



**Muthegi & another v Waswa (Suing as the Administrator of the Estate of Brigid Aplundo Wafula)  
(Civil Appeal 505 of 2019) [2024] KEHC 11240 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL 505 OF 2019  
JN NJAGI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**JENIFER WATHENJENI MUTHEGI ..... 1<sup>ST</sup> APPELLANT**

**HASBAH KENYA LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FREDRICK WAFULA WASWA ..... RESPONDENT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF BRIGID APLUNDO  
WAFULA**

*(Being an appeal from the judgment and decree of Hon. M. W. Murage,  
SRM, in Milimani CMCC No. 4657 of 2016 delivered on 1/8/2019)*

**JUDGMENT**

1. The respondent herein instituted suit at the lower court against the appellant herein in his capacity as the administrator of the estate of his late daughter, Brigid Aplundo Wafula, wherein he was seeking general and special damages after his said daughter was killed in a road traffic accident the causation of which was blamed on the appellant. The trial court upon hearing the parties awarded the respondent Ksh.1,500,000/= in lost years, the deceased having died at the age of 9 years. The appellants were dissatisfied with the said decision and filed the present appeal.
2. The appeal raised only one ground of appeal which is that:-

The learned magistrate erred in principle in making an award of Kshs. 1,500,000/= which is manifestly excessive and outside the reasonable margin for awards of lost years in cases of minors.



3. The appeal was disposed of by way of written submissions of the counsels appearing for the parties.

### **Appellants submissions**

4. The appellants submitted that in arriving at the award of Kshs. 1,500,000/= for lost years, the trial court did not consider awards by the High Court in similar cases.
5. The appellant made reliance on the case of Chen Wembo & 2 others vs. IKK & another (suing as the legal representative and administrators of the estate of CRK (deceased) (2017) eKLR where the trial magistrate awarded Ksh.1,680,080/= for loss of dependency on a 12 year old. On appeal, Meoli J. set aside the award and made a global award of Kshs. 600,000/=.
6. The appellant also relied on the case of Chhabhadiya Enterprise ltd & another vs. Gladys Mutenyo Bitali (Suing as the administrator and Personal Representative of the Estate of Linet Simiyu (deceased) (2018) eKLR where the trial court awarded Kshs. 1,200,000/= for loss of dependency for a 12 year-old. The same was set aside on appeal and the appellate court made a global award of Ksh. 700,000/=.
7. The appellant further cited the case of Rosemary Onyango & another vs. Mohamed Jenjewa Ndoyo & another (2019) eKLR where the appellate court overturned an award of Ksh. 1,000,000/= for loss of dependency where the minor died at the age of 7 years and substituted it with an award of Kshs. 500,000/=.
8. Also cited was the case of Anthony Konde & another vs. RMC (The representative of FC (deceased) (2020) eKLR, where the appellate court set aside an award of Kshs. 2,000,000/= for loss of dependency for a deceased who died at the age of 7 years and substituted it with an award of Kshs. 900,000/=.
9. In view of the cited authorities, the appellants urged this court to set aside the award made by the trial court and substitute it with an award of Ksh.800,00/=, taking into consideration that the minor died at the age of 9 years.

### **Respondent's submissions**

10. The respondent filed his submissions dated 19<sup>th</sup> July 2023 wherein it submitted that it is now trite that the appellate court will not disturb an award for damages unless it is shown that the trial court applied the wrong principles or misapprehended the evidence. In this respect he respondent cited the case of Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 (2004) 2 KLR 55 where it was held that:

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 difference 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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470).

11. The appellant submitted that the age of the deceased is a relevant factor to be taken into account when assessing damages for loss of dependency in the case of a minor. In support of this proposition, the



respondent relied in the case of Daniel Mwangi Kimemi & 2 others vs. JGM & another (2016) eKLR where the court held that:

We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen-year-old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four-year-old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law.

12. It was submitted that the trial magistrate in arriving at the global figure of Kshs. 1,500,000/= took into account the age of the deceased at the time of his death. That the court did not consider any irrelevant factors and therefore the appellants cannot claim that the award was erroneous.
13. It was further submitted that 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 had it tried the case at first instance. The court can only interfere where it is shown that there was misapplication of the law.
14. In support of the award of Ksh.1,500,000/=, the respondent relied on the following cases:-
  - Daniel Mwangi Kimemi & 2 others v J. G. M. & another (2016) eKLR where a global award of Ksh.1,000,000/= was made for loss of dependency for a minor who died at the age 9 years.
  - S.M.K vs. Joseph Nkari Makaga Civil Appeal No. 66 of 2011 (2017) eKLR where an award of Ksh. 800,000/= in damages for loss of dependency was made for a deceased minor who died at the age of 6 years.
  - Michael Kamotho Maina & another vs. JMW (2020) eKLR an award of Ksh. 1,000,000/= was upheld on appeal for a deceased who died at the age of 6 years.
15. The respondent submitted that assessment of damages is a matter of the court's discretion and that each case depends on its own facts. More so that the court has to consider the passage of time and inflation. That it has not been demonstrated that the trial court proceeded on the wrong principles or misapprehended the evidence during the trial in order to warrant interference with the award. Therefore, that the trial magistrate was within the law in arriving at the award of Ksh.1, 500,000/= . The respondent urged this court to dismiss the appeal with Costs.

### **Analysis and Determination**

16. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the Trial Court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the Trial Court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
17. In awarding damages, the court has to bear in mind that the general method of approach is that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases - see the Court of Appeal decision in *Stanley Maore vs. Geoffrey Mwenda* [2004] eKLR.



18. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the case of *Bashir Butt v Khan* Civil Appeal No. 40 of 1977 [1978] eKLR thus;

“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.”
19. In *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited* [2015] eKLR the Court of Appeal aptly restated this principle as follows:

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages.”
20. The deceased in this matter was a minor aged 9 years. The age of a minor is a relevant factor in awarding damages for loss of dependency as was held by the Court of Appeal in *Kenya Breweries Ltd v Saro* [1991] KLR 408 (*supra*).
21. The issue for determination in this appeal is whether the award of Ksh.1,500,000/= was inordinately high as to warrant interference by this court.
22. I have considered the principles set out above and particularly that the deceased died at the age of 9 years. I have considered the awards cited by the respective advocates for the parties. The advocates for the appellant urged the court to reduce the award to Ksh.800,000/= while the respondent's advocates supported the award of Ksh.1,500,000/=.
23. In the authorities cited, the awards for loss of dependency in respect to deceased minors aged between 6 and 12 years ranged between Ksh.500,000/= and Ksh.1,000,000/=. In the cases of *Michael Kamotho Maina & another vs. JMW* (2020) eKLR and *Anthony Konde & another vs. RMC* (The representative of FC (deceased) (2020) eKLR, which were cited by the advocates for the respondent, the awards of Ksh.1,000,000 and Ksh.900,000/= respectively were made in the year 2020, which was after the award in this case was made. The respondent did not cite any authority where an award of Ksh.1,500,000/= was made in 2019 or thereabouts for a 9 year-old. In my view, the award of the trial court was excessively high in comparison to other High Court awards made at the same time. There is reason for this court to interfere with the award. I however do not agree with the advocates for the appellant that the award should be reduced to Ksh.800,000/=. I consider a sum of Ksh.1,000,000/= to be more reasonable.
24. The upshot is that the award of Ksh.1,500,000/= made by the trial court in respect to loss of dependency is set aside and substituted with an award of Ksh.1,000,000/=.
25. Each party to bear its own costs to the appeal.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**J. N. NJAGI**



## **JUDGE**

In the presence of:

Miss Obwang for Appellants

Mr Makhanu for respondents

Court Assistant – Amina

30 days Right of Appeal.

