



**Onkoba v Ali & another (Both suing as legal representative of the Estate
of the Late Lukman Hamisi Mwamshindo - Deceased) (Civil Appeal
E265 of 2023) [2024] KEHC 11265 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E265 OF 2023
JK NG'ARNG'AR, J
SEPTEMBER 25, 2024**

BETWEEN

STEPHEN OKARI ONKOBA APPELLANT

AND

**MWANAMINA ALI & HAMISI ABDALLA (BOTH SUING AS LEGAL
REPRESENTATIVE OF THE ESTATE OF THE LATE LUKMAN HAMISI
MWAMSHINDO - DECEASED) RESPONDENT**

JUDGMENT

1. The Plaintiffs/Respondent, the administrators and legal representatives of the estate of the deceased filed a suit against the Defendant/Appellant who was the registered and/or insured and/or beneficial owner of the motor vehicle registration number KBB 352. That on or about the 24th day of July 2019, the deceased was lawfully walking off the road along Likoni-Ukunda Road in Mkunazini area, when motor vehicle registration number KBB 352K which was being driven at a very high speed, so negligently and/or recklessly that it knocked down the deceased occasioning fatal injuries and for which the Defendant/Appellant was liable and/or vicariously liable for the loss and damages suffered by the estate and family of the deceased and Plaintiffs/Respondents.
2. The Plaintiffs/Respondents averred that at the time of the accident, the deceased was aged 9 years and would have become a teacher earning an average income of Kshs. 10,000 per month. That there was therefore loss of future income and/or lost years and/or lost dependency with a multiplier of 50 years. That the deceased was survived by dependants/his parents who as a result of the death suffered loss and damage. That the deceased died several hours after the accident and throughout those hours, he underwent acute and excruciating pain. The Plaintiffs/Respondents therefore prayed for judgments against the Defendant/Appellant for general and special damages, loss of future income and/or lost



years and/or dependency, loss of expectation of life, pain and suffering before death, and costs and interests.

3. The Defendant/Appellant denied averments in the Pleat and that if at all an accident occurred as alleged, the same was solely caused and/or substantially contributed by the negligence of the Plaintiff in failing to have regard to other road users and particularly motor vehicle registration number KBB 352K Nissan Matatu, failing to keep to the pedestrian walk, walking carelessly and dangerously on the road, failing to walk with due care and attention, and failing to move and avoid the accident. The Defendant/Appellant therefore prayed that the Plaintiffs/Respondents' suit be dismissed with costs.
4. In the judgment delivered on 24th August 2023, the court found that the Defendant was 100% vicariously liable for the fatal accident that was caused by the recklessness of the driver. On general damages under the *Law Reform Act*, the court awarded Kshs. 50,000 for pain and suffering and Kshs. 150,000 for loss of expectation of life. On general damages under the *Fatal Accidents Act*, the court awarded Kshs. 1,000,000 for loss of dependency while the court awarded Kshs. 50,000 on special damages. The Plaintiff was also awarded costs of the suit and interest at court rates from the date of judgment.
5. The Appellant being dissatisfied with the decision of the trial court filed the appeal herein through the Memorandum of Appeal dated 22nd September 2023 on grounds that the learned trial magistrate erred and misdirected herself by relying on the wrong principles when assessing damages that were awarded to the Respondent, failed to apply precedents and tenets/principles of the law applicable in awarding damages, by awarding an excessive sum in respect of damages which was inordinately high for soft tissue in the circumstances occasioning a miscarriage of justice, by failing to adequately evaluate the evidence and exhibits and thereby arrive at a decision unsustainable in law, by ignoring the defendant's submissions on record hence arriving at a wrong decision in awarding damages, and by ignoring the evidence of witnesses on record especially the police officer hence arriving at a wrong decision in awarding damages.
6. The Appellant therefore prayed for orders that the appeal be allowed with costs, that the judgment delivered on 24.08.2023 by Hon. L.N. Wasige (SRM) in Garsen Civil Suit No. E2287 of 2019 and judgment delivered on 24.8.2023 be set aside and the costs be reassessed, and the cost of this appeal be borne by the Respondent.
7. The appeal herein was canvassed by way of written submissions. The Appellant in their submissions dated 10th July 2024 contended that damages should represent a fair compensation but must not be excessive as was held in *Jesky Enterprises Limited & Another v Nancy Wachinga Wanjiru & Another* (2019) eKLR which cited with authority the case of *Kigaraari v Aya* (1982-88) KAR 768. The Appellant submitted that the award by the lower court was exaggerated on the part of pain and suffering, loss of expectation of life, and loss of dependency. That comparable injuries should as far as possible be compensated by comparable awards. On pain and suffering, the Appellant relied on decisions in *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR and *Abubakar Abdalla Salim v Tawfiq Bus Services & TSS Bus Service* (2013) eKLR, and proposed that the pain and suffering be reduced from Kshs. 50,000 to Kshs. 20,000.
8. On loss of expectation of life, the Appellant relied on the decision in *Charles Masoso Barasa & Another v Chepkoech Rotich & Another* (2014) eKLR and *Satwidner Singh Bhogal v Satwinder Kaur Benawr & 2 Others* (2004) eKLR in urging the court to reduce the award from Kshs. 150,000 to Kshs. 70,000. On loss of dependency, the Appellant cited *Chabhadiya Enterprise Ltd & Another v Gladys Mutenyo Bitali* (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu) (2018)



eKLR, Palm Oil Transporters & Another v WWN (2015) eKLR and Kitale Industries Ltd & Another v Zakayo Nyende & Another (2018) eKLR and submitted that the global sum of Kshs. 1,000,000 was excessive and that the same be replaced with an award of Kshs. 600,000. The Appellant also prayed for costs of the appeal.

9. The Respondent in his submissions dated 16th July 2024 contended that this appeal is defective and ought to be struck out. That the appeal had been filed out of time without leave of the court contrary to Section 79G of the *Civil Procedure Act* that provides for mandatory requirement of filing an appeal within 30 days of the decree failure of which one ought to seek leave to file it. That the Memorandum of Appeal is also limited to soft tissue injuries yet the deceased herein suffered fatal injuries. That this means the Appellant has pleaded one thing and seeks to prove another without procedurally seeking leave to amend his Memorandum of Appeal. The Appellant relied on pronouncement of the court in *Dakianga Distributors (K) LTD v Kenya Seed Company Limited* (2015) eKLR in submitting that the Appellant is prohibited from departing from his pleadings.
10. The Respondent submitted that the trial court correctly exercised its discretion while coming up with the award for pain and suffering. That evidence showed the deceased was rushed to hospital but was pronounced dead on arrival which means the deceased underwent a lot of pain and suffering on his way to the hospital which would not be the same as someone who died on the spot. The Respondent relied on the holding in *RETCO East Africa Ltd v Josephine Kwamboka Nyachaki & Another* (2021) eKLR and *Premier Dairy Limited v Amarjit Singh Sagoo & Another* (2013) eKLR in urging the court that the trial court rightly exercised its discretion and this court cannot therefore interfere with the award of Kshs. 50,000 under this head.
11. The Respondent also maintained that the court exercised the correct principles in making the award for loss of expectation of life. That the loss of expectation of life ranges between Kshs. 100,000 and Kshs. 200,000. That the Respondent prayed for Kshs. 200,000 before the trial court while the Appellant did not bother to submit on this head. That the trial court considered the authorities presented and awarded Kshs. 150,000 under this head. That guided by the case of *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* (2017) eKLR, the Respondent urged that the award of Kshs. 150,000 was in line with comparable authorities and took into consideration the element of inflation and as such cannot be deemed as inordinately high as to arrive at an erroneous estimate.
12. The Respondent submitted that the court rightly made an award of Kshs. 1,000,000 under the head loss of dependency. That the fact that the deceased was knocked down off the road on the way to school confirms that the deceased was in the process of attaining an education that would be useful to him in the future. That the deceased report card was presented to court which showed that the deceased's performance was above average and therefore potential of professional work in the future. The Respondent relied on the decisions in *Makueni Courts Ltd & Another v Felistus Kanini Ndunda* (Suing as the legal representative of the estate of Eric Mutuku) (2020) eKLR, *Daniel Mwangi Kimemi & 2 Others v GJM & Another* (2016) eKLR and *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* (2017) eKLR in urging the court that there is no justification for interfering with the trial court's award under this head.
13. The duty of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out by the Supreme Court of India in *Santosh Hazari vs. Purushottam Tiwari* (Deceased) by L.Rs (2001) 3 SCC 179 as follows: -

“ A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the



appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the 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 first appellate court had discharged the duty expected of it.”

14. I have considered the Record of Appeal dated 9th April 2024 and submissions by the parties. The issue for determination are: -

Whether the appeal is defective.

a. Whether proper principles were applied in assessing and awarding general damages.

15. On the first issue, the Respondent in their submissions claimed that the appeal was filed out of time by a day and without leave of the court contrary to Section 79G of the Civil Procedure Act. That this qualified the appeal as defective and ought to be dismissed with costs.

16. This court has established that the judgment being challenged was delivered on 24th August 2023. This means that the appeal challenging the decision ought to have been filed on or before 24th September 2023. This court has established on the Judiciary Case Tracking System (CTS) that the Appellant filed the Memorandum of Appeal dated 22nd September 2023 on 23rd September 2023. This was within the 30-day time limit upon which an appeal ought to be filed pursuant to Section 79G of the Civil Procedure Act.

17. This court further notes that the issue of filing the appeal out of time was brought up late in the day in the Respondent’s submissions where the Appellant could not get a chance to ventilate the issue. This is a point of law upon which the Respondent ought to have raised in a preliminary objection. However, be as it may, the issue herein has no basis, is disregarded and which leads us to the next issue for determination.

18. On the second issue, the Appellant on the one hand submitted that there was arbitrary and erroneous award of damages. That there was exaggeration on the part of pain and suffering, loss of expectation of life and loss of dependency. That instead of Kshs. 50,000 awarded by court for pain and suffering, there ought to have been an award of Kshs. 20,000. That instead of Kshs. 150,000 awarded for loss of expectation of life, court ought to have awarded Kshs. 70,000, and that the global sum of Kshs. 1,000,000 awarded for loss of dependency was excessive and court ought to have awarded Kshs. 600,000. The Appellant argued that comparable injuries should as far as possible be compensated by comparable awards. The Respondent on the other hand disputed this position and that the appeal failed to meet the threshold for interference and the same must fail with costs to the Respondent.

19. The principles guiding this court in relooking into the quantum of general damages awarded were set out in *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730 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 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. See *Ilango v Manyoka* (1967) E.A. 705, 709, 713;



Lukenya Ranching and Farming Cooperative Society Limited v Kalovoto (1970) E.A. 414, 418, 419. This court follows the same principles.”

20. Further, the principles that guide courts in assessing damages were outlined in *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR as follows:
- i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
 - ii. The award should be commensurate to the injuries suffered.
 - iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit.
 - iv. Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.
 - v. Awards should not be inordinately too high or too low.”
21. This court has analysed the following comparable cases in determining whether the trial court considered the above principles in awarding damages: -
- a. In *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (2017) eKLR where the court held: -

“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.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
 - b. In *Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali* (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu – Now (Deceased)) (2018) eKLR the court considered the award of Kshs. 100,000/= for loss of expectation of life made under the *Law Reform Act* for a deceased who met her death when she was 12 years old and in class 4.

In *Daniel Mwangi Kimemi & 2 others v J G M & another* (the personal representatives of the estate of N K (DCD)) (2016) eKLR the court held: -

“As a matter of common sense and good judgment, for the deceased who died at the age of nine years; was a student at [particulars withheld] primary school with excellent performance; and the fact that her parents had reasonable expectations that she would finish school, enter the job market and assist them in old age, a sum of Kshs 1,000,000 would be fair compensation under the head of damages for loss of dependency.”
22. I find that Kshs. 50,000, Kshs. 150,000 and Kshs. 1,000,000 awarded for pain and suffering, loss of expectation of life and loss of dependency respectively was not excessive as to amount to an arbitrary and erroneous award. The reasoning of the trial court was correct and there is nothing suggesting that discretion was improperly exercised. The trial court examined the circumstances of each case that



was considered in arriving at the award. This appeal therefore fails and is dismissed with costs to the Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH SEPTEMBER 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

Further order;

30 days stay granted.

In the presence of: -

Njuguna Advocate for the Appellant

Kamau Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

