M'Itabari (Suing as the Administrator of the Estate of the Erastus Kirimi Mithika (Deceased)) v Celina (Civil Appeal 131 of 2018) [2023] KECA 1647 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KECA 1647 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 131 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 17, 2023

BETWEEN

JOHN MITHIKA M'IABARI ..... APPELLANT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE ERASTUS KIRIMI MITHIKA (DECEASED)

AND

MAINGI CELINA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Meru (D.S. Majanja, J.) dated 31st May 2018 in HCCA No. 45 of 2016)

JUDGMENT

1. The deceased, Erastus Kirimi Mithika, was on 17th December 2013 travelling as a fare paying passenger in motor vehicle registration number KBM 147F matatu along Chuka-Meru road. The vehicle belonged to the respondent Maingi Celina. It collided with another vehicle registration number KBV 836N make Canter. The deceased died in the accident. His father and legal representative John Mithika M'Itabari (the appellant) filed a suit in the Principal Magistrate's Court at Nkubu claiming general and special damages under the Fatal Accidents Act and the Law Reform Act on the basis that the respondent's vehicle was being driven negligently which caused the accident in which the deceased met his death. The deceased was aged eighteen (18) years and was at the time of his demise waiting to join the University of Kabianga to pursue a degree in Economics.

2. The respondent filed a defence and denied the claim, but subsequently a consent was entered on liability in which she was blamed 85% and the deceased 15%.

3. The trial magistrate heard the suit, and on 17th August 2016 delivered a judgment in which she made an award as follows:-

> " 1. General damages:-
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> | | |
> |---|---|
> | (a) Pain and suffering | 70,000.00 |
> | (b) Loss of expectation of life | 100,000.00 |
> | (c) Lost years | 3,722,400.00 |
>
> 2. Special damages 74,350.00 Total 3,966,750.00"
>
> Kshs.595,012.5 was deducted to represent the deceased's 15% contribution on liability. The award was therefore Kshs.3,371,738/= plus costs and interest.

4. The respondent was aggrieved by the judgment and decree and appealed to the High Court sitting at Meru. Her grounds were that the award under the Fatal Accidents Act and Law Reform Act was inordinately excessive in the circumstances, and against the weight of evidence; the adoption of the multiplicand of Kshs.31,030/= in calculating damages for lost years had no legal or evidential basis; the deceased, although going to join university, was only a student without any source of income; the assumption that the deceased was going to complete university, get employed and support his parents was without basis; it was wrong for the trial court to rely on documents that had neither been produced nor agreed upon by the parties; the quantum was based on extraneous evidence and factors; the respondent's submissions and list of authorities had not been considered; the court had failed to consider the vagaries of life, including the possibility of dropping out of school and lack of employment, and thereby had arrived at erroneous quantum; and that, the award and judgment were out of proportion and against the weight of evidence.

5. The High Court (D.S. Majanja, J.) heard the appeal, and in the judgment delivered on 31st May 2018, found that the trial court had erred in adopting the multiplicand of Kshs.31,030/= being the starting salary of the Civil Service because she had relied on a document entitled "Civil Servants Salaries and Allowances in Kenya" which the appellant's advocates had introduced in his written submissions, and which had not formed part of the list of documents the parties had agreed on. In the absence of the multiplicand, the learned Judge awarded Kshs.1,000,000/= for loss of dependency under the Fatal Accidents Act in place of Kshs.3,722,400/= that the trial court had awarded. This is how the learned Judge observed.

> " 8. The trial magistrate accepted the multiplicand proposed by the respondent and used it to calculate the award for lost years. As I have set out before, the issue in this case is whether the trial magistrate was entitled to use Kshs. 31,030/= being the starting salary in the Civil Service as a multiplicand, I note here that in so far as the nature of the claim was concerned, both parties were at cross-purposes arising from the manner in which they chose to proceed with the case. The appellant believed the respondent's claim was for loss of dependency under the Fatal Accidents Act and submitted as such while the respondent agitated his case under the Law Reform Act for lost years. Although the trial magistrate took the respondent's position, there was no appeal on this issue.

In any case, the issue remains one of the multiplicand which is a common denominator in either case.

9. I now turn to the question of what was the basis of the adopting the multiplicand. From the tenor of the consents recorded by the parties, the documents relied upon were those contained in the list of documents filed on either side and the witness statements. I have perused the respondent's witness statement dated 24th October 2014 and the list of documents of the same date. They neither allude nor contain any evidence of the deceased's expected income or the document titled, "Civil Servants Salaries and Allowances in Kenya". The trial magistrate erred in relying on this document which was introduced through the submissions. I find and hold that it was improper for the respondent to introduce new evidence in the submissions. I adopt what Aburili, J. stated in General Motor East African Ltd –v- Eunice Alila Ndeswa and Another NRB HCC No. 527 of 2013 [2015]eKLR that:

> " Parties do not provide new evidence in submissions and therefore one cannot adduce evidence by way of a submissions to challenge evidence or documents which in this case did not form part of the pleadings."

10. On the same issue, the Court of Appeal in Douglas Odhiambo Apel & another –v- Telkom Kenya Limited NRB CA Civil Appeal No. 115 of 2006[2014] eKLR observed that:

> " The learned judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annexures to the plaintiff's submissions. Submissions, as he correctly observed are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the plaintiffs taking the stand and producing them on oath of the parties agreeing expressly that they are the basis for special damages. This did not occur."

11. Since the document titled, "Civil Servants Salaries & Allowances in Kenya" was not admitted as part of the lists of documents and witness statements, it could not be relied upon by the trial magistrate and was extraneous. The trial magistrate could not take judicial notice of the document when the fact of actual or expected income of the deceased is a question of fact that ought to be proved by evidence. I also find that inclusion of the document as evidence denied the appellant an opportunity to challenge it and offer counter- evidence. I therefore find and hold that there was no basis to award the respondent an award for lost years in the absence of a multiplicand.

12. This does not mean that the deceased's dependants remain without a remedy. This is a case where the deceased's dependants were his father and mother. In Sheikh Mushtaq Hassan –v- Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457, the Court of Appeal acknowledged that in Kenya, children, regardless of their age, are expected to provide and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. Our courts have, in several cases, awarded damages for loss of dependency even

on the death of a child in primary or secondary school. The Court of Appeal in Kenya Breweries Limited v Saro MSA CA Civil Appeal No. 144 of 1990 [1991]eKLR observed that;

> " 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.

13. In this case, the deceased was aged 18 years at the time of his death. He was just about to be admitted in University and no doubt he would have supported his parents once he completed his studies. I have seen two decisions cited by the respondent; David Micheni v Stephen Johana Njue and Another MRU HCCA No. 21 of 2014 (UR) where the trial judge awarded Kshs.1,200,000/= as a lump sum for loss of dependency where the deceased was 16 years old and Daniel Mwangi Kineni and 2 Others v Jackim Gikunda Mbaya and Others MRU HCCA No. 18 of 2014 (UR) where the a lump sum of Kshs.1,000,000/= was awarded where the child was 9 years old. Taking all these factors into consideration, I would award a global lump sum of Kshs.1,000,000/=."

6. The appellant was aggrieved by this decision and appealed to this Court. In his Memorandum of Appeal, he listed the following grounds.

> " 1. That the Learned Judge erred in law in failing to properly re-evaluate the evidence on record before exercising his discretion to revise downward the award of damages made by the trial Court.
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> 2. That the Learned Judge erred in Law by failing to direct his mind properly and to consider and apply the Principles of making award of damages for loss of dependency whereby he arrived at an inordinate low award of damages for lost years.
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> 3. That the Learned Judge erred in law in failing to properly apply the Authorities cited by the Appellant in the trial Court in exercising his discretion to revise the award by the trial Magistrate in view of the evidence on record on the age and education status of the deceased.
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> 4. That the Learned Judge erred in Law in failing to appreciate that the Civil Servants Salaries and Allowances in Kenya date was a gazetted public document and which the trial Court properly applied to arrive at the Multiplicand.
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> 5. That the Learned Judge exercised his discretion wrongly by awarding Kenya Shillings one Million (Kshs.1,000,000/=) for lost years which was inordinately low and an erroneous estimate of the reasonable award for lost years in view of the evidence on record."

7. During the hearing of this appeal before us, the appellant was represented by learned counsel Mr. Gitonga while learned counsel Mr. Kariuki represented the respondent. Each had filed submissions on which they relied wholly.

8. The crux of this appeal was the issue of the multiplicand. There was a document titled "Civil Servants Salaries and allowances in Kenya" which the appellant's advocate had introduced through his written submissions before the trial court. The document had indicated that the entry point of graduate civil servants was job group "K" at salary Kshs.31,020/=. Based on the document, the appellant had proposed a multiplier of 30 years and a multiplicand of Kshs.31,020/=. It was on the basis of this that the trial court arrived at lost years of Kshs.3,722,400/=, having agreed with the appellant's proposal. This is the finding that the learned Judge interfered with, by holding that the document in question had been improperly introduced through written submissions and therefore could not form the basis of a multiplicand.

