



**Helias Kenya Limited & another v Nalianya & another (suing as the Administrators of the Estate of Felix Wanjala Checheya - Dcd) (Civil Appeal E070 of 2022) [2023] KEHC 21398 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E070 OF 2022**

**DK KEMEL, J  
JULY 28, 2023**

**BETWEEN**

**HELIAS KENYA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**UNIVERSE FREIGHT SERVICES LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EVERLYNE NALIAKA NALIANYA & SCOVIA NALIAKA WANJALA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF FELIX WANJALA CHECHEYA - DCD) ..... RESPONDENT**

*(Being an appeal against the judgement and decree delivered by Hon. J.O. Manasses (RM) on 14th July 2022 in Sirisia PMCC No. 38 of 2020)*

**JUDGMENT**

**Background**

1. This appeal is against the award of quantum of damages by the trial Court in respect of an accident involving the deceased and motor vehicle registration number KCD 789C which was hauling trailer registration number ZF 0317.
2. The accident occurred on 2<sup>nd</sup> December 2019 while the deceased was lawfully standing near Kimaeti Shopping Centre along Malaba-Bungoma road when the Appellants driver, servant and or agent so negligently drove and/or managed motor vehicle registration number KCD 789C which was hauling trailer registration number ZF 0317 that it lost control and knocked the deceased where he sustaining serious bodily injuries to which he succumbed.
3. Upon full trial, the learned trial Magistrate awarded the Respondents: Kshs. 50,000/= for pain and suffering; Kshs. 300,000/= for loss of expectation of life; Kshs. 732, 780/= for loss of dependency and



Kshs. 97,700/= for special damages. By consent dated 21<sup>st</sup> April 2022, the parties before the trial Court agreed on liability at 85:15 in favour of the Respondents herein and that the trial court proceeded to record evidence on the assessment of quantum of damages.

4. According to PW1, Everline Naliaka Nalianya, she adopted her statement as evidence in chief. She testified that she is a farmer who resides in Muiyenga. She told the court that the deceased herein was her friend and lover. To prove this, she produced a death certificate serialized as 0896133 dated as 30<sup>th</sup> December 2019. She testified that the deceased's body was held at Life Care Hospital before being transferred to Bungoma County Referral Hospital mortuary. She testified that a post-mortem was done and that Kshs. 8,600/= was paid and that she has the receipts. She told the Court that she paid Kshs. 20,000/= for a coffin and used Kshs. 30,000/= in filing for limited letters of grant of administration. She testified that the deceased was a farmer and businessman who earned Kshs. 25,000/= per month and that both the Respondents herein, his wives, depended on him. She told the Court that the deceased had eighteen children with nine of them being minors. She produced the birth certificates. She told the Court that she reported the incident to the police and she was given an abstract and that she also conducted a search on the motor vehicle registration number KCD 789C/ZF 0317 and that she has receipts to prove the same. She testified that she obtained a grant for purposes of filing this suit and that she paid Kshs. 30,000/= and that she has a receipt with regard to the same.

On cross examination, she testified that the deceased had two wives the Respondents herein and that there used to be a 3<sup>rd</sup> wife who left in 2005 but left her kids with the deceased. She told the Court that she does not have any marriage certificate to prove that she was a wife of the deceased.

On re-examination, she told the Court that the children of her co-wife who abandoned the marriage all reside with her and are below the age of 18 years. She testified that she was married via customary laws and that the deceased earned Kshs. 15,000/=.

5. The Respondents closed their case and likewise the Appellants. The trial court rendered a judgment on quantum of damages both general and special as follows:

Law Reform Act

- i. Pain and suffering..... Kshs. 50,000/=
- ii. Loss of expectation of life.....Kshs. 300,000/=

Fatal Accidents Act

- iii. Loss of dependency-  
Kshs.  $18,319.50 \times 12 \times 5 \times 2/3$ .....Kshs 732,780/=
  - iv. Special damages.....Kshs. 97,700/=
- Total Kshs 1,180,480/=
- Less 15% Kshs. 177,072/=
- (Contributory negligence)
- Net Award... Kshs. 1,003,408/=
- v. Interests on damages at Court rates
  - vi. Costs of the suit awarded to the Plaintiff.

