



**West Kenya Sugar Co. Ltd v Wachiye & others (Suing as the Legal Representative/Administrator of the Estate of Elias Simiyu (DCD) (Civil Appeal E036 of 2023) [2024] KEHC 11449 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11449 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E036 OF 2023  
DK KEMEL, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**WEST KENYA SUGAR CO. LTD ..... APPELLANT**

**AND**

**DAVID WABWILE WACHIYE & OTHERS (SUING AS THE LEGAL REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF ELIAS SIMIYU - DCD) ..... RESPONDENT**

*(Being an Appeal against the judgement and decree of the Hon. C. Maundu, the Chief Magistrate in Bungoma delivered on 25th April, 2023 in Bungoma CMCC No. 195 of 2020)*

**JUDGMENT**

**Background**

1. This appeal is against liability and the award of quantum by the trial Court in respect of an accident involving a tractor registration number KCBT 773/ZE and a motor cycle registration number KMEX 533V Boxer. The accident occurred on 26<sup>th</sup> June 2020, while the deceased was lawfully travelling as a pillion passenger at Nasiande area after Kiminini River Bridge along Brigadia-Tongaren-Naitiri Road and resulted in the deceased sustaining severe bodily injuries resulting to his instant death.
2. On 29<sup>th</sup> November 2022, the parties recorded a consent letter dated 3<sup>rd</sup> October 2022 duly executed by both parties before the trial Court agreeing on liability at 80:20 in favour of the Respondent herein which the trial Court duly endorsed and that the issue of assessment of quantum was dispensed with via written submissions.
3. The Appellant's in the lower Court submitted that the parties apportioned liability at 20:80 in favour of the Respondent and proceeded to submit the aspect of quantum under the Fatal Accidents and Law Reforms Acts.



4. Under pain and suffering, the Appellant submitted that the deceased died on the spot and proposed an award of Kshs. 20,000/= placing reliance on the case of Muthike Nyaga (suing as the administrator of the estate of James Githinji (deceased) vs Dubai Super Hardware (202) eKLR.
5. Under loss of expectation of life, the Appellant submitted that the conventional sum of Kshs. 100,000/= was appropriate placing reliance of the case of Martha S. Omondi vs Webuye Escort Co. Ltd BGM HCCC No. 84 of 1998 where the Court made an award of Kshs. 60,000, however, due to inflation the Appellant proposed an award of Kshs. 100,000/=.
6. Under loss of dependency, the Appellant proposed that since the deceased had three dependents who were minors, there was no evidence presented on how much he spent on them thus he must have spent 2/3 of his income for their upkeep and maintenance. On the multiplier, he refuted the claim of the Respondents of 26 years since the deceased would have worked until 60 years old, setting the multiplier at 17 years for purposes of computation taking into consideration the vagaries of life. The Appellant worked it out as  $Kshs. 13,375 \times 12 \times 17 \times 2/3 = 1,819,000/=$ . Reliance was placed on the case of Martha S. Omondi vs Webuye Escort Co. Ltd BGM HCCC No. 84 of 1999-Ringera.
7. The Appellant proposed the final award to be as follows:
  - i. Pain and Suffering Kshs. 20,000/=
  - ii. Loss of expectation of life Kshs. 100,000/=
  - iii. Loss of dependency Kshs. 1,918,000/=
  - iv. Less 20% contribution Kshs. 363,800/=
  - Total Kshs. 1,575,200/=
  - v. Plus costs and interest
8. On the other hand, the Respondents submitted that the issue of liability was settled at 80:20 in favour of the Respondent on 31<sup>st</sup> May 2022.
9. On quantum, the Respondents submitted that as per the availed PEXH.10, the deceased's net income was Kshs. 18,722/=per month; that the current age of retirement is 60 years old thus setting the multiplier at 26 years and that he would have lived that long; concurred with the Appellants on the fact that the deceased must have spent 2/3 of his income for the upkeep and maintenance of the minors. The Respondent proposed the loss on dependency as follows:  $(18,722 \times 26 \times 12 \times 2/3)$  less 20% contribution=3,245,340.
10. The trial court issued a judgment on quantum and which was as follows:
 

Pain and suffering Kshs. 60,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency Kshs. 10,053,824/=

Total Kshs. 10,213,824/=

Less 20% Kshs. 2,042,764/=

Amount payable Kshs. 8,171,059/=

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



11. Aggrieved by the judgment of the trial Court, the Appellant filed its memorandum of appeal dated 4<sup>th</sup> May 2023. The grounds are essentially:
  - i. That the learned trial magistrate erred in law and fact by delivering judgement not supported by documentary evidence on record.
  - ii. That the learned trial magistrate delivered a judgement not consistent with the evidence and submissions of the parties.
  - iii. That the learned trial magistrate failed to consider the submissions and case law in delivering his judgement.
  - iv. That the learned trial magistrate erred in law in assessment of law of dependency and the same was not supported by evidence case law and legal precedent.
  - v. That the learned trial magistrate erred in law in failing to discount damages and subject the same to taxation due to accelerated income hence breaching the established law and practice.
  - vi. That the learned trial magistrate erred in law in failing to make an investment order despite knowledge that there were minors to the estate of the deceased.
12. The Appellant prayed for orders inter alia: the appeal be allowed and the subordinate Court's judgement be set aside and this appeal be allowed with costs to the Appellant.
13. Vide the directions of this Court dated 2<sup>nd</sup> April 2024, the appeal was to be canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
14. I have duly perused, analyzed and considered the record of the lower court as well as the submissions filed herein.

