Arimi & another v Muasya (Suing as the Administratix of the Estate of Kairi Kinoo - Deceased) (Civil Appeal E413 of 2023) [2024] KEHC 15262 (KLR) (Civ) (2 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15262 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E413 OF 2023

JM OMIDO, J

DECEMBER 2, 2024

BETWEEN

FRANKLIN MWITI ARIMI ..... 1ST APPELLANT

ROBERT MWITI ..... 2ND APPELLANT

AND

JACKLINE NDUKU MUASYA (SUING AS THE ADMINISTRATIX OF THE ESTATE OF KAIRI KINOO - DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Rawlings Liluma, Senior Resident Magistrate delivered on 28th April, 2023 in Nairobi Milimani CMCC No. E1735 of 2022)

JUDGMENT

1. This judgment determines the Appellant's appeal filed on 30th May, 2023 vide the Memorandum of Appeal dated 5th May, 2023. This appeal relates only to the issue of quantum.

2. The Respondent who was the plaintiff before the trial court presented the suit as the Administratix of the Estate of Kairi Kinoo ("the Deceased") and pleaded that the Deceased was fatally injured following a road traffic accident that occurred on 7th June, 2021. The accident occurred while the Deceased was walking along North Airport Road and was knocked down by motor vehicle registration number KCX 207S.

3. The issue of liability was determined by the trial court at 100% against the Appellants (the Defendants in the lower court), jointly and severally in the judgement that was delivered on 28th April, 2023.

4. On quantum, the learned trial Magistrate, Hon. Rawlings Liluma proceeded to assess damages under the various heads as follows:

a. Special damages Ksh.62,550/-.

b. Damages under the *Law Reform Act*Pain and suffering Ksh.10,000/-.Loss of expectation of life Ksh.100,000/-.

c. Damages under the *Fatal Accidents Act*

Multiplier – 35

Multiplicand – 13,960.80/-.

Dependency ratio – one third.
Loss of dependency Ksh.1,954,512/-.

5. It is that judgment that gave rise to this appeal where the Appellant now complains that:

i. That the learned trial Magistrate erred in law and in fact in awarding damages that were manifestly and grossly excessive and out of sync with comparable awards.

ii. That the learned trial Magistrate erred in law and in fact in awarding excessive damages for loss of dependency.

iii. That the learned trial Magistrate erred in law and in fact in adopting and applying an excessive multiplier.

iv. That the learned trial Magistrate erred in law and in fact in his application and consideration of the vicissitudes and vagaries of life.

v. That consequently, the learned trial Magistrate erred in law and in fact in his exercise of judicial discretion in assessment of damages.

6. As observed above, the appeal is against quantum of damages only. The appeal was admitted to hearing on 16th May, 2024. This court gave directions that the appeal be canvassed by way of written submissions and both sides complied by filing their respective submissions.

7. A first appellate court is mandated under Section 78 of the *Civil Procedure Act* to re-evaluate the relevant evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.

8. This court is therefore empowered to subject the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 in which Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
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> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanour of a witness is inconsistent with the evidence in the case generally."

9. Going to the trial court's record, the Respondent (the Plaintiff in the lower court), presented the suit, a tortious liability claim, vide a plaint dated 28th February, 2022, seeking the following reliefs against the Appellant (the Defendant in the lower court), following a road traffic accident that is said to have

occurred on 7th June, 2021, involving the Deceased, who was a pedestrian along North Airport Road and who was knocked down by motor vehicle registration number KCX 207S and who met his demise as a result of the accident:

a. General damages under the *Fatal Accidents Act* and the *Law Reform Act*.

b. Special damages of Ksh.62,550/-.

c. Costs and interests.

10. The Respondent testified before the lower court and adopted the contents of her brief statement dated 28th February, 2022. She stated that the Deceased was her son and worked as a machine attendant at a company that manufactured body oil, earning Ksh.40,000/- monthly and would assist the Respondent and her husband with upkeep. She stated that her son met his demise on 7th June, 2021 at the age of 24.

11. The Respondent produced the following documents in support of her case before the lower court:Limited Grant of Letters of Administration Ad Litem dated 7th October, 2021.Police abstract.Post mortem report.Certificate of death No. 1222455.Burial permit.Letter from the Chief Kauti Sub-location dated 30th June, 2021.Receipts for mortuary and burial expenses for a total amount of Ksh.41,800/-.Copy of records and receipt for Ksh.550/-.Copy of demand letter and statutory notice to insurance.

12. The Respondent called Police Constable Jackline Naiku and Cheye Wafula as witnesses. The evidence of the two was in respect to the issue of liability, which as stated above, is not challenged in the present appeal.

13. I have perused the Memorandum and Record of Appeal, the submissions filed by the parties and the record of the trial court. What is clear from the Appellants' submissions is that they do not challenge the awards made under the head of special damages. They do not also challenge the awards made under the *Law Reform Act*, i.e. under the heads of pain and suffering and loss of expectation of life.

14. What the Appellants challenge is the award of loss of dependency under the *Fatal Accidents Act*.

15. From the record and material before me, I deduce the issue for this court to determine to be whether the trial magistrate erred in awarding damages for loss of dependency and whether the same were excessive in the circumstances and ultimately whether the award that the learned trial Magistrate made under the *Fatal Accidents Act* was appropriate and in judicious exercise of his discretion.

16. Dependency is always a matter of fact to be proved by evidence. It is upon the party who brings a claim seeking damages under the head of loss of dependency to adduce evidence to prove the claim.

17. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of *Price & another v Hidler* [1996] KLR 95 as follows:

> " The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

18. Further, in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.
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> It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
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> "An appellate court will not disturb an award of damages unless it is so 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."

19. There is also the authority of *Mbogo & Another v Shah* [1969] EA 93, where it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

20. In determining loss of dependency, the learned trial Magistrate applied the multiplier/multiplicand formula or method, which requires that the court determines the multiplier, multiplicand and dependency ratio which form the basis upon which loss of dependency can then be calculated.

21. From the certificate of death that the Respondent produced as an exhibit, the trial court was able to determine with certainty the age at which the Deceased met his demise, which was 24. As properly held by the learned trial Magistrate, the Respondent did not present proof of earnings by the Deceased.

22. The trial court however went on to hold that the Deceased was employed as a machine operator. In my view, the learned trial Magistrate erred by so holding as no evidentiary material on such employment or engagement was presented to prove as much. Perhaps a letter or other documentation from the alleged employer would have sufficed. But in this case, the Respondent, when questioned in cross examination, stated that she did not even know who the Deceased's employer was.

23. So now here is a case in which the Deceased's age is known but there is no proof of his occupation and earnings. How is the court to determine the claim under the *Fatal Accidents Act*?

24. The answer to this question is opportunely to be found in the authority of *Mary Khayesi Awalo & another v Mwilu Mulungi & another* [1999] eKLR in which Nambuye J. (as she then was), took

guidance from and quoted the case of *Mwanzia v Ngalali Mutua v Kenya Bus Service & another Nku* Hcca No.15 of 2003 [2007] eKLR in which Ringera J. (as he then was) expressed himself as follows;

> " 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."

25. There is also the decision of the High Court (C. Kariuki, J.) of *David Mbuba & another v Victoria Mwongeli Kimwalu & another* [2018] eKLR, where the court dealt with a scenario in which there was no proof of earnings by the Deceased in a claim under the *Fatal Accidents Act*. The court held as follows:

> " The multiplier approach was not suitable in the current case for the simple reason that the deceased's earnings were not proved. It is clear that the Learned Trial Magistrate applied the correct principles and relied on relevant authorities in deciding to use the global approach."

26. In the same breath, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased)* [2016] eKLR, held as follows-

> " It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

27. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* [2020] eKLR where the court was dealing with a similar issue, it was held as follows:

> " In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.
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> The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

28. Embracing the enlightenment from the decisions above, it is instructive that the jurisprudence that emerges is that where the earnings of a deceased cannot be ascertained like was in the case before the lower court, the multiplier/multiplicand formula is not apt and the court ought to apply the global sum approach. The trial court ought to have applied the global sum method as the Deceased's occupation and earnings or income were not proved.

29. The deceased was survived by his parents, who were dependent on him for upkeep, which is a factor the court must consider.Section 4(1) of the *Fatal Accidents Act* provides that the actions brought by

virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. As the Respondent and her spouse, who were listed as dependants in the plaint were mother and father, respectively, of the Deceased, they were entitled to benefit.

30. In the case of *Abdalla Rubeya Hemed v Kajumwa Mvurya & Kula La Mvunga suing as the legal representative of the estate of Jumaa M. Mwamtutu (deceased)* [2017] eKLR where the deceased was unmarried, a global sum of 1,080,000.00 was awarded in 2017.

31. In the case of *John Macharia v Josphat Muriungi Muguange & Another* [2020] eKLR the deceased was 31 years old. A global sum of 1,000,000/- for loss of dependency was awarded in 2020.

32. I take guidance from the above cases particularly on the awards made. Guided by the principles that in awarding damages, the same should not be so inordinately high or low as to represent an entirely erroneous award, while considering the young, productive age at which the Deceased met his death, and further considering that he had no spouse or children but had parents who depended on him for upkeep, I think that a global amount of Ksh.1,500,000/= would aptly compensate the deceased's estate.

33. Being of the foregoing findings, I will allow the appeal only to the extent that I set aside the award made by the learned trial Magistrate under the head of loss of dependency and substitute the same with a global sum of Ksh.1,500,000/- under the said head.

34. The Respondent shall bear the costs of the appeal.

35. Orders accordingly.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 2ND DAY OF DECEMBER, 2024.

JOE M. OMIDO

JUDGE

For The Appellants: No Appearance.

For The Respondent: Ms. Mumbi H/b For Mr. Waiganjo.

Court Assistant: Ms. Njoroge.