



REPUBLIC OF KENYA



**Wanderi & another v Nyambura & another (Civil Appeal 560 of 2018)  
[2023] KEHC 2873 (KLR) (Civ) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 560 OF 2018**

**JK SERGON, J**

**MARCH 28, 2023**

**BETWEEN**

**JOSHUA WANDERI ..... 1<sup>ST</sup> APPELLANT**

**JOHN C W KARIUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JANE WANGUI NYAMBURA ..... 1<sup>ST</sup> RESPONDENT**

**LOISE WANJIRU WARURII ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Honourable Magistrate D. A. Ocharo  
delivered on 31st October, 2018 at the Chief Magistrate Court at Nairobi)*

**JUDGMENT**

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated May 3, 2012 pursuant to a road accident on April 16, 2011 along Ngong road near Kenol petrol station and sought for reliefs against the appellants in the nature of general and special damages plus costs of the suit and interest thereon.
2. The respondents pleaded in their plaint that on or about April 16, 2011 the 1<sup>st</sup> appellant's vehicle registration number KAM 456C was being driven along Ngong road by the 1<sup>st</sup> appellant who is the driver, servant or agent of the 2<sup>nd</sup> defendant drove the vehicle negligently and hit John Mwangi Maina causing him fatal injuries.
3. The appellants filed their statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondents in the sum of Kshs 968,256/=.



4. The appellant being aggrieved preferred this appeal and put forward the following grounds:
  - i. That the learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased of closely related age and ended up applying exorbitant number of years.
  - ii. That the learned magistrate erred in law and fact by awarding exorbitant sum on loss of expectation of life and on pain and suffering by failing to appreciate and be guided by prevailing range of comparable awards hence arriving at excessive figure.
  - iii. That the learned magistrate erred in law in making such a high award on loss of dependency and failed to take into account awards under the *Fatal Accident Act* and *Law Reform Act* as to show that the magistrate acted on a wrong principle of law.
  - iv. That the learned magistrate's award on the multiplier was high as he failed to consider the uncertainties and contingencies of life when adopting the multiplier hence acting on a wrong principle of Law.
  - v. That the learned magistrate erred in law and fact in adopting a high monthly income which was not specifically proved and pleaded as required.
  - vi. That the whole judgment on quantum was against the weight of evidence before the court.
5. Directions were given that the appeal be canvassed by way of written submissions. At the time of writing this judgment the respondents had not filed their submissions. I have also considered the written submissions. The only issue for determination put forward is quantum.
6. This is a first appeal and this court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters v Sunday Post Limited* [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
7. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In *Butt v Khan* (1977)1KAR.
8. The Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that–

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
9. On general damages under pain and suffering, the appellant submitted that the trial award of Kshs 100,000/= for pain and suffering was excessive as no evidence was adduced by the respondents to indicate that the deceased did not die on the spot of the accident. On this the appellant placed



reliance on the case of *China National Aero Technology International engineering Corporation v Raphael Lenamboyo* (2020) eKLR whereby the court awarded Kshs 20,000/= where the deceased died immediately after the accident.

10. The appellant further relied on the following authorities:

- a. *Teresia Sebastian Massawe (Suing as the Legal Administratrix of the Estate of the Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another)* (2018) eKLR the deceased died on the same day without even being attended at any medical facility and the court awarded Kshs 10,000/=.
- b. In *Suluenta Kennedy Sita & another (Suing as legal representative of the estate of Joyce Jepkembui v Jeremiah Ruto)* (2017) eKLR the deceased died one day after the accident and was awarded Kshs 10,000/= for pain and suffering.

11. It is the appellant's submissions that as per the above authorities that the trial court award of Kshs 100,000/= for pain and suffering was excessive in the circumstances.

12. The appellant contention are as follows; firstly, that the award of Kshs 100,000/= for pain and suffering was excessive in the circumstances and no evidence was adduced by the respondents to indicate the deceased did not die on the spot. 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 the court 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.”

13. In view of the above cited authority it is clear that when death followed immediately after the incident very nominal damages should be awarded. It was submitted that the deceased did not die on the spot of the accident. The same is proved by the death certificate which was admitted into evidence by both parties' consent.

14. From the foregoing, it is evident that the deceased did not die immediately after the accident but on his way to hospital, he must have endured pain and suffering before he lost his life. In the case of *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] eKLR, 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.” (emphasis added).



15. In view of the above decisions and bearing in mind that this court has been invited to exercise its discretion when considering the award made by the trial court, I find that the award made in the sum of Kshs 100,000/= for pain and suffering was reasonable.
16. The appellant also submitted that the award of Kshs 200,000/= for loss of expectation of life in our instant case was excessive hence the trial court failed to appreciate the guiding principles it had to put into consideration when assessing the said award.
17. It is the appellant's submissions that no explanation on how the court arrived at the award of loss of expectation being appealed from and that the court failed to take into consideration comparable awards as suggested by the appellant hence the award arrived at ought to be disturbed.
18. The appellant relied on the case of *Sukari Industries Limited v Ismael Ombaka Omar & another* (2017) eKLR the court upheld the trial court's award of Kshs 80,000/= for loss of expectation of life where the deceased died aged 35 years. Further in the case of *Easy Coach Bus Services & another v Henry Charles Tsuma & another (Suing as the administrators and personal Representatives of the estate of Josephine Weyanga Tsuma –Deceased)* (2019) eKLR the court herein awarded a sum of Kshs 80,000/= for loss of expectation of life.
19. The trial court awarded Kshs 200,000/= for loss of expectation of life. The appellant contends that the figure is excessive and that an amount of Kshs 80,000/= would have been sufficient compensation
20. In *Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi)* (2019) eKLR the court observed 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 Ksh 100,000/- while for pain and suffering the awards range from Ksh 10,000/= to Ksh 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
21. In the case of *Moses Akumba & another v Hellen Karisa Thoya* (2017) eKLR Chitembwe J held that an award of Kshs 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In the cases of *Patrick Kariuki Muiruri & 3 others v Attorney General* [2018] eKLR Serگون J made an award of Ksh 200,000/= under this heading. In *Vincent Kipkorir Tanui (suing as the administrator and/or personal representative of the estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co Ltd & another* [2018] eKLR an award of Kshs 200,000/= was made.
22. There are therefore some High Court authorities to support the award made by the learned trial magistrate. It has not been shown that the trial court used the wrong principles in making the award for loss of expectation of life. That this court may have made a different award if it had tried the matter itself is not a ground for setting aside the award. It is therefore my considered view that the award of Kshs 200,000/= for loss of expectation of life was not excessive.
23. In is clear that the trial magistrate weighed all this and came to the correct conclusion that the appellant had failed to prove her case as required by law. I find no reason to make me fault the learned trial magistrate.
24. The upshot is that the appeal lacks merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**



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**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....for the 1<sup>st</sup> Appellant

.....for the 2<sup>nd</sup> Appellant

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent

