Kagwanji v Bett (Suing as the legal representatives of the Estate of Julius Cheruiyot Bett (Deceased) (Civil Appeal 28 of 2018) [2023] KEHC 24424 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24424 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 28 OF 2018

RL KORIR, J

OCTOBER 18, 2023

BETWEEN

GEOFFREY GITHI KAGWANJI ..... APPELLANT

AND

CHEMUTAI BETT (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JULIUS CHERUIYOT BETT (DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgment of Omwansa B. at the Principal Magistrate's Court at Sotik, Civil Suit Number 185 of 2015)

JUDGMENT

1. The Respondent (then Plaintiff) as the Legal Representatives of the estate of Julius Cheruiyot Bett, sued the Appellant (then Defendant) for General and Special Damages from an accident involving Motor Cycle Registration Number KMCS 641L and Motor Vehicle Registration Number KBJ 976B and in which her husband Julius Cheruiyot Bett sustained fatal injuries.

2. The trial court conducted a hearing and after hearing one witness for the Respondent, the parties entered into a consent for liability in the ratio of 90:10 in favour of the Respondent.

3. In its Judgement dated 22nd November 2018, the trial court awarded Kshs 859,500/= as General and Special Damages to the Respondent (then Plaintiff).

4. Being aggrieved with the Judgment of the trial court, the Appellant through his Memorandum of Appeal dated 21st December 2018 appealed against the liability and quantum of damages and relied on the following grounds:-

   I. That the learned trial Magistrate erred both in law and principle by applying erroneous principles in computation of damages payable thus arriving at erroneous and grossly excessive estimates of general damages payable.

II. That the award of general damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.

III. That the learned trial Magistrate erred in law and/or fact and in principle when the same opted to apportion liability in the ration of 90:10 in favour of the Plaintiff against the defendant when no sufficient evidence had been tendered to occasion any blame on the part of the defendant.

IV. That the learned trial Magistrate erred in law and/or in fact and in principle when the same opted to apply a multiplicand of Kshs 20,000/= whereas the respondent failed to put before court any material form which could derive deduction that the deceased was engaged in any meaningful employment/ income generating activity.

V. That the learned trial Magistrate erred in law and/or in fact and in principle when the same failed to discount the award of Kshs 130,000/= made under the heading of loss of life and pain and suffering from the total and cumulative award, thus making a grave and prejudicial omission.

VI. That the learned trial Magistrate acted in error when the same failed to properly evaluate evidence on record thus reaching an erroneous decision.

5. My duty as the first appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in Gitobu Imanyara & 2 Others Vs Attorney General (2016) eKLR.

The Plaintiff's/Respondent's case.

6. Through her Plaint dated 4th August 2015, the Respondent stated that on 4th May 2015, the deceased while riding as a pillion passenger on Motor Cycle Registration Number KMCS 641L along Sotik-Ndanai road was knocked down by Motor Vehicle Registration Number KBJ 976B.

7. The Respondent stated that the Appellant being the owner or proprietor of Motor Vehicle Registration Number KBJ 976B, was negligent in causing the accident and particularized the negligence in paragraph 4 of the Plaint. It was the Respondent's further case that the deceased had dependants and the said dependants were listed in paragraph 5 of the Plaint.

8. It was the Respondent's case that at the time of the death of the deceased, he was aged 55 years and that he earned approximately Kshs 60,000/= per month which he used to support his family members. That by his demise, the deceased's estate and dependants suffered grave loss and damage.

9. The Respondent's claim against the Appellant was for Special and General Damages under the *Law Reform Act* and *Fatal Accidents Act*.

The Appellant's/Defendant's case

10. Through his statement of defence dated 22nd September 2015, the Appellant denied that he was the driver or registered owner of Motor Vehicle Registration Number KBJ 976B and further denied the occurrence of the accident.

11. The Appellant denied the particulars of negligence levelled against him. That if any accident happened, it was contributed to by the negligence of the deceased and the rider of the subject motorcycle. He particularized the negligence in paragraph 4 of his statement of Defence.

12. The Appellant contended that the suit was non-compliant with the mandatory statutory provisions and rules of procedure and was incompetent, fictitious, unavailable and an abuse of the court process.

13. Pursuant to the directions of this court on 15th November 2022, the Appeal was canvassed by way of written submissions.

The Appellant's written submissions.

14. In his submissions dated 14th December 2022, the Appellant submitted that the issue of liability was agreed upon and settled. That he was to shoulder 90% responsibility and the Respondent was to bear 10% responsibility.

15. It was the Appellant's submission that as a matter of principle, damages must be within limits set out by comparable decided cases and also within the limits of the Kenyan economy. That there had to be uniformity of awards in case involving similar injuries.

16. The Appellant submitted that the award of Kshs 30,000/= for pain and suffering and Kshs 100,000/= for loss of expectation of life was inordinately high and was fit for interference by this court.

17. It was the Appellant's submission that the deceased was aged 55 years at the time of his death. That taking into consideration of the vagaries of life, a multiplier of 4 years would be sufficient.

18. The Appellant submitted that it was evident that the deceased's income was unknown and that this court should adopt a minimum wage of Kshs 10,000/=. He further submitted that the deceased had four sons and four daughters but it was not demonstrated how they entirely depended on him. He proposed that a dependency ratio of 1/3 be adopted by this court.

19. It was the Appellant's submission that this court awards the sum of Kshs 153,000/= as general damages. On special damages he submitted that this court only awards the amounts that were specifically pleaded and proved by production of relevant documents.

The Respondent's written submissions.

20. The Respondent filed submissions dated 16th May 2023. She submitted that the parties recorded a Consent on liability which was settled in the ration of 90:10 in her favour on 16th May, 2018.

21. It was the Respondent's submission that the only question for determination was whether the general damages awarded by the trial court was too high to persuade this court to interfere with it. That for this court to interfere with the award, it had to be convinced that the award was unreasonably high or unreasonably low. She relied on Gitobu Imanyara & 2 others v Attorney General [2016] eKLR and Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KAR 5.

22. The Respondent submitted that the award of Kshs 30,000/= and Kshs 100,000/= for pain and suffering and loss of expectation of life was reasonable. She relied on Sukari Industries Limited vs Clyde Machimbo Juma (2016) eKLR and Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi) [2019] eKLR.

23. It was the Respondent's submission that the Appellant's proposal of Kshs 10,000/= was untenable as the same was below the gazetted minimum wage of Kshs 12,296/=. It was her further submission that the deceased was a private surveyor, a farmer and a businessman who earned more than Kshs 20,000/= per month. That there was no reason to interfere with the trial court's award of Kshs 20,000/= as multiplicand. She relied on Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR and Jacob Ayigo v Simon Obayo [2005] eKLR.

24. The Respondent submitted that the trial court exercised its discretion judiciously when it used the multiplier of 5 years. That the trial court rightly observed that the deceased was married with 8 children who depended on him and that there was no reason to disturb the multiplicand.

25. It was the Respondent's submission that the award of Kshs 800,000/= was sufficient compensation and was even similar to global awards in the similar cases of Charles Makanzie Wambua v Nthoki Munyao & Prudence Munyao (suing as personal representatives of the estate of Lilian Katumbi Nthoki) [2020] eKLR, Twokay Chemicals Limited v Patrick Makau Mutisya & another [2019] eKLR and Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago [2020] eKLR.

26. I have gone through and carefully considered the Record of Appeal dated 29th February 2020, the Supplementary Record of Appeal dated 9th December 2021, the Appellant's written submissions dated 14th December 2022, and the Respondent's written submissions dated 16th May 2023. The sole issue for my determination is whether the amount assessed as quantum by the trial court was unreasonably excessive.

General Damages

27. I begin by dismissing the Appellant's ground of appeal touching on liability as the Record shows that there was a Consent recorded on liability on 16th May 2018. I also disregard any submissions on liability as the same constitute an abuse of judicial time.

28. For an appellate court to interfere with the award by the trial court, it must be convinced that the trial Magistrate acted upon some wrong principle of the law or that the award was extremely high or extremely low so as to make it erroneous. The Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 stated that:-

> "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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 factor 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."

29. In regard to the pain and suffering, the trial court awarded Kshs 100,000/=. The Police Abstract produced and marked as P.Exh 7 stated that the accident occurred on 4th May 2015. The Post Mortem Report produced by Juliana Chemutai Bett (PW1) and marked as P.Exh 5 indicated that the deceased died on 4th May 2015. The same was supported by the Death Certificate marked as P.Exh 2 which indicated that the date of death was 4th May 2015. PW1 testified that on the material day, she heard screams nearby and when she rushed to the place where the screams emanated, she found that her husband (deceased) had been hit and had passed away. It was clear from PW1's testimony and the aforementioned documents that the deceased died on the same day and that his pain was not prolonged.

30. It is my finding that the award of Kshs 30,000/= by the trial court for pain and suffering and Kshs 100,000/= for loss of expectation of life was reasonable and sufficient. I am guided by the persuasive

case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, where Nyamweya J. (as she then was) held that:-

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

31. On loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall , subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

32. The claim for loss of dependency constitutes the multiplicand, the dependency ratio and the multiplier.

33. The Respondent testified that her husband (the deceased) was a private surveyor who used to earn Kshs 20,000/= per month. In the Plaint, the Respondent stated that the deceased was a private surveyor, a farmer and a business man who earned approximately Kshs 60,000/= per month. She submitted in this appeal that the deceased was a private surveyor, farmer and businessman who earned more than Kshs 20,000/= per month.

34. I have gone through the trial court proceedings and there was no evidence on record to sustain the claim that the deceased earned Kshs 20,000/= or Kshs 60,000/=. It was evident that the deceased's income was unknown. In such circumstances, courts are minded to use the minimum wage as the base income when calculating the loss of dependency as was held by the Court of Appeal in the case of Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga [2020] eKLR thus:-

> " We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs.11,995/- was an appropriate place to begin....."

35. I have gone through the Regulation of Wages (General Amendment) 2015 and among the occupations listed in the 15 categories, there is nowhere where a farmer or a surveyor can be placed. That leaves this court with no option than to award a reasonable sum under this head. I find precedent in the case of Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa v Gichumu Githenji [2007] eKLR, where Ringera J. (as he then was) made the following observation:-

> " 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."

36. The trial court awarded the sum of Kshs 20,000/= as the multiplicand, an amount which I find to be reasonable and I so hold.

37. On the issue of multiplier, the trial court used a multiplier of 5 years. The Appellant submitted that the adoption of the multiplier of 4 years. The Respondent submitted that the trial court was correct in adopting the multiplier of 5 years.

38. In the case of Roger Dainty vs Mwinyi Omar Haji & another (2004) eKLR, the Court of Appeal held that:-

> " To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life."

39. After taking into account the vicissitudes and vagrancies of life, it is my finding that the use of 5 years as the multiplier by the trial court was reasonable and I will not disturb the same.

40. On the issue of the dependency ratio, it is trite that dependency is a question of fact to be established in each case. The Respondent submitted that the trial court was right when it found that the deceased was married with 8 children who depended on him. The Appellant on the other handed submitted that the deceased had 4 daughters and 4 sons but the Respondent did not demonstrate how the children depended entirely on the deceased. The trial court noted that the deceased was married and blessed with 8 children who were all school going and it therefore used the dependency ratio of 2/3.

41. The particulars of the deceased's dependants are contained in paragraph 5 of the Plaint and the age of the dependants ranged between 8 -27 years and it is reasonable to believe that most if not all the children were school going. The older children were stated to be attending university while the rest were at different levels of education. This would mean that the deceased spent a significant portion of his earnings on the family.

42. It is the presumption in law that the deceased is taken to spend 1/3 of his income on himself and 2/3 is available as reserve for his dependents. I agree with the trial court's use of 2/3 as the dependency ratio and I so hold.

43. The Appellant submitted that the awards under *Law Reform Act* i.e. loss of expectation of life and pain and suffering should be discounted from the total award as it amounted to double compensation. In the case of Hellen Waruguru Waweru (suing as the legal representative of peter Waweru Mwenja (deceased))v Kiarie shoe stores limited [2015] eKLR, the Court of Appeal stated:-

> " 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 issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

"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 for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants 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 ....."

44. It is my finding that the issue of double compensation does not arise as a party entitled to sue under the *Fatal Accidents Act* is also entitled to sue under the *Law Reform Act*.

45. In summary therefore, I concur with the trial court's award of Kshs 800,000/= as loss of dependency and I so hold.

46. With regard to Special Damages, the Respondent pleaded:-

Funeral Expenses Kshs 25,000/=

Death Certificate Kshs 150/=

Grant Kshs 25,000/=

Police Abstract Kshs 200/=

47. The Respondent produced a receipt marked as P.Exh 4 from the firm of E.M Orina & Co. Advocates which showed that the Respondent incurred Kshs 25,000/= for payment of Ad Litem Number 53 of 2015. There was no other evidence adduced by the Respondent to support payment for the death certificate and the Police Abstract. I agree with the trial court's award of Kshs 25,000/= as special damages and I so hold.

48. In the final analysis, I have not found any mistake on the part of the trial court in awarding of the damages. The trial court did not act on any wrong principle of law and its award was reasonable. It does not warrant interference by this court.

49. In the end the Appeal dated 21st December 2018 is dismissed with costs to the Respondent.

Judgement delivered, dated and signed at Bomet this 18th day of October , 2023

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr.Kefa for the Respondent and in the absence of the Appellant. and Siele (Court Assistant)