



REPUBLIC OF KENYA



**Kensilver Express Limited & another v JNG (Suing as legal representative for FKN (Deceased))
(Civil Appeal E018 of 2021) [2023] KEHC 2920 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E018 OF 2021
TW CHERERE, J
MARCH 30, 2023**

BETWEEN

KENSILVER EXPRESS LIMITED 1ST APPELLANT

DOUGLAS NTAMBURA 2ND APPELLANT

AND

**JNG (SUING AS LEGAL REPRESENTATIVE FOR FKN
(DECEASED)) RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Maua CMCC
188 of 2013 by Hon. C.K. Obara (SPM) on 25th January, 2021)*

JUDGMENT

1. On 06th November, 2010, Respondent's 3-year-old daughter FKN suffered fatal injuries while travelling as a fare paying passenger in 1st Appellant's motor vehicle KAW 097K which was being driven by 2nd Appellant.
2. After the hearing, the trial court by a judgment dated 25th January, 2021 found Appellant liable at 100% and awarded the Respondent damages in the sum of KES. 1,500,000/-.

The Appeal

3. The Appellants being dissatisfied with the lower court's decision preferred this appeal and set out 19 grounds which were summarized into four as follows:
 1. Respondent was a passenger in the accident motor vehicle
 2. Whether the defence was considered
 3. Whether the general damages were excessive



Analysis and Determination

4. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v. Sunday Post Limited* (1958) EA at Pg. 424).
5. I have considered the appeal in the light of the grounds of appeal and submission filed by both parties. In determining this appeal, I shall consider the 4 grounds of appeal as follows;

Whether Respondent was a passenger in the accident motor vehicle

6. Appellants do not deny that an accident occurred on the material date and that several passengers were injured but deny that Respondent was one of the said passengers.
7. The Police Abstract form tendered in evidence before the trial court was not challenged. It is not open to the Appellants to raise an objection on appeal whereas they had an opportunity to raise it during the trial. A reading of the trial court's judgment reveals that judgment on liability was agreed in a test suit MAUA CMCC 182 OF 2013 which is binding on the Appellants in this case.

Whether the defence was considered

8. Appellants did not tender any evidence. That averments in pleadings are not evidence was appreciated in *Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989* where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in *Mohammed & Another vs. Haidara* [1972] E.A 166 where that the contents of a plaint are only allegations, not evidence. According to Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

9. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the



Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

10. Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others [2009]* eKLR Lesiit, J (as she then was) citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
11. From the foregoing, I find that there was no defence that the court could consider and this ground too must fail.

Whether the general damages were excessive

12. 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 that 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 *John Kamore & another vs. Simon Irungu Ngugi [2014]* eKLR, *Katheri Dairy Co-op. Society & another v M'marete M'guatu [2014]* eKLR and *Idi Ayub Omari Shabani v City Council of Nairobi [1985]* eKLR cited on behalf of the parties).
13. In *Catholic Diocese of Kisumu v Tete [2004]* eKLR the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages as follows:

“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 different 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.”
14. Concerning pain and suffering, Respondent at the hearing asked for Kshs. 200,000/- and cited *Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013]* eKLR where the sum of Kshs. 200,000/- was awarded for pain and suffering for deceased who died four months following the accident and the authority is in my considered view not comparable the deceased in this case having died immediately after the accident.
15. The court record reveals that Appellants did not make any submissions under this heading. The learned trial magistrate considered the case of *Alice Ombachi & another v Jerusha Kemunto Mokaya & Joshua Ageta Mokaya [Suing As Legal Representatives And Administrators of The Estate of Risper Nyaboke Mokaya (Deceased)] [2019]* eKLR where KES. 50,000/- was awarded for a deceased that died 45 minutes after the accident and awarded KES. 50,000/- which in my considered view has not been demonstrated to be excessive.
16. For loss of expectation of life, Respondent at the hearing asked for Kshs. 200,000/- and cited *Benedeta Wanjiku Kimani v Changwon Cheboi & another (supra)* where the sum of Kshs. 100,000/-. Appellants did not make any submissions under this heading. The award of KES. 100,000/- was in my considered view well founded and I see no reason to interfere with the



17. Concerning loss of dependency, the general rule is that in the absence of prove of earnings, courts have adopted the global figure approach or the minimum wages guidelines in calculating the award for loss of dependency. (See *Beatrice W Murage v Consumer Transport Ltd & another [2014]* eKLR; *Monica Njeri Kamau v Peter Monari Onkoba [2019]* eKLR and *Patrick Barasa v Serah Wambui Karumba (Suing as the legal representative to the estate of the late Albert Chebaya) [2019]* eKLR).
18. Respondent proposed an award of KES. 2,000,000/- and cited *Mini Bakeries (Nbi) Limited & another v Zamzam Josephine Akinyi Aindo (Suing as the legal representative ad litem of estate of the late Jamalddin Ramadhan (Deceased) [2019]* eKLR and *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD) [2016]* eKLR where global sums of KES. 1,000,000/- were awarded for minor children. The award of KES. 1,350,000/- was therefore cannot be in the circumstances of this case be said to be excessive.
19. There being no evidence of deceased's earnings, the trial court rightly applied the global sum principle. From the cases that were cited by the parties as stated hereinabove, I find that the sum of KES. 3,000,000/- was reasonable in the circumstances.
20. For the reasons given on the foregoing analysis, I have come to the conclusion that the trial magistrate's correctly applied the law and in view of other comparable cases awarded reasonable awards.
21. Consequently, I find that this appeal has no merit and it is dismissed with costs to the Respondent.

DATED AT MERU THIS 30TH DAY OF MARCH 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellants - Mr. Chebii for M.K.Chebii & Co. Advocates

For Respondent - Mr. Njindo for Ngunjiri Michael & Co. Advocates