### **Analysis and determination**

15. 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.
16. In this appeal, it is clear from the Appellants' submissions that the Appellant is only 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).”



17. 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...”

18. 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.”

19. 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.

20. 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...”

21. 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...”

22. 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.

23. 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.
24. 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.
25. 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.
26. Under the heading of pain and suffering, the trial Court held that the deceased died on the spot and made the award of Kshs. 60,000/=. 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 expectation of life, the trial court held that the deceased died at the age of 34 years and made the conventional award of Kshs. 100,000/=. I do note that the appellant has no contention with this award. I, therefore, uphold the award by the trial magistrate.
28. Under the heading of loss of dependency, the trial Court held that the deceased was aged 34 years and that he was a medical laboratory technologist earning a gross salary of Kshs. 78,040/= and less security deduction of Kshs. 12,203.6/= and calculating the net as 62,836/4 adopting a multiplier of 20 years and dependency ratio of 2/3. The Appellant submitted that the gross salary of the deceased being Kshs. 78,040/= less 30% tax, NHIF deduction of Kshs. 1,400/= and NSSF deduction of Kshs. 1,200/= would have left a net figure of Kshs. 51,040 /= and that the said figure ought to have been discounted to allow for legitimate consideration. The Appellant proposes this Court reassess the multiplicand as (Kshs. 35,000×12×20×2/3) less 20% contribution=Kshs. 4, 520,000/=.
29. In rebuttal to the Appellant's submissions, the Respondent concurred with the decision of the lower Court and urged this Court to uphold it.
30. The question that arises is, what is this net salary? Is it gross salary less the statutory deduction only, or does it include other deductions.
31. In that regard, some courts have held that, net salary is the gross salary less the statutory deductions only. In the case of; Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR the Court of Appeal stated thus: -

“ 12. In this case, there was no complicated record of evidence to evaluate. Only Hellen testified and produced documentary evidence. On the issue of the salary, the deceased's last pay-slip was produced and it showed clearly his gross earnings of Kshs 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Kshs 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error.



13. In the case of *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the *Fatal Accidents Act* which we cite in part as follows:

“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 dependants, 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 dependants. 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”

14. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions.”

32. This position has been reiterated in various decision of the Courts. In *Joseph Ndegwa & another v Japhet Ndungu Muboro the Legal Representative of the Estate of late Dishon Irungu Ndungu* [2019] eKLR Mwangi, J stated that: -

“42. I am persuaded by the argument that non statutory deductions are in essence for the benefit of the family. In the present case, the statutory deductions that are not for the benefit of the family are:

- i. Tax deductions Kshs 18,309.00
- ii. NHIF Kshs 320.00
- iii. NSSF Kshs 200.00
- iv. Fringe benefit tax Kshs 14.05
- v. University Loans Kshs 3,489.30

Total deductions from Gross Kshs 22,332.35

These deductions cannot be included in the deceased's net salary.

43. The deductions for aspects that the deceased voluntarily subscribed to such as the Pension scheme, Emergency Loans, Co-operative shares, and Co-operative loan are deductions which form part of his earnings and are a benefit to his estate that cannot be withheld from his net earnings.”

33. Having considered the law and legal authorities referred afore, I find the net pay applicable is the gross salary less statutory deductions only and which leaves the net salary at Kshs. 65,361.2/= . Consequently, the award on loss of dependency works out as follows:  $65,361.2 \times 12 \times 20 \times 2 / 3 =$  Kshs 10,457,792/=.

34. This Court will not lose sight of the fact that even though money can compensate to an extent, it cannot create an experience to be the same as it were before the event giving rise to the action. Lord Morris in *West v Sheppard* [1964] AC 326 stated;

“ All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation. ”



35. I, therefore, interfere with the award by the trial magistrate under this heading. The amount in that regard will increase by a small margin of hundreds of shillings only.
36. The Appellant failed to discharge its duty under Section 107 of the *Evidence Act* to warrant this Court to interfere with the award of the trial Court regarding the award on loss of dependency. The assessment by the trial court was cogent and must be upheld save only that the amount will increase by a sum of Kshs 403, 968/. The appellant's appeal must thus fail.
37. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The trial court's judgement is upheld save that the award of loss of dependency will be increased by a sum of Kshs 403, 968/. Hence, the awards due to the Respondents shall be as follows:
- a. Pain and suffering-----Kshs. 60,000
  - b. Loss of expectation of life-----Kshs.100.000
  - c. Loss of dependency-----Kshs. 10,457,792/=
  - Total sum awarded-----Kshs. 10,617,792/=
  - f. Less 20% contributory negligence-----Kshs.2,123,558.4/=
  - Net figure awarded-----Kshs. 8,494,233.6/=
  - g. Plus, costs and interest.

The costs of the appeal are awarded to the Respondents.

It is hereby so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024**

**D. Kemei**

**Judge**

In the presence of :

Miss Mutunga for Masinde for Appellant

Miss Oriko for Kassim for Respondents

Kizito Court Assistant

