



Wamalwa v PNM (Suing as the Administrator and Personal Representative of the Estate of SN-Deceased) (Civil Appeal 33 of 2017) [2023] KEHC 3500 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 33 OF 2017**

DK KEMEL, J

APRIL 25, 2023

BETWEEN

STEPHEN WAFULA WAMALWA APPELLANT

AND

PNM (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SN- DECEASED) RESPONDENT

JUDGMENT

1. By a plaint dated 21/06/2013, the respondent herein sued the appellant for general and special damages plus costs of the suit on behalf of the estate of the deceased who was involved in a road traffic accident on the September 20, 2012 where walking as a pedestrian along Bungoma – Mumias road at Ndengelwa area and in which the appellant’s motor vehicle registration number KBL 518X Toyota Wish knocked and killed him
2. It was pleaded that the deceased was carefully and lawfully walking as a pedestrian along Bungoma – Mumias road at Ndengelwa area when the appellant’s motor vehicle Reg No KBL 51X make Toyota Wish was negligently driven by the appellant or his agent and or servant that it lost control and knocked the deceased who sustained fatal injuries. It was further pleaded that the accident was attributed to the negligence of the appellant particulars whereof were captured under paragraph four of the plaint. Special damages of Kshs 73,160/= were pleaded as well.
3. The parties herein on the 6/5/15 entered into a consent on liability in the ratio of 30% to 70% in favour of the respondent and thereafter proceeded to tender evidence on assessment of quantum of damages.
4. The respondent Patrick Nyongesa Mulati (PW1,) testified that the deceased had been his child. He produced the post-mortem report as well as receipts in respect of purchase of coffin ,transport, food clothing, filing for limited grant of letters of administration intestate. He added that the deceased had been a pupil at Muyayi Primary School in class one. He produced the school’s report card. He finally



stated that the deceased used to assist him in herding the family cows and running some errands. On cross examination, he stated that the deceased was aged 8 years old and who depended on him. He stated that the report card did not contain remarks by the class teachers regarding the 2nd and 3rd term reports.

5. The respondent closed his case. The appellant did not tender any evidence on assessment of quantum of damages. Parties thereafter files and exchanged their submissions.
6. Vide a judgement dated September 15, 2017, the learned trial magistrate awarded the respondent Kshs 20,000 for pain and suffering, Kshs 80,000/= for loss of expectation of life, Kshs 1,632,720/= for loss of dependency and then Kshs 46,200/= for special damages.
7. Aggrieved by the aforesaid judgment, the appellant filed a memorandum of appeal wherein he raised the following grounds:
 - i. That the learned trial magistrate misapprehended the principles applicable in the award of damages and arrived at a decision in which a reasonable tribunal addressing itself on the evidence could not.
 - ii. That the learned trial magistrate erred both in law and fact in using a wrong approach in the assessment of damages ending up making an award which was manifestly excessive in the circumstances
 - iii. In awarding damages, the trial magistrate erred both in law and fact in relying on authorities and decision which were not comparable to facts and circumstances of the instant case and which could not be a guide in assessing the award of damages.
 - iv. The general damages awarded are excessive and not in line with the current decisions of the courts i.e. it is not in line with authorities and is against the doctrine of precedence.

The appellant thereafter sought for reliefs inter alias; that an order be made for a re-trial before another magistrate; alternatively, the award of damages be set aside and a suitable award of a lesser sum be made in its place; the costs of the appeal be borne by the respondent.

8. The appeal was canvassed by way of written submission. Both parties dully filed and exchanged submissions.
9. Vide submissions dated January 20, 2023, learned counsel for the appellant raised two issues for determination namely; whether the trial magistrate erred in applying a multiplicand in the calculation of damages for loss of dependency and whether the award of damages was manifestly excessive.
10. As regards the first issue, it was submitted that it was wrong for the trial magistrate to use a multiplicand yet the victim was just a minor whose expectation of life by his dependents could not be ascertained and that his earning power could not be determined. It was submitted that a global award should have been made instead. Reliance was placed in several cases such as *Moses Mairua Muchiri Vs Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR. *Mwanza Ngalali Mutua Vs Kenya Bus Limited* cited in *Albert Odawa Vs Gichumu Githenji* – NKU HCCC No 15 of 2003 [2007] eklr.

It was submitted that the deceased was a standard one pupil and it was impossible to determine how far he could go in education and how much he would earn. It was submitted that the multiplier approach was erroneous since a global award should have been appropriate.

11. On whether the damages awarded were excessive, it was submitted that the trial magistrate gave an award which was manifestly excessive. It was urged that a global sum of between Ksh 500,000/= - Ksh 700,000/= be awarded. Reliance was placed in several cases – *Mwangangi another Vs FKM (suing as*



legal representative of the estate of the late AMK (2021) eKLR in which a global sum of Ksh 800,000/= was awarded where deceased was aged 12 years

12. Vide submissions dated 2/3/23, the respondent's counsel submitted that the trial magistrate was right to use a multiplier in computing the award due to the respondent as the deceased would have grown to be at least a skilled worker. Reliance was placed in the case of David Ngunje Mwangi Vs Chairman BOG Njiri High School Nairobi HCCC No 2409 of 1998 where a deceased student aged 17 years was held to have been eligible to earn kshs 4000/= as minimum wage In 2005. It was finally submitted that the assessment by the trial magistrate was proper and should be upheld and that the appeal should be dismissed with costs
13. I have given due consideration to this appeal as well as the record of appeal and the submissions by learned counsels. I have also considered the authorities cited. In this appeal, the appellant is only challenging the quantum of damages on loss of dependency as learned counsel for the appellant in his submissions has no problem with the rest of the heads of damage. The issue for determination therefore is whether the award on loss of dependency was manifestly excessive
14. This being the first appellant court, its duty is spelt out namely; to examine and re-evaluate the evidence and finding of the trial court on quantum of damages on loss of dependency. See Sele Vs Associated Motor Boat Company Limited [1968] EA 123.
15. It is an established principle of law that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor or where the award was too high or low as to amount to an erroneous estimate of damages or where the assessment is not based on any evidence. See Kemfro Africa limited t/a Meru Express Petrol station & Another Vs A M Lubia & Another {1982-88} KLR 727
16. It is the appellant's contention that the deceased was a minor aged 8 years and in class one and that it was difficult to establish how he would turn out later in life and further that his parents could not have been dependent on him. It was the appellant's contention that the trial court erred when it used a multiplier in calculating the award of loss of dependency. According to the appellant, a global award ought to have been applied. On the part of the respondent, it was contended that the application of a multiplier by the trial court was proper and ought to be upheld.
17. After careful consideration of the submission and the relevant guiding principles on award of damages for minor victims of road traffic accidents, the issue that arises for determination is whether the findings of the trial magistrate were well anchored in law. I am of the considered view that the learned trial magistrate fell into error in using the multiplier approach to arrive at the award of damages for loss of dependency. It transpired from the evidence that the deceased was then aged 8 years old and a pupil in class one at Muyayi primary school and whose report card did not have remarks by the class teacher for second and third terms. It became apparent that the future of the deceased was uncertain as there was no way of knowing what he would have become had he lived his life to the full or how much he would earn and support his parents. Even though the respondent claimed that the deceased was useful as he used to herd the family cows and run some errands, I am persuaded that the same was sufficient to amount to dependency on the part of the deceased's parents. I find that the appropriate procedure ought to be that a global award be made in respect of a young child instead of using a multiplier approach. Hence, it is my finding that the learned trial magistrate failed to take into account the principle of making awards for injuries/death of child victims of traffic accidents. It is thus obvious that the learned trial magistrate proceeded on wrong principles and by so doing he arrived at a figure which was inordinately high as to amount to an erroneous estimate of damages



18. In determining the proper award (global) to be made, I must look at decided cases. In the case of *Mwangangi and Another Vs FKM (suing as legal representative of the estate of the late AMK)* [2021] eKLR, the court awarded Ksh 800,000 for loss of dependency where the deceased was aged 12 years. A sum of Ksh700,000 was awarded as a global sum for a deceased minor in the case of *Chabbadiya Enterprises limited and Another Vs Sarah Alusa Mwachi (suing as the legal administrator and personal representative of the estate of the late Faiza Musa (deceased))* [2011] eKLR. It is noted that the appellant's counsel has proposed the sum of Ksh 700,000 as the global sum to be awarded. I am satisfied that a global sum of Ksh 700,000 would be reasonable in the circumstances for the respondents.
19. As the other heads of damages are not disputed, I hereby proceed to maintain them but the sum on the loss of dependency is hereby set aside and substituted with a global sum of Ksh 700,000,
20. In the result, I find merit in the appeal. The same is allowed. The trial court's award of loss of dependency is hereby set aside and substituted with the sum of Ksh 700,000. All the other items shall remain intact and that the total sum will attract 30% contribution. The said sums together with costs will attract interest at court rates from the date of judgement in the lower court. Each party will meet their costs of this appeal.
- 21 Orders accordingly

DATED AND DELIVERED AT BUNGOMA THIS 25TH OF APRIL 2023

D.KEMEI

JUDGE

In the presence of:

Onsango for Appellant

Okaka for Mwebi for Respondent

Kizito Court Assistant

