Mutete & another v Bosire & another (All suing as the Personal Representatives & Legal Administrators of the Estate of Evans Nyang'au Maturu [Deceased]) (Civil Appeal E036 of 2023) [2024] KEHC 5155 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5155 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E036 OF 2023

WA OKWANY, J

APRIL 25, 2024

BETWEEN

JONATHAN MUTETE ..... 1ST APPELLANT

JONATRA LIMITED ..... 2ND APPELLANT

AND

TERESA KERUBO BOSIRE ..... 1ST RESPONDENT

SAMUEL OMATO OMOSA ..... 2ND RESPONDENT

ALL SUING AS THE PERSONAL REPRESENTATIVES & LEGAL ADMINISTRATORS OF THE ESTATE OF EVANS NYANG'AU MATURU [DECEASED]

(Being an Appeal from the Judgment and Decree of Hon. C. Ombija, Senior Resident Magistrate dated & delivered on 5th July 2023 in the Original Keroka Principal Magistrate's Court Civil Case No. 90 of 2020)

JUDGMENT

1. The Respondents herein were the Plaintiffs before the trial court where they sued the Appellants (Defendants) for damages under both the *Fatal Accidents Act* and the *Law Reforms Act*, in their capacity as the Personal Representatives of Legal Administrator of the Estate of Evans Nyang'au Maturu (Deceased). They also sought Special damages in the sum of Kshs. 57,500/= together with the costs of the suit.

2. The Respondents' (Plaintiffs') case was that the deceased was, on or about 27th day of December 2019, a lawful passenger walking off the verge of the road along Keroka-Sotik when at Kisumu Ndogo, the 1st Appellant's Motor Vehicle Registration No. KBQ xxxx veered off the road and knocked him thereby

occasioning him fatal injuries. The Respondents attributed the accident to the negligence of the 1st Appellant's driver, servant, agent and/or representative.

3. The Appellants filed a joint Statement of Defence where they denied the claim that the accident was caused by the negligence of their driver and/or agent.

4. The Respondents testified at the hearing as PW1 and PW2. They produced the documents listed in their list of document as exhibits (P.Exh1-12) in support of their claim.

5. Simon Gathanya Gekonyo (DW1) testified as the only witness for the Defence.

6. At the end of the trial, judgment was entered in favour of the Respondents as follows: -

   Liability at 80:20 in favour of the Respondents

   General Damages for Pain and Suffering – Kshs. 100,000/=

   General Damages for Loss of Expectation of Life – Kshs. 100,000/=

   Loss of Dependency - Kshs. 700,000/=

   Less 20% contributory negligence – (Kshs. 180,000)

   Total – 720,000/=

7. Dissatisfied with the decision by the trial court, the Appellants filed this appeal in which they listed the following grounds of appeal: -

   1. That the Learned Trial Magistrate erred in law and fact by holding the Appellants 80% liable for the subject accident whereas there was no evidence tendered to prove the negligence alleged against them, which decision is untenable and grossly unjust to the Appellant.

   2. That the Learned Trial Magistrate erred in law and fact by failing to judiciously analyse evidence adduced by the Appellants thereby holding the Appellants 80% liable for the accident, which decision is untenable and grossly unjust to the Appellant.

   3. That the Learned Trial Magistrate erred in law and fact by disregarding express provisions of the law by awarding general damages for loss of dependency to the Respondents who are not dependants of the deceased which decision is untenable and grossly unjust to the Appellant.

   4. That the Appellants shall upon receipt of the typed proceedings file a supplementary Memorandum of Appeal to include other grounds and reasons that may become apparent therein.

8. The Appellants urged this court to set aside the trial court's judgment and to dismiss the Respondent's case with costs.

9. The Appeal was canvassed by way of written submissions which I have considered.

10. The Court of Appeal explained the duty of the first appellate court in the case of *Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* Civil Appeal No. 161 of 1999, as follows: -

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way..."

11. I have considered the Record of Appeal and the parties' rival submissions. I find that the main issues for determination are as follows: -

    i. Whether the Respondents were entitled to make the claim under the *Fatal Accidents Act* and *Law Reform Act*.

    ii. Whether the trial court erred in apportioning liability and assessing quantum as it did.

i. Claim under the *Fatal Accidents Act* and *Law Reform Act*.

