



Mwasuna v Kilonzo (Suing as the Administrator of the Estate of Isaac Maingi Nzioka - Deceased) (Civil Appeal E029 of 2022) [2023] KEHC 4041 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E029 OF 2022**

MW MUIGAI, J

APRIL 28, 2023

BETWEEN

NICHOLAS MUTUKU MWASUNA APPELLANT

AND

PATRICIA MUENI KILONZO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ISAAC MAINGI NZIOKA - DECEASED) RESPONDENT

(Being an appeal from the judgment of the Hon B. Bartoo (SRM) delivered on 14.07.2021 in Machakos CMCC No 290 Of 2020)

JUDGMENT

Trial Court Record

1. *Vide* a plaint filed on July 14, 2020, the cause of action arose on February 20, 2019. The deceased was travelling on motorcycle registration number KMEQ 554J along Nairobi- Mombasa Road and near Gulf petrol station, the defendant's driver, servant and/or agent driving motor vehicle registration number KCQ 121A was negligent, lost control thereby knocking the deceased who sustained fatal injuries and his estate has suffered great loss and damage as a result. The defendant was said to be vicariously liable.
2. The dependents pursuant to the *Fatal Accident Act* are;
 - a. Patricia Mueni Kilonzo widow
 - b. Jackson Muthiani Maingi son
 - c. Everlyn Kalewa Maingi daughter
 - d. Pauline Ndunge Maingi daughter
 - e. Benjamin Nzioka Maingi son



3. The deceased was 56 years at the time of his death and was a farmer earning Kshs 30,000 per month.
4. The plaintiff claimed special damages of Kshs 360,000, general damages under the *Fatal Accident Act* and *Law Reform Act*, costs of the suit and interest.
5. The defendant filed a defence dated November 27, 2020 denying the contents of the plaint and stated that of the accident occurred, it was caused by the negligence of the rider of the motor cycle and the deceased. He prayed that the suit be dismissed with costs.
6. On May 27, 2021, the parties by consent agreed that liability be entered for the plaintiff against the defendant in the ratio of 85: 15% and file submissions on quantum with supporting documents which will be admitted without calling the maker.

Trial Court Judgment

7. It was found that for pain and suffering, the deceased was taken to the hospital and died while undergoing treatment and for this reason an award of Kshs 100,000 was granted/awarded.
8. Under loss of expectation of life, the deceased was said to be 56 years and the court awarded Kshs 100,000/-
9. Under the *Fatal Accidents Act*, the court found that an award of Kshs 1,000,000 was sufficient taking into account the cost of living and rate of inflation. The Trial Court relied on the case of *John Wamae and 2 others v Jane Kituku Nziva and another* [2017] e KLR where it was held that under such circumstances, applying the global award was the safest way to award damages.
10. As regards special damages, the special damages items were pleaded and proved and therefore were awarded.
11. In conclusion, the award of the Trial Court was as follows;
 - a. Liability 85:15% in favour of the plaintiff
 - b. Damages
 - i. Under *Law Reform Act* Kshs 200,000
 - ii. Under *Fatal Accident Act* Kshs 1,000,000
 - c. Special damages Kshs 360,000
 - d. Costs and interest

The Appeal

12. Being dissatisfied by this judgment the appellant filed memorandum of appeal dated March 15, 2022 seeking to have the judgment and substitute the award of Kshs 1,326,000 with an award that is just to grant. The appeal is founded on the grounds that;
 - a. The learned trial magistrate erred in law and in fact by making an award of Kshs 100,000 for pain and suffering which was manifestly excessive.
 - b. The learned trial magistrate erred in law and in fact by making an award of Kshs 1,000,000 being general damages under the Fatal Accident's Act which was manifestly excessive



- c. The learned trial magistrate erred in law and in fact by completely disregarding their written submissions on general damages under the *Fatal Accident's Act* and the *Law Reform Act*
- d. The learned trial magistrate erred in law and in fact in awarding damages under the *Law Reform Act* without taking into account the damages awarded under the *Fatal Accidents Act*
- e. The learned trial magistrate erred in law and in fact by completely disregarding the written submissions on special damages.

13. The Appeal was canvassed by way of written submissions.

Submissions

Appellants Submissions

- 14. The Appellant filed submissions on February 6, 2023 and submitted that on the award of pain and suffering, Kshs 20,000 would be sufficient as the Plaintiff did not produce any documents of evidence to show that he was admitted or treated in any hospital and as such it is to be implied that he died instantly or shortly afterwards before he could reach hospital and was only produced dead on arrival. Reliance was placed on the case of *Kimunya Abednego v Zipporah S. Musyoka & another* [2019] e KLR
- 15. On loss of expectation of life, it was contended that the deceased was in good health and would have lived long. With the uncertainties of life, it was submitted that an award of Kshs 100,000 would be sufficient.
- 16. Under the loss of dependency, it was submitted that there was no evidence of the kind of farming the deceased was undertaking to earn such amount of money therefore the award was not justified as it has been held that the global sum approach would be an estimate informed by the special circumstances of each case. The appellant proposed calculation at the minimum wage of an agricultural worker in 2019 under the *Wages (Agricultural Industry) (Amendment) Order 2018* of Kshs 7,779.45. The Appellant proposed a multiplier of 5 years.
- 17. According to the Appellant, from the chief's letter, all the children of the deceased were adults with the youngest listed to be 25 years and in the absence of any proof of any physical, mental or special need of the children, they should be presumed to be self-reliant. The court was urged to adopt a ratio of ½ bringing the total to Kshs 233,384.
- 18. The Appellant submitted that the Respondent should not benefit twice as stated in the case of *Dismas Mubami Wainarua v Sopon Kasirimo Maranta (suing as the administrator and or personal representative of the estate of Partinini Supon (deceased))* [2021] e KLR.
- 19. As regards special damages, the court was urged to consider reasonable expenditure that was so fundamental to the funeral amounting to Kshs 255,000. According to the Appellant, hiring a bus to ferry people from Kyumbi to Machakos was not justified and only Kshs 20,000 should be awarded, the receipt for family members clothes was unreasonable and should not be granted as the funeral would have proceeded even without having new clothes. Further, that that a sum of Kshs 20,000 was sufficient for hiring 5 tents as opposed to Kshs 45,000 and lastly that the advocates fees for obtaining the ad-litem should be Kshs 30,000 as per the Advocates Remuneration Order.



Respondents Submissions

20. The Respondent filed submissions on February 2, 2022 and submitted that from the evidence of Jackson Muthiani Maingi, the deceased died at hospital while undergoing treatment and no evidence was availed to the contrary. The award for pain and suffering was therefore reasonable.
21. While relying on the case of *Chinibhai J Patel and another v PF Hayes and others* (1957) EA 748 -749 and *Jacob Ayiga Maruja & another v Simeone Obayo* (2005) e KLR, it was submitted that the deceased was a farmer earning Kshs 30,000 per month and that the Appellant opted to file submission and not put the Respondent on test over that assertion. Further, that the trial court was right in adopting a global award after it was faced with a situation where no documents to prove earnings were provided.
22. It was submitted that the court of Appeal settled that damages can be awarded in both the *Law Reform Act* and the *Fatal Accident's Act* in the case of *South Nyanza Sugar Company Limited v James Martin Matoke* CA 91 of 1998, Hellen Warunguru Waweru (suing as the legal representative of the estate of Peter Waweru Mwenja) v Kiarie Shoe stores Limited CA 22 of 2014, *Kioko Peter and another v Josephine Nthenya Kimeu (suing as a legal representative of the estate of Justus Kioko Mutisya (deceased))* HCCA 129 of 2018 and *David Kaburuka Gitau & another v Nancy Ann Watitibi Gitau & another* (2016) eKLR.
23. On special damages, it was submitted that the Respondent produced receipts and the money was spent to give the deceased a decent and dignified send off and contended that it is common knowledge that mourners are to eat and travel, that chairs and clothing are required. Further, the trial court addressed the issue of special damages. The court was urged not to interfere with the award. Reliance was placed on the case of *Rosemary Wanjiru Kungu v Elijah Macharia Gitbinji & another* [2014] eKLR.

Determination

24. The Court considered the trial court record, the submissions of the parties and the evidence of record and the issues that arise are that of quantum and special damages. Liability is not contested.
25. This being the first appeal, under section 78 of the *Civil Procedure Act* this court is 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.
26. In the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

27. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the *Evidence Act*, cap 80 Laws of Kenya provides that:-Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.



Pain and Suffering

28. Under the head of pain and suffering, 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.

29. The Trial Court awarded Kshs 100,000 on the basis that the deceased died while undergoing treatment at the hospital. The Appellant contends that there was no evidence of the same. The accident occurred on 20.2.2019 and the deceased died on the same day according to the death certificate. The deceased did not die instantly from the accident but later the same day. I therefore find that the award was not excessive in the circumstances.

30. 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.”

31. In the absence of evidence to the contrary, it is to be assumed that the deceased died on the spot and I find that an award of Kshs 100,000 was appropriate.

Loss of Expectation Of Life

32. Under the head of loss of expectation of life, relying on the case of *Hyder Nthenya Musili (supra)* I find no reason to interfere with the Trial Court award of Kshs 100,000/-

33. As regards, the loss of dependency, in *Albert Odawa v Gichimu Gichenji* [2007] eKLR), cited with approval the case of *Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & another*, where Hon. Ringera, J took the view that:

“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.”



34. The respondents contend that the deceased was a farmer who earned Kshs 30,000 per month. From the record, there is no evidence that the deceased was a farmer, even on the birth certificate, there is no indication of his occupation. The appellant did not produce any evidence to the contrary therefore as it stands, the only contention is that provided in the plaint. I therefore find that a global award was the safest in the circumstances and the trial court did not err in relying on it.
35. The other issue is that of the deceased dependents, the appellant contends that the children of the deceased are self-reliant as the last child is said to be 25 years old. Section 4(1) of the Fatal Accidents Act which states that
- “ Action to be for benefit of family of deceased
- “Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:...”
36. The Act does not matter reference about age and the issue of self-reliance of dependants. The children and the widow of the deceased are therefore entitled to bring this claim. However, there was no evidence that the adult children were dependent on the deceased.
37. In the case of Risbi Hauliers Limited v Josiah Boundi Onyancha [2015] eKLR where the court awarded a global sum of Kshs. 500,000/- to a 50 year old.
38. In Dora Mwawandu Samuel (Suing on her behalf and on the behalf of the Estate of Samuel Muweliani Jumamosi (Deceased) v Shabir M. Hassan [2021] eKLR where the court awarded a 59 year old farmer a global sum of Kshs. 400,000/-.
39. In Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR where the court awarded a global sum of Kshs 800,000 for a 68 year old farmer and businessman and there was evidence of the deceased being a business man.
40. This court therefore substitute the award of Kshs 1,000,000 with Kshs 800,000.

Special Damages

41. As regards special damages, it is trite law that it must be pleaded and proven, in this case the Plaintiff pleaded Kshs 360,000 and the Trial Court awarded the same having found that the amount had been proved.
42. The Appellant takes issue with funeral expenses and took the view that it should be reduced while the respondent contends that the deceased was given a dignified and decent send off. Section 6 of the Fatal Accidents Act is a proviso on funeral expenses , it provides that;

In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.



43. The respondent provided receipts as follows;
- a. Ngwatanio Itimboni Welfare Association Kshs 15,000
 - b. Mwangaza Self Group Kshs 80,000
 - c. Cash Sale Receipt Kshs 34,500
 - d. Naiwe Academy Kshs 40,000
 - e. Cymudaz Media Production Kshs 5,000
 - f. Professional Tailoring shop Kshs 30,000
 - g. Machakos level 5 receipt Kshs 2,500
 - h. Professional Tailoring shop Kshs 20,000
 - i. Ngwatanio Itimboni Welfare Association Kshs 45,000
 - j. Kalimani Welfare Association Kshs 30,000
 - k. A.K. Mutua office account Kshs 60,000
 - l. General Funeral Services Kshs 17,000
- Total Kshs 379,000
44. The Court awards what was pleaded, and proved the respondent pleaded Kshs 360,000 and that is what was awarded. The appellant should not dictate how the funeral of the deceased should be, that is the sole discretion of the family and to be obsessed with such nitty-gritty where there is proof of expenses is not the duty or place of the appellant.
45. This court notes that the appellant has taken issue with the award under the *Fatal Accidents Act* and the *Law Reform Act*. This Court has rendered itself in the case of *Kioko Peter and another v Josephine Nthenya Kimeu (suing as a legal representative of the estate of Justus Kioko Mutisya (deceased))* [2021] where it was observed that;

“I find the position has been settled by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Ltd* [2015] eKLR where the court noted the confusion in regard to the concept of double compensation put across by *Kemfro Africa Limited* case. The learned Judges expressed themselves as follows:-

21. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kemfro Africa Ltd t/a Meru Express Services 1976 & another v. Lubia & another* (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, *inter alia*, that:

An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.



22. The deduction of the entire amounts made under the *LRA* in this case was erroneous and once again, we have to interfere with the final award of damage.... there is no compulsion in law to make the deduction.”

The court is fortified by the decision of Majanja J.in *Richard Matheka Musyoka & another v Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased))* [2016] eKLR where the learned Judge guided by the Court of Appeal decision in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited (supra))* held at paragraph 10 and 20 that:-

10. The principal does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act* hence the issue of duplication does not arise regarding that aspect of the award.”

“20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.” See Meoli J. in *Chen Wembo & 2 others v. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) (supra))*.”

46. The contention that the estate should not benefit twice therefore fails, there was no double compensation.

Disposition

47. Consequently, the Appeal partly succeeds and I award as follows;

- a. Liability 85:15% In favour of the Plaintiff
- b. Damages
 - i. Pain and suffering Kshs 100,000
 - ii. Loss of expectation of life Kshs 100,000
 - iii. Loss of dependency Kshs 800,000
- c. Special damages Kshs 360,000
- d. Costs and interest

48. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH APRIL 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI



JUDGE

IN THE PRESENCE OF

Ms. Ndambiri H/B for Masika for the Appellants

No appearance - for the Respondents

Geoffrey- Court Assistant

Ms Ndambiri holding brief Masika for the Appellant: Our client paid Kshs.750,000/- on 6/04/2022 to the Respondents Bank Account. We are praying the sum awarded by the Court to be deducted. We wish the Insurance Bond be discharged.

COURT: There shall be stay of execution 30 days to allow settlement of the debt/award. The Insurance bond is hereby reimbursed.

M.W. MUIGAI

JUDGE

28/04/2023

