



Achenda & another (Suing as the legal representatives/administrators of the Estate of the Late Jophan Achenda) v West Kenya Sugar Company Ltd (Civil Appeal E004 of 2022) [2023] KEHC 18044 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E004 OF 2022
JRA WANANDA, J
MAY 26, 2023**

BETWEEN

JANE KHALAKAYI ACHENDA 1ST APPELLANT

PATRICK JUMA ACHENDA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES/ADMINISTRATORS OF THE
ESTATE OF THE LATE JOPHAN ACHENDA**

AND

WEST KENYA SUGAR COMPANY LTD RESPONDENT

JUDGMENT

1. This Appeal is against a portion of the quantum of damages awarded as compensation for the death of a 29 years old adult male that arose as a result of a fatal road accident. In the trial Court, the Appellants were the Plaintiffs whereas the Respondent was the Defendant.
2. By the Plaint filed on 18/12/2019, the Appellants sued the Respondent seeking general damages under the *Fatal Accidents Act* and the *Law Reform Act*, special damages, costs of the suit and interest.
3. The Appellants alleged that on 5/4/2019, one Jophan Achenda (Deceased), was lawfully walking as a pedestrian along Ingavira-Kambi ya Mwanza Road, when the Respondent's driver/agent, negligently drove the motor vehicle Registration KBM 915V/ZA 1508, New Holland Tractor, causing the motor vehicle to knock down the deceased. As a result, the deceased sustained injuries to which he succumbed.
4. The Respondent filed its Statement of Defence on 03/03/2020 denying the claim. The case then proceeded for trial. However, the parties subsequently recorded a consent order apportioning liability at 90:10 in favour of the Appellants. The trial Court was then asked to assess quantum.



5. By its Judgment delivered on 13/01/2022, the Court assessed and awarded quantum to the Appellants as follows:

Pain & Suffering	Kshs 10,000.00
Loss of expectation of life	Kshs 100,000.00
Loss of dependency	Kshs 1,506,117.60
Special damages	Kshs 75,000.00
Sub-total	Kshs 1,691,117.60
Less 10% liability	Kshs 169,111.80
Grand Total	Kshs 1,552,005.80

6. The Appellants were dissatisfied with the amounts awarded to them under items (c) and (d) above which they deemed to be too low. They accordingly filed this Appeal seeking enhancement of the amounts awarded under the said two items. The Memorandum of Appeal filed on 25/01/2022 therefore contains the following grounds:
- i. That the Learned Magistrate erred in law and in fact by adopting a monthly income of Kshs 7,240.95.
 - ii. That the Learned Magistrate erred in law and fact in failing to award proved Special damages.

Hearing of the Appeal

7. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellants filed their Submissions on 06/12/2022 through their Advocates, Abok Odhiambo & Co. and the Respondent filed on 19/01/2023 through Masinde & Co.

Appellants' Submissions

8. Regarding loss of dependency, the Appellants' Counsel faulted the Magistrate for adopting the minimum wage. He argued that by adopting the scale under the Regulations of Wages (General) Amendment order, 2018, the trial Magistrate was essentially speculating as to whether the deceased earned the amount that had been pleaded. He further faulted the trial Magistrate for failing to accept the pleaded figure of Kshs 50,000/- as the multiplicand (monthly amount that was earned by the deceased prior to his death). Counsel faulted the trial Magistrate for reaching a finding that the deceased was an unskilled labourer on the basis that there was no evidence to ascertain that the deceased was a farmer or his level of education. He submitted that this was an erroneous conclusion since in his view, it is now established that proof of earnings or skills of a deceased person is not of much importance when determining loss of dependency. He argued that it was not mandatory for the Appellants to formally produce any documentary evidence to prove that the deceased was a farmer since it not common for records to be kept by peasant farmers.
9. Counsel further contended that the deceased died at the age of 29 years and left behind 2 widows and 3 children and that the minimum wage adopted by the trial Court could not logically sustain



these dependants. He cited the Chief's letter as evidence of these facts. Since he did not challenge the multiplier of 26 years and the 2/3 dependency ratio adopted by the trial Court, he submitted that under loss of dependency, the award ought to have made in the following terms:

$50,000 \times 26 \times 12 \times 2/3 = \text{Kshs.}10,400,000/-$

10. Regarding special damages, Counsel faulted the trial Magistrate for failing to award the same despite the Appellants having produced relevant documents and receipts. He contended that the Appellants strictly proved that they were entitled to Kshs.155,550/- as special damages.
11. Regarding funeral expenses, Counsel maintained that in light of the burial permit on record, the award of Kshs 75,000/- was inordinately low in the circumstances and the same should be enhanced to Kshs 150,000/-. He cited the decision in *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 the court awarded Kshs.150,000/- as funeral expenses despite the absence of receipts. He also relied on the decision in *Ibrahim Chitambe Juma* (Suing as the Legal Representative/Administrator of the Estate of Benson Juma Wesonga (Deceased) vs *Glory Rent A Car Limited* [2021] where the Court found that the Judgment of the trial Court was wrong in principle for failing to award funeral expenses on the basis that documentary evidence was not produced.
12. In support of his arguments, Counsel cited various other authorities. He also faulted the trial Magistrate for not citing authorities to support his findings in the Judgment.

Respondent's submissions

13. In the Respondent's Submissions, Counsel argued that the trial Court applied the correct legal principles in awarding Kshs.75,000/- as special damages and Kshs.1,506,117/- under loss of dependency. He submitted that an appellate Court ought to only disturb the trial Court's decision where the award made is inordinately low or high that it is a wholly erroneous estimate of the damages. He further submitted that a party is bound by his/her pleadings and cannot be allowed to depart therefrom. He argued that although the Appellants listed the dependants as themselves and 2 minors, they did not produce any evidence to prove that they were such dependants. He further submitted that although the Appellants testified that the deceased had 3 children, in the Plaintiff they had stated that the deceased had only 2 children.
14. Counsel also contends that the Appellant never produced the children's birth certificates nor attempted to indicate who the children were, their age or who their mother was. He also contended that in the Plaintiff, the Appellants pleaded a total of Kshs 155,540/- as special damages, namely; Kshs 5,000/- for the demand letter, Kshs.100,000/- for funeral expenses and Kshs 50,000/- for obtaining the limited Grant. He maintained that these being special damages, they ought to have been strictly pleaded and proved, that a look at the documents produced shows that only a total of Kshs 70,000/- was incurred on mortuary, limited grant, search fees and purchase of coffin and that although the items were pleaded, they were never strictly proved and were therefore properly disallowed. Her submitted that that although the Appellants were unable to prove the special damages allegedly incurred, the Court still awarded them Kshs 75,000/-.
15. On loss of dependency, Counsel submitted that the Appellants' pleadings, evidence and submissions were inconsistent as to the number of dependants that the deceased left behind, that while in the Pleadings it is stated that the deceased left behind 4 dependants (the 2 Appellants who are both adults and 2 minors), the chief's letter claims that the deceased left 1 widow and 3 unnamed children, that during the trial the Appellants testified that the deceased left behind 3 children but did not mention anything about a widow and did also not produce any documents to support the assertion. He argued



that in the absence of such evidence, the proper dependency ratio should have been 1/3 and not 2/3 as adopted by the Court. He maintained that the trial Court was justified in adopting the minimum wage of Kshs 7,720/-. He argued that although in the Plea it was pleaded that the deceased was 29 years at the time of his demise and that he was a farmer, no evidence was tendered to support the alleged monthly income and/or earnings.

16. He cited various authorities to buttress his arguments, submitted that the appeal has no basis and prayed that the same be dismissed with costs.

Analysis & Determination

17. This being a first appeal, the Court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Kiruga v Kiruga & Another* [1988] KLR 348).
18. Further, this being an appeal only on quantum, this Court is aware of the limits of its jurisdiction. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia* [1985], the following was stated:

“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.”

Issues for determination

19. In my view, the issues that arise for determination in this appeal are the following;
 - i. Whether adoption of the statutory minimum monthly income as the multiplicand in computing loss of dependency was proper and whether the multiplier method was the appropriate method to be applied.
 - ii. Whether the amount awarded as Special damages should be enhanced.
20. I now proceed to analyse and answer the issues.

i. Whether adoption of the statutory minimum monthly income as the multiplicand was proper and whether the multiplier method was the appropriate method to be applied

21. Section 4 of the *Fatal Accidents Act*, provides as follows:

“(1) 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:



Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

22. The bone of contention in this appeal is adoption of the then prevailing minimum wage of Kshs 7,240.95/- by the trial Court as the deceased’s monthly income in computing the damages to be awarded under the head of “loss of dependency”. The Appellant submits that the deceased was a farmer and that he used to earn a monthly income of Kshs 50,000. In its Judgment, the trial Court held that no evidence was produced to prove such facts. The trial Court further observed that there was no evidence as to the deceased’s level of education and/or whether he was trained in any trade or occupation.

23. There being no such evidence in its view, the trial Court made a finding that the deceased was an unskilled labourer and proceeded to adopt his monthly wage as Kshs 7,240.95/-. This is as per the Regulation of wages (General) Amendment Order, 2018. I agree that indeed there was no concrete evidence on what the deceased used to earn. It was merely stated that he was a farmer earning Kshs 50,000/- a month. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwititi Gakungu deceased [2020] eKLR, Mabeya J dealt with a similar issue and stated as follows:

“[23]. In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

24. In *Mary Khayesi Awalo & Another v Mwilu Mulungi & Another* [1999] eKLR cited in *Albert Odawa v Gichimu Gichenji* [2007] eKLR, Nambuye J (as she then was), stated the following:

“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.”

25. In the said *Mary Khayesi Awalo & Another v Mwilu Malungi* (supra), Nambuye J (as she then was), stated further as follows:

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court’s opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books”.



26. Considering the foregoing, it is my humble view that the trial Magistrate should have adopted a global sum instead of employing the multiplicand method in determining the loss of dependency in this matter. This is in view of the absence of evidence to prove the earnings of the deceased.
27. According to the Chief's letter, the deceased was survived by a widow and 3 children. There is therefore evidence that the deceased had dependants. He was 29 years at the time of his death and there was no evidence that he was in bad health. He was in the prime of his life and his estate must have undergone loss and anguish as a result of his death.
28. I have taken notice of the decision in Isaac Muriira M'mwanie & another v Misheck Mutuma M'kuchina [2021] eKLR where P. J. Otieno J, on Appeal, upheld an award of a global sum of Kshs 2,500,000/- for loss of dependency where the deceased was 24 years.
29. I have also considered Charles Makanzie Wambua vs Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased) [2020] eKLR where Odunga J (as he then was), on Appeal, upheld a global award of Kshs.1,320,000/- for loss of dependency where the deceased was 17 years old.
30. Finally, I have considered Twokay Chemicals Limited vs Patrick Makau Mutisya & another [2019] eKLR where again, Odunga J (as he then was) upheld a global sum of Kshs.1,500,000/- for loss of dependency where the deceased was aged 16 years.
31. Taking in totality all the circumstances of this case including the impact of inflation, I find and hold that a global sum of Kshs.2,000,000/- would be adequate compensation for loss of dependency. Accordingly, I set aside the sum of Kshs.1,506,117/- awarded by the trial Court for loss of dependency and substitute it with a sum of Kshs.2,000,000/-.

ii. Whether the amount awarded as Special damages should be enhanced

32. The Appellants have also faulted the trial Magistrate for awarding Kshs 75,000/- as special damages. They contend that the same was inordinately low in the circumstances.
33. In the Plaintiff, the Appellants pleaded a sum of Kshs 155,550/= as the total special damages figure as follows:

Demand letter	Kshs 5,000
Funeral expenses	Kshs 100,000
Cost of obtaining Limited Grant of Letters of Administration	Kshs 50,000
Motor vehicle search	Kshs 50,000
Total	Kshs 155,550

34. It is trite law that a claim for special damages must not only be pleaded, but must also be strictly proved. This is because such a claim represents what a party has actually lost in the form of expenses incurred and he ought to be restored to the position he was in had he not been forced to incur the expenses, hence the need to strictly prove the claims.



35. With regard to funeral expenses, as already stated, the Appellants pleaded a sum of Kshs 100,000/-. However, they only produced 3 receipts totalling Kshs 15,500/-. These were Kshs.8,000/- for mortuary charges, Kshs 500/- for hospital registration fees and Kshs.7,000/- for the coffin. On the matter of absence of Receipts for funeral expenses, the Court of Appeal in Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR stated as follows:

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased - testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

36. Again, the Court of Appeal in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR held as follows:

“We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved. ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.”

37. Further, in JNK (suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR, Gikonyo J having made reference to the above case held as follows:

“In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”

38. I agree that special damages must be pleaded and proved. However, a perusal of the above authorities reveals that where funeral expenses are pleaded, they may still be awarded even though no receipts have been produced to support such expenses. In view of the foregoing, and despite the failure to produce receipts totalling the pleaded figure of Kshs 100,000/-, there really is no dispute that indeed there was a funeral following the deceased's death. This is evidenced by the copy of the burial permit on record. The Appellants are therefore entitled to a reasonable award in funeral expenses. Although the Appellants have asked for Kshs 150,000/-, they are bound by their Pleadings and cannot therefore be awarded a sum beyond the figure of Kshs 100,000/- that they expressly pleaded in their Pleint.

39. For funeral expenses therefore, I award the pleaded sum of Kshs 100,000/-.



40. Regarding the rest of the Special damages pleaded, the Appellants produced 3 Receipts. These are Kshs 50,000/- for obtaining the Grant, Kshs 5,000/- for the demand letter and Kshs 550/- for the motor vehicle search. The Appellants are entitled to these amounts and I so award them.
41. The summary of the award for Special damages that I have made is therefore as follows:

Demand letter	Kshs 5,000
Funeral expenses	Kshs 100,000
Cost of obtaining Limited Grant of Letters of Administration	Kshs 50,000
Motor vehicle search	Kshs 550
Total	Kshs 155,550

Observation on the award for pain & suffering

42. As much as this was not amongst the grounds of appeal raised, I note that in the body of the Judgment of the trial Court, the Learned Magistrate awarded Kshs 20,000/- for pain and suffering. However, in the final Orders, he indicated Kshs 10,000/-. I presume that this was an honest and inadvertent mistake. Having so found, I hereby set aside the award of Kshs 10,000/- under the head of “pain and suffering” and substitute with an award Kshs 20,000/- as had been stated by the trial Court in the body of its Judgment.

Final Orders:

43. In the end, I make the following orders:
- a. On loss of dependency, I set aside the award of Kshs 1,506,117.60 made by the trial Court and substitute it with an award of Kshs 2,000,000/-.
 - ii. On Special damages, I set aside the award of Kshs 75,000/- made by the trial Court and substitute it with an award of Kshs 155,500/-.
 - iii. On pain and suffering, I set aside the award of Kshs 10,000/- made by the trial Court and substitute it with an award of Kshs 20,000/-.
44. The final award in favour of the Appellant is therefore as follows:



Pain & Suffering	Kshs 20,000
Loss of expectation of life	Kshs 100,000
Loss of dependency	Kshs 2,000,000
Special damages	Kshs 155,550
Sub-total	Kshs 2,275,550
Less 10% liability	Kshs 227,555
Total	Kshs 2,047,995

45. Since the Appellants have partially succeeded, I award them half of the costs of this appeal.
46. However, regarding costs in the lower Court, the order of the trial Magistrate awarding costs to the Appellants remains.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

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WANANDA J.R. ANURO

JUDGE

