Birgen & another v Rono & another (Suing as the legal representatives of the Estate of Frida Chebet alias Susan Cherop alias Susan Jebet - Deceased) (Civil Appeal 60 of 2018) [2024] KEHC 3366 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 60 OF 2018

JRA WANANDA, J

MARCH 22, 2024

BETWEEN

NICHOLAS K BIRGEN ..... 1ST APPELLANT

NOAH NGETICH ..... 2ND APPELLANT

AND

KIMAIYO ARAP RONO ..... 1ST RESPONDENT

FRANCIS KIPROTICH CHEROP ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FRIDA CHEBET ALIAS SUSAN CHEROP ALIAS SUSAN JEBET - DECEASED

JUDGMENT

1. This Appeal arises from a suit seeking compensation for injuries suffered by a 32 years old female which arose as a result of a road accident. The Appeal is against the trial Court's assessment of quantum (damages). In the suit, the Appellants were the Defendants whereas the Respondents were the Plaintiffs.

2. The suit was initially instituted vide the Plaint filed on 11/06/2015 through Messrs Bundotich Korir & Co. Advocates. The same was however subsequently amended and re-filed on 30/5/2016. The Respondents, suing as the legal representatives of the deceased, pleaded that the 1st Appellant was the driver of the motor vehicle registration number KBH 726W while the 2nd Appellant was its owner, that on 23/08/2014, the deceased was on board and/or travelling in the said motor vehicle along Eldoret-Ravine road at Torongo area when the 1st Appellant negligently drove the vehicle causing it to lose control and veer off the road and as a result, the deceased was seriously injured form which she died approximately 455 days later on 9/11/2015. The Respondents therefore prayed for Judgment for general damages, special damages, costs and interest against the Appellants.

3. In their joint Statement of Defence filed on 26/6/2015 through Messrs Kamau Lagat & Co. Advocates, the Appellants denied liability for any negligence or blame for causing the accident.

4. On 25/1/2018, the parties recorded a consent on liability in the ratio of 80:20 in favour of the Respondents as against the Appellants. The suit then proceeded to hearing in which only the 2nd Respondent testified as PW1. The Defence did not call any witness.

5. After trial, the Court delivered its Judgment on 19/4/2018 whereof it assessed and awarded damages to the Respondents as follows:

Pain & suffering	Kshs 150,000/-
Loss of expectation of life	Kshs 80,000/-
Loss of dependency	Kshs 2,400,000/-
Special damages	Kshs 673,000/-
Total	Kshs 3,303,000/-
Less 20% contributory negligence	Kshs 660,600/-
Net sum	Kshs 2,642,400/-
Costs and interest	

6. Aggrieved by the said award, the Appellant preferred this Appeal on 7 grounds as follows:

   i. That the trial Magistrate erred in law and fact in pronouncing judgment in favour of the Respondent on liability when there was no legal or otherwise basis of doing so in light of there being no sufficient evidence adduced before him.

   ii. That the trial Magistrate erred in law and fact by failing to take into consideration the evidence presented by the Appellant.

   iii. That the trial Magistrate erred in law and fact by pronouncing judgment in favour of the Respondent whereas the Respondent had not proved Appellants' liability on a balance of probabilities.

   iv. That the Learned trial Magistrate erred in law and in fact in awarding the Respondent excessive general damages of Kshs 2,642,400/-.

   v. That the trial Magistrate erred in law and fact in awarding the Respondent a generous award on loss of dependency when there was no proof of income by this Respondent, or alternatively when the income pleaded was lower than awarded.

   vi. That the gross ward if Kshs 2,642,400/- is so manifestly high as to amount to an erroneous estimate of the damage suffered by the Respondent.

   vii. That the trial Magistrate erred in law and fact in not taking into account entirely the submissions of the Appellants and relied on submissions filed by the Respondent's Counsel.

7. It will right away be noted that grounds 1 and 3 insofar are misconceived. This is because, as aforesaid, liability was agreed upon and adopted as a consent before the trial Court.

Hearing of the Appeal

8. It was then agreed and directed that this Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellants filed their Submissions on 26/1/2021. Up to the time of concluding this Judgment, I had not come across the Respondents' Submissions.

Appellants' Submissions

9. On "loss of expectation of life", Counsel submitted that the trial Magistrate erred in law by awarding damages under this head as this amounts to double compensation, that in awarding damages under both the *Law Reform Act* and *Fatal Accidents Act*, the Court should not make an award for loss of expectation of life on the ground that the same would amount to double compensation. He cited the case of *Kemfro v A.M Lubia & another* (1982-1988) KAR 727 as quoted in *Bernard Njuguna Karanja & another v Hyness Mutavi Kivuva (suing as the legal representative of the Estate of Miriam Mumbua Kakui also known as Miriam Mumbua Makumi (Deceased)* [2016] eKLR. Counsel further submitted that duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same hence the claim for loss of expectation of life and dependency will go to the same persons amounting to double compensation and that the trial Court should not have made award under this head.

10. On "pain and suffering", Counsel submitted that the deceased was involved in the accident on 23/8/2014 and discharged from hospital on 23/9/2014, that the medical report dated 29/4/2015 prepared by Dr. Aluda concluded that the fractures sustained had healed, that therefore, it is clear that the pain caused by the accident had subsided, that there was no evidence that the deceased was re-admitted, and that considering the duration which the deceased was in hospital, a sum of Kshs 100,000/- should have been adequate.

11. On "loss of dependency", Counsel faulted the trial Magistrate for awarding Kshs 2,400,000/- for lost years, a figure that is unreasonable and excessive in the circumstances, that according to the death certificate, the deceased was 32 years of age and was a business woman, that there was no medical proof that the deceased was in good health before her death and taking into account the vagaries and vicissitudes of life and factoring accelerated payment in lumpsum, and also considering that the death toll has risen, the multiplier of 20 years adopted by the trial Court was unfair and does not have any legal standing, and that a multiplier of 18 years would have been appropriate. He cited the case of *Dainty v Haji & another* in which, he submitted, the deceased was 27 years old and the Court of Appeal upheld a multiplier of 10 years. He also cited the case of *Ann Njoki Njenga v Umoja Flour Mills & another* [2006] eKLR, in which, he submitted, a multiplier of 14 years was applied in respect to a deceased who died at the age of 36.

12. On the "multiplicand", Counsel faulted the trial Magistrate for using a figure Kshs 15,000/- on the ground that the deceased was a teacher, that in the Amended Plaint, the Respondents stated that the deceased was a shopkeeper, that at no point was it stated in the pleadings that she was a teacher, that the Respondents could not therefore adduce evidence to the contrary, that parties are bound by their pleadings and evidence which tends to be at a variance ought to be ignored. He cited the case of *Daniel Otieno Migore v South Nyanza Sugar & Co. Ltd* [2018] eKLR and averred that the trial Court ought to have used a mutliplicand of an amount payable to a shopkeeper, and not a teacher, that given that it was not proved what amount the deceased was earning as a shopkeeper, the Court should thus use the minimum wage as enumerated under the *Regulation of Wages (General) (Amendment) Order, 2015*,

that the deceased resided and worked at Chepkorio area which falls under column 4 of the *Regulation of Wages (General) (Amendment) Order, 2015*, this being Kshs 11,279.50/- and that the Court has to also take into account statutory deductions which thus means that the deceased could take home a monthly amount of approximately Kshs 10,000/-

13. In respect to the "dependency ratio" of 2/3 adopted by the trial Court, Counsel conceded that the same was appropriate. He also did not challenge the award on special damages.

14. He therefore submitted that the award under lost years ought to have been computed as follows:

> Kshs 10,000/- x 18 years x 12 months x 2/3 = Kshs 1,440,000/-.

