



**Kyalo & another (Suing on Behalf of the Estate of Samuel Kyalo Nzivo) v Cellz R US Limited  
(Civil Appeal E119 of 2022) [2024] KEHC 13355 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E119 OF 2022  
H NAMISI, J  
OCTOBER 31, 2024**

**BETWEEN**

**SILVERSTER MUTISYA KYALO ..... 1<sup>ST</sup> APPELLANT**

**SUSANA NZISA MULI ..... 2<sup>ND</sup> APPELLANT**

**SUING ON BEHALF OF THE ESTATE OF SAMUEL KYALO NZIVO**

**AND**

**CELLZ R US LIMITED ..... RESPONDENT**

*(Being an Appeal against from the Judgement of Hon. M.E Analo, Resident Magistrate delivered on 20 July 2022 in Machakos CMCC No. 148 of 2021)*

**JUDGMENT**

**Introduction**

1. This appeal arises from a suit by the Appellants against the Respondent following a road traffic accident that occurred on 19th August 2019 along the Machakos – Kathiani Road. As a result of the accident, Samuel Kyalo Nziva, who was a lawful pedestrian at the time, was fatally injured. In their Amended Plaintiff dated 30th November 2021, the Appellants sought judgement for:
  - i. General Damages for loss of dependency, loss of expectation of life and pain and suffering under the Law Reform Act and Fatal Accident Act;
  - ii. Special damages of Kshs 415,550/=
  - iii. Cost of the suit
  - iv. Interest on (i), (ii) and (iii) at court rates
  - v. Any other/further relief that the court may deem fit and just to grant



2. The Respondent entered appearance and filed a Statement of Defence dated 3 May 2021. Parties recorded a consent on 8 June 2022 on the issue of liability in the ratio 90:10 in favor of the Appellants. The matter proceeded to hearing on the issue of quantum.
3. At the hearing, only the 1st Appellant testified. He adopted his witness statement dated 11 May 2022 and produced a Bundle of Documents. It was his testimony that the Deceased, his late father, was a small-scale farmer and earned about Kshs 100,000/- per month. In terms of dependents, it was the 1st Appellant's testimony that the Deceased had 8; his wife, 6 children as well as the Deceased's mother. The Deceased was the sole bread winner.
4. The Respondent did not adduce any evidence nor file any submissions in respect of the claim.
5. The trial court entered judgement in favor of the Appellants as follows:
  - i. General Damages  
Under the *Fatal Accidents Act* (loss of dependency) Kshs 300,000/=  
Pain and suffering under *Law Reform Act* Kshs 20,000/=  
Loss of Expectation of Life Kshs 100,000/=
  - ii. Special Damages Kshs 550/=  
Total Kshs 420,550/=  
Less 10% contribution Kshs 42,000/=  
Net Total Kshs 378, 000
  - iii. Costs of the suit and interest at court rates. Interest on general damages to run from the date of the suit until payment in full. Interest on special damages will accrue from the date of filing suit until payment in full
6. Aggrieved by this decision, the Appellants lodged an appeal on the following grounds:
  - i. That the learned Magistrate erred in law and fact by awarding a global sum of Kshs 300,000/- for loss of dependency that is inordinately low and not supported by law, parties' submissions and judicial authorities cited thereby arriving at an erroneous award;
  - ii. That the learned Magistrate erred in law and fact by making an award of Kshs 20,000/- for pain and suffering which figure was not supported by the law, parties' submissions and judicial authorities cited thereby arriving at an erroneous award;
  - iii. That the learned Magistrate erred in law and in fact by failing to consider the conventional awards for the general damages for pain and suffering and loss of dependency in similar cases and proceeded to make inordinately low awards thereby occasioning a miscarriage of justice;
7. The appeal was canvassed by way of written submissions. The Appellants filed their submissions dated 15 December 2023, while the Respondent's submissions are dated 20 February 2024.

### **Analysis & Determination**

8. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing



and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.

9. In the Court of Appeal's decision in the case of *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, the Court held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘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.’

10. I have considered the Record of Appeal as well as the submissions filed herein. The issues for determination herein are whether the trial court awarded inordinately low sums in respect of loss of dependency and pain and suffering.

### **Loss of Dependency**

11. The Appellant testified that at the time of his death, the Deceased was in good health and was the primary provider for his widow, mother and 4 children. His income which stemmed from small scale farming, was Kshs 100,000/- per month. The Deceased was aged 69 years at the time. At the trial court, the Appellants submitted that Kshs 4,000,000/- would be sufficient for loss of dependency.
12. In their submissions herein, the Appellants contended that the since the Deceased owned the agri-business, it ought to be reasonably inferred that the same was an income-generating business. They submitted that the trial court did not exercise its discretion judiciously by holding that there was totally no income from the agri-business despite the fact that nobody had challenged the business' ownership. They relied on the cases of *China Civil Engineering & Construction Company (k) ltd -vs- Mwanoyoha Kazungu Mweni & Mweni Kazungu* (both suing on behalf of the Estate of Ndegwa Mzungu Mweni (Deceased) [2019] eKLR and *Moses Maina Waweru -vs- Esther Wanjiru Githae* (suing as personal representative of the Estate of late David Githae Kiririo Taiti [2022] eKLR.
13. On this limb, the Respondent referred to the trial court's judgement, in which the Magistrate made reference to the cases of *Eston Mwirigi Ndege & Another -vs- Damaris Kairiari* (suing as the legal representative of the Estate of Felix Kibiti (Deceased) [2018] eKLR and *Moses Mairua Muchiri -vs- Cyrus Maina Macharia* (suing as the personal representative of the estate of Mary Nzula Maina (Deceased) [2016] eKLR.
14. The Appellants' issue herein is not so much that the trial court applied the global approach to the assessment of the damages, but that the figure awarded was inordinately low. In assessing the appropriate damages herein, I have reviewed comparable cases.



15. In John Muchiri Njoroge & another v Monicah Asami [2021] eKLR, the court upheld an award of Kshs 100,000/= where the deceased was 65 years old.
16. In Philip Musyoka Mutua v Veronica Mbulo Mutiso [2013] eKLR, the Court awarded the sum of Kshs 100,000 in a matter where the deceased was 65 years. Similarly, in Philip Wanjera & another v Ahmed Liban & Shukri Ahmed Liban (suing for and on behalf of the Estate of Habiba Liban) [2016] eKLR, the appellate court set aside an award of kshs 750,000/= and substituted it with Kshs 100,000/- in a case where the deceased was aged 65 years.
17. Noting that uncertainties of life have to be considered while computing damages under this head, I affirm the award of the trial court and see no reason to interfere with the same.

### **Pain and Suffering**

18. The Appellants submitted that the trial Magistrate erred in law and fact by awarding a sum of Kshs 20,000/- for pain and suffering despite the fact that it was uncontested that the deceased died the day after the accident. They argued that the Deceased must have been in immense pain and suffering before his death. They relied on the case of Hyder Nthenya Musili & Another -vs- China Wu YI Ltd & Another [2017] eKLR in their argument that a sum of Kshs 250,000/- would be sufficient.
19. In its judgment, the trial court noted that as per the death certificate, the deceased died on the same day as the accident.
20. According to the Police Abstract, the accident occurred on 10 August 2019 at 1800hours. The death certificate indicates that the deceased passed away on 11 August 2019. The cause of death is indicated as severe traumatic brain injury due to blunt abdominal injury. The Appellants produced the Charge Sheet and Sentence of the Court from the proceedings in Machakos Traffic Case No. 172 of 2020 in which Duncan Maingi Mutua was charged with the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act*, Cap 403 Laws of Kenya. The said Charge Sheet confirms that the accident occurred on 10 August 2019, while the deceased passed away on 11 August 2019 at Machakos Level 5 Hospital while undergoing treatment.
21. The court in West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR observed that-

“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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”
22. In the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR the court stated:-

“... I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.”



23. In *Mercy Muriuki & another v Samuel Mwangi Nduati & another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR it was held that:

“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.”

24. In the case of *Magari Africa v Odongo & another* (Suing as the legal representatives of the Estate of Aloice Ogallo Ondiek (Deceased)) (Civil Appeal E026 of 2021) [2022] KEHC 16965 (KLR), the deceased was hit at around 7pm on 25th December and passed on the following day at around 11am. The Court awarded Kshs 20,000/- as damages for pain and suffering.

25. In the case of *Mzee v Muli (Suing as the Legal Representative of Daniel Muli - Deceased)* (Civil Appeal E160 of 2023) [2024] KEHC 8581 (KLR), the deceased passed on a day after the accident. The Court substituted an award of Kshs 50,000/- with an award of Kshs 100,000/- for pain and suffering.

26. In view of the foregoing, I am of the considered view that a sum of Kshs 50,000/- would suffice for an award under this limb.

### **Disposition**

27. The upshot of the foregoing is that the Appeal partly succeeds. The judgement of the lower court is set aside and judgement is hereby entered as follows:

i. General Damages

Under the *Fatal Accidents Act* (loss of dependency) Kshs 300,000/=

Pain and suffering under *Law Reform Act* Kshs 50,000/=

Loss of Expectation of Life Kshs 100,000/=

ii. Special Damages Kshs 550/=

Total Kshs 450,550/=

Less 10% contribution Kshs 45,055/=

Net Total Kshs 405,495/=

28. The costs of this Appeal of Kshs 40,000/= is awarded to the Appellant.

**DATED AND DELIVERED AT MACHAKOS THIS 31 DAY OF OCTOBER 2024.**

**HELENE R. NAMISI**

**JUDGE**

Delivered on virtual platform in the presence of:

N/A .....the Appellant

....N/A.....the Respondent