6. Aggrieved by the judgment of the trial Court, the Appellants filed its memorandum of appeal dated 11<sup>th</sup> August 2022. The grounds are as follows:



- i. The learned trial Magistrate erred in law and fact in failing to appreciate the reasonable and sufficient evidence tendered in Court when assessing and awarding damages.
  - ii. The learned trial Magistrate erred in law and fact by awarding damages under the *Law Reform Act* and the *Fatal Accidents Act* that was excessive in the circumstances.
  - iii. The learned trial Magistrate erred in law and fact in assessing damages for loss of expectation of life at Kshs. 300,000/= which assessment when viewed against the evidence adduced is manifestly excessive and inordinately high as to amount to miscarriage of justice.
  - iv. The learned trial Magistrate erred in law and fact in adopting a multiplicand of Kshs. 18,319.50/= as a minimum wage and thus failed to appreciate the reasonable and sufficient evidence tendered in Court by the Appellants hence arriving at an erroneous award.
  - v. The learned trial Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellants.
  - vi. The learned trial Magistrate failed to exercise his discretion judiciously in awarding damages and failed to apply the settled principles of law and thus there was no good or basis for the said assessment of damages.
  - vii. The learned trial Magistrate erred in law and fact in awarding damages at a total sum of Kshs. 1,003,408/= which assessment when viewed against the evidence adduced and comparable decisions/cases is manifestly excessive and inordinately high as to amount to a miscarriage of justice.
  - viii. The trial Court's award of damages is out of keep with other Kenyan awards for comparable/similar claims.
  - ix. The learned trial Magistrate failed to, generally, judicially apply and to adequately evaluate the evidence tendered and thereby arrived at a decision unsustainable in law.
7. The Appellant prays for the judgement and decree of the subordinate Court to be set aside and substituted with an order that may be just and expedient in the circumstances and that the costs of this appeal be awarded to the Appellants.
  8. The appeal was canvassed by way of written submissions. Both parties complied and filed their respective submissions.
  9. I have given due consideration to the appeal herein, the evidence before the trial Court, the grounds of appeal and the submissions by the parties herein. In my humble view, I find the only issue for consideration is whether this Court should interfere with the award of damages by the trial Court.
  10. It is trite that this is a first appeal to this Court and as provided in the well settled principles, I am obligated to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before him, that advantage is not availed this court (See *Peters Vs Sunday Post Limited* [1958] EA 424.)



11. The Court also in the cases of *Bundi Murube v Joseph Omkuba Nyamuro* [1982-88]1KAR 108 had this to say; -

“However, a Court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did.”

And also, in *Rahima Tayabb & Another V Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated; -

“An appellate Court will be slow to interfere with a Judge’s findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him.”

12. On the issue of quantum, according to the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR: -

“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...”

13. The trial magistrate made an award under both the *Law Reform Act* and the *Fatal Accidents Act* that according to the Appellants were excessive in the circumstances.

14. On pain and suffering, the trial court being guided by viable decision of Maurice Oduor Ogada (suing as the Legal representative of Jane Dorothy Anyango) versus John Juma Obungu & Another Kisumu HCCC NO. 375/1999(2013) eKLR made an award of Kshs. 50,000/=. According to PW1, on cross-examination she told the Court that the deceased died at the place of the accident meaning that he died on the spot. In the case of *James Gakinya Karienyé & another* (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR my learned colleague Justice R.E Aburili made an award of Kshs 10,000/= for pain and suffering, referring to it as being a convectional figure for the death that occurred immediately after the accident, under the *Law Reform Act*. It is noted that the deceased died on the spot and thus did not undergo excruciating pain before breathing his last. A sum of Kshs 30,000/= would have been appropriate taking into consideration the inflation rate. Under this head, this appeal succeeds.

15. On loss of expectation of life, the trial Court made an award of Kshs. 300,000/= due to inflationary trends. He relied on the case of *Daniel Kuria vs Nairobi City Council* (2013) eKLR Nairobi HCCC No. 132 of 2001. I believe the trial Magistrate misguided himself when making an award of Kshs. 300,000/=. I place reliance on the case of *Charles Masoso Barasa & Another vs Chepkoech Rotich & Another* (2014) eKLR which made an award of Kshs. 80,000/= under the head of loss of expectation of life. I hereby make an award of Kshs. 200,000/= taking into account the inflation rate. Under this head this appeal succeeds.

16. The above awards are capped to a minimum so that the estate of the deceased does not benefit twice from the same death under the *Fatal Accidents Act* and the *Law Reform Act*.

17. On the claim under the *Fatal Accidents Act*, I note that the Respondents had a letter of administration ad litem to represent the estate of the deceased person. They sued in their capacities as wives of the



deceased. They are therefore de jure dependants under section 4(1) of the Fatal Accidents Act which provide that:

“Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...”

18. The trial Magistrate made an award of Kshs. 732, 780/= for loss of dependency using the multiplier method. The advocates for the Appellants submitted that the adoption of Kshs. 18, 319.50 as per the Kenya Gazette Legal Notice No. 2 of 8<sup>th</sup> January 2019 by the trial Magistrate was an error. The Appellants argue that the adoption of the First Schedule to the Regulation of Wages General (Amendment) Order 2018, No. 12 of 2018 (LN 2 of 2019) would have been the most appropriate approach. As per the death certificate of the deceased, he was a farmer thus a general labourer and that the appropriate sum was Kshs. 7,240.95/=. The Respondents argued that the trial Court was right in adopting a multiplicand of Kshs. 18, 319.50/= as a minimum wage as the deceased was a farmer and a business man earning Kshs. 25,000/= per month. I am inclined to agree with the submissions of the Appellants. This Court properly takes judicial notice of the statutory regulations on Basic Minimum Wages for the relevant year under section 60 (1) (a) of the Evidence Act. THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2019, which is applicable for the present case where the deceased died on 30<sup>th</sup> December 2019, provides for a basic minimum wage of Kshs. 7, 240.95/= for a general labourer in Bungoma.
19. The deceased was married and had issues. On the claim for lost years (loss of dependency), the manner of assessment of damages under the Fatal Accident’s Act was set out in *Chunibhai J Patel and Another vs PF Hayes and Others* (1957) EA 748, 749 where the Court of Appeal stated that:-

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the Court should apportion among the various dependants.”
20. In computing damages, the trial Court used a multiplier of 5 years and a dependency ratio of 2/3 which the Appellants did not contest. As the same are not contested in this appeal, this Court will not venture into its analysis.
21. From the forgoing, in this case, the earnings of Kshs. 18, 319.50/= adopted by the trial Magistrate was in the circumstances unreasonable and I find good reasons to interfere with this award. The loss on dependency therefore would be worked out as Kshs. 7, 240.95 x 12 x 5 x 2/3= 289,638/=.
22. As the special damages are not contested in this appeal, this Court will not venture into its analysis. The same will remain undisturbed.



23. In the result, the appeal partly succeeds. The judgement of the trial court is hereby set aside and substituted with the following orders:

Law Reform Act

- a. Pain and suffering -Kshs. 30,000.00
- b. Loss of expectation of life -Kshs 200,000.00

Fatal Accidents Act

- c. Loss of dependency  
Kshs.  $7,240.95 \times 12 \times 5 \times \frac{2}{3}$  -Kshs. 289,638.00
- d. Special damages -Kshs. 97,700.00  
Total -Kshs. 617,338.00
- e. Less 15% -Kshs. 92,600.7  
(Contributory negligence)  
Net Award -Kshs. 524,737.3
- f. The above sum of Kshs. 524,737.3/= shall attract interest at Court rates from the date of judgement in the lower court.
- e. As the appeal has partially succeeded, the Appellants shall have half costs of the appeal while the Respondents will have full costs in the lower court.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY, 2023.**

**D.KEMEI**

**JUDGE**

In the presence of :

No appearance Milimo Mose for Appellants

Wamalwa R for Mukisu for Respondents

Kizito Court Assistant

