Katiti & another v Wangari & Aret (Both Suing as the Next of kin & Administrator of the Estate of the Late Evans Njeri Wangari - Deceased) (Civil Appeal 52 of 2018) [2024] KEHC 4123 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 52 OF 2018

FR OLEL, J

APRIL 26, 2024

BETWEEN

ALBERT PHILIP KATITI ..... 1ST APPELLANT

NDETI MULI ..... 2ND APPELLANT

AND

MARY NJERI WANGARI & BENSON OTIENO ARET (BOTH SUING AS THE NEXT OF KIN & ADMINISTRATOR OF THE ESTATE OF THE LATE EVANS NJERI WANGARI - DECEASED) ..... RESPONDENT

(Both suing as the Next of kin & Administrator of the Estate of the late EVANS NJERI WANGARI(Deceased).....RESPONDENT)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Honourable A.G Kibiru C.M dated 18th April 2018, delivered in Machakos CMCC No. 642 of 2012 where he awarded the Respondents damages arising from a fatal road accident in the sum of Ksh.2,518,200/= less 20% contributory negligence (Kshs.503,040/=), the total award being Kshs.2,014,560/= plus costs and interest.

B. The Pleadings

2. The Respondents vide their Amended plaint dated 20th April 2013, filed a suit as parents and legal administrators of the Estate of the late Eva Njeri Wangari(Deceased), who died on 18th August 2010 and sought for compensation under the *Fatal Accidents Act*, the *Law reform Act*, and special damages of Kshs 18,200/=.The respondents averred that on the said date, the deceased was lawfully travelling along Nairobi-Kangundo Road near Nguluni Area in Motor vehicle registration No KAP 652L

(Hereinafter referred to as the suit Motor vehicle) when the Appellants lorry registration No KAW 326G,(hereinafter referred to as the 2nd suit motor vehicle) was reckless, and negligently driven that it was permitted to violently collide with the 1st suit motor vehicle, causing the deceased and her fellow passengers to suffer fatal injuries. The respondents particularized the negligence alleged in their pleadings and prayed to be awarded compensation as pleaded.

3. The appellant's in response filed their joint statement of defence wherein they denied liability for this accident either directly and/or vicariously and put the respondents to strict proof thereof. The appellants further denied owning the 2nd suit motor vehicle and/or the fact that an accident did occur on the material date as between the 1st and 2nd suit motor vehicles. In the alternative and without prejudice to the above the appellant did aver that if indeed an accident did occur then it was caused by the negligence of the driver of the 1st suit motor vehicle, and therefore they were not to blame for the accident and prayed for the suit to be dismissed.

C. Evidence at trial

4. The parties herein did not call any witness to testify, but recorded a consent in court on 16.01.2018, where judgment on liability was entered in the ration of 80:20 in favour of the respondents, parties agreed to file written submissions on quantum of damages, the respondents list of documents dated 06.08.2012, additional list of documents dated 20.04.2017 and further additional list of document's dated 18.01.2018 were adopted into evidence without calling the makers of the said documents and this consent was to apply in Machakos CMCC No 643/2012 , 644/2012 , 645/2012 & 646/2012.

5. The trial magistrate did consider the evidence presented, submissions filed and proceeded to find that the Appellants were liable for causing this accident and proceeded to award the respondents damages as follows;

    a. Liability 80:20 in favour of the Respondents.

    b. Pain and suffering Kshs.10,000/=

    c. Loss of Expectation of life Kshs.100,000/=

    d. Loss of dependency Kshs.2,400,000/=

    total Kshs 2,518,200/=

    Less 20% contributory Negligence (Kshs 503,040/=)

    Amount Awarded Kshs.2,014,560/= plus costs and Interest.

6 Being wholly aggrieved and dissatisfied by the judgment/decree issued, the appellant did prefer this appeal and raised six (6) grounds of Appeal namely;

    a. That the learned magistrate erred in law and in fact in awarding loss of dependency at Kshs2,400,000/= which award was excessive and unwarranted in light of the evidence adduced.

    b. That the learned trial magistrate erred in law and in fact in applying a dependency ratio of 2/3 in total disregard of the fact that the deceased was unmarried.

    c. That the learned magistrate erred in law and in fact in failing to deduct the award of loss of expectation of life of Kshs.100,000/= under the rule of Thumb.

    d. That the learned Magistrate erred in law and in fact in not finding that the special damages awarded of Kshs.18,200/= was not strictly proved.

e. That the learned Magistrate erred in law in not taking into account entirely the written submissions of the Appellant.

f. That the learned Magistrate's finding and decision were against the weight of the Evidence adduced.

7. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect to loss of dependency and special damages be set aside. The appellants further prayed that the loss of Expectation of life of Kshs.100,000/= awarded be deducted from the final accordingly. The Appellants also prayed for costs of this Appeal.