Determination

15. As reiterated in a plethora of cases, this being a first appellate Court, my role is to evaluate, re-assess and re-analyze the evidence before the trial Court and draw my own conclusion. In the case of *Kenya Ports Authority v Kuston (Kenya) Ltd.* [2009] 2 EA 212, for instance, the following was stated:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

16. Upon examination of the Record, including the Submissions presented, I find the issues that arise for determination in this Appeal to be the following:

    i. Whether the trial Court's award for "loss of expectation of life" amounted to double compensation.

    ii. Whether the trial Court's award for "pain and suffering" was excessive.

    iii. Whether the trial Court's award for "loss of dependency" was excessive.

17. As aforesaid, the Appellants' grievance herein is on the quantum of damages awarded which they "feel" is excessive. On this issue, in the case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia* [1985], Kneller JA, guided as follows:

> " 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 that 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. See *Ilango v Manyoka* [1961] E.A. 705, 709, 713; *Lukenya Ranching And Farming Co-operatives Society Ltd v Kavoloto* [1970] E.A., 414, 418, 419. This Court follows the same principles."

18. The question is therefore whether there are justifiable grounds for this Court to interfere with the quantum of damages awarded by the trial Court. As stated above, the trial Magistrate's discretion in assessing damages can only be disturbed if I find that the trial Court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be a wholly erroneous estimate of the damages. I now proceed to determine the said issues.

i. Whether the trial Court's award for "loss of expectation of life" amounted to double compensation

19. In arguing that the trial Court's award for "loss of expectation of life" amounted to double compensation, Counsel relied on the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia* C.A. 21 of 1984 (1882-1988)1 KAR 727 where the Court of Appeal stated as follows:

> " the net benefit will be inherited by the same dependants under the *Law Reform Act* and must be taken into account in the damages under the latter Act must be offset by the gain from the estate under the former Act."

20. As has been explained and clarified in a multitude of subsequent cases, this passage had been wholly misunderstood by any and it is now generally agreed by jurists that the said statement does not at all mean that a claimant under the *Fatal Accidents Act* should not benefit or be denied damages for pain and suffering under the *Law Reform Act* as that cannot be duplication of compensation. I am, in fact, surprised that, despite all the case law available on this subject, Lawyers are still quoting *Kemfro Africa Ltd t/a Meru Express Services* (*supra*) out of context.

21. For instance, in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal clarified this issue of "double compensation" under the *Law Reform Act* and the *Fatal Accident Act* as follows:

> " Finally, on the third issue, learned counsel for KSSL, Mr. C.K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law."

This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issues of duplication does not arise.

> " The words 'to be taken account' and 'to deducted' are two different things. The words in Section 4(2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

22. From the above explanation therefore, it is clear that there is no legal requirement for the Court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*. The argument by Counsel for the Appellants does not therefore stand. As stated by Hon. Lady Justice Muchemi in the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrators of the Estate of the late Robert Mwangi)* [2019] eKLR, it would be a futile exercise for a Court to labour to make an award under the *Law Reform Act* and then proceed to again

deduct it from the award under the *Fatal Accidents Act* and that such deduction would, effectively, nullify the benefits intended by the two statutes for deserving claimants.

23. It is therefore my finding that the trial Court was entitled to make awards under both the *Law Reform Act* and the *Fatal Accidents Act* as it did.

ii. Whether the trial Court's award for "pain and suffering" was excessive

24. The trial Court awarded Kshs 150,000/- on the head of "pain and suffering" on the basis that the medical documents indicated that the deceased did not die immediately after the accident but was hospitalized and underwent treatment for a long period of time before she succumbed to the injuries. On this point, in the case of *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR, Njagi J observed that:

> " The principle is that 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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life ....."

