



Kariuki & another v Mwangi (Suing as representatives of the Estate of Andrew Macharia - Deceased) (Civil Appeal 563 of 2019) [2024] KEHC 8365 (KLR) (Civ) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8365 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 563 OF 2019
JK NG'ARNG'AR, J
JUNE 26, 2024

BETWEEN

J MWANGI KARIUKI 1ST APPELLANT
ANAS MOTORS LIMITED 2ND APPELLANT

AND

ROSEMARY WANJIKU MWANGI (SUING AS REPRESENTATIVES OF THE ESTATE OF ANDREW MACHARIA - DECEASED) RESPONDENT

(Being an appeal on quantum against the judgment delivered by Hon. D.W. Mburu, SPM on 6/9/2019 in Nairobi CMCC No. 1484 of 2013)

JUDGMENT

1. This judgment determines the appellant's appeal brought vide the memorandum of appeal dated 30/9/2019. The appeal relates only to the issue of quantum and special damages.
2. The respondent who was the plaintiff before the trial court pleaded that the he was lawfully crossing Nairobi-Thika road at Astrol area when the defendants or their agent/driver carelessly and negligently drove motor vehicle KBC 601N and knocked down the respondent who sustained serious injuries. The appellants filed a defence dated 11/6/2013 and denied the respondent's averments and apportioned any negligence to the deceased.
3. After conducting the hearing, the court entered liability at 50% as against the defendants therein who are the appellants in the instant suit. The trial court also awarded Kshs. 3,766,525.50/= for special damages and Kshs. 5,000,000/= for general damages. The plaintiff therein was also awarded costs. The court however found that though the accident occurred on 6/4/2010, the deceased died on 21/1/2015 and the certificate of death indicated that the cause of death was unascertained due to diabetes mellitus



and hypertension which were lifestyle diseases and had no relation to the accident. That no post-mortem was availed thus there was no proof that the deceased's death was directly caused by the accident, consequently, the claim under the Law Reforms Act and *Fatal Accidents Act* failed.

The Appeal

4. It is that judgment that gave rise to this appeal where the appellant complains that: the trial court erred by failing to consider the parties submissions; the trial court erred in awarding Kshs. 5,000,000/= yet the suit was brought under the Law Reforms Act and *Fatal Accidents Act* which the court determined that the respondent had not proved her case under those laws; that the trial court erred in awarding Kshs. 5,000,000/= for pain and suffering as the award was excessive and unjust as they were not pleaded nor proved, the trial court erred in awarding special damages for Kshs. 3,766,525.50/= that was excessive as majority of the hospital bill was incurred due to illnesses not related to the accident and majority of the bill was paid by Kenya Revenue Authority thus the respondent could not be indemnified twice.
5. As observed above, the appeal is against quantum and special damages only. The appellant filed submissions dated 4/3/2024 whereas the respondent's were dated 15/3/2024. I have considered those submissions alongside the entire record.

Analysis and Determination

6. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424.
7. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984* [1985] eKLR where the court held that: -

“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.”

8. The first issue for consideration is whether the trial court erred in awarding Kshs. 5,000,000/= for pain and suffering though the claim under the Law Reforms Act and *Fatal Accidents Act* had failed. The appellants appeared to argue that since the trial court found that the deceased's death was not a result of the accident, then damages could not be awarded. Respectfully, that is not the correct approach. Court's will award damages for pain and suffering that a deceased experienced before their death. The court in *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 discussed the issue of damages awarded under the *Law Reform Act* and 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. The



generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

9. It then follows that damages are awardable where there is proof that the deceased suffered pain and suffering. The Court of Appeal in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v. Lubia & Another (No. 2)* [1987] KLR 30 further held that damages under the Law Reforms Act were independent of the Fatal Accident Act and held that

“An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered....The *Law Reform Act* (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.”

10. See also *Hellen Waruguru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) –V- Kiarie Shoe Stores Limited (2015) eKLR* where the Court of Appeal held that a claimant under the *Fatal Accidents Act* should not be denied damages for pain and suffering as they are only awarded under the *Law Reform Act* and *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR where the court held that as regards damages awarded under the *Law Reform Act*, 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.

11. In the instant case, it was proven before the lower court that an accident occurred as alleged and the deceased suffered serious head injuries and was admitted at the ICU at Nairobi Hospital and later at the psychiatric ward at Nairobi Hospital. The appellant’s witness confirmed that the deceased suffered serious injuries corroborating the respondent’s expert witness, Dr. Wokabi. In the circumstances, the trial court did not err in awarding damages for pain and suffering while denying the claim for other awards available under the *Law Reform Act* and *Fatal Accidents Act*. That ground of appeal therefore fails.

12. The next question to answer is whether the award of Kshs. 5,000,000/= for pain and damages was inordinately high. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR* where the Court of Appeal held: -

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

13. As correctly found by the trial court, all the medical documents on record indicated that the respondent sustained major head injuries and lost consciousness immediately after the accident. He was admitted to the ICU where he was on life support and the CT scans showed presence of fluid covering the brain as well as brain degeneration resulting in the reduction of the mass of the brain. I also note that the deceased was no longer independent and had to be washed and clothes and also became forgetful and disoriented. Dr. Wokabi assessed disability at 100%. Dr. Kahuthu, the appellant’s expert witness also



confirmed that the deceased suffered traumatic brain injury and amnesia as a result of the accident. Whether or not the deceased had other pre-existing conditions before the accident, the fact remained that he suffered serious brain injuries which affected the remaining part of his life quite negatively. The trial court observed that the deceased was unable to identify his environment and could not recall current and past experiences. He was also physically weak and dependent on others for daily care. None of those pre-existing conditions caused the serious brain injuries and after effects, those were directly sustained from the accident. I do also note that permanent disability was assessed at 100% and there was no evidence to challenge that assessment.

14. The trial court proceeded to award damages of Kshs. 5,000,000/= relying on *Rosemary Wanjiru Kungu Vs. Elijah Macharia Githinji & Another* (2014) Eklr where the court awarded Kshs. 3,000,000/= for injuries that resulted to 100% permanent incapacity. To this Court's mind, the case was relevant. The trial court also depended on the case of *Re Estate of E S M* (2017) Eklr where an award of Kshs. 5,000,000/= was made for severe head injury with loss of consciousness, severe brain oedema and intra ventricular hemorrhage which resulted in 90-95% permanent disability. That case was similarly relevant as the nature of injuries suffered were quite similar to those suffered by the respondent herein and the assessment of permanent disability was close to that of the respondent.
15. In *Meru Hcc No.100 Of 2016, H.K.N Vs Kenafric Bakery Ltd and Elphas Mugambi*, the plaintiff a minor was involved in an accident and suffered serious injuries to the head with brain contusion and oedema, fracture of left mandible, degloving injury to the right thigh and other soft tissues injuries. As a result of the injuries he suffered 60% disability and was awarded Kshs.2.5 Million general damages. I do note that assessment of disability was much lower than that of the respondent herein.
16. In *Nairobi Hcc No.715 Of 2002 Eris Onduso Omondi –Versus- Tectura International Ltd & John Musyimi* the plaintiff a minor at the time of the accident sustained fracture of the right tibia and blunt injury to the head which resulted in loss of consciousness, blunt injuries to the right hand and the upper front teeth. As a result of the accident the plaintiff complained of forgetfulness, had a slurred speech with poor memory and abnormal behavior in form of excess laughter on his own. She was awarded Ksh.3 Million general damages for pain and suffering. The matter was decided 22 years ago and the economic circumstances of the time have since changed.
17. The appellants did not submit on this ground and did not direct this court to any contrary authorities nor did they propose a figure that would be reasonable to them in the circumstances. Taking into consideration the injuries suffered as well as assessment of permanent disability, further considering the above quoted authorities as well as those quoted by the trial court, and taking into consideration the lapse of time between when those authorities were delivered and the changes in the economic circumstances of this times, I do find that the award of Kshs. 5,000,000/= was not inordinately high. The Court of Appeal in *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 held that: -

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 at a figure which was either inordinately high or low”
18. I find no justification in disturbing the award of damages. This ground of appeal must similarly fail.
19. Though the appellants included special damages in their grounds of appeal, I note that the same was not submitted on and it is doubtful that the appellants were interested in prosecuting that ground of appeal. The allegation that the medical bills related to other conditions unrelated to the accident, as well as the allegation that the medical bill was largely paid by Kenya Revenue Authority thus remained



unsupported. It is trite that he who alleges must prove and this burden lay with the appellants. I have considered the record before me and I do agree with the trial court's finding that the receipts and supporting documents were produced during the hearing. I see no reason to disturb the trial court's finding on special damages and the same is upheld.

20. The upshot is that the appeal is found to be unmerited and the same is dismissed with costs to the respondent assessed at Kshs. 45,000/=.

It is so decreed.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

Chuichi for the 1st Appellant

No appearance for the 2nd Appellant

Kerushi for the Respondent

Court Assistant- Peter Ong'idi

Further Order;

30 days stay granted.

J.K. NG'ARNG'AR, HSC

JUDGE

