Mauti & another v Momanyi & another (Civil Appeal 208 of 2019) [2025] KECA 996 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 996 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 208 OF 2019

HA OMONDI, LK KIMARU & JM NGUGI, JJA

MAY 30, 2025

BETWEEN

BONIFACE METOBWA MAUTI ..... 1ST APPELLANT

STELLA KEMUMA MAUTI ..... 2ND APPELLANT

AND

JOHN PHILYS MOMANYI ..... 1ST RESPONDENT

SAMETA LODGES LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Majanja, J.) dated 19th July, 2019 in HCCA No. 5 of 2019)

JUDGMENT

1. The appellants, Bonface Metobwa Mauti and Stella Kemuma Mauti sued the respondents, Sameta Lodges Ltd and John Philys Momanyi in their capacity as the administrators of the estate of their son, WNM (deceased) who died in an accident that involved the respondent's vehicle. They sought compensation for the loss they suffered following his death.

2. In their claim, the appellants sought general damages, special damages of Kshs. 60,500/- and costs and interest. It was alleged that at the time of his death the deceased was one and a half - years old, of good health and vibrant.

3. In his statement of defence, the 2nd respondent denied all wrong doing and admitted being the beneficial owner of the vehicle KBB 055F Toyota Hilux having purchased it from the 1st respondent but its transfer had not been effected. It was alleged that if the accident occurred on the material day, it was solely caused by or substantially contributed to by the deceased, gave particulars of negligence attributed to the minor and, prayed for the appellant's suit to be dismissed with costs.

4. The case before the trial court was canvassed through rival pleadings, evidence tendered by the respective parties and their witnesses and at the conclusion, parties filed written submissions. The evidence that was presented to the trial court; and subsequently reconsidered by the High Court was that Sameta Lodges, the 1st respondent was the owner of motor vehicle Reg. No. KBB 055 F Toyota Hilux. On or about 30th August 2013, the deceased was a lawful pedestrian walking along Suneka --Kirwanda Road at Kirwanda area, when John Philys Momanyi, the 2nd respondent recklessly and negligently drove the said motor vehicle, causing it to knock the deceased. As a result, the deceased sustained severe head injuries, leading to his death. The accident was attributed to negligence on the part of the 2nd respondent who was accused of causing the motor vehicle to veer off the road, driving the motor vehicle without regard for other road users, and failing to apply breaks and otherwise swerve to avoid hitting the deceased.

5. In denying liability and urging the court to dismiss the claim, the respondents contended that negligence on the part of the deceased who failed to heed to the hooting and warning given to her by the driver of the said motor vehicle, abruptly and without warning appearing on the way of the said motor vehicle, carelessly walking across the road, walking without due care and attention to other road users, being generally careless and negligent.

6. The trial magistrate evaluated the evidence on record in totality and delivered a judgment where he found the respondent 80% liable and awarded the appellants a total of Kshs.780,500 made up as follows: loss of expectation of life- 100,000; loss of dependency Kshs.800,000 and special damages Kshs.60,500.

7. The respondent was dissatisfied with the damages awarded and therefore preferred an appeal to the High Court on grounds that the trial court awarded damages under the *Fatal Accidents Act* yet the deceased was of tender years and that the damages awarded were inordinately high and therefore an error in principle.

8. The learned Judge in his judgment held that the trial magistrate did not give reasons why he adopted Kshs. 800,000/= as damages for loss of dependency, and thus excessive. In allowing the appeal, the learned judge noted that since the deceased was aged a year and a half, Kshs. 250,000/= for loss of dependency was reasonable compensation. The learned judge allowed the appeal to the extend of setting aside the award of Kshs.800,000/= and substituted it Kshs.250,000/= plus special damages subjected to contribution.

9. Being aggrieved by the Judgment of the High Court, (Majanja, J.), the appellants lodged this 2nd appeal in which they raised three grounds that the learned Judge erred in holding that; the trial court's award was excessive, in his assessment of damages for loss of dependency and in awarding an inordinately low compensation.

10. The appeal was canvassed by way of written submissions by Mr. Nyabena, learned counsel for the appellant, and Mr. Geno, learned counsel for the respondent.

11. It was the appellant's submission that the trial magistrate did not commit an error as he exercised his discretion in awarding the damages in the amount of Kshs.800,000/=. Further, that in his determination, the learned judge failed to point out the wrong principles applied by the trial magistrate in awarding damages. Reliance was laid in the case of Kenya Breweries Limited vs. Saro [1991] eKLR and in the case of Ali vs. Nyambu T/A Sisera Stores [1990] KLR 534.

12. Regarding the award of Kshs.250,000/-, the appellant complained that the sum was inordinately low considering the fact that there was a high expectancy of life hence a high dependency. That the learned judge failed to meet the threshold necessary to vary the trial courts' decision.

13. On costs, the appellants relied on the case of Joseph Oduor Anode vs. Kenya Redcross Society, [2020] eKLR and urged the Court to award them costs having successfully presented their case.

