Urgent Cargo Handling Ltd v Jacob (Suing as the legal representative of the Estate of Patrick Kisio Mailu) (Civil Appeal E042 of 2022) [2023] KEHC 23588 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E042 OF 2022

TM MATHEKA, J

SEPTEMBER 22, 2023

BETWEEN

URGENT CARGO HANDLING LTD ..... APPELLANT

AND

CONJESTINA NTHENYA JACOB (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK KISIO MAILU) ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A Mayamba, HSC (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.176 of 2017, delivered on 6th August 2021)

JUDGMENT

1. The respondent filed KILUNGU PMCC NO 176 OF 2017 seeking general damages under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA) on behalf of the Estate of Patrick Kisio Mailu (Deceased) pursuant to a fatal road accident, involving motor vehicles KBQ 992W and KCC 451H on 03rd June 2015 along the Nairobi-Mombasa Road at Kima Junction. She also prayed for special damages, costs of the suit and interest.

2. The appellant filed a statement of defence, denied each and every allegation of fact in the plaint and called for strict proof of the claim. It averred that if at all an accident happened on the material day as claimed; it was wholly and or substantially contributed to by the deceased.

3. After the preliminaries; the matter proceeded for hearing and judgment was delivered on the 6th August 2021. The learned trial magistrate apportioned liability in the ratio of 50:50 between the parties and assessed damages as follows;

   Pain & suffering..... Kshs 50,000/=

   Loss of expectation of life.....Kshs 100,000/=

   Loss of dependency.....Kshs 4,943,800/=

Special damages..... Kshs 550/=

Total Kshs 5,094,350/=

Less 50% Kshs 2,472,175/=

4. Aggrieved by the award, the appellant filed this appeal and listed 3 grounds as follows;

   a. The learned magistrate erred and misdirected himself in law, principle and facts when he misapprehended and misunderstood the applicable principles and the law in assessing quantum thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances of the case.

   b. The learned trial magistrate erred in law and fact in arriving at a finding on liability which went against the weight of evidence.

   c. The learned trial magistrate erred in law and fact by making a finding in favour of the respondent when they had not proved their case on a balance of probabilities.

   d. The learned trial magistrate erred in law and fact in awarding the respondent Kshs 4,943,800/= damages under the *Fatal Accidents Act* which award was too excessive in the circumstances.

   e. The learned trial magistrate erred in law and fact in relying on the maximum number of productive working years which was 25 years in the circumstances and failing to consider vicissitudes of life when awarding damages under the *Fatal Accidents Act*.

   f. The learned trial magistrate erred in law by failing to deduct the damages awarded under the *Law Reform Act* from the total award.

   g. The learned trial magistrate erred in law and fact if failing to accord due regard to the appellant's submissions and authorities on quantum on applicable principles for assessment of damages.

   h. The learned trial magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record, descended into the arena of litigation and thus erroneously apportioned liability against the appellant.

5. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions. Further, leave was granted to the parties to file supplementary submissions.

The Appellant's Submissions

6. With regard to the award for loss of dependency, the appellant submits that the plaintiff did not provide any documentation to prove that the deceased earned the alleged amount of Kshs 30,000/=. That the trial court resorted to the minimum wage but it erred in interpreting the provisions of the Regulation of Wages (General) Amendment Order 2015. It submits that the salary payable therein was Kshs 17,090/= and not Kshs 24,719/= that was adopted by the trial court.

7. The appellant is not opposed to the use of the ratio of 2/3.

8. The appellant acknowledges that the mandatory age of retirement is 60 years but contends that; the vicissitudes of life nowadays and the nature of business that the deceased was involved in would impede the deceased from working for 25 years. It submits that a multiplier of 20 years is enough.

9. According to the appellant, the award for loss of dependency should therefore be calculated as follows; 17,090 x 2/3 x12 x 20 = 2,734,400/=.

10. On the issue of double compensation, the appellant submits that where a claimant gets awards for loss of life both under *Law Reform Act* and *Fatal Accidents Act*, the former should be deducted from the latter. It has relied on the case of Kemfro –vs- A.M Lubia & Anor (1982-1988) KAR 727 where the Court of Appeal stated;

> " The net benefit will be inherited by the same dependants under the *Law Reform Act* and that must be taken into account in the damages awarded under *Fatal Accidents Act* because the loss suffered under the latter Act must be offset by gain from the estate under the former Act.

11. With regard to the award for pain and suffering, the appellant submits that Kshs 20,000/= ought to have been sufficient since the deceased died on the same day. That according to precedent, the award ranges between Kshs 20,000/= and Kshs 30,000/=. It relies on the case of Kimunya Abednego alias Adednego Munyao –vs- Zipporah S Musyoka & Anor (2019) where an award of Kshs 20,000/= was made for a deceased who died on the same day.

12. The appellant submits that the award for loss of expectation of life is conventional and should not be disturbed.

Respondent's Submissions

13. With regard to the award for pain and suffering, the respondent submits that the fact of the deceased dying on the same day of the accident does not in any way negate the fact that he suffered immeasurable pain leading to a full body shut down. She contends that evidence from the trial court is certain that there was no indication on how long it took before the deceased was pronounced dead or how long it was between the accident and his demise. She proposes that the award be disturbed and enhanced

    to Kshs 100,000/=. She has relied inter alia on the case of Acceler Global Logistics –vs- Gladys Nasambu Waswa & another [2020] eKLR where the court observed;

    > 37. It is not in dispute that the deceased sustained serious injuries and that the deceased died on the spot. This raises a fundamental question of what each unit of pain and suffering is worth. This question has in my view been authoritatively discussed in an article in the International Review of Law and Economics[27] entitled "Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards" by W. Kip Viscussi who argues that:-
    >
    > "Pain and suffering is generally recognized as being legitimate component of compensation but one for which we have no accepted procedure of measurement.... Pain and suffering is by no means a negligible component of awards.... The general implication is that pain and suffering awards are not entirely random or capricious."
    >
    > 38. The position laid down in Rose vs Ford [28] is that where the period of suffering is short, only nominal damages are awarded. That was in 1935 and 500 pounds was awarded for a two days suffering. I am persuaded that the amount of Ksh. 50,000/= awarded under the said head is not in my view excessive nor has it been shown to be erroneous or unreasonable."

14. Emerging jurisprudence shows, she submits, that appellate courts uphold damages of Kshs 50,000/= for pain and suffering and the appellants have not demonstrated that the award is in any way excessive, erroneous or unreasonable.

15. With regard to the award for loss of dependency, she submits that she was able to prove that the deceased was a family man with three children of school going age who were enrolled at Tracy Academy. That she

produced a fee structure which was sufficiently probative that she required a total sum of Kshs 31,600/= per term. She submits that whereas she was unable to produce proof of income, courts ought to generally be guided by a balance of probabilities rather than subject the same to strict proof as proposed by the appellants. She has relied on Jacob Ayiga Maruja & Anor -vs- Simeon Obayo [2005] eKLR where the Court of Appeal stated;

> "In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, 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"

16. She has urged the court to find that the deceased was earning Kshs 30,000/= as pleaded in view of the fee obligations proved at trial. She contends that the minimum wage, for a heavy commercial vehicle driver, was Kshs 24,719/= and not Kshs 17,090/= as submitted by the appellant. That if the court declines to find that the deceased was earning Kshs 30,000/=, it should be pleased to find that the minimum wage was Kshs 24,719/=.

17. As for the multiplier, she submits that there is no basis for the assertion that vicissitudes of life nowadays would preclude the deceased from working for 25 years. Further, she submits that page 48 of the appellant's submissions in the trial court shows that the appellant had proposed the same 25-year multiplier that was adopted by the trial court. She contends that the appellant cannot now be seen to approbate and reprobate.

18. With regard to special damages, she submits that the trial court disregarded the funeral expenses and awarded only what was provided by way of receipts. She has respectfully differed with the trial court's position and relied on Premier Dairy Ltd –vs- Amarjit Singh Sagoo & Anor (2013) eKLR where the Court of Appeal held;

> "We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

19. She submits that the pleaded amount for funeral expenses was 70,000/= and has invited the court to award it.

20. On the issue of double compensation, she disagrees with the proposal of deduction and relies on Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) –vs- Kiarie Shoe Stores Limited [2015] eKLR where the Court of Appeal explained the issue of double compensation under the *Law Reform Act* and the Fatal Accident Act as follows: -

> "Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.
>
> 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 dependants 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 issues of duplication does not arise.
>
> The words 'to be taken account' and 'to 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."

21. In conclusion, she contends that any disturbance of the trial court's award should only be for purposes of enhancement.

Duty of Court

22. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

23. Having considered that evidence on record, the submissions and authorities cited by parties and the grounds of appeal, my view is that the issue of liability is not in dispute. The issue for determination is whether the learned trail court erred in the award of damages to warrant the interference by this court.

Analysis

24. The award of damages is an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In Butt –vs Khan (1977)1KAR it was held that;

> "An appellate Court will not disturb an award for damages unless it is 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 at a figure which was either inordinately high or low.

25. An appellate court will not disturb an award simply because it would have awarded a different figure if it had tried the case in the first instance.

Award Under The Fatal Accidents Act

26. It was pleased that the deceased was a driver earning Kshs 30,000/= per day. In her statement which was adopted as evidence in chief, PW1 indicated that the deceased was her husband and was a professional driver with a monthly pay of Kshs 30,000/=. In her oral evidence, she stated that the deceased was a lorry driver. The trial court resorted to the minimum wage after noting that the claim of Kshs 30,000/= was not supported by actual earning vouchers.

27. The respondent's argument in this appeal is that the deceased's earnings should not have been subjected to strict proof because the school fees structure was sufficiently probative that she required a total sum of Kshs 31,600/= per term. From the evidence on record, it is indeed true that term 2 school fees in 2020 for three children was Kshs 31,600/=. However, this Court should take Judicial Notice of the fact that school terms in Kenya are made up of about 4 months hence that figure of Kshs 31,600/= was spread across 4 months and was not a monthly requirement.

28. Be that as it may, it is trite that where monthly income cannot be ascertained, courts should use the minimum wage or award a global sum. In persuasive authorities such as Melbrimo Investment Company Limited –vs- Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR and Caleb Juma Nyabuto –vs- Evance Otieno Magaka & another [2021] eKLR, the honorable Judges upheld the use of a minimum wage as a multiplicand where monthly income could not be ascertained.

29. In this case, the trial magistrate's use of the minimum wage was well within his discretion. As to whether the proper minimum wage was Kshs 24,719/= or Kshs 17,090/=, the deceased died on 03rd June 2015 and there is proof that he was a lorry driver. Accordingly, the applicable wage is as provided in the Regulation of Wages (General) (Amendment) Order 2015 which came into operation on 1st May 2015. The accident happened along the Nairobi-Mombasa highway hence column 2 is applicable for Nairobi, Mombasa and Kisumu cities. The figure therein is Kshs 24, 719.50 /= and not Kshs 17,090/= as submitted by the appellant. It was therefore not erroneous for the trial magistrate to adopt a multiplicand of Kshs 24, 719/= and this court should uphold it.

30. With regard to the multiplier, the appellant wants it to be reduced from 25 years to 20 years. I have looked at the appellant's submissions in the trial court and it is indeed true that it had proposed a multiplier of 25 years. It is therefore dishonest for it to change tune on appeal.

31. The award for loss of dependency works out as follows; 24,719/= x 2/3 x12 x 25 = 4,943,800/=. This is the figure that the trial court arrived at.

32. With regard to special damages, the respondent pleaded an amount of Kshs 70,000/= but the trial magistrate did not award any. Funeral expenses are in the category of special damages which require strict proof however, however, there is not a dispute that the deceased died. The family must have incurred funeral expenses.

33. There is no cross appeal with regard to these damages, but this court is empowered to make the award under Order 42 Rule 32 of the Civil Procedure Rules which provides as follows;

> " The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal."

With regard the sum awardable I am guided by the Court of Appeal decision in Premier Dairy Ltd (supra) and find that the sum award the sum of Ksh 70,000 as it is moderate sum.

Award under the Law Reform Act

34. The trial magistrate awarded Kshs 50,000/= for pain and suffering and the appellant submitted that Kshs 20,000/= should have been sufficient. The death certificate shows that he died on the same day of the accident but there is nothing to show whether the death was instant or whether there was a prolonged period between the accident and demise. In the case of Sukari Industries Limited –vs- Clyde Machimbo Juma, Homa Bay HCCA NO. 68 of 2015 [2016] eKLR, the deceased died immediately after the accident and the trial court awarded Ksh. 50,000/= for pain and suffering. On appeal, the court held that:

> " On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

35. I hold a similar view and see no reason to disturb the award.

36. On the issue of double compensation, section 2(5) of the LRA provides a follows;

> " The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act* (Cap. 32) or the *Carriage by Air Act*, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

37. It is evident that there is nothing wrong with awarding damages under both Acts even where the beneficiaries under both Acts are the same. Indeed, there I find no requirement in law to engage in a mathematical deduction.

Determination

Liability 50%:50%

Pain & suffering.....Kshs 50,000/=

Loss of expectation of life..... Kshs 100,000/=

Loss of dependency.....Kshs 4,943,800/=

Special damages..... Kshs 70,550/=

Total Kshs 5,164,350/=

Less 50% Kshs 2,582,175/=

38. In the end I find that the appeal is not merited and find in favour of the respondent. The appeal is dismissed and judgment entered in favour of the respondent at the sum of Ksh 2,582,175 plus costs and interest from the date of the judgment in the subordinate court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER 2023

.....

MUMBUA T MATHEKA

JUDGE

CA Nelima

Ms. Mwangangi for Appellant

Ms. Kwamboka for the Respondent

Appellant's Advocates

Mwangangi Nzisa & Associates

Respondents' Advocates

Nzei & Co. Advocates