D. Submissions

(i). Appellant's Submissions

8. The appellants filed their submission dated 2nd February 2023 wherein they submitted that the award of Kshs.2,400,000/= for loss of dependency was excessive and that the trial magistrate had failed to take into consideration the established principles and therefore arrived at a wrong award. There was no evidence that the deceased was married, and was still waiting to joint college. She was only survived by her nuclear family, who included her parents and brother. The trial court thus made an error in using a dependency ration of 2/3 and the ought to have used the dependency ration of 1/3. Reliance was placed on Beatrice Wangui Thairu Vs Ezekiel Bargetuny & Ano, Nairobi Hccc No 1638 of 1988(UR), West Kenya sugar Co ltd Vs Philip Sumba Julaya (Suing as the Adminsitrator and personal representative of the Estate of James Julaya sumba(2017) eKLR.

9. Further the appellants faulted the trial court for failing to deduct an award of Kshs.100,000/= for loss of Expectancy of life, from the total award. That under the head of pain and suffering and loss of expectation of life only nominal awards of damages were to be granted and therefore the award granted thereat should be reduced to Ksh 80,000/=. In relation to multiplier and multiplicand, the Appellants placed reliance on the case of Stephen Kamau & Another Vrs Muraguri Ndugiri(2010)eklr, where the court applied a multiplier of 25 years for a deceased who was 20 years at the time of death. This court was therefore urged to reduce the multiplier used from 30 years to 20 years.

10. Where there was no proof of earning, the proper method, was to apply the provisions of the Regulations of wages (General), (Amendment) Order, 2010. Under the said order as established by legal Notice No 98 of 2010, the amount Applicable for general wages was Kshs.6,221.00/=. This court was therefore urged to lower the award of loss of dependency to (6,221 x 12x 20 x 1/3 = 497,680.00/=). Finally, the Appellants also submitted that the respondents never specifically proved special damages and did not tender fiscal receipts or proof of payment of some burial expenses. They had therefore failed to discharge the burden of proof.

11. The Appellants therefore prayed that this Appeal be allowed on the said terms.

Respondents Submissions

12. The respondents did file their submissions dated 28th March 2023 wherein they stated that the formula for computation of dependency in fatal accidents claim were clear. The court was to find out the value of annual dependency (multiplicand). In determining the same, the important figure is the net earning of the deceased. The court would multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figures, usually called multiplier, the court should bear in mind the expectation of earing life of the deceased, level of dependency of his/her dependents and the chances of life of the deceased and the dependents. Reliance was placed on Crown Bus services &

2 others Vrs Jamila Nyongesa & Amida Nyongesa (legal representative of Alvin Nanjala (Deceased) 2020(eklr.

13. The learned magistrate had properly assessed the evidence adduced, that the deceased died at 21 years and had just started off her life. She was in good health and would probably live and carried out her business until the age of 60 years or beyond. It was also proved that the respondents were her parents and beneficiaries. The Minimum wage under the Regulations of wages (General), (Amendment) order, 2010 legal Notice No 98 of 18th June 2010 did provide for a minimum wage of Kshs 10,000/=, which was used by the court as the multiplicand. The finding of the trial court on loss of dependency could therefore not be faulted. Reliance was placed on Easy coach Bus service & Another Vrs Henry Charles Tsuma & Another (suing as personal representative of the Estate of Josephine weyanga Tsuma-Deceased) (2019) eklr & P F Hayes & others (1957) E.A 748.

14. The respondents also urged the court not to interfere with the dependency ration of 2/3 as awarded, since the respondents were the parents of the deceased and she was naturally shouldering the huge financial burden in maintaining the her parents and her brother. Further it was incorrect for the Appellants to seek to have the award of Kshs.100,000/= awarded under loss of expectation of life to be deducted off the final award. It had been held in the case of Crown Bus services & 2 others Vrs Jamila Nyongesa & Amida Nyongesa (legal representative of Alvin Nanjala (Deceased) 2020) eKLR , 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 appeared that legislation intended that it should be considered.

15. Finally, on special damages, the respondents submitted that, it was not denied that they incurred expenses in burying the deceased and therefore the court could not be faulted for using its inherent discretion to allow a minimal award of Kshs.18,200/= for special damages to cover for funeral expenses.

16. The respondents thus prayed that this court finds that this Appeal has no merit and proceed to dismiss the same.

Analysis and Determination

17. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

18. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Ouseph AIR 1969 Keral 316.

19. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. In this Appeal liability was settled by consent at 80:20 as against the Appellants vide a

consent entered into on 16.01.2018 and based on the grounds of appeal raised the two issues which arise for determination are whether the court ought to have deducted Kshs 100,000/= awarded for loss of expectation of life from the final award and whether the sum awarded for loss of dependency of Kshs 2,400,000/= excessive and should be reviewed

Whether the court ought to have deducted Kshs 100,000/= awarded for loss of expectation of life from the final award

20. On this limb, am guided by the finding of the court in the case of Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR where the court observed that:

> " ...The conventional award for loss of expectation of life is Ksh 100,000/- while for pain and suffering the awards range from Ksh 10,000/= to Ksh 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

21. Looking at awards made under loss of expectation of life, the Court in the case of Rose v Ford [1937] AC 826, held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further In Benham v Gambling [1941] AC 157 it was held that-

> " 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 loss of future pecuniary prospects." (emphasis added).

22. As to whether an award of loss of expectation of life under the *Law Reform Act* and an award of loss of dependency under the *Fatal Accidents Act* amounts to double compensation, the Court of Appeal in Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] eKLR, held as follows-

> " 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 dependents 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 issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, 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 for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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. The words &paragraph 39;to be taken into account&; and & paragraph 39;to be 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." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

23. The Appellants assertion that the trial court ought to have deducted the award under the heading of loss of expectation of life from the final award, therefore has no basis and this ground of Appeal fails.

(II) Whether Quantum Awarded for loss of dependency was Excessive.

24. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu &Another (supra). Further the Court of Appeal in the case Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992 Stated:

> " Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-
>
> '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 ..."

25. On loss of dependency, it was held by the Court of Appeal in Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995 that the issue of dependency is always a question of fact to be proved by he who asserts. Further I am guided by the observation of the Court of Appeal for East Africa in the case Chunibhai J Patel and Another vs PF Hayes and Others [1957] EA 748, observed that:

> " The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependent's, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependent's. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."

26. However, in determining the multiplicand, it was held in by Ringera, J (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 that:

> "In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

27. The deceased died at young age of 21 years and was about to join college, the respondents counsel submitted that a multiplier of 39 years and monthly income of Kshs.10,000/= , and dependency ration of 2/3 would be the appropriate manner of calculating the loss of dependency. On the other hand, the Appellant proposed a multiplier of 20 years, minimum income of Ksh.6,221/= and a multiplier of 1/3. The trial court did consider the same and the authorities cited by both parties and arrived at a figure of Ksh.2,400,000/= based on (10,000 x 12 x 30 x 2/3). The Appellant argues that this was excessive and should be reduced.

28. In the primary suit the income of the deceased was not determined and the trial court fell back on the applicability of regulation of wages order. I find support for this proposition in Nyamira Tea Farmers sacco Vs Wilfred Nyambati Keraita & Another Kisii civil Application No 68 of 2005 (2011) eklr where Asike – Makhandia. J stated that " in absence of proof of income, the trial magistrate ought to have reverted to Regulations of wages (General Amendment) order, 2005. I therefore do affirm the learned Magistrate's finding on this point.

29. In Board of Governors of Kangubiri Girls High school & Another Vrs Jane Wanjiku & Another NYR CA Civil Appeal No 35 of 2014 (2014) eklr, the court of Appeal stated that, "The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with, a reason." The learned Magistrate did apply a multiplier of 30 years. The deceased died at a young age of 21 years and in considering the multiplier, the courts are also bound to consider the aspect of vagaries of life, imponderables and reasonable life expectancy. Looking at all these factors and given the official retirement age limit is 60 years, the learned magistrates finding on this aspect cannot be faulted.

30. The learned magistrate did consider the minimum wage of Kshs 10,000/=. The Regulation of wages (General) (Amendment) Order, 2010 – legal notice No 98 of 2010, does for provide for various minimum wages for various categories. For general worker, Telephone operator, receptionist and/or storekeeper, it provides for a minimum salary of Ksh11,446/=. The average income applied then of Ksh.10,000/= is less than what Is provided for and cannot be faulted. It also cannot be increased as the respondent did not cross-Appeal on this aspect.

31. With regard to the extent of dependency and the ration to be used, in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J. as he then was, was:

> " ...constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track."

32. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, it was the opinion of the Court of Appeal that:

> " There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss..."Dependancy" or "dependency" is the relation of a person to that by which he is supported...The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation...But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person...In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half."

33. The learned magistrate used a dependency ration of 2/3 I do find that at a young age of 21 years, in all probability the deceased would not have spent more than half her income in supporting her parents and by extension her brother. The court takes judicial notice of the fact that as a society it is the children who in most instances chip in to help alleviate family economic/financial challenges and it is a fact that daughters have stepped up their role in this aspect. Be that as it may I do find that the ration of 2/3 is on the higher side and reduce the same to ½. The loss of dependency is thus calculated and reduced to (kshs.10,000 x 12 x 30 x ½ = 1,800,000/=).

34. Finally on the issue of special damages, though pleaded and not specifically proved, it has been held severally that reasonable funeral expenses are awardable. The award of Ksh.18,200/= incurred for the same is therefore justified.

Disposition

35. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal partially succeeds with respect to the award of loss of dependency. The trial Magistrate award of Kshs.2,400,000/= on this head is reduced to Ksh.1,800,000/=.

36. The award therefore shall be adjusted as follows

    a. Liability 80:20 in favour of the Respondents.

    b. Pain and suffering Kshs.10,000/=

c. Loss of Expectation of life Kshs.100,000/=

d. Loss of dependency Kshs.1,800,000/=

total Kshs 1,910,000/=

Less 20% contributory Negligence (Kshs.382,000/=)

37. Amount Awarded Kshs1,528,000/= plus costs and Interest.

38. Each party will bear their own costs of this Appeal.

39. It is so ordered.

JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 26TH DAY OF APRIL, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 26th day of April, 2024

In the presence of: -

No appearance for the Appellant

No appearance for the Respondent

Sam Court Assistant