Otieno & 3 others v Bunduki (Suing as the Legal Representatives of the Estate of the Late Veronica Bosibori Ongeri - Deceased) (Civil Appeal E072 of 2024) [2025] KEHC 2622 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E072 OF 2024

DKN MAGARE, J

FEBRUARY 27, 2025

BETWEEN

OSCAR SWETA OTIENO ..... 1ST APPELLANT

TRUE BLAQ INTERNATIONAL LIMITED ..... 2ND APPELLANT

TRUE BLAQ DISTRIBUTORS ..... 3RD APPELLANT

TRUE BLAQ ENTERTAINMENT ..... 4TH APPELLANT

AND

JOSECK NYANKIEYA BUNDUKI ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE VERONICA BOSIBORI ONGERI - DECEASED

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. V.M. Moguche (RM) dated 20.3.2024 arising from Etago PMCC No. 89 of 2023. The lower court heard the parties and proceeded to render the impugned judgment in which the Court adopted the agreed liability of 75:25 against the Appellants. The Judgment on damages was as follows:

    a. Liability by consent 75:25 in favour of the Respondent.

    b. Pain and suffering Ksh. 100,000/=

    c. Loss of expectation of life Ksh. 100,000/=

    d. Loss of dependency Ksh. 1,686,672.80/=

    e. Special damages Ksh. 98,000/=

Total Ksh. 1,984,672/=

2. The Appellant, aaggrieved by the lower court's finding, appealed herein vide a mmemorandum of appeal dated 17.4.2024. The appeal is against the award of general damages. The Appellant posited that the lower court made an inordinately high award. The appeal was argued by way of submissions.

3. The Plaint dated 2.8.2021 claimed damages for an accident that occurred on 15.3.2021 when the deceased was a pedestrian along Ikoba-Tabaka road when at Botabori area the Appellant, his driver or agent negligently and dangerously drove motor vehicle Registration No. KCY 157T causing it to violently hit the deceased hence the accident.

4. The Respondents set forth particulars of negligence for motor vehicle Registration No. KCY 157T. They pleaded special and general damages under the *Law Reform Act* and *Fatal Accidents Act*. The Appellant entered appearance and filed Defence dated 27.9.2022 denying the particulars of negligence and injuries pleaded in the Plaint.

Evidence

5. During the hearing, PW1 was Joseck Nyankieya Bunduki. He relied on his witness statement dated 15.3.2021 and testified that he was the brother-in-law of the deceased. He did not witness the accident. The deceased left a widower and 2 children 3 and 8 years old respectively. He produced the documents in the Plaintiff's bundle of documents dated 15.3.2021 as exhibits and closed his case. The Defendant did not call witnesses.

Submissions

6. The Appellant filed submissions dated 5.12.2024. On damages, it was submitted for the Appellant that there was no evidence that the deceased suffered in hospital before death and Kshs. 10,000/= would be an adequate award under pain and suffering.

7. On loss of dependency, it was also submitted that a multiplier of 25 years would be appropriate. Reliance was placed on Silas Mugendi Nguru vs Nairobi Womens Hospital (2014) eKLR. Further, the use of a minimum wage bill of Ksh. 8,109/= was in error as no income was proved. It was their case that Ksh. 5,000/= would be an appropriate minimum wage. They did not submit on how the damages for loss of expectation of life could be excessive.

8. The Respondent submitted that the award under general damages was proper and ought not to be interfered with.

Analysis

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

10. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

11. It must be borne in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

12. On damages the Appellant submitted that Kshs. 10,000/- would be adequate award under pain and suffering. The lower court awarded Ksh. 100,000/- under this head. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph *21* Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

13. It must be remembered that damages are at large and are not a mathematical exercise. Where the deviations in the overall award are minimal, the court will not interfere with the award under the various heads, except for special damages that require specificity. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would, as far as possible, be compensated by comparable awards, but it must be recalled that no two cases are exactly the same."

14. Award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted, unlike in a case where a deceased dies later on. In this case, the deceased passed away on the same day of the accident, but hours later. He cannot be said to have died on the spot. He died, according to the certificate of death and the evidence on record at Kisii Teaching and Referral Hospital, as a result of chest injury due to blunt force trauma in the chest secondary to a road traffic accident.

15. The question, therefore, is whether the award of Kshs. 100,000/= for pain and suffering was excessive. The damages for pain and suffering were awarded at 100,000/=. The deceased died after some hours of excruciating pain, The court awarded nominal damages of 100,000/=. The Appellant proposed Ksh.10,000/= under this head while the Respondent submitted that the award of Kshs. 100,000/- was proper. In Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W. Musyoka stated as doth; -

> 13. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:
>
> > "[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

16. The awards under this head are nominal and do not represent the pain the deceased suffered. In granting nominal damages, looking at damages from other perspectives is necessary. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry and the economy. In the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra), where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

17. I do not find nominal damages for a person who died after three or so hours to be inordinately excessive. I do not find a reason to disturb the discretion of the court. The appeal in respect thereto is therefore dismissed.

18. On loss of expectation of life, the Appellant did not submit how this award was excessive. I find that the award of Ksh. 100,000/- under loss of expectation of life was not excessive and is hereby upheld. It is not in dispute that the deceased died at the scene of the accident. The deceased also did not die after suffering elongated pain for some hours. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati

& Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

19. Under loss of dependency, the court will address two aspects, that is, the multiplier and the dependency ratio. To disturb the lower court's finding on loss of dependency, this court has to find a basis. The Appellant's case is that Kshs. 5,000/= would have been applied as a minimum wage bill as there was no proof of income.

20. The lower court adopted a multiplier of 26 years and a multiplicand of 2/3 with an income of Kshs. 8,109/= per month based on the Wage Minimum Regulations 2018. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the grounds of excess or insufficiency.

21. The first question is the multiplicand. The Appellant proposed Ksh. 5,000/=. Whither the figure came from is difficult to fathom. The court cannot base an appeal decision on conjecture, hyperbole, and surmises. This sum is not provided anywhere in the regulations. The court cannot pick a figure arbitrarily. The duty of the court regarding damages is settled, and the state of Kenya's economy and the people generally, as well as the welfare of the insured public, must be at the back of the mind of the trial court. In the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results that should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision, and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA)March 30,1983. The general picture, all the circumstances, and the effect of the injuries on the person concerned must be considered.
>
> The fall in the value of money generally and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling must be taken into account.
>
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
>
> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's

own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

22. Finally, in deciding whether to disturb the quantum given by the lower court, the Court should be aware of its limits. As an exercise of discretion, it should be done judiciously and conclusively in circumstances to ensure that the award is not too high or too low to be an erroneous estimate of damages.

23. The court of appeal pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs. Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

24. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

25. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

26. The applicable wage bill was the Regulation of Wages (General) (Amendment), 2018 which the court applied. The court categorized the deceased as a general labourer and I have no reason to interfere with this. The Court in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J, as he then was, held at page 248 that:

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

27. The use of a minimum wage of Ksh. 8,109/= is thus proper. Further, this court finds that the award based on 26 years was not high. The award was not inordinately high as to amount to an improper exercise of discretion. The Appellant proposed 25 years as the multiplier. There is no practical difference with 26 years. The parties were in congruence in their submissions under this limb. The issue

of the multiplier is thus otiose and is accordingly dismissed. Thus, I find no basis to fault the award by the lower court as the exercise of discretion did not subvert relevant considerations. I am fortified by the reasoning of the court in the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000/= per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *Fatal Accidents Act*.

28. I find no wrong principles that the lower court applied. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

29. There was no appeal against the award on special damages. The lower court awarded Kshs. 98,000/= for special damages as pleaded and proved. I will not disturb this finding.

Determination

30. In the upshot, I make the following orders: -

    a. The appeal is dismissed with costs of Kshs. 125,000/=.

    b. Stay of execution for 30 days.

    c. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael