Onsongo & another v Ogundo (Suing as the legal administrator of the Estate of Walter Otieno Ogudu - Deceased) (Civil Appeal 30 of 2020) [2024] KEHC 400 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 400 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 30 OF 2020

AC MRIMA, J

JANUARY 29, 2024

BETWEEN

ANN KEMUMA ONSONGO ..... 1ST APPELLANT

KEVIN OMONDI AROGE ..... 2ND APPELLANT

AND

PETER ODHIAMBO OGUNDO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF WALTER OTIENO OGUDU - DECEASED) RESPONDENT

(Being an appeal arising out of the judgment and decree of Hon. P. K. Mutai (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 118 of 2017 delivered on 16th October, 2019)

JUDGMENT

Background:

1. The appeal subject of this judgment is only against the quantum of damages. It arose from the judgment and decree in Kitale Chief Magistrate's Court Civil Case No. 118 of 2017 *Peter Odhiambo Ogundo (suing as the legal administrator of the Estate of Walter Otieno Ogudu (Deceased) v. Ann Kemuma Onsongo & Another* (hereinafter referred to as 'the suit') which was delivered on 16th October, 2019.

2. Liability was agreed at 20%: 80% in favour of the Deceased through the Respondent in this appeal, who was the Plaintiff in the suit.

3. The Plaintiff's case in the suit was heard before the liability was apportioned. Peter Odhiambo Ogundo testified as PW1 and produced various exhibits which were admitted by the consent of the parties. PW2 was the Executive Officer In-Charge of the Civil Registry at the Kitale Law Courts. She produced the

CM's Ad Litem File No. 2 of 2017. PW3 was a Senior Clerical officer In-Charge of the Traffic Registry at the Kitale Law Courts. He produced the CM's Traffic Case File No. 1411 of 2016. A Traffic officer from the Kitale Police Station testified as PW4.

4. At the close of the Plaintiffs case, the Defendants did not call any witness, but instead the consent on liability was recorded.

5. Parties were directed to file and exchange written submissions. Only the Plaintiffs complied.

6. The trial Court in its judgment rendered itself as follows: -

    a. Liability is apportioned at the ratio of 20%:80% in favor of the Plaintiffs;

    b. Pain and suffering at Kshs. 60,000/=;

    c. Loss of expectation of life at Kshs. 120,000/=;

    d. Loss of Dependency at Kshs. 3,360,000/=;

    e. Special damages awarded at Kshs. 7,655/=;

    c. The Plaintiff has the cost of the suit and interest at court rates.

The Appeal:

7. Being dissatisfied with the above decision, the Appellants herein preferred an appeal vide a Memorandum of Appeal filed on 5th November, 2020.

8. The Appellants mainly contended that the trial Court erred in adopting wrong principles and failing to consider the evidence adduced. As a result, they opined that the trial Court arrived at a grossly excessive award in general damages.

9. They prayed that this Court sets aside the award on general damages and to re-assess the general damages downwards. It also sought for the costs of the appeal.

10. Parties canvassed the appeal by way of written submissions.

11. The Appellants majorly expounded the grounds of appeal in their submissions. Several decisions were referred to in support.

12. The Respondent opposed the appeal. He urged this Court to uphold the trial Court's findings and relied on several decisions to buttress the argument.

13. He prayed for the dismissal of the appeal.

Analysis:

14. As the appeal is on quantum of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler v. Butler* (1982) KLR 277.)

15. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.

16. This position was restated by the Court of Appeal in *Arrow Car Limited v Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* (2013) eKLR.

17. This Court has carefully read and understood the gist of the appeal, the pleadings, the proceedings, the impugned judgment, the submissions and the judicial authorities referred to by the parties.

18. There is one main issue for determination in this appeal. It is whether the award of Kshs. 60,000/= made on Pain and Suffering and the multiplicand of Kshs. 21,000/= used in arriving at the award of Loss of Dependency were appropriate in the circumstances of the case.

19. This Court has carefully considered the awards.

20. On the issue of the award on pain and suffering before death, the record has it that the deceased died after around 2 hours post the accident. According to PW1, he found the deceased still alive at the scene and could even speak. He died later in hospital as he was undergoing treatment.

21. There is no doubt the deceased suffered excoriating pain before he died. The award of Kshs. 60,000/= is, hence, reasonable.

22. The Court will now consider the multiplicand used in the judgment.

23. The manner in which damages for lost years or loss of dependency ought to be arrived at has, by now, been a well-trodden path. Briefly put, where there is evidence of income on the part of the deceased or such income can be appropriately ascertained say for instance through the duly gazetted minimum wages or any other manner as to enable the Court appropriately determine the multiplicand, then a Court is enjoined to undertake the mathematical process of calculating the lost years by inter alia using the multiplicand, the earnings, among other parameters.

24. In instances where it is not possible to ascertain the deceased's income, say for instance where the deceased was not in any formal employment, business or such-like engagements, a Court is called upon to adopt a globe sum.

25. In *Franklin Kimathi Maariu & another v. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu (Deceased)* [2020] eKLR the Court held as follows: -

> 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 .... as the appropriate mode of assessing the loss of dependency...

26. In *Mwanzia v Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa v Gichumu Githenji* Nakuru High Court HCCA No. 15 of 2003 [2007] eKLR, the Court made the following observation: -

> ..... The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

27. Similarly, in *Moses Mairua Muchiri v. Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (Deceased)* [2016] eKLR, the Court held as follows: -

> ....It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, Courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.....

28. In the present case, PW1 testified that the deceased was a Tuk Tuk driver earning a sum of Kshs. 700/= daily thereby making a monthly income of 21,000/=. No proof of income was adduced. In the judgment, the trial Court settled for the proposed amount of Kshs. 21,000/= as the multiplicand.

29. The trial Court did not, however, give the basis of the multiplicand of Kshs. 21,000/= monthly save that it was what had been proposed by the Plaintiffs. The Appellants contended that since there was no proof of earnings, then the trial Court ought to have been guided by the *Regulation of Wages (Amendment) Order*, 2015 which would have placed the earnings at Kshs. 10,840/50.

30. The deceased met his death on 19th October, 2016 at the Kitale County Referral Hospital. By then the applicable Order was the Legal Notice No. 117 *Regulation of Wages (General) (Amendment) Order*, 2015 which came into operation on 20th May, 2015.

31. According to the *Order*, the amount of Kshs. 10,840/50 referred to by the Appellants fell in the category of Machinists. However, the deceased was a trained and qualified driver. As such, the Appellants' categorization of the deceased as a machinist was inappropriate. The deceased would have ideally been in the category of driver's for cars and light vans since Tuk-Tuk vehicles are public service vehicles. In that category, the monthly wage was Kshs. 15,239/10 for one working within Kitale Municipality.

32. The trial Court, therefore, settled for a higher multiplicand. The correct one was to be Kshs. 15,239/10 instead. As a result, the figure of Kshs. 21,000/= adopted can only be erroneous.

33. The upshot is that the appeal must succeed on that limb. For clarity, the rest of the awards remain as awarded.

34. Consequently, this Court enters judgment for the Respondent (Plaintiff) as against the Appellants (Defendants) jointly and severally as follows: -

    a. Liability is apportioned by consent at the ratio of 20%:80% in favor of the Plaintiffs;

    b. Pain and suffering at Kshs. 60,000/=;

c. Loss of expectation of life at Kshs. 120,000/=;

d. Loss of Dependency at Kshs. 2,438,256/=;

e. Special damages awarded at Kshs. 7,655/=;

f. The Plaintiff shall have the costs of the suit. Since the appeal has partly succeeded, each party shall bear its own costs of the appeal.

g. The awards shall attract interest at court rates from the date of judgment in the trial Court save the award on special damages of Kshs. 7,655/= whose interest at Court rates shall accrue from the date of filing the suit.

h. For clarity, all the sums above shall be subject to the agreed apportionment of liability.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

JUDGMENT DELIVERED VIRTUALLY AND IN THE PRESENCE OF: -

No appearance for Miss. Were, Counsel for the Appellants.

Miss. Munialo, Counsel for the Respondent.

Duke – Court Assistant.