9. Learned counsel for the appellant submitted that the document was a public document that had been published in the Kenya Gazette and which the trial court had properly relied on, and therefore the learned Judge was wrong to reject it and instead award a global figure of Kshs.1,000,000/= for loss of dependency; that the figure was inordinately low and an erroneous estimate of a reasonable award given the evidence. It was submitted that the learned Judge ought to have taken judicial notice of the starting salary of a graduate civil servant as contained in this published document; and that, based on the document, the trial court had correctly reached the award it had done on lost years.

10. According to the learned counsel for the respondent, the learned judge was well guided in awarding the global figure of Kshs.1,000,000/= for loss of dependency as there was no proof of income, and that the document that the trial court had relied on did not form part of the list of documents that the appellant had placed before the court; that the learned Judge did not take judicial notice of the document introduced in the submissions and which neither the respondent nor the court had been given the opportunity to interrogate. We were referred to the decisions in Catholic Diocese of Kisumu –v- Sophia Achieng Tete Civil Appeal No. 284 of 2001; Sheikh Mustaq Hassan –v- Nathan Mwangi Kamau Transporters & 5 Others; James Chelagat Bor –v- Andrew Otieno Onduu [1988-92] 2 KAR 288; Emmanuel Wasike Wabukesa –v- Muneria Ndiwa Burman, Civil Appeal No. 10 of 2017; and Kenya Breweries Limited –v- Saro MSA Civil Appeal No. 144 of 1990; and asked to find that the award of a global figure of Kshs.1,000,000/= for loss of dependency was reasonable and the learned Judge had considered all the available evidence in reaching the amount.

11. Our mandate on second appeal is limited to matters of law only, unless it is demonstrated that the courts below considered matters they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse (See Maina –v- Mugiria [1983} KLR 78, Kenya Breweries Ltd – Godfrey Odongo, Civil Appeal No. 127 of 2007).

12. It was common ground that the deceased was an above average student who, after attaining a B+ grade at form four level, had been admitted to study economics at the University of Kabianga. It was while waiting to join the University that he was involved in that fatal accident. He was eighteen (18) years old at the time and in good health. Both courts agreed that the deceased would have supported his parents once he completed his studies.

13. Before the trial court, the parties elected to proceed on the basis of a list of documents and on the witness statements that each side had filed. They recorded a consent on these. The document in question did not appear in the appellant's list of documents. The document came into the case through the written submissions by the appellant's counsel. Yet the trial court relied on it as a basis for the expected income of the deceased upon graduation and employment into the civil service. The learned

Judge found, correctly in our view, that the trial court had improperly admitted the evidence contained in the document; that parties are not allowed to introduce evidence through written submissions. The learned Judge rightly relied on the High Court decision in General Motors East Africa Ltd –v- Eunice Alila Ndeswa & Another NBI, HCCC No. 527 of 2013 and the Court of Appeal decision in Douglas Odhiambo Apel & Another –v- Telekom Kenya Limited, NBI Civil Appeal No. 115 of 2006. Submissions are not evidence. The appellant, who had the duty to prove his case on the evidence, had the obligation to testify and place the document to court, or to get the respondent to agree that the document was going to form part of the list of documents to be relied on by the court. The respondent had the right to challenge the document, or at least address the court on its relevance and value. Once the appellant had not included the document in his list of documents that the respondent had consented to, it was expected that no other document was going to be relied upon; whether or not it was contained in the official gazette.

14. The learned Judge observed that the actual or expected income of the deceased was a question of fact to be proved, and now that the document had been improperly relied upon by the trial court, there was no basis –

> " to award the respondent an award for lost years in the absence of a multiplicand."

15. All the same, the learned Judge considered that the death of the deceased had denied his parents (father and mother) his support once he completed his education. The learned Judge awarded a global figure of Kshs.1,000,000/= after considering the circumstances of the case, and the two decisions in David Micheni –v- Stephen Johanna Njue & Another, Meru HCCA No. 21 of 2014 and Daniel Mwangi Kineni & 2 Others –v- Jackim Gikunda Mbaya & Others, Meru HCCA No. 18 of 2014. In the first case, the deceased was sixteen (16) and the award of Kshs.1,200,000/= was made and in the second case, the deceased was nine (9) years and the award was Kshs.1,000,000/=.

16. In Catholic Diocese of Kisumu –v- Sophia Achieng Tete (supra) this Court delivered itself as follows:-

> " 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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate."

17. After considering all the circumstances that this appeal has presented, we agree with the respondent that the award of Kshs.1,000,000/= for loss of dependency was not inordinately low to warrant our interference.

18. The upshot is that the appeal lacks merit, and is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER 2023

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR