Batian Flowers Limited v Mwenda & another (Suing as Legal Representatives of the Estate of Andrew Muthuri Gitonga - Deceased) (Civil Appeal E016 of 2023) [2024] KEHC 15350 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E016 OF 2023

AK NDUNG'U, J

DECEMBER 5, 2024

BETWEEN

BATIAN FLOWERS LIMITED ..... APPELLANT

AND

DORCAS KARUTHU MWENDA ..... 1ST RESPONDENT

JULIUS M'MARETE ..... 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ANDREW MUTHURI GITONGA - DECEASED

(Appeal from original Decree passed on 05/07/2023 in Nanyuki CM Civil Case No 119 of 2016 – A. R Kithinji, CM)

JUDGMENT

1. This is an appeal in respect to quantum of damages awarded in the decree of the lower court passed on 05/07/2023. The trial court found the Appellant wholly liable for the accident. The matter proceeded for hearing with the respondent calling five witnesses while the Appellant opted not to call any witness.

2. The trial court awarded the Respondent damages in the following terms;

    Pain and suffering- Kshs.50,000/-

    Loss of expectation of life Kshs.200,000/-

    Loss of dependency- Kshs.3,888,000/-

    Special damages- Kshs.4,100/-

    Total- Kshs.4,142,100/-

3. Being dissatisfied with the trial court assessment of damages, the Appellant filed the memorandum of appeal dated 25/07/2023 and raised the following grounds;

   i. The learned magistrate erred by awarding inordinately high general damages to the Respondents.

   ii. The learned magistrate failed to consider the Appellant's submissions and authorities on quantum hence arriving at an erroneous decision.

   iii. The learned magistrate erred by awarding damages that were inordinately high to constitute a miscarriage of justice in the circumstances of the case.

   iv. The learned magistrate erred by applying a dependency ratio of 2/3 without cogent evidence about the deceased dependants or marital status.

   v. The learned magistrate erred by awarding an exorbitant sum on the loss of life expectation.

   vi. The judgment was wholly not supported in law by evidence tendered in court by the parties.

4. The Appellant prays that award on general damages be set aside and the same be assessed afresh, dependency ratio of 2/3 be set aside and be substituted with a ratio of 1/3 as the deceased was not married, award on loss of expectation of life be set aside and be assessed afresh and costs in the subordinate court and the appeal be awarded to the Appellant.

5. The Appellant's counsel filed written submissions. The Respondent did not file submissions. The Appellant submitted thatthe trial court judgmentwas fraught of errors in principle of law, rules of evidence and irrelevant considerations and abused its discretion for awarding an excessive sum of general damages which amounted to punishment of the Appellant and its insurer. That despite the fact that award of damages is discretionary, it should not be abused to award a party damages that amount to punitive or to unjustly enrich a party in a suit.

6. On pain and suffering, he submitted that an award of Kshs.10,000/- will be sufficient based on the ground that the deceased died on the same day of the accident and at the scene of the accident and therefore, he did not endure great pain and suffering. Reliance was placedon the case of Hyder Nthenya Musili & another v China Wu Yi Limited & another (2017) eKLR.For loss of expectation of life, he urged the court to adopt a conventional figure of Kshs.100,000/- as was stated in Hyder Nthenya Musili case (supra).

7. On loss of dependency, he argued that the trial court adopted 31 years as a multiplier for adeceased aged 29 years being on the opinion that the deceased would have lived up to 60 years. That the court failed to appreciate the vagaries and vicissitudes of life in its assessment of the multiplier. He urged the court to adopt a multiplier of 20 years guided by the case of Put Sarajevo Gen. Eng. Co. Ltd v Esther W. Njeri & Johnson Mwangi Gucha (suing as the legal representative of the estate of Sylvester Muhia Gucha (deceased) & 2 others (2014)eKLR among other cases.

8. On the multiplicand, he submitted that there was no evidence that the deceased was a driver as alleged as no driving license was produced, there was no proof of income as no bank statement or payslip was produced. That PW5 testified that the deceased was a driver earning Kshs.18,000/- whereas the plaint indicated that the deceased's earning was Kshs.25,000/- and therefore, income was not proved. He urged the court to adopt a multiplicand of Kshs.8,109.90/- as the minimum wage for individuals outside the municipalities and cities.

9. On dependency ratio, he submitted that there was no proof that the deceased was married because in the submissions, the wife was not included as a dependent. They only alluded to the elderly parent and the son. Thus, the dependency ratio of 2/3 adopted by the trial court was excessive. He urged the court to adopt a dependency ratio of 1/3 since there was no proof that the deceased was married guided by the case of Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu (2021) eKLR.

10. He therefore suggested an amount of Kshs.648,792/- as general damages and termed the amount of Kshs.4,142,100/- awarded by the trial court as excessive.

11. As to costs, he submitted that costs follow the event. He urged the court to find that the Respondents did not prove their case and therefore prayed that the costs be paid by the Respondents.

12. I have considered the Appellant submissions together with case law cited. This being a first appeal, the duty of an appellate court is as well enunciated in the case of Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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."

13. The Appellants' position is that the assessment of damages by the trial court was not justified. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. The applicable principles in that regard are well set out inButt v. Khan Civil Appeal No. 40 of 1997 thus: -

> " 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 arrive at a figure which was either inordinately high or low."

14. It is therefore the law that this court will only interfere with the trial's court award of damages if the Appellantdemonstrate that the same was inordinately high or the trial court proceeded on wrong principles.

15. Under pain and suffering, the trial court awarded the Respondent a sum of Kshs.50,000/- The Appellants' contention is that the amount awarded was excessive and manifestly high considering the fact that the deceased died shortly after the accident.The Appellants urged this court to award Kshs.10,000/- for pain and suffering guided by the case of Hyder Nthenya (supra) which case was decided in 2017. It is my view that even though the deceased died at the scene, he endured a lot of pain momentarily before his death. In considering the appropriate award under this head, I cannot lose sight of the passage of time, general inflation and the beating and weakening of the Kenya Shilling in exchange rates. I hold the view that view that the award of Kshs.50,000/- was reasonable.

16. On loss of expectation of life, the trial court awarded Kshs.200,000/- as proposed by the Plaintiff.The Appellant urged the court to adopt a conventional figure of Kshs.100,000/- as was awardedin Hyder Nthenya Musili case (supra).

17. From the cases I have seen, the award under this sub head are normally conventional, and in the bracket of Shs.60,000/= to 200,000/=. Some of the comparable cases are as follows;

> In Kenya Wildlife Services Vs. Geoffrey Gichuru Mwaura (2018)e KLR, a sum of Shs. 150,000/= was granted.
>
> In Wembo & 2 others Vs. TKK (2017) e KLR, a sum of Shs.100,000/= was awarded.
>
> The court in Easy Coach Bus Services Ltd & another Vs. HenryCharles Tsuma & another (2019) e KLR, a sum of Shs.80,000/= was awarded.

18. It is my view that an award of kshs.100,000/- would be sufficient.

19. On loss of dependency, the Appellant had an issue with the multiplier adopted by the trial court, the multiplicand and the 2/3 ratio. He submitted that the trial court adopted 31 years as a multiplier for a deceased aged 29 years being on the opinion that the deceased would have lived up to 60 years. That the court failed to appreciate the vagaries and vicissitudes of life in its assessment of the multiplier. He urged the court to adopt a multiplier of 20 years guided by the case of Put Sarajevo Gen. Eng. Co. Ltd (supra).

20. Contrary to the Appellant's contention, the trial court adopted a multiplier of 27 years and not 31 as alleged by the Appellant. I have also perused the Appellant's submissions before the trial court and under this head, he urged the court to adopt a multiplier of 25 years and reliance was placed on the case of Gachoki Gathuri vs John Ndiga Njagi Timothy & 2 others (2015) eKLR where the court adopted a multiplier of 25 years for a 29year old. There is no indication why the Appellant has vacillated on this issue.

21. The undisputed fact is that the deceased was aged 29 years old. The retirement age in Kenya is at 60 years. The deceased had around 31 years of his active working life. The trial Court settled for a multiplier of 27 years. I find it as quite reasonable considering the vicissitudes of life.

22. As to the multiplicand, it is submitted that there was no evidence that the deceased was a driver as alleged as no driving license was produced and income was not proved. He urged the court to adopt a multiplicand of Kshs.8,109.90/- as the minimum wage for individuals outside the municipalities and cities.

23. PW5 testified that the deceased was his employee. He was a driver/salesman. That he would give him a daily lunch allowance of Kshs.400/- and night out Kshs.1200/-. He worked for 20-22 days a month with a salary of Kshs.18,000/-. That he could take home Kshs.50,000-60,000/- per month. He testified on cross examination that he did not have employment contract and a payslip.

24. The trial court went ahead and adopted Kshs.18,000/- as the deceased's salary. The court noted that this was the basic salary and that there was no payslip to prove earnings.

25. As seen, PW5 testified that the deceased's salary was Kshs.18,000/- but also stated that he would take home Kshs.50,000-60,000/- per month. It is therefore difficult to discern what was the deceased's

salary. The court in Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, stated that:

> " The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. ..."(emphasis added)

26. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions.Since it is not clear from the evidence the amount the deceased was earning as net pay per month, the question that this court now has to grapple with to is the correct applicable principle in calculating general damages to be awarded to the Respondent. Useful guide is found in the case of Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLRwhere the court held that;

> " 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."

27. Though the Appellant has disputed the fact that the deceased was employed as a driver in this appeal, he did not dispute that fact in the lower court. In its submissions before the trial court, it urged the trial court to adopt Kshs.13,646.40/- being the minimum wage for a car/light van driver pursuant to the Regulation of Wages(General) (Amendment) Order, 2015.

28. I find this a proper case to adopt the minimum wage as suggested by the Appellant. I also adopt Kshs.13,646.40/- for car/light van driver.

29. On dependency ratio, counsel submitted that there was no proof that the deceased was married because the wife was not included as a dependent in the submissions. They only alluded to the elderly parent and the son. He urged the court to adopt a dependency ratio of 1/3.

30. In the plaint, the Respondent averred that the deceased was survived by a wife, a son, father and mother. In their submissions, they alluded to a son, father and mother. However, it is not lost that the Appellant in its submissions before the trial court submitted that PW1 testified that the deceased was married and had a son.They agreed with the Plaintiff's submissions that a ratio of 2/3 will be sufficient in the circumstances.

31. Therefore, suggesting a ratio of 1/3 is another unexplained vacillation on the part of the Appellant. From the pleadings and the evidence, the ratio of 2/3 is founded on solid ground.

32. With the result that the appeal partially succeeds. Accordingly the judgment of the trial court on quantum is hereby set aside and substituted with a an entry of judgment for the Respondent against the Appellant in the following terms;

Pain and suffering- Kshs.50,000/-

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

Loss of dependency- Kshs.3,192,257.60-

Special damages- Kshs.4,100/-

Total- Kshs. 3,346,357.60

The Appellant shall have half the costs of the appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER 2024

A.K. NDUNG'U

JUDGE