



REPUBLIC OF KENYA



Onyango & another v Juma (Suing as the Legal Representative of the Estate of Patrick Juma Nduzi (DCD)) (Civil Appeal E114 of 2022) [2024] KEHC 11403 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E114 OF 2022**

DK KEMEL, J

SEPTEMBER 30, 2024

BETWEEN

PATRICK JOSEPH ONYANGO 1ST APPELLANT

DAVID ODHIAMBO OPONDO 2ND APPELLANT

AND

EVERLYNE NEKESA JUMA RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK
JUMA NDUSI (DCD)**

*(Being an Appeal against the judgement and decree of the Hon. C.A.S. Mutai, the Chief
Magistrate in Bungoma delivered on 4th November 2022 in Bungoma CMCC No. 85 of 2020)*

JUDGMENT

Background

1. This appeal is against the award of quantum by the trial Court in respect of an accident involving a motor vehicle registration number KAL 278X and a cyclist which occurred on 30th September 2019, while the deceased was lawfully cycling along Bungoma-Malaba road particularly at Bukembe Market when the Appellant's motor vehicle registration number KAL 278X violently knocked him down thereby occasioning him fatal injuries which led to his death.
2. Vide a plaint on 24th February 2020 and amended on 17th February, 2021, the Respondent instituted a suit at the lower Court against the Appellants claiming damages under the *Fatal Accidents Act* and the Law Reforms Act, special damages, costs and interests of the suit.
3. The Appellants entered appearance and filed their statement of defence dated 20th March 2021 denying all the averments in the amended Plaint and alleging that the accident was as a result of the negligence of the deceased.



4. On 21st July 2022, the parties recorded a consent before the trial Court agreeing on liability at 80:20 in favour of the Respondent herein which the trial Court duly endorsed and the issue on quantum was dispensed with via the tendered viva voce evidence.
5. PW1 was Everlyne Nekesa Juma who testified that the deceased was her husband and that he died in a road traffic accident. The Court adopted her recorded statement dated 20th February 2020 and her attached documents as her evidence in chief. She prayed for general, special and costs of the suit. On cross-examination, she stated inter alia; that she did not witness the accident; that her husband was a farmer and boda boda rider; that her children were in school at the moment and that she was the one paying the fees; that she incurred burial expenses to a tune of Kshs. 88,950/= which was raised and that she paid her advocate fees in the sum of Kshs. 30,000/=; that her husband died on the spot and that he was 48 years old; that she did not avail any banking slip to ascertain the income or the profits her husband made.
6. PW2 was Eunice Mukhebi who relied on her statement dated 1st February 2020. On cross-examination, she stated inter alia; that the deceased was her neighbour and who was beside the road at the time of the accident; that the point of impact was at the side of the road as one faced Bungoma; that landing of the vehicle was on the right side as one faced Webuye; that she had never testified in any criminal proceedings. On re-examination, she maintained that she witnessed the accident.
7. PW3 was No. 81578 Pc Jackline Were who produced the police file containing the abstract. She testified that the accident took place on 30.9.2019 at around 5.00 pm along Webuye road at Bukembe area which involved motor vehicle registration number KAL 278 X and motor cycle registration number KMEC 357 S and a pedal cyclist named Patrick Ndusi who died on the spot. She further stated that the vehicle was owned by the 1st Appellant herein and that the driver carelessly overtook an unknown trailer and without due care to other road users, he collided with the pedal cyclist who died on the spot. That the Appellants were responsible for the accident as the pedal cyclist was riding from Bungoma direction towards Webuye direction and that the point of impact was on the lane of the pedal cyclist. That the driver of motor vehicle registration number KAL 278 was to be charged with an offence of causing death by dangerous driving. On cross-examination, she stated inter alia; that the 1st Appellant was charged with an offence of causing death by dangerous driving but she could not recall the case number; that the point of impact was five metres off the road; that she did not have the court proceedings and judgement; that the rider and motor vehicle were headed towards the same direction; that the point of impact was on the right side of the road while facing Bungoma from Webuye direction; that investigations were completed on a date not indicated on the police file; that she could not blame anybody so far. On re-examination, she stated that the accident happened when the driver was in the process of overtaking.
8. Parties later entered into a consent on liability in the ratio of 20% to 80% in favour of the Respondent. The Appellants closed their case without calling evidence. Parties thereafter filed and exchanged submissions.
9. The trial Court issued a judgment on quantum and which was as follows:
Pain and suffering Kshs. 35,000/=
Loss of expectation of life Kshs. 200,000/=
Loss of dependency Kshs. 2,464,000/=
Special Damages Kshs. 2,787,550/=
Total Kshs. 2,787,550/=



Balance Kshs. 1,859,000/=

Costs on the above figures and interest at Court rates from the time of judgement.

10. Aggrieved by the judgment of the trial Court, the Appellants filed its memorandum of appeal dated 16th November 2022. The grounds are essentially:
 - i. That the learned trial magistrate erred in law and fact in adopting the wrong principles of assessment of damages herein thereby arriving at an erroneous decision.
 - ii. That the learned trial magistrate erred in law and fact by adopting a sum of Kshs. 14,000/= as the multiplicand despite the fact that the same was not proved and/or supported by evidence on record.
 - iii. That the learned trial magistrate erred in law and fact by adopting the maximum multiplier of 22 years without taking into account the vicissitudes and vagrancies of life.
 - iv. That the learned trial magistrate erred in law and fact in adopting a dependency ration of 2/3 when the same was not proved/and or supported by evidence on record.
 - v. That the learned trial magistrate erred in law and fact in awarding excessive damage for loss of expectation of life considering the age of the deceased.
 - vi. That the learned trial magistrate erred in law and fact in failing to consider the submission of the Appellants on quantum.
11. The Appellants prayed for orders inter alai: that the appeal be allowed; that the subordinate Court's judgement be set aside; that this Court to review the quantum downwards; that this appeal be allowed with costs to the Appellants
12. Vide the directions of this Honourable Court dated 17th May 2024, the appeal was to be canvassed by way of written submissions. Both parties duly filed and exchanged submissions.

Analysis and determination

13. I have duly perused, analyzed and considered the record of appeal as well as the submissions both in this court and in the lower Court.
14. This is the first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, i am duty-bound to re-evaluate and reconsider the evidence adduced before the trial court in order to draw my own independent conclusions remembering that, unlike the trial court, i did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See *Selle V Associated Motor Boat Company ltd* (1968) EA 123; *Williamson Diamond Ltd V Brown* (1970) EA 1.
15. In this appeal, it is clear from the Appellants' memorandum of appeal that the Appellants are mainly challenging the quantum of damages to be specific under the head of loss of dependency. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried



the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate).”

16. It was therefore held by the same court in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

17. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

18. I have considered the evidence tendered before the trial Court, the learned trial magistrate’s brief judgment, the grounds of appeal, the submissions filed by the parties and all the authorities cited.

19. This being an appeal challenging the trial magistrate’s decision on quantum of damages only, it is important to set out the principles that guide an appellate Court in deciding whether or not to interfere with the damages awarded by the trial Court. In the celebrated case of *Kemfro Africa Limited t/a Meru Express Services (1976) & Another V Lubia & Another (No. 2) (1985)* eKLR, the Court of Appeal expressed itself 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 to be that; it must be satisfied that either that 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...”

20. In *Mariga V Musila* (1984) KLR 251 the same court also stated as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles...”



21. It is the law in Kenya that general damages must be compensatory. When one looks at the impugned Judgment, it must be fair in the sense of what the claimant suffered. In my view, whether at the trial Court or on appeal, claimants should not aspire to a perfect compensation. They should take what has reasonably been found by the Court as a fair compensation since the said award cannot by any chance replace a damaged part of a human body but that the same suffices as the tortfeasor's earnest response (sorry) for the accident.
22. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in the assessment of damages under the loss of dependency awarded to the respondents in view of the evidence on record. I will start with the damages awarded under the Law Reform Act. It is important to point out at this juncture that general damages under the Law Reform Act are awarded for the benefit of the deceased's estate in two categories only namely for pain and suffering and secondly, for loss of expectation of life.
23. At this stage, I wish to point out in passing that only dependants recognized under the Fatal Accidents Act are supposed to benefit from damages awarded for loss of dependency. Section 4(1) of the Fatal Accidents Act defines dependants as the wife, husband, parent and child of the deceased person.
24. I do stand guided by the principle that there is no golden rule in the assessment of damages in respect of a deceased. The heads, global or mixed approaches have been applied in the superior Courts. What is beyond doubt is that irrespective of the age of a deceased, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents.
25. Under the heading of pain and suffering, the trial Court held that the deceased died on the spot and made the award of Kshs. 35,000/=. I do note that the Appellant has no contention with this award. I, therefore, uphold the award by the trial magistrate.
26. Under the heading of loss of expectation of life, the trial court held that the deceased died at the age of 48 years and made the conventional award of Kshs. 200,000/=. I do note that the appellant has no contention with this award. I, therefore, uphold the award by the trial magistrate.
27. Under the heading of loss of dependency, the trial Court held that the deceased was aged 48 years and that he was a businessman earning Kshs. 30,000/= per month but no proof was availed in Court to substantiate the same. Counsel for the Respondent in the Lower Court urged the magistrate to adopt a sum of Kshs. 30,000/= as the deceased's monthly income placing reliance on the case of Malindi HCA No. 47 of 2017 Joseph Mwangi Wanyeki vs Alex Murithi Mucoki & another where the Court adopted a multiplicand of Kshs. 30,000/= for the deceased who was a boda boda rider. On multiplier, he urged this Court to adopt one of 22 years relying on the case of Migori HCA No. 16 of 2020 Caleb Juma Nyabuto vs Evans Otieno Magalk & another (suing as the legal representative of James Magak Kawere (deceased) where the Court adopted a multiplier of 15 years for 50 year deceased who was a carpenter and noted that a carpenter is not entitled to retirement age.
28. In rebuttal, the Appellant urged the magistrate to use an amount in line with the maximum Regulations of Wages Guidelines 2015 which entitles the deceased a wage of Kshs. 7,240.95/=. He also urged this Court to apply a multiplier of 5-8 years.
29. The trial Court adopted a multiplier of 22 years which the Appellants argued that it failed to factor in the vicissitudes and vagaries of life. Further, the multiplicand of Kshs. 14,000/- was not based on any availed evidence. He urged this Court to set aside the multiplier of 22 years and substitute the same with that of 8-10 years and that the multiplicand of Kshs.8,109/= is appropriate in this instant appeal.



30. The deceased was aged about 48 years old when he met his death. The life expectancy as per statistics given by the World Bank is 66.7 years. The retirement age in Kenya for all civil servants is 60 years. I shall take the retirement age which would be 60 years meaning that the working life of the deceased would be 18 years on average. In this case, and in the absence of any debilitating health concerns, the Court shall make only a small reduction of three (3) years on the public sector retirement age of 60 so that the multiplier of 9 years is used in the computation. The Court relies on the case of Mam & Poa Vs. Lawrence Micha Condit (2015) eKLR and Alfalah Wholesalers Ltd Vs. Florence Martha Chege (suing as a personal representative of Patrick Chege (2017) eKLR where the multiplier of 13 years was adopted for a deceased who died at the age of 42 years old. In this case, the multiplier of 22 years adopted by the trial magistrate was in the circumstances unreasonable. Hence, the award under this head should be $11,219.50 \times 12 \times 9 \times 2/3 = 807,804/-$.
31. On the multiplicand, in the instant appeal, there was no satisfactory proof of the monthly income, where there is no salary proved or employment. The Appellants trial Court submissions urged the trial Court to rely on Maximum Wages Bill Guidelines. I believe the appropriate regulations to guide this Court will be the Regulation of Wages (General) (Amendment) Order, 2015 to decipher the appropriate wage for a general labourer as the deceased was a boda boda rider cum farmer. The most appropriate wage was Kshs. 11,219.50/ - for an ungraded artisan. I find the multiplicand of Kshs. 14,000/= as adopted by the trial magistrate was in the circumstances unreasonable and i find good reasons to interfere with this award.
32. On the dependency ration, it was the evidence of PW1 that the deceased was survived by four children and one is already married. I have noted that the appellant did challenge the dependency ratio of 2/3 adopted by the trial magistrate. The deceased was the family's sole breadwinner. He was married and blessed with four children. The deceased was responsible for paying the school fees for his children. The said dependency ratio of 2/3rd is appropriate and should be maintained.
33. Lastly, on special damages, it is trite law that special damages must be specifically pleaded and proved. I do note that the Appellant has no contention with this award. I, therefore, uphold the award by the trial magistrate.
34. The upshot of the foregoing observations is that the appeal partly succeeds. The lower Court's award of Kshs. 2,464,000/= as damages for loss on dependency is hereby set aside and substituted with an award of Kshs 807,804/=.The rest of the amounts awarded remain undisturbed and are as follows:
- a. Pain and suffering-----Kshs. 35,000
 - b. Loss of expectation of life-----Kshs.200.000
 - c. Loss of dependency-----Kshs. 807,804
 - Total sum awarded-----Kshs.1,042,804/=
 - f. Less 20% contributory negligence-----Kshs.208,560.8/=
 - Net figure awarded-----Kshs. 834,243.2/=

The Appellants are awarded half costs of the appeal while the Respondent will have full costs in the lower court.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.

D.KEMEI



JUDGE

In the presence of :

Miss Langat for Appellants

Shikhu for Mukisu for Respondent

Kizito Court Assistant

