PN Mashru Limited v GWF (Suing as administrator in the Estate of Elias Wanjala (Deceased) (Civil Appeal 19 of 2016) [2023] KECA 83 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 83 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 19 OF 2016

W KARANJA, S OLE KANTAI & M NGUGI, JJA

FEBRUARY 3, 2023

BETWEEN

PN MASHRU LIMITED ..... APPELLANT

AND

GWF (SUING AS ADMINISTRATOR IN THE ESTATE OF ELW (DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 28th January, 2016 in HC. C.A. No. 68 of 2013)

JUDGMENT

1. A road traffic accident occurred on 28th March, 2008 near Webuye town when the motor vehicle registration mark KAR 664Y and trailer ZC0460 was so negligently driven that it overturned, killing a passerby, Elias Wanjala. A suit was filed at the Chief Magistrate's Court, Bungoma, by the family of the deceased against the owner of the said motor vehicle P.N. Mashru (the appellant). That suit was defended but in a consent recorded by the parties before the Magistrate on 1st March, 2013, liability was apportioned at 75:25 against the appellant. What was left to the court was assessment of damages and the Magistrate after considering the evidence made the following award:

   Ksh.

   i) Pain and suffering -

   120,000

   ii) Loss of expectation of life -

   100,000

   iii) Loss of dependency -

600,000

iv) Special damages -

18,750

2. The respondent, GWF (suing as Administrator of the estate of EW (deceased) was not satisfied with those findings and filed an appeal to the High Court of Kenya, Bungoma. That Court (Ali-Aroni, J. as she then was), in a judgment delivered on 28th January, 2016 faulted the Magistrate's findings; considered minimum wage applicable at the time and applying a multiplier of 25 years to the deceased who was 16 years old at the time of death found and awarded Ksh.1,715,960 (Ksh.8,579.80 x 25 x 12 x 2/3).

3. The appellant is dissatisfied with those findings and has filed this second appeal. In the Memorandum of Appeal drawn by M/S Okongo, Wandago & Company Advocates it is said that the Judge erred in law in applying a multiplier without evidence; that the Judge erred in not applying a lump sum award; that the Judge was wrong to disturb the award by the Magistrate; that the Judge erred in failing to take into account relevant facts and circumstances that the deceased's living expenses ought to have been taken into account in calculating the speculative dependency under the circumstances; that the Judge erred in not taking into account damages awarded under the *Law Reform Act* and those awarded under the *Fatal Accidents Act*, and, finally, that the damages awarded for loss of dependency was wrong.

4. When the appeal came up for hearing on a virtual platform on 5th July, 2021 the appellant was represented by learned counsel, Miss Achieng while the respondent was represented by learned counsel Mr. Waswa. Both sides relied fully on written submissions and did not find it necessary to highlight the same.

5. We have perused those submissions and lists of authorities.

   This is a special appeal from the decision of the Magistrates court and the first appeal. Section 72 of the *Civil Procedure Act* provides:

   72. (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

   a. the decision being contrary to law or to some usage having the force of law;

   b. the decision having failed to determine some material issue of law or usage having the force of law;

   c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

   (2) An appeal may lie under this section from an appellate decree passed ex parte."

6. The only valid complaint raised in this appeal is whether the Judge on appeal was right to disturb the global award made by the Magistrate in respect of dependency under the *Fatal Accidents Act*.

7. The Magistrate considered that the deceased died aged 16 years, a pupil at Class 6, was a slow learner and in the circumstances gave a global award of Ksh.600,000.

8. The Judge on first appeal considered various case law including *Peter Kanyango v David Mukii Mereka* [2007] eKLR; *Sheikh Mustaq Hassan v Hassan Mwangi Kamau Transporters & 5 others* [1986] eKLR

and disturbed the global award made by the Magistrate. The Judge considered the minimum wage applicable at the time; the age of the deceased and gave a multiplier of 25 years considering that the deceased may have started work at the age of 23 (the evidence was that he was a slow learner in school).

9. This court recognized that damages for dependency are a proper claim even for deceased minors, the age of the minor being a relevant consideration. This is what the court stated in the case of *Kenya Breweries Limited v Saro* [1991] eKLR:

> We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact."

10. The Judge took into account the age of the deceased (16 years at the time of death) and the applicable minimum wage at the time of death and awarded dependency at 2/3.

11. The appellant complains at paragraph 4 of memorandum of appeal that:

> 4. The Learned Judge erred in law when in her award she failed to take into account a relevant fact and circumstances that the deceased living expenses ought to have been taken into account in calculating the speculative dependency under the circumstances."

12. The deceased was aged 16 years and was a pupil; had he lived he would probably have married and started his own family and would apply most of his resources to his own family, not his parents. He would not give 2/3 of his resources to his parents; they would be entitled to 1/3. It was recognized in the case of Sheikh Mushtaq Hassan (supra) that the victims living expenses should be taken into account during the "lost years". The Judge should not have applied a multiplicand of 2/3; it was 1/3. We set aside that part of the judgment giving an award of loss of dependency at Ksh.1,715,960. The same works out as follows:

    Ksh.8579/80 x 25 x 12 x 1/3=857,980

13. The awards in respect to pain and suffering, loss of expectation of life and special damages remain the same. The appeal is partially allowed to the extent we have stated in respect of loss of dependency. In the circumstances let each party meet their costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

**MUMBI NGUGI

.....

JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR