



Justine v Etemesi (Suing as the Legal Representative/Administrator of the Estate of Sussy Akinyi - Deceased) (Civil Appeal E058 of 2021) [2023] KEHC 1484 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E058 OF 2021
PJO OTIENO, J
FEBRUARY 28, 2023**

BETWEEN

OTSYALO MUHENJE JUSTINE APPELLANT

AND

**NICHOLAS ETEMESI (SUING AS THE LEGAL REPRESENTATIVE/
ADMINISTRATOR OF THE ESTATE OF SUSSY AKINYI -
DECEASED) RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Noel Akee (SRM) in
Kakamega CM's Civil Case No. 324 of 2019 delivered on 27th October 2021)*

JUDGMENT

1. In this appeal, the challenge against the Judgment of the trial Court, as can be deciphered from the four grounds of appeal, is limited to the single question whether the award of general damages for loss of dependency is manifestly so high as to merit the Court's right to interfere with the discretionary jurisdiction of the trial Court in assessment of damages. The question of liability and the award under other heads of damages are not faulted and the Court has not been called upon to review same.
2. It is now well settled that an appellate Court, even while proceeding with an appeal by way of a re-hearing, ought be slow from freely interfering with the exercise of discretion by the trial Court.
3. An appellate Court would only interfere with the exercise of discretion in award of damages where it is demonstrated that in arriving at the assessment, irrelevant matters were considered, irrelevant factors ignored. Short of that the Court must be convinced that the award is so very high and exorbitant or so low and a misery to present a wholly erroneous approach to assessment of damages.
4. The head of damages called lost of dependency is an award due to the dependants of the deceased a such dependants and is usually a ratio of the deceased's net income. The income lost by the death or incapacity, known as the multiplicand, must be ascertained and the fact of dependency proved because



dependency is a matter of fact, not one of law or a dogma. In *Albert Kubai Mbogori –vs- Violet Jeptum Rabedi* [2017] eKLR the Court of Appeal reiterated the law to be that:-

“The degree of dependency in the deceased’s income is a matter of fact... To ascertain it, the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule of principle in such a situation.”

5. The evidence placed before the trial Court and regarding dependency by those pleaded to have been dependants upon the deceased was that the deceased was at time of death a minor aged 9 years and that as a consequence of the death the estate suffered loss. The witness statement adopted as evidence in chief did not allege any loss by the dependants yet dependency is only lost by the dependants not the estate.
6. It is the finding by the Court that since no loss of dependency was pleaded nor evidence on it led, it was not open to the trial Court to award it. The Court, like the parties, was bound by the pleadings filed and proved by evidence availed. Without pleading and evidence in support, there is no discretion upon a Court to assess and award damages. In *Sarah Jelagat Siele vs. Attorney General & 3 Others* [2018] eKLR the Court of Appeal reiterated the law on pleadings and determination by the Courts in the following words:

“It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination... However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court’s decision when a party addresses the court and leads evidence on the issue. See *vyas Industries v Diocese of Meru* [1976] eKLR.”

7. In this matter it being clear that loss of dependency was never pleaded nor evidence led on it and even though the law is that in African societies, parents expect to be supported by children when they grow up and get established, the Courts’ pursuit as an uninterested arbiter is bestowed by the pleadings filed to found a pedestal to frame issues and determine same.
8. For the foregoing reasons, I am compelled by law to part ways with the trial Court for reasons that it made an award for an issue that was never pleaded nor left to Court by the parties for determination.
9. The appeal succeeds in full and is allowed with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Nyangano for the Appellant

Mr. Mulama for the Respondent

Court Assistant: Polycap

