Kiilu v Namurwa & another (Suing as the administrators of the Estate of Gladys Nasimiyu Maasika - Deceased) & 2 others (Civil Appeal E029 of 2022) [2024] KEHC 16032 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E029 OF 2022

AC MRIMA, J

DECEMBER 18, 2024

BETWEEN

STANLEY SIKUKU KIILU ..... APPELLANT

AND

BERNARD MASIKA NAMURWA & FRIDA NAFULA WANYAMA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF GLADYS NASIMIYU MAASIKA - DECEASED) ..... 1ST RESPONDENT

MAXMILLIAN MAUBE GETWAMBU ..... 2ND RESPONDENT

WILFRED MATOKE ISANDA ..... 3RD RESPONDENT

(Being an appeal from the Judgment and decree of Hon. S. K. Mutai (Senior Principal Magistrate) in Kitale Chief Magistrates Civil Case No. E165 of 2021 delivered on 12th September 2022)

JUDGMENT

Background:

1. Bernard Masika Namurwa and Frida Nafula Wanyama, the 1st Respondents herein, are the Administrators of the estate of Gladys Nasimiyu Maasika (hereinafter referred to as 'the deceased'). Through the Plaint dated 24th April 2021, the 1st Respondents sought redress for the deceased after she was fatally injured in a road traffic accident.

2. The facts leading up to the accident are not contested. Briefly, the deceased was a pillion passenger on motorcycle registration KMEC 764R [hereinafter referred to as 'the motor cycle'] riding along Kitale - Eldoret road whereas Stanley Sikuku Kiilu, the Appellant herein, was the beneficial owner of motor

vehicle registration No. KBE 884L make Toyota Station Wagon [hereinafter referred to as 'the motor vehicle'] which motor vehicle was driven by Wilfred Matoke Isanda, the 3rd Respondent herein.

3. At the trial Court, the 1st Respondent, being the Plaintiffs, called two witnesses. The Appellant herein did not adduce any evidence. The 2nd and 3rd Respondents herein did not participate in the matter at all. Liability was agreed by consent of the parties. To that end, a consent dated 22nd August 2022, apportioning liability in the ratio of 80% - 20%, was recorded in favour of the 1st Respondent herein.

4. Upon considering the evidence and the submissions, the trial Court assessed quantum and awarded the deceased Kshs. 200,000/- for pain and suffering, Kshs. 200,000/- for loss of expectation of life, Kshs. 2,638,008/- for loss of dependency, Kshs. 30,000/- as special damages, Kshs.300,000/- for loss of consortium and Kshs. 50,000/- for funeral expenses.

5. Cumulatively, quantum was assessed at Kshs. 3,418,008/-. Less 20% contribution, the Appellant was to compensate the deceased Kshs. 2, 734,406/-.

The Appeal:

6. The Appellant was dissatisfied with the findings of the trial Court on the awards. Through the Memorandum of Appeal dated 6th October 2022, he urged that the judgment of the trial Court be set aside entirely and in the alternative the award of consortium be set aside and the assessment of general damages for pain and suffering and loss of expectation of life be revised downwards on the following grounds;

    1. That the Honourable learned Magistrate erred in law and in fact by awarding an excessive sum of Kshs. 200,000/- for pain and suffering to the 1st Respondent.

    2. That the Honourable learned trial magistrate erred in law and in fact in adopting a multiplicand of Kshs. 18,319/50.

    3. That the Honourable trial magistrate erred in law and in fact by making an award of consortium yet the same was not pleaded.

    4. That the Honourable trial magistrate erred in law and fact in awarding excessive amount in general damages under loss of expectation of life and loss of dependency to the 1st Respondent.

    5. That the quantum of damages is excessive and an erroneous estimate if the damages that may be awarded to the 1st Respondent due to regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.

The Appellant's submissions:

7. The Appellant elaborated his case through written submissions dated 30th January 2024. In urging the Court to revise downwards the damages of Kshs. 200,000/-, the Appellant submitted that whereas the deceased must have suffered considerable pain, she was pronounced dead on arrival at the hospital. It was submitted that fair estimation of the damages would have been Kshs. 30,000/-. The Appellant relied on the decision in Civil Appeal No. 1 of 2019 Bernard Kimeto -vs- Emmy Chebet Koskei suing as administrator of the Estate of Nixon Kiprotich Koskei where it was observed that Kshs. 30,000/- was a fair assessment for pain and suffering.

8. As regards damages for loss of consortium, the Appellant submitted that the Kshs. 300,000/- was awarded without any guidelines or precedents in law. The Appellant submitted that damages under this head are unavailable in the event of death. He relied on the decision in Civil Appeal No. 1 of 2019 Acceler Global Logistics -vs- Gladys Nasamba Waswa & Another (2020) eKLR.

9. On the loss of expectation of life, the Appellant submitted that an award o Kshs. 100,000/- would be a reasonable as opposed to Kshs. 200,000/-. The decision in Civil Appeal No. 39 of 2020 Antony Njoroge Ng'ang'a (legal representative of the estate of Fred Nganga Njoroge a.k.a Fred Ng'ang'a Njoroge) -vs- James Kinyanjui Mwangi & 2 Others (2022) eKLR where it was observed that the conventional award for loss of expectation of life is Kshs. 100,000/- was referred to.

10. The Appellant further argued that the damages for loss of dependency was erroneously arrived at when the trial Court adopted a multiplicand of Kshs. 18,319/50.

11. Whereas the Appellant did not have an issue of the multiplier of 18 years and the ration of 2/3, it was his case that there was no justification for use of the Kshs. 18,319/50 as the multiplicand. It was his further case that the claim that the deceased was a farmer and a business lady was not supported by any evidence. He argued that the since the widower in his evidence stated that the deceased was involved in small businesses, a multiplicand of Kshs. 7,240/-, a basic minimum wage set by Government for a general labourer.

The 1st Respondent's case:

12. The 1st Respondent challenged the Appeal through written submissions dated 15th March 2024. In its introductory arguments, the Respondents urged the Court to disregard new matters and authorities that were not presented the trial Court. To that end, the decision in Easy Coach Limited -vs- Emily Nyagasi (2017) eKLR was relied on where it was observed that the case on consortium was not pleaded and argued in the trial Court.

13. On the issue of quantum, the Respondent submitted that such assessment is at the discretion of the trial Court which ought not to be disturbed unless the trial Court took into account an irrelevant factor, left out a relevant factor or the award is inordinately low or inordinately high that it wholly is an erroneous estimate.

14. In a bid to justify the award of Kshs. 200,000/-, the 1st Respondent submitted that the deceased was hit at Moi's Bridge in Eldoret-Kitale highway and the effort to resuscitate her were futile. It was their submission that the deceased endured excruciating pain before her death. the decision in Letayoro & Another -vs- JK (suing as the legal representative of the Estate of the CK (deceased) (Civil Appeal 13 of 2020 (2022) where the Court observed that pain and suffering ranges from Kshs.150,000/- - 200,000/- taking into account inflation was referred to

15. Under the head of loss of expectation of life, the Respondent submitted that the conventional figure has been Kshs. 200,000/-. It was its case that in of Letayoro & Another -vs- JK (suing as the legal representative of the Estate of the CK (deceased (Civil Appeal 13 of 2020 (2022), the Court found no reason to interfere with the award of Kshs. 300,000/-.

16. In defending trial Court's finding on loss of consortium, the Respondent submitted that the widower, his mother and children lost affection, love and care on the deceased's demise. It was their case that the

issue was not contested. The Respondent relied on the Court of Appeal decision in Salvatore De Luca -vs- Abdullahi Hemed Khalil & Another (1994) eKLR where it was observed thus:

> The learned Judge clearly erred in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts.

17. Finally, under the head of loss of dependency, the 1st Respondent submitted that the figure of Kshs. 18,319/50 was well founded and within the range for a shop attendant since the minimum wage does not provide for such persons since they cannot be termed to be casual labourers and gardeners or house managers. It was their case that any such misconception would lead to miscarriage to justice.

18. In the end, they argued that the trial Court did not err in its findings and that this Court ought to dismiss the appeal with costs.

19. The 2nd and 3rd Respondents did not take part in the appeal.

Analysis:

20. From the foregoing, the only issue for determination is whether the learned trial Magistrate, in the circumstances of the case, properly assessed the damages under the various heads.

21. As the appeal is on quantum of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See Butler vs. Butler (1982) KLR 277.)

22. The Court of Appeal in Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> 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.

23. This position was restated by the Court of Appeal in Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101 and also in Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.

24. With the foregoing principles, this Court will now sequentially address the issues.

i. Pain and suffering:

25. Benard Masika, the deceased's husband testified as PW1. It was his evidence that on 20th June 2020, he received a phone call where he was informed that his wife had been involved in an accident. In his statement, he stated that the motor vehicle rammed into the motorcycle wherein the deceased was riding as a pillion passenger a result of which the deceased suffered fatal injuries.

26. From both PW1's evidence and statement, it cannot be ascertained the point in time the deceased died.

27. However, the Police Abstract produced as Exhibit 3 by PW2, speaks to that fact. Under the head circumstances of death are the following findings: -

> ...the deceased was a pillion passenger on a motor cycle which was involved in a road traffic accident along Eldoret road whereby she sustained severe injuries she died on the way to hospital...

28. The Death Certificate, Burial Permit, Police Abstract and the Post Mortem Report all indicated that date of death of the deceased was 20th June 2020, the same day of the occurrence of the accident. It is evident, therefore, that the deceased died the same day. She was pronounced dead by the hospital on arrival.

29. In assessing the damages for pain and suffering, the decision in Hyder Nthenya Musili & Another -vs- China Wu Yi Limited & Another [2017] eKLR, come to the fore where the Court stated as follows: -

> ..... 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....

30. Taking cue from the foregoing, and having due regard to the fact that the assessment of damages by a trial Court can only be interfered with where its inordinately high or low as was observed the case of Kemfro Africa Ltd case [supra] it is this Court's assessment that the award of Kshs. 200,000/- considering that the deceased was pronounced dead on arrival, was inordinately high.

31. The proposed figure of Kshs. 30,000/- by the Appellant is equally inordinately low. In the circumstances, and in consonance with the prevailing damages awardable under this head, a fair and reasonable amount is Kshs. 100,000/- is hereby awarded.

ii. Loss of Dependency

32. When tabulating loss of dependency, the generally accepted principle of law is that global/lumpsum damages are awarded in instances where the Court has no proof of the deceased's monthly earnings or the nature of work the deceased engaged in. In such instances, the Regulation of Wages (General) Amendment) Orders cannot be applied and that the use of the multiplier approach would be tantamount to the Court being speculative.

33. Under this head, the trial Court adopted the multiplier method. It based its tabulation from the fact that the deceased was 42 years of age at the time of her death. The Court then made the assessment that the deceased would have lived beyond the retirement age hence the multiplier of 18 years. The Court then adopted a multiplier of Kshs. 18,319/50 on the fact that the deceased was a shop attendant. Cumulatively the trial Court arrived at a figure of 2,638,008/- for loss of dependency.

34. This Court will, hence, interrogate the evidence and assess whether the trial Court's findings be upheld.

35. PW1 stated that his wife was his helper and a farmer. In his statement she stated that her wife was a business lady and a farmer with a monthly income of not less than Kshs. 30,000/-. It was his evidence that his wife used to support herself, their children and his aging mother.

36. Having gone through the record, no evidence, documentary or testamentary was availed before the trial Court to corroborate the kind of business the deceased was engaged in. Objectively, it would appear that the monthly income of 'not less than Kshs. 30,000/-' was plucked from the air.

37. The 1st Respondent herein had the obligation to, at the very least, avail bits and pieces of evidence that would make the Court arrive at a definite figure or a fair estimate of the deceased's monthly income. No such evidence was availed.

38. In the circumstances, whereas this Court takes cognizance of the fact that the deceased was engaged in an economic activity, one way or another, the approach used by the trial Court was not supported by the material on record. The circumstances of the case warranted a global award.

39. In Frankline Kimathi Maariu & another -vs- Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu [Deceased] (2020) eKLR the Court while dealing with a similar issue observed as follows: -

> ... In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

40. The above was further bolstered in Mwanzia -vs- Ngalali Mutua & Kenya Bus Service (Msa) Ltd & another, where Hon. Ringera, J [as he then was] observed thus: -

> .... The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do.

41. With the foregoing, this Court finds that the award arrived at by the Court lacked any basis and cannot stand. In view of the deceased's age, her economic background and by considering all other attendant factors, this Court hereby makes a global award of Kshs. 1,500,000/-.

iii. Loss of Consortium:

42. The Appellant's contention on this limb was straight forward. It was his case that an award of consortium is not available where a victim of an accident dies. It also was his case that the 1st Respondent did not plead for consortium.

43. The 1st Respondent on the other hand claimed that as a result of the accident and loss of his wife, he lost affection, love and care and that his children and mother also lost love and affection and person that cared for them.

44. Back to the pleadings, the 1st Respondent pleaded for damages for loss of consortium in paragraph 5. However, under *Fatal Accidents Act* and the *Law Reform Act* a claim for loss of consortium is usually included as part of the damages awarded. Courts have nevertheless taken divergent views. Whereas

some Courts have turned down such claims, based on the fact that they are not anchored in law, (see: Innocent Ketie Makaya Denge -vs- Peter Kipkore Cheserek & another [2015] eKLR), other Courts have made such awards (see; Paul Kioko -vs- Samuel G. Karinga & 2 Others [2012] eKLR).

45. The Court of Appeal has also taken a position on this issue. In Salvadore De Luca Vs Abdullahi Hemedi Khalil & Another [1994] eKLR, the Learned Judges of Appeal observed as follows: -

> .... So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full.

46. There is no doubt the deceased had a husband and children. It also was not contested by the Appellant that the deceased used to take care and provide love and affection to her children and her husband as well as her mother-in-law.

47. This Court, however, affirms its earlier position on the issue. The Court finds that such damages are usually within the rubric of general damages and there is no need of making separate awards.

48. In the premises the claim of loss of consortium was unfounded and is hereby declined by this Court. The sum is hereby set-aside accordingly.

iv. Loss of expectation of life.

49. The Respondent was awarded Kshs. 200,000/- under this head.

50. However, conventionally, Courts have awarded Kshs. 100,000/- for loss of expectation of life bearing in mind the award on loss of dependency. The award of Kshs. 200,000/- was, therefore, on the higher side for purposes of this suit. The sum is hereby reviewed downwards to Kshs. 100,000/=.

Disposition:

51. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

52. In the end, the Appeal succeeds and the following final awards and orders hereby issue: -

    a. Pain and Suffering ..... Kshs 100,000/-

    b. Loss of dependency..... Kshs. 1,500,000/-

    c. Loss of expectation of life..... Kshs. 100,000/-

    d. Special damages..... Kshs. 30,000/-

    e. Funeral Expenses..... Kshs. 50,000/-

Kshs. 1,780,000/-

Less agreed 20% contribution ..... Kshs. 356,000/-

Total..... Kshs. 1, 424,000/-

53. Since the appeal has substantially succeeded, the 1st Respondent shall bear the costs thereof.

Orders accordingly.

DELIVERED, DATED and SIGNED at KITALE this 18th day of December, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Ngira, Learned Counsel for the Appellant.

No appearance for Miss. Baraza, Learned Counsel for the 1st Respondent.

No appearance for the 2nd & 3rd Respondents.

Chemosop/Duke – Court Assistants.