14. In rebuttal, the respondent relied on written submissions filed at the lower court stage and authorities relied upon and submitted that the three grounds of appeal were all on quantum and that in the said grounds, the appellants had not disclosed the error complained of and what the learned judge failed to take into account.

15. Relying on the principle in second appeals, the respondent submits that the instant appeal does not meet the threshold that is required to disturb the award before the superior court because the superior court already retried and re-heard both issues in fact and law in reaching that award.

16. This being a second appeal, the Court's mandate is limited to matters of law only. As a second appellate Court, this Court cannot interfere with the concurrent finding of fact by the two courts. In Kenya Breweries Ltd vs. Godfrey Odoyo [2010] 1 KLR176 while citing Stephen Muriungi and Another vs. Republic [1982-88] 1 KAR 360 this Court expressed itself as follows:

> "In a second appeal, the court has to resist the temptation of delving into matters of facts. The court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or looking at the entire decision, it is perverse. Where a right of appeal is confined to matters of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

17. In the instant case, the learned judge interfered with the award of damages made by the trial court and revised it downwards, holding that:

> "Of course, the decisions cited by the parties are useful in guiding the court's discretion. In this case, the decisions cited by the respondent were not illustrative of the deceased's circumstances as the children in those cases were much older. The case cited by the appellant was apposite and close to the case at hand. The trial magistrate did not state or give reasons why he adopted Kshs.800,000/- as damages for loss of dependency in light of the authorities cited to him. I therefore hold that the award was excessive and made without regard to the decisions cited by the parties thus entitling this court to intervene. As the deceased was aged 1½ years old and in light of the decisions cited by the parties. I find that Kshs.250,000/- for loss of dependency is reasonable compensation and I allow the appeal to that extent. Before I conclude, I note that the trial magistrate did not subject the special damages to contribution. There is no reason why this was not done. In conclusion, I allow the appeal to the extent that I set aside the award of Kshs.800,000/- as general damages for loss of dependency and substitute it with an award of Kshs.250,000/-. For avoidance of doubt the resulting sum including special damages shall be subjected to contribution."

18. Before the trial court, the parties agreed that a global approach for assessing damages was most appropriate in assessing damages under the *Fatal Accidents Act*. The issue then is whether the sum of Kshs.800,000/- awarded under this head was reasonable compensation or was excessive.

19. Assessment of damages are matters that are within the discretion of the trial court and the appellate court ought to respect that discretion if properly exercised. This was aptly expressed by the Court of Appeal in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) vs. Kiarie Shore Stores Limited [2015] eKLR thus:

> "As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or law as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

The appellant argues that the award of Kshs. 250,000/= as damages was inordinately low and that the learned judge did not meet the threshold necessary to vary the trial court's decision.

20. The case of Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "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."

21. In determining the quantum of damages, the learned judge took the approach based on common sense as was held in the case Kenya Breweries Ltd vs. Saro [1991] KECA 12 (KLR). In the instant case, the claim was for damages for loss of dependency on the estate of the deceased whose life was shortened by the tortious act of the respondents. In determining the quantum of the global award, the learned Judge was guided by the case law relating to assessment which was an error in principle that resulted in an inordinately low award.

22. The appellant contended that in revising the award, the learned judge failed to consider the fact that prior to their son's death, there was a high expectancy of dependency. In Emmanuel Wasike Wabukesa vs. Muneria Ndiwa Burman [2019] eKLR the Court observed that:

> "Although the deceased had not even started schooling, it is probable that she would have lived a normal life and be engaged in an income generating venture or in a profession and save money for a rainy day at least for some years. Considering the value of money today and the improbables of life, a sum of Kshs. 500,000 would be a reasonable compensation to the estate."

23. It is a fact that monetary awards can never adequately compensate litigants for what they have lost, especially when it is life. However, awards have to make sense and have to have regard to the context in which they are made; they cannot be too high or too low, but must strike a chord of fairness. In the instant case, the award of Kshs.250,000/- is a total mockery to the value of life, pain, suffering and even the principle of fairness. Kshs.800,000/= awarded by the trial court in itself is reasonable. In awarding the sum of Kshs.800,000/-, the learned trial magistrate acknowledged the difficulty in assessing an award for a minor whose life had barely begun, and who died instantly. The learned magistrate then adopted the global sum approach to make the award on loss of dependency; and unlike what the first appellate court stated, the initial sum of Kshs.800,000/- was actually added to the sum awarded for pain and suffering to get a total of Kshs.900,000/- less the 20% contribution, to get a sum of Kshs.720,000/-. The reason for awarding the sum of Kshs.100,000/- for pain and suffering, was because the trial court opined that the deceased either died instantly or on arrival at the health facility, as the records showed he was pronounced dead on arrival thus the pain and suffering was not prolonged. The special damages of Kshs.60,500/- was not disputed. Our considered view is that this was a well balanced and reasonable approach; and there was really no reason for the first appellate court to interfere with the award.

24. The upshot is that the appealis merited and is allowed to the effect that the award of Kshs.250,00/- and the costs awarded be and is hereby set aside and, in its place, the Court restores the trial court's judgment in favour of the appellant in the sum of Kshs.780,500/= with costs.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

H. A. OMONDI

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL