K'Ochieng v Oweru & another (Suing as administrators and legal representatives of the Estate of John Onyango Ochiel-Deceased) (Civil Appeal E007 of 2023) [2024] KEHC 8271 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 8271 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E007 OF 2023

KW KIARIE, J

MARCH 19, 2024

BETWEEN

JOHN LENNOX K'OCHIENG ..... APPELLANT

AND

JOSEPH OCHIENG OWERU & MAUREEN AKOTH (SUING AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN ONYANGO OCHIEL-DECEASED) ..... RESPONDENT

(Being an Appeal from the judgment and decree in Ndhiwa Senior Resident Magistrate's SRMCC No. 103 of 2018 by Hon. B. W. Murangasia – Resident Magistrate)

JUDGMENT

1. John Lennox K'Ochieng, the appellant, was the defendant in Ndhiwa Senior Resident Magistrate's SRMCC No 103 of 2018. He had 'been sued for a claim of general damages and special damages following a road traffic accident involving motor vehicle KBE 039P and the deceased. The deceased was a passenger in the motor vehicle of the appellant when it rolled. As a result, the deceased sustained fatal injuries. The learned trial magistrate apportioned liability at 80:20 in favour of the respondent. The respondent was awarded Kshs 2,803,445.60 in general damages and Kshs 253,300.00 in special damages before factoring in contributory negligence.
2. The appellant was aggrieved by the judgment and filed this appeal through Kimondo Okong'o, Wandago & Company Advocates. He raised the following grounds of appeal:
    a. That the learned magistrate erred in law and fact in failing to find and hold that the respondent's suit before him was statute-barred and further erred in failing to strike it out for being incompetent, having failed to address and/or determine that issue of limitation of actions.

b. The learned trial magistrate erred in law in proceeding with the suit as before him and in entering judgment for the respondent, as against the appellant, without jurisdiction to do so.

c. The learned trial magistrate erred in law and, in fact, adopted a multiplier of twenty-nine (29) years when that multiplier was excessive and did not take the vicissitudes of life into account.

d. The learned trial magistrate erred in law and, in fact, when, after he opted for and applied the multiplier approach to assessing damages, he chose and applied a multiplicand of Kshs 15,000/-, whereas that amount was never proven by the evidence presented before him.

e. The learned trial magistrate erred in law and, in fact, in applying wrong principles and ignoring the proper principles in assessing damages. Hence, he awarded the respondent Kshs 1,740,000 as general damages for loss of dependency under the *Fatal Accidents Act* on a 100% basis, which award of general damages was inordinately and manifestly excessive.

3. The respondents opposed the appeal through the firm of Staussi, Asunah & Oluoch & Advocates. The respondent did not file any grounds of opposition or submissions.

4. This Court is the first appellate court. I am aware of my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.

5. The appeal concerns whether the suit was statutorily barred and the apportionment of the general damages.

6. In the case of *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR, the Court of Appeal (Asike-Makhandia JA) explained the purpose of the *Limitations of Actions Act* as follows:

> Limitation of time for land claims as with claims of any other nature exist for three main reasons, which are:
>
> i. A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent);
>
> ii. A defendant might have lost evidence over time to disprove a stale claim; and
>
> iii. Long-dormant claims have more cruelty than justice (*Halsbury's Laws of England*, 4th Edition).

7. This explanation means that the primary intention is to protect the defendant from being confronted with claims they may have forgotten or lost evidence due to the passage of time.

8. For a defendant to invoke the limitation of actions doctrine, the same must be pleaded. If not canvassed earlier, this can never be argued at the appeal. It may be unfair to the plaintiff, who assumed this right was forfeited. The Court of Appeal in *Stephen Onyango Achola and another v Edward Hongo Sule and another* [2004] eKLR where the Court of Appeal stated as follows:

> The second respondent, having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it, nor will the second respondent be entitled to rely on that defence during the trial unless it amends its defence. It is a trite law that cases must be decided on the issues pleaded, and we need not cite any authority for that proposition. It is equally not to be forgotten that a

> party who is entitled to rely on the defence of limitation is perfectly entitled to waive such a defence and thus let the suit proceed to trial on its merit.

In the instant case, the appellant is estopped from raising the limitation issue at this stage.

9. A plaintiff may apply for an extension of time to file an otherwise statute-barred claim. If sufficient compelling reasons are proffered, the court may allow the application. Therefore, the limitation issue is not jurisdictional, for no court can arrogate jurisdiction to itself. Jurisdiction is a creature of statutes. I, therefore, find that the learned trial magistrate had jurisdiction to hear and determine this matter.

10. The appellant contended that the award to the respondents was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 on page 356, Law JA stated:

> ...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

11. Joseph Ochieng Oweru (PW1), the deceased's father, testified that he (the deceased) was employed in a security firm and was earning Kshs 30,000.00 per month. There was, however, no proof of his earnings. In *Albert Odawa v Gichimu Githenji*; Nakuru HCCA No 15 of 2003 (2007), eKLR Justice Ringera expressed himself as follows:

> 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.

In this case, the learned trial magistrate should have adopted the global sum approach to assessing damages.

12. The deceased herein died at the age of 27. The deceased had many productive years ahead of him. I have perused the decisions relied on by both parties in the trial court and this court. After considering the vicissitudes of life, I do not find the award of Kshs Kshs 2,803,445.60 inordinately high. This award will not be disturbed. I will equally not disturb the award in special damages.

13. The appeal is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE