstrate that an award for loss of dependency ought to be made.

10. On his part, the Respondent pointed out that the appellate court could only interfere with the decision of a trial court if it exercised its discretion injudiciously by giving an award that was too high or so low as to amount to an outright error in assessment of damages as was held by the Court of Appeal in the case of Ken Odondi & 2 Others vs James Okoth Omburah t/a Okoth Omburah & Co Advocates (eKLR citation not given).

11. In determining whether or not the Learned Trial Magistrate proceeded on the wrong principles of the law, this court therefore dealt with the following issues under separate heads.

A. Multiplier

12. The Appellants submitted that the Learned Trial Magistrate did not rely on any authority to justify her adoption of a multiplier of nineteen (19) years. They asserted that the same was based on wrong principles and was excessive in the circumstances of the case as she failed to into account, the vagaries and vicissitudes of life. It was their contention that there was no guarantee that the deceased would have worked until the retirement age.

13. In this regard, they placed reliance on the case of John Muchiri Njoroge & Another vs Prisca Mmbone & Another [2019] eKLR where it was held that even where a person was expected to retire at sixty (60) years, the vicissitudes and/or vagaries of life did not guarantee him the entire balance of working years.

14. They argued that since the deceased died at the age of forty six (46) years, a multiplier of eight (8) years would have been reasonable in the circumstances.

15. In this respect, they relied on the case of Monica Njeri Kamau vs Peter Monari Onkoba [2019] eKLR where it was held that a multiplier of eleven (11) years was suitable for a thirty nine (39) years old deceased person.

16. On his part, the Respondent submitted that the Appellants did not call evidence did not tender any evidence of the vicissitudes and imponderables or illness that would have shortened the deceased's life.

17. He relied on the case of Mohamed Dagane Falir aka Dagane vs Alphonse Mutuku Muli & Another [2020] eKLR that cited the case of Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 Others [2012] eKLR where it was held that a matter that was stated on oath had to be denied on oath and that if it was not, then the fact remained the truth in that matter.

18. They also referred this court to the case of Motex Knitwear Limited vs Gopitex Knitwear Mills Limited HCCC No 834 of 2002 (eKLR citation not given) which cited the case of Autar Singh Bahra & Another vs Raju Govindnji HCCC No 548 of 1998 (eKLR citation not given) where it was held that although the defendant therein had filed an amended defence and counter-claim, he did not call any evidence and hence the counter-claim had to fail.

19. He submitted that the Appellants' proposal of a multiplier of eight (8) years was not brought to the attention of the Learned Trial Magistrate hence the same should not be the basis for overturning the award.

20. He pointed out that the Appellants did not file written submissions in the lower court that would have helped the learned Trial Magistrate determine the issues in dispute. In this regard, he placed reliance on the case of Tiren Another vs Simon Ombati Omimabo [2014] eKLR where it was held that an appeal was intended to correct the errors that had been made during trial and that the appellate court would use the same material that was used during trial to determine the correctness of otherwise of the decision that was being challenged.

21. He submitted that the Learned Trial Magistrate exercised her discretion judiciously when she applied the multiplier of nineteen (19) years. In this regard, he relied on the case of Mwanzia vs Ngalali Mutua Kenya Bus Ltd that was cited in Albert Odawa vs Gichumu Githenji Nku [2007] eKLR where it was held that the multiplier approach was just a method of assessing damages and was not a principle of law or a dogma.

22. To further support his argument, he placed reliance on the case of Kenya Wildlife Services vs Geoffrey Gichuru Mwaura [2018] eKLR where it was held that in arriving at a multiplier, courts take into consideration the vagaries of life but there was no clear-cut approach.

23. He asserted that the decision of John Muchiri Njoroge & Another vs Prisca Mmbone & Another(Supra) that was cited by the Appellants in their submissions herein was not binding to this court and instead he invited it to rely on the holding that it was not the duty of the court to determine and explore the imponderables of life as was held in the case of Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (Suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma- Deceased [2019]eKLR and the case of Chunibhai J. Patel & Another vs PF Hayes & Others (1957) EA 748, 749.

24. Right at the outset, this court wishes to point out that while an appellate court ought to determine whether or not the trial court exercised its discretion or did not misdirect itself on the basis of the material that was adduced during trial, nothing stops it from re-evaluating the evidence that has been adduced vis a vis considering comparable awards and coming to its own conclusion as was held in the cases of Selle & Another vs Associated Motor Boat Co Ltd & Others (Supra) and Kenya Ports Authority vs Kushton (K) Ltd (Supra).

25. The Respondent's argument that the Appellants could not at the appeal stage submit that the multiplier was high having failed to furnish the Learned Trial Magistrate with the relevant case law for consideration was therefore immaterial.

26. In determining whether or not the Trial Court exercised its discretion judiciously, this court had due regard to the case of Patrice Ombogo Bundi & Another (suing as the Personal representatives of the Estate of Douglas Bundi Ombogo) vs The Guardian Coach Limited [2022] eKLR in which it adopted a multiplier of sixteen (16) years where the deceased therein was aged thirty six (36) years at the time of death.

27. This court also had due regard to the case of Joseph Njuguna Mwaura vs Builders Den Limited & Another [2014] eKLR where the court adopted a multiplicand of seventeen (17) years where the deceased was aged thirty five (35) years at the time of death.

28. In the case of James Njiiri & 2 Others vs FPU & Another [2019] eKLR, the deceased therein was aged twenty nine (29) years at the time of his death. The appellate court therein adopted a multiplier of thirty one (31) years.

29. As was seen hereinabove, there is no clear cut formula of assessing what the appropriate multiplier would be. However, courts are guided by comparable cases so to arrive at conclusions that are not so wide apart as to cause inconsistency and confusion to those relying on the decisions.

30. Taking into account all the past decisions relating to the issue of a multiplier, this court agreed with the Appellant herein that the multiplier of nineteen (19) years where a person was aged forty six (46) years at the time of his death was disproportionate and not comparable to past decisions where the persons died at the same age as the deceased herein.

31. This court therefore found and held that the Trial Court misdirected itself in having adopted a multiplier of nineteen (19) years and there was therefore merit in disturbing the said figure.

32. Towards this end, this court found and held that a multiplier of eight (8) years as proposed by the Appellants was fair and reasonable in the circumstances of the case.

B. Multiplicand

33. The Appellants were emphatic that the Learned Trial Judgment's was bereft of any reasoning as to how she adopted the multiplicand of Kshs 22,800/=. They submitted that no evidence of payslips were adduced to prove the deceased's earnings. They pointed out that whereas her Death Certificate had indicated that she was a farmer, the Amended Plaint had showed that she was a business woman without pleading how much she used to earn.

34. They contended that the Advice slips allegedly from Mudete Tea Factory that the Respondent relied upon as proof of the deceased's earnings did not bear the name of the said factory and that the letter dated 29th January 2020 from Viyalo Primary School was also not proof of her earnings. They submitted the maker of the invoices ought to have been called so that they could have had a chance of cross-examining on the same.

35. They further asserted that on cross-examination, the Respondent confirmed that the deceased only had two (2) cows and that she was not a large scale producer of milk. They thus argued that it was impossible for the deceased to have supplied all that milk as had been alleged and added that alleged earnings were not constant every month. It was their contention that since the deceased left the said tea farm and the cows, it was the Respondent's duty to have continued with the same.

36. They argued that since the deceased's income was not proved, the Learned Trial Magistrate ought to have used the minimum wage to arrive at the appropriate multiplicand. To buttress their point, they relied on the case of Allan Owiti Awuor & Anor vs Tabitha Micere Mathu (Suing as the personal representative of the estate of Peter Mathu Ng'ang'a) [2021] eKLR where it was held that it was trite law that in the absence of proof of income the court should fall back to the regulations on wages and apply the minimum wage.

37. They further contended that the Learned Trial Magistrate ought to have applied the Regulation of Wages (General) (Amendment) Order, 2016 for purposes of determining the appropriate multiplicand as the deceased died on 16th April 2018 before Regulation of Wages (General) (Amendment) Order, 2018 came into force.

38. They added that since the Death Certificate indicated that the deceased was a house wife and that no proof was produced to show that she worked in the hotel industry, the minimum wage of Kshs 5,844/= for a general labourer would suffice as she was a resident of Musasa-Sabatia which was not a city and/or municipal county.

39. On his part, the Respondent submitted that the deceased person was a hardworking business woman who was contracted and engaged in supply of green tea leaves to Mudete Tea Factory where she earned an average of Kshs 12,000/= per month. He pointed out that he produced eight (8) receipts in support of the fact that she supplied milk to Viyalo Secondary School at Kshs 10,800/= per month and further produced thirty five (35) receipts which in total, showed that she earned a monthly income of Kshs 22,800/=. It was his case that the court was justified in using the proved income of Kshs 22,800/= as the multiplicand herein.

40. This court did not find it prudent to reproduce the evidence under this head as the same had been summarised in the parties' submissions hereinabove. shown as above. So as to determine what was the appropriate multiplicand in this matter, it had due regard to the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated as that it did not subscribe to the view that the only way to prove the profession of a person had to be by the production of certificates and that the only way of proving earnings was by production of documents as this would occasion a lot of injustice to very many Kenyans who were illiterate and kept no records yet they earned their livelihood in various ways.

41. In that case the Court of Appeal found that the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.

42. In the absence of any contrary evidence from the Appellants, this court was persuaded to believe the Respondent's testimony that the deceased was a business woman contracted to supply green tea leaves and milk. However, it was not clear if the payments for the supply of green tea leaves were monthly as the advice slips were for different months between June 2016 and March 2018. They ranged between Kshs 11,970/= and Kshs 12,600/=. It was also not clear from the letter from Viyalo Primary School dated 29th January 2020 how much the deceased used to get for the supply of milk to the school through the school feeding programme.

43. The deceased appeared to have been more of a farmer than a business woman. In the Regulation of Wages (Agricultural Industry) Order, 2017 that came into effect on 1st July 2017 which this court found and held to have been the applicable Regulation herein as the deceased died on 16th April 2018, the minimum wage of a farm foreman or farm clerk was Kshs 11,573.55.

44. Although the Appellants did not challenge the said multiplicand of Kshs 22,800/=, this court nonetheless found that the Respondent did not prove that the deceased was earning money for the tea leaves every month. In the absence of other proof, this court adopted a sum of Kshs 11,573.55 as a multiplicand as she definitely supervised her farm so as to produce the green tea.

C. Dependency Ratio

45. The Appellant submitted that in view of the evidence on record it was erroneous for the Learned Trial Magistrate to have adopted a dependency ratio of 2/3. They pointed out that it was the Respondent's evidence that he was a farmer and used to work before the deceased person died.

46. It was their contention therefore that the deceased person was not the sole bread winner as she assisted the Respondent in taking care of the children. They argued that even after the deceased's death, the Respondent would have still been in a position to take care of the children.

47. They thus submitted that the Learned Trial Magistrate ought to have adopted a dependency of 1/3 as opposed to 2/3 which was manifestly excessive in the circumstances.

48. In that respect, they relied on the case of DKM (Suing as Legal Representative to the Estate if JMM-Deceased) vs Mehari K. Towolde [2018]eKLR which was cited with approval in Joshua Mulinge Itumo (Suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) vs Bash Hauliers Limited & Another [2021]eKLR where it was held that the ratio of 1/3 was reasonable in the circumstances as both spouses were working. On his part, the Respondent did not submit on the dependency ratio.

49. Indeed, the extent of dependency was a question of fact as held in Leonard Ekisa & Another vs Major Birgen [2005] eKLR where the court stated that there was no rule of law that 2/3 of the income of a person was to be taken as available for family expenses but that the extent of dependency was a question of fact that was to be established in each case.

50. There was no evidence that the deceased was the sole bread winner of her the family. On the other hand, it emerged from the Respondent's evidence that both of them used to help each other take care of the family.

51. Taking into account that the deceased was said to be assisting the Respondent fend for the family as his wife, this court found and held that a dependency ratio of 1/3 was appropriate in the circumstances of this case and substituted it in place of the dependency ratio of 2/3 that the Learned Trial Magistrate had adopted.

II. Damages Under The Law Reform Act

A. Loss Of Expectation Of Life

52. The Appellant did not appear to have objected to the sum of Kshs 100,000/= that was awarded under this head. This court therefore left the same as undisturbed.

B. Pain And Suffering

53. The Appellants submitted that the evidence on record confirmed that the deceased died on the spot. They therefore argued that Kshs 10,000/= would have been sufficient under this head. They argued that the award made by Learned Trial Magistrate was manifestly excessive and urged the court to review the same downwards.

54. In this regard, they relied on the case of Kenya Railways Corporation vs Samwel Mugwe Gioche [2012] eKLR where a conventional sum of Kshs 10,000/= was made for pain and suffering.

55. On his part, the Respondent submitted that the award of Kshs 100,000/= under this head was justified and should not be disturbed. He argued that although the deceased died on the same day, it could not be said that she did not suffer any pain. She relied on the case of Sukari Industries Limited vs Clyde Machimbo Juma [2016] eKLR where an award of Kshs 50,000/= was upheld by the appellate court where the deceased died immediately after the accident. He added that the deceased herein must have suffered some degree of pain before she succumbed to her injuries thus it would be an injustice for this court to disturb the award given.

56. In the case of Nancy Ann Wathithi Gitau & Another [2016] eKLR, the court awarded a sum of Kshs 100,000/= where the deceased died thirty (30) minutes after the accident.

57. In the cases of Acceler Global Logistics vs Gladys Nasambu Waswa & Another [2020] eKLR and Sukari Industries Limited vs Clyde Machimbo Juma [2016] eKLR as quoted in the case of Wachira Joseph & 2 Others vs Hannah Wangui Makumi & Another [2021] eKLR, the courts therein awarded a sum of Kshs 50,000/= for pain and suffering.

58. As was held in the case of Kiwanjani Hardware Limited & Another vs Nicholas Mule Mutinda [2008] eKLR, an appellant court will not disturb an award of damages unless the same is inordinately low or high so as to represent an erroneous estimate or was based on an entirely wrong principle.

59. Taking into account the aforesaid comparable cases against that the backdrop that an appellate court ought not to disturb an award of a trial court on the basis that it could have awarded a lower figure but only on the basis that the award must have been inordinately high or inordinately low, this court was not persuaded that it should interfere with the award of Kshs 100,000/= for pain and suffering that was awarded by the Learned Trial Magistrate in view of the extent of the injuries which were a mangled skull, collapsed lungs on both sides, raptured intracranial systems on the head and ruptured digestive systems, a consideration that the said Learned Trial Magistrate took into account at the time of making the award.

III. Special Damages

60. The Appellants submitted that the special damages were not specifically pleaded and ought not to be awarded. They added that if the court found it otherwise, then the receipts produced as Exhibit 8F, Exhibit 8G, Exhibit 8H and Exhibit 8I for Kshs 1200/, Kshs 5000/=, Kshs 20,000/= and Kshs 84,000/ = and respectively should not be awarded as the same were not strictly proven.

61. They pointed out that the Learned Trial Magistrate did not justify how she arrived at an award of Kshs 407,000/=. They further argued that the Advice slips allegedly from Mudete Tea Factory and invoices produced were not expenses incurred by the Respondent but were allegedly used to prove earnings of the deceased thus ought not be treated as special damages.

62. On his part, the Respondent cited the cases of Premier Diary Limited vs Amarjit Singh Sagoo & Another [2013] eKLR and Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited [2016] eKLR where the common thread was that the court would occasionally loosen the mandatory requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.

63. He argued that having proved the special damages by way of receipts, the Learned Trial Magistrate was right in awarding the special damages of Kshs 407,000/= and that the Appellants had not demonstrated that she had erred.

64. A perusal of the undated Amended Plaint dated 9th January 2020 showed that the Respondent did not specifically plead the claimed amount Kshs 407,000/= under the head of Special Damages. It was merely indicated that the Special damages were as pleaded. Save for the Police Abstract Report which was specifically pleaded at Kshs 100/=, the rest of the items were referred to as per the receipts.

65. The Learned Trial Magistrate only indicated that the Respondent had pleaded and proved a sum of Kshs 407,000/= but failed to justify of how he had arrived to the aforesaid amount.

66. This court noted that the receipts the Respondent adduced as proof of the claim for Special damages did not amount to Kshs 407,000/=. The receipts that were legible to the court amounted to the sum of Kshs 222,200/=. The Appellants had therefore demonstrated that there was a lawful basis to interfere with the finding of the Learned Trial Magistrate in this regard.

67. Having said so, this court noted that in African customs, funerals are a community affair and that although the family incurs some monies in arranging for the funeral, the bulk of the contributions come from extended family members and the community. It was for that reason that this court found and held that it could not order for the reimbursement of the entire budget for the funeral but will instead give a global figure of Kshs 50,000/=. This is not withstanding that the Respondent did not plead an actual sum under his claim for Special damages.

Disposition

68. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4th July 2022 was partially merited. The effect of this is that the Judgment of Kshs 4,072,600/= that was entered by the Learned Trial Magistrate in Hamisi PMCC No 89 of 2018 on 17th June 2022 in favour of the Respondent herein against the Appellants herein jointly and severally be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondent herein against the Appellants herein jointly and severally for the sum of Kshs 620,353.60 made up as follows:-

Pain and Suffering Kshs 100,000.00

Loss of Expectation of Life Kshs 100,000.00

Loss of Dependency Kshs 370,353.60

1/3 x 11,573.55 x 12 x 8

Special Damages Kshs 50,000.00

Kshs 620,353.60

Plus costs and interest thereon. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit while damages under the Fatal Accidents Act Cap 32 (Laws of Kenya) and the Law Reform Act Cap 26 (Laws of Kenya) will accrue interest at court rates from the date of judgment of the lower court until payment in full.

69. As the Appellant was partly successful in his Appeal, each party will bear its own costs of the Appeal herein.

70. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JULY 2023.

J. KAMAU

JUDGE