25. In the instant case, it is not in dispute that the deceased did not die immediately after the accident. Her injuries were severe and she was hospitalized for a long time before her demise. Indeed, I have perused a number of recent authorities and come to the conclusion that it is now almost uniform that at present, "loss of expectation", where the deceased did not die immediately, is awarded in the region of approximately Kshs 80,000/- to Kshs 150,000/- or thereabouts depending on the level of suffering before death. The deceased was involved in the accident on 23/8/2014, admitted in hospital and discharged 1 month later on 23/9/2014. There is evidence that after discharge, she continued to receive treatment and still required extensive specialized medical intervention which I presume, due to financial limitations, she was unable to access. Although she was discharged from hospital, she was clearly still in very "bad shape", medically speaking. She eventually died on 9/11/2015 from the complications arising from the injuries sustained in the accident. Cumulatively therefore, she "suffered" for more than 1 year from the injuries before she died. In the circumstances, I do not find the amount of Kshs 150,000/- to be so inordinately high that it would amount to be a wholly erroneous estimate of the damage. I therefore find no reason to disturb the award made under this heading.

iii. Whether the trial Court's award on "loss of dependency" was excessive.

26. The claim for "loss of dependency" constitutes determination of the multiplicand (monthly earnings), multiplier (number of years remaining in earning life) and the dependency ratio.

27. In the instant case, the Appellants fault the trial Magistrate for adopting a multiplier of 20 years and a multiplicand of Kshs 15,000/- and also holding that the deceased was a teacher. It is indeed evident that in the Amended Plaint, the deceased was described to have been "employed as a shopkeeper" earning Kshs 15,000/- per month. I also observe that in the Certificate of Death, the profession of the deceased was described simply as "business". However, and apparently relying on an unverifiable handwritten recommendation letter said to have been from Cheyet Early Childhood Development (ECD) school and produced in evidence, the Magistrate treated the deceased as a teacher and adopted a figure of Kshs 15,000/- as her monthly earning. In any case, no evidence whatsoever was presented to demonstrate that the deceased possessed any academic or professional qualifications as a teacher.

28. It is trite law that parties are bound by their pleadings and as such, the Respondents having pleaded that the deceased was employed as a shopkeeper, are bound by their pleadings. On this point, in the case of *Joshua Mungai Mulango & another v Jeremiah Kiarie Mukoma* (2015) eKLR the Court of Appeal held as follows:

> " Parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs"

29. In view of the foregoing, I find that the trial Magistrate erred in accepting evidence to indicate that the deceased was a teacher when the Respondents, in their own Plaint, had described her as a "shopkeeper".

30. In respect to the "multiplier", the trial Court adopted a figure of 20 years. The Court observed that being a teacher, like any other civil servant, the deceased would have worked up to the age 60 years - the age of retirement. Even though I have found that the trial Court erred in treating the deceased as a teacher, instead of a "shopkeeper", considering that the deceased was 32 years at the time of her death, and also considering the vagaries and vicissitudes of life, I will still accept the same multiplier of 20 years adopted by the trial Court.

31. Regarding the multiplicand, the trial Court adopted a figure of Kshs 15,000/- on the basis that the deceased was a teacher. The Appellants on the other hand want this Court to adopt the minimum national wage of Kshs 11,279/- as per the then prevailing *Regulation of Wages (General) (Amendment) Order, 2015*. The Appellant's argument is that it was not proved what amount the deceased used to earn even as a shopkeeper. The Appellants also want the Court to take consideration of statutory deductions and adopt a net multiplicand of Kshs 10,000/-.

32. I agree that as at 9/11/2015 when the deceased died, the applicable law on minimum national wages was the Regulation of Wages (General) (Amendment) Order, 2015 - Legal Notice No. 116 which came into operation on 1/5/2015. The same set the minimum wage for shop assistants of Kshs 11,279/= in all other areas. I hereby adopt this figure as the applicable multiplicand in this case.

33. In view thereof, the new award of loss of dependency is reduced and computed as follows:

    Kshs 11,279/- x 20 x 12 x 2/3 = 1,804,640/-

Final Orders

34. In the end the Appeal partially succeeds and only to the extent stated hereinbelow and upon which I order as follows:

    i. The trial Court's award on loss of dependency at the sum of Kshs 2,400,000/- is hereby set aside, reduced and substituted with an award of Kshs 1,804,640/-.

    ii. The rest of the awards made by the trial Court are left undisturbed.

    iii. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE