



**Orion Investments v Kung'u (Suing for and on Behalf of the
Estate of Jane Gathoni Kung'u Deceased) & another (Civil Appeal
204 of 2021) [2023] KEHC 22222 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 22222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 204 OF 2021
F WANGARI, J
MAY 25, 2023**

BETWEEN

ORION INVESTMENTS APPELLANT

AND

**STEPHEN NJOROGE KUNG'U (SUING FOR AND ON BEHALF OF THE
ESTATE OF JANE GATHONI KUNG'U DECEASED) 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

*(Being an Appeal from the Judgment of the Learned Chief Magistrate Hon. F. Kyambia
in Mombasa Civil Suit No. 195 of 2006 delivered at Mombasa on 8th October, 2021)*

JUDGMENT

1. This is an appeal from the Judgment and decree of the Learned Chief Magistrate Hon. Francis Kyambia in Mombasa CMCC 195 of 2006 given on October 8, 2021.
2. The appellant raised ten (10) grounds of appeal which were only limited to the quantum of damages. The Trial Court had apportioned liability at 50% against the appellant.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



4. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. I have looked at the appellant’s grounds of appeal and in particular, the detailed written submissions filed by both parties.
6. The appeal is only on quantum of damages awarded by the Lower Court. It is therefore settled that parties have no quarrel with the testimony that was rendered before the Trial Court and thus this court shall not rehash what the witnesses said before the Trial Court unless it has a bearing on the quantum of damages that were awarded.

Analysis and Determination

7. In an appeal against assessment of damages, an Appellate Court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services [1976]” & another v Lubia & another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

“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 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.”

8. On the first issue, the Appellant submitted that an award of Kshs. 50,000/= as damages for pain and suffering was inordinately high. It submitted that an award of Kshs. 20,000/= would have sufficed. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of *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 as follows: -

“...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...”

9. I note that the Trial Court held that both parties had submitted for Kshs. 50,000/= and that is why it awarded the said sum. I have looked at the Appellant’s submissions before the Trial Court and I note that the Trial Court’s holding on this issue is not entirely correct as the Appellant had submitted for a sum of Kshs. 20,000/= and which position it holds on this appeal. As held in various decisions, nominal awards should be made where the death follows immediately after the accident. It is not in doubt that the deceased died immediately after the accident. In *Retco East Africa Limited v Josephine Kwamboka*



- Nyachaki & Another [2021] eKLR, an award of Kshs. 100,000/= on this head was upheld on appeal where the deceased died thirty (30) minutes after the accident. In upholding the award, the court took into account passage of time and inflation. I hold a similar view that the award of Kshs. 20,000/= as proposed by the Appellant does not take into account inflation and passage of time. Therefore, I see no reason to disturb the Trial Court's award under this head.
10. On loss of expectation of life, the Appellant opined that the award of Kshs. 200,000/= was inordinately high. 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, it was held as follows; - "...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..." In Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, it was held that Kshs. 100,000/= is a conventional sum for loss of expectation of life. Considering passage of time and inflation, I consider that a sum of Kshs. 150,000/= on this head would suffice. Each case has to be decided on its own merits. I therefore set aside the award of Kshs. 200,000/= made by the Trial Court and in its place, I substitute it with an award of Kshs. 150,000/=.
 11. On loss of dependency, the appellant submitted that the sum of Kshs. 6,000,000/= was on a higher side. I note that both parties submitted in favour of the multiplier approach. What is in dispute is the multiplier and the multiplicand. The Trial Court adopted a multiplier of 25 years and a multiplicand of Kshs. 30,000/=. It is not in dispute that the deceased was 33 years at the time of death as per the death certificate that was produced. Similarly, though the Appellant submitted that no evidence was produced to show how much the deceased was earning, it is not in dispute that she was in business as evidenced by documents contained at pages 97 to 101 of the record of appeal. The respondent had submitted for a sum of Kshs. 100,000/= before the Trial Court while the appellant had submitted that the minimum wage regulation in force at the time of death be relied upon.
 12. The Trial Court upon considering all factors settled for a sum of Kshs. 30,000/= as the multiplicand. In this court's perspective, I have no doubt that the deceased was in business and she was earning. In Julius Kiprotich v Eliud Mwangi Kibobia [2006] eKLR, it was held that assessment of general damages for injuries sustained is not a scientific or mathematical process but is based on what a judge assesses to be the best compensation to such a person in the circumstances of each case. Considering that the deceased was in business and which evidence was not controverted, I have no doubt that the Trial Court was well guided in setting the multiplicand at Kshs. 30,000/=. The 25 years adopted as the multiplier was well founded since the deceased was a business lady who would have worked way beyond the retirement age of sixty (60) years.
 13. Similarly, it was not controverted that the deceased was married with three (3) children who were dependants. Therefore, the dependency ratio of 2/3 was perfectly in order. I therefore see no reason to disturb the award of Kshs. 6,000,000/= under the head of loss of dependency.
 14. There was no contest on the issue of special damages and the same stands as per the Trial Court's judgement.
 15. Accordingly, this appeal succeeds only to the extent afore-stated and judgement for the Appellant shall now be as follows: -
 - i. Liability at 50%: 50%
 - ii. Pain and suffering Kshs. 50,000/=
 - iii. Loss of expectation of life Kshs. 150,000/=



- iv. Loss of dependency Kshs. 6,000,000/=
- v. Special damages Kshs. 437,000/=
- Total Kshs. 6,637,000/=

16. Since the Appellant has nominally succeeded, I order that each party shall bear their own costs.
It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

In the presence of:

N/A by the Appellant

N/A by the Respondent

Guyo, Court Assistant