12. Section 4 of the *Fatal Accidents Act* cap 32 provides as follows: -

> 4. Action to be for benefit of family of deceased
>
> (1) Every action brought by virtue of the provisions of this *Act* shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
>
> Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

13. My understanding of the above provision is that it does not place a restriction on the persons who may bring an action under the *Fatal Accidents Act*. The law provides that the administrators of the estate of a deceased may do so. The only restriction is on the intended beneficiaries of the said cause of action who are the people specified under subsection (1).

14. The Appellants' contention was that the Respondents were the aunt and uncle of the deceased and therefore not his parents who are entitled to compensation under the *Act*. I note that PW1 (the 1st Respondent) testified that the deceased was her son. On cross-examination, however, she conceded that the Plaint indicated that she was an aunt to the deceased. In re-examination, she clarified that the deceased was her brother's son. PW2 confirmed that the deceased was a son to his brother but that he lived with them at their home.

15. This court takes judicial notice that in most African set ups, an uncle or an aunt may 'adopt' and live with their nephews or nieces as their own children especially in circumstances where the actual parents of the child in question are deceased.

16. In the present case, it was not clear if the deceased's parents were alive or dead. It was however not disputed that the deceased lived with the Respondents as his guardians and that PW1 would give him money for his upkeep. The deceased is reported to have been aged 17 years at the time of his death. He did not have any dependants.

17. The Respondents testified that they received the accident report. This leads me to conclude that they were the legal guardians of the deceased, even though not his biological parents. I find that the Respondents considered the deceased as their son as he was under their care. No evidence was presented to show that the deceased had other parents who could have filed the suit apart from the Respondents. I have perused the *Grant Ad Litem* dated March 11, 2020 (P.Exh12) which was obtained by the Respondents for purposes of filing the suit and find that the Respondents were duly appointed as the deceased's personal representatives for the purposes of this suit.

18. Having found that there is no evidence on Record to rebut the Respondents' legal capacity to bring the claim, I find that the Respondents were correctly recognized as the deceased's parents and were thus entitled to bring the claim.

ii. Liability and Quantum.

19. It is trite that the standard of proof, in civil matters, is on a balance of probabilities. The burden of proof, on the other hand, is vested on the claimant. In *Miller vs. Minister of Pensions* (1947) 2 ALL ER 372 the court discussed the burden of proof and stated:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

20. In the present case, I note that the Respondents produced several exhibits in support of their case. I have perused the Post Mortem Report (P.Exh 3), the Burial Permit (P.Exh8) and the Death Certificate (P.Exh9) which prove that the deceased had succumbed to his injuries. The Police Abstract (P.Exh7) proved that an accident did occur involving the Appellant's motor vehicle on December 27, 2019.

21. The Appellants argued that the Respondents' evidence had no probative value because they did not witness the said accident. I however find that the evidence presented by the Respondents was sufficient to prove, on a balance of probabilities, that the deceased was fatally injured in an accident involving the Appellant's motor vehicle. My finding is fortified by the testimony of DW1 who admitted that his car ran over the deceased. He stated as follows:

> " ....It is my motor vehicle that ran over the deceased. It had rained, there was a slight traffic jam and I was moving on a slow pace. I was careful. The deceased crossed by suddenly....The deceased ran into the rear tyres of the motor vehicle."

22. I have considered the fact that the Appellant's evidence, on how the accident happened, was not controverted by the Respondents. Thus means that the deceased may have, to some extent, contributed to the accident that resulted in his fatal injuries. I therefore find that the trial court was justified in apportioning liability between the parties as it did. I find no reason to disturb the trial court's finding on liability. I am guided by the decision, by the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Co. Ltd &Another* (1968) EA 123 where it was held that:-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

23. On quantum, I refer to the principles espoused by the Court of Appeal in the case of *Arrow Car Ltd vs. Elijah Shamalla Bimomo & 2 Others* (2004) eKLR where it was held 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. ..."

24. I have considered the awards made under the *Law Reform Act* for pain and suffering and loss of expectation of life. The Court awarded Kshs. 100,000/= under both headings. The Appellants did not take issue with the award under loss of expectation of life and I therefore uphold it. The Appellants' however contended that the award made for pain and suffering was on the higher side in view of the fact that the deceased died instantly.

25. Courts will, as a general principle make nominal awards under pain and suffering in instances where the deceased died soon after the accident or on the spot. In *Benham v Gambling*, (1941) AC 157 it was held that only moderate awards should be granted under this head for the following reasons:-

> " In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects."

26. In our jurisdiction, the awards for pain and suffering range from Kshs. 10,000/= to Kshs. 100,000/= depending on how long the deceased suffered before he died. In this regard, I find that the award of Kshs. 100,000/= was on the higher side and I therefore reduce it to Kshs. 35,000/=. I find guidance in the decision in *Lorna Amimo vs. Akamba Public Road Service & Another* [2008] eKLR where it was held thus: -

> " Pain and suffering in the event of death is for the pain suffered before death. Herein death was instantaneous. That notwithstanding the deceased suffered pain before death. The plaintiff's counsel suggested 50,000/=. The defence 10,000.00. In this court's opinion Kshs. 35,000.00 would be adequate compensation."

27. Turning to the award under *Fatal Accidents Act*, I have already found that the Respondents herein were the parents or guardians of the deceased. The Respondents were therefore entitled to benefit under this Act. I am guided by the determination of Ringera, J. (as he then was) in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another* – Nairobi HCCC. No.1638 of 1988 (unreported) at page 248 where it was held thus: -

> " 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."

28. In this case, the deceased died at 17 years of age as shown in his Certificate of Death. PW1 stated that he was not in gainful employment at the time of his death. This Court will therefore adopt a global figure approach in calculating damages under loss of dependency.

29. In *Oyugi Judith & another vs. Fredrick Odhiambo Ongong & 3 others* [2014] eKLR, the court awarded Kshs. 700,000/= to each plaintiff for loss of dependency where the deceased persons were aged between 18 and 30 years old. Guided by this precedent, I find no reason to disturb the award of Kshs. 700,000/= under loss of dependency.

30. Lastly, I have considered the issue of Special Damages. The Court of Appeal in *Jivanji vs. Sanyo Electrical Company Limited* (2003) 1, EA 98, quoted from *Coast Bus Service Ltd v Murunga and Others* (1992) LLR 318(CAK) and held thus: -

> " ....It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council vs. Nakaye* (1972) EA 446, *Ouma vs. Nairobi City council* (1976) KLR 304..."

31. The Respondents pleaded Special Damages at Kshs. 57,500 made up as follows: -

i. Search Fees for Motor Vehicle Records – Kshs. 550/=

ii. Food and Miscellaneous Funeral Expenses – Kshs. 10,000/=

iii. Transport from Mortuary – Kshs. 7,000/=

iv. Mortuary Fees – Kshs. 10,000/=

v. Coffin – Kshs. 10,000/=

vi. Cost of Succession Cause – Kshs. 20,000/=

Total – Kshs. 57,500/=

32. From the trial record, the Respondents only produced receipts relating to items (ii), (iii), (v) and (vi) which amount to Kshs. 47,000/=. It is my finding that the trial court erred in entirely dismissing the claim on special damage on the basis that they were not proved.

33. In the final analysis, I will allow the appeal, albeit partly. I set aside the judgment of the trial court and in its place enter judgment for the Respondents ad follow: -

Liability remains at 80:20 in favour of the Respondents

Damages under the *Law Reform Act*

i. Pain and Suffering – Kshs. 35,000/=

ii. Loss of Expectation of Life – Kshs. 100,000/=

Damages under the *Fatal Accidents Act*

iii. Loss of Dependency – Kshs. 700,000/=

Special Damages – Kshs. 47,000/=

Less liability – 20% of 882,000/= (Kshs. 176,000/=)

Total – Kshs. 706,000/=

34. Each party will bear his/her own costs of the appeal.

35. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF APRIL 2024.

W. A. OKWANY

JUDGE

In the presence of: -

Moracha for the Respondents

Ndade for the Appellants

C/AA - Georgina/Anita