



Ronald v Nyabuti & another (Suing as the Legal Representatives of the Late James Kinara) (Civil Appeal 20 of 2021) [2023] KEHC 17988 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 20 OF 2021**

REA OUGO, J

MAY 26, 2023

BETWEEN

OMUKO NYAMARI RONALD APPELLANT

AND

SALOME KEMUNTO NYABUTI 1ST RESPONDENT

VICTOR MARIERA NYABUTI 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE LATE JAMES KINARA

*(Being an appeal from the judgment delivered by Honourable S.K Onjoro
Principal Magistrate on 12th February 2021 in KISII CMCC No 446 of 2018)*

JUDGMENT

1. This appeal challenges the award of damages awarded by the trial court. The appeal emanates from the suit filed by the respondent following a traffic accident that occurred on November 9, 2017 between motorcycle Registration No. KMEG 708J and vehicle registration No KBL 258B along Kisii-Migori Road. According to the respondent, the appellant's driver negligently rode the vehicle and permitted it to collide with the motor cycle and as a result of the accident the deceased sustained fatal injuries. The deceased sustained personal injuries accompanied by pain, suffering and loss of life. The deceased had dependants who now claim damages from the appellant.
2. It was also pleaded that the deceased was 30 years old at the time of his demise and that his life was considerably shortened and his estate suffered loss under the Law Reform Act. At the time of his death, the deceased earned Kshs 20,000/- per month.
3. The appellant in his response denied that he was the owner of the vehicle and that the accident occurred as claimed by the respondent. He averred that if an accident occurred then the same was as a result of the recklessness on the part of the deceased.



4. The trial magistrate upon finding the appellant to be 100% liable entered the following award in favour of the respondent:
 - a. Pain and suffering Kshs 50,000/-
 - b. Loss of expectation of life Kshs 100,000/-
 - c. Loss of Dependency Kshs 3,200,000/-
 - d. Special damages Kshs 120,000/-

Total Kshs 3,320,000/-

5. It is this judgment by the trial court that has occasioned the filing of the Memorandum of Appeal herein which is challenging the award of damages on the following grounds:
 1. The learned magistrate erred in law and facts and misdirected himself when he failed to consider the applicants' submissions on points of law and facts on quantum.
 2. The learned trial magistrate erred in law by relying on the sole testimony of the deceased's wife as proof of the deceased occupation and earnings.
 3. The learned magistrate erred in law and fact by finding that the deceased earned Kshs 670/- per day when the same had not been proved when there was no proof of the same (sic).
 4. The learned magistrate erred in law and fact in finding that the deceased earned Kshs 20,000/- per month when there was no proof of the same.
 5. The learned magistrate erred in law and fact in assuming that the deceased worked every day of the month thereby multiplying assumed daily earnings of Kshs 670/- per day by 30 days.
 6. The learned magistrate erred in law and fact in awarding general damages of Kshs 3,320,000/- an amount that was excessive and unjust in the circumstances considering the evidence adduced before court and the principles of law.
 7. The learned magistrate erred in law and facts and his decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.
 8. The learned magistrate erred in law and fact in unduly disregarding the judicial authorities cited by the Respondent which were excessive in the circumstance.

6. At the hearing of the appeal, parties were directed to file their written submissions for and against the appeal. Both parties have complied. The appellant has made submissions challenging the award of damages and has conceded in his submissions that the appeal is solely on quantum. The limits under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR as follows:

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...’

7. The appellant submitted that the Kshs 50,000/- awarded under the head pain and suffering was unwarranted as the post mortem showed that the deceased died on the spot. While relying on the case of *Civiscope Limited v Gilbert Kimatare Nairi & Lilian Napudo Nairi (suing as personal representatives)*



of the estate of Gilbert Nairi Lemayian (Deceased) [2021] eKLR it was submitted that an award of Kshs 20,000/- was sufficient.

8. The respondent on the other hand submitted that the trial magistrate's award was well within the range of awards that have been made by various magistrates and judges. He relied on the case of Meru HCCA No 92 of 2012, Civil Case No 56 of 2014, *Beatrice Mukulu Kang'uta & Another v Silverstone Quarry Limited & Another* (2016) eKLR where the court made an award of Kshs 200,000/- for a deceased who died a few hours after the accident.
9. It is not in dispute that the respondent was entitled to damages on the head pain and suffering as the deceased suffered pain as a result of his injuries in the time leading up to his passing. The post mortem form reveal that the body of the deceased was found at the accident scene on the date of the accident at 10:00hrs and it was also noted that the time of death was 10:00 hrs. The deceased therefore died on the spot. However, considering that the deceased must have suffered some pain before his death as well as the rate of inflation, I do not find the award of Kshs 50,000/- to be excessive. In the case of *Sukari Industries Limited v Clyde Machimbo Juma* Homa Bay HCCA No 68 of 2015 [2016] eKLR the award of Kshs 50,000/- was upheld for a deceased who died immediately after the accident. The court stated:

“(5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”
10. On loss of dependency, the appellant was submitted that there was no evidence that the deceased's mother and his brothers were dependants of the deceased as provided under section 4 (1) of the *Fatal Accident Act*. It was argued that the respondent failed to prove dependency which is a fact proved by evidence (see *Dismas Mubami Wainarua v Sopon Kasirimo Maranta (suing as administrator and personal representatives of the estate of Partinini Supon (Deceased))* [2021] eKLR and *John B Njeri and another vs Sabina Bosibori marita Modestar Bwari Nyabuto (suing as the legal representative of the late Richard Nyakundi Marita* Civil Appeal Ni. 51 of 2018 Embu). The appellant also submitted that in the alternative if the court finds that the dependency did exist, then the ration of 1/3 would be most appropriate as opposed to 2/3 adopted by the subordinate court. He also faulted the trial court's finding that the deceased made Kshs 20,000/- yet there was no evidence that the deceased earned such a sum. In his submissions, he urged the court to apply a global sum of Kshs 600,000/- as sufficient compensation.
11. The respondent submitted that they led evidence at the trial court that the deceased was working as a boda boda rider. They relied on the decision of *Jacob Ayiga Maruja & another v Simeon Obayo* CA 167/200 [2005] eKLR where the court stated categorically that it did not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents.
12. The respondent further submitted that Pex 3 produced before the subordinate court revealed that the deceased's dependants were his mother and 3 brothers. That a parent is deemed as a dependant on their child irrespective of their age and financial abilities. They relied on the case of *Marko Mwenda v Bernard Mugambi & Another* Nairobi HCCC No 2343 of 1993 where the court held that in the



African context, the deceased child was expected to continue assisting her parents financially, for many years into the unknown future. The 2/3 ratio adopted by the trial magistrate should therefore be upheld.

13. The evidence before the subordinate court was clear that the deceased was a boda boda rider. Pw1 gave evidence in chief that the deceased was motor cycle rider earning Kshs 20,000/-. His beneficiaries were his brother's and mother. In fact, the deceased suffered fatal injuries that led to his death while engaged in his trade. There was no evidence by the appellant that was presented to challenge the respondent's evidence. Although the trial magistrate applied an income of Kshs 20,000/- he did not give a reason how he arrived at the sum. In my view, an income of Kshs 10,000 is more reasonable if the deceased worked for 20 days in each month and taking into account that his boda boda business would also cater for the normal wear and tear expected in the transport business. In *David Mwenda & another v Alice Kawira (Suing the Administrator of the Estate of John Munyoki Malyunga (Deceased))* [2018] eKLR in awarding a bodaboda rider Kshs 10,000/- as his monthly income within the Kisii locality held as follows:

“PW 1 testified on oath that the deceased was in boda boda business and he in fact died while carrying a pillion passenger. The issue is what is the multiplicand to adopt. PW 1 stated that the deceased was earning about Kshs 1,000/- per day while the trial magistrate relied on, “gazetted wages which is about Kshs 15,000/- per month.” It is not clear what gazette the trial magistrate was referencing. While the sum of Kshs 1,000/- per day would be reasonable, I take into account the fact that there would be good days and bad days and I find a sum of Kshs 500/- on average more reasonable and if he was working for 6 days a week, his monthly income would be Kshs 10,000/-.

14. The respondent was required to prove that the deceased had dependents, i.e. that he had a wife, parent or child that depended on him. There was evidence that the deceased's mother was a dependent, however it is unclear how much money she received from her son. In *Rodgers Kinoti v Linus Bundi Murithi & another* [2022] eKLR the court found that a dependency ratio was most appropriate for the deceased therein who was unmarried. The court stated that it was not realistic for the deceased to spend more than ½ of his salary on his parents given the tough economic times. Therefore, the dependency ratio of 2/3 applied by the trial magistrate was therefore excessive and I am persuaded that a ratio of 1/3 would be appropriate. The award of loss of dependency is therefore worked out as follows: 10,000 x 12 x 20 x 1/3 = 800,000/-.

15. The appellant made no submissions challenging the award of loss of expectation of life as well as special damages and find no reason to interfere with the award by the trial magistrate. In the end, the Lower Court's judgement is set aside, in its place this court enters judgement and quantifies damages as follows:

- a. Pain and suffering Kshs 50,000/-
 - b. Loss of expectation of life Kshs 100,000/-
 - c. Loss of Dependency Kshs 800,000/-
 - d. Special damages Kshs 120,000/-
- Total Kshs 1,070,000/-

16. The appellant is awarded half costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY 2023



R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Mr. Oremo For the Respondent

Aphline C/A

