



Atieli v Anene & another (Both Suing as Representatives of the Estate of Moses Kaverenge - Deceased) (Civil Appeal E035 of 2021) [2023] KEHC 20939 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E035 OF 2021**

**JN KAMAU, J
JULY 27, 2023**

BETWEEN

HARISON ETEMESI ESKUMO ATIELI APPELLANT

AND

JAVAN MIASEE ANENE 1ST RESPONDENT

KERAN MBOONE ANENE 2ND RESPONDENT

**BOTH SUING AS REPRESENTATIVES OF THE ESTATE OF MOSES
KAVERENGE - DECEASED**

(Being an appeal from the Judgment and Decree of Hon S. O. Ongeru (SPM) delivered at Vihiga in Senior Principal Magistrate's Court Case No 215 of 2020 on 24th August 2021)

JUDGMENT

Introduction

1. In his decision of 24th August 2021, the Learned Trial Magistrate, Hon S.Ongeru, Senior Principal Magistrate found the Appellant to have been fully liability for the death of Moses Kaverenge (hereinafter referred to as “the deceased minor”) and entered Judgment in favour of the Respondents as against the Appellant as follows:-

Pain & Suffering Kshs 100,000/=

Loss of Expectation of Life Kshs 100,000/=

General Damages under Fatal

Accident Act Kshs 800,000/=

Kshs 1,000,000/=



Plus costs and interest at court rates.

2. Being aggrieved by the said decision, on 15th September 2021, the Appellant filed a Memorandum of Appeal dated 14th September 2021. He relied on five (5) grounds of appeal.
3. His Written Submissions were dated 24th February 2023 and filed on 1st March 2023 while those of the Respondents were dated 7th March 2023 and filed on 10th March 2023. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination were:
 - a. Whether or not the Appellant herein was liable for the accident herein;
 - b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.
7. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Liability

8. The Appellant submitted that one must prove his case before the court of law to the required standard. He was emphatic that the Respondents did not prove any of the Particulars of negligence that were set out in the Plaint. He added that they never called any eye witness who witnessed the accident to testify contrary to Section 3(1)(c) of the *Evidence Act* Cap 80 (Laws of Kenya).
9. He further contended that parties to a suit were bound by their pleadings. He argued that from the Plaint, it was clear that the deceased never suffered any injuries as a result of the accident and that no particulars of injuries were ever stated on the pleadings. He asserted that the Respondents did not also tender a P3 Form and that no medical expert was called to confirm that the deceased minor died of the injuries that he had allegedly sustained.
10. He added that the unmentioned and unjustified injuries he suffered were only meant to deceive the court and that it was very possible that in the absence of evidence, he may have incurred injuries elsewhere after the accident that eventually took his life. He placed reliance on the case of *Joseph Kimanthi Nzau vs Johnson Macharia* [1019] eKLR where it was held that medical reports had to be produced by the person giving them.
11. He referred this court to Sections 107, 108 and 109 of the *Evidence Act* and invited this court to make a fresh analysis of the evidence that was adduced during trial. He further submitted that as the first appellate court, this court was under duty to reconsider and re-evaluate the evidence on record and



draw its own conclusion and in doing so must bear in mind that the trial court had the advantage of seeing and hearing the witness testify before it.

12. To support his argument in this regard, he placed reliance to the cases of *Mary Wanjiku Gachigi vs Ruth Mothoni Kamau Civil Appeal No 172 of 2000* (eKLR citation not given), *Ann Wambui Nderitu vs Joseph Kiprono Ropkoi & Another Civil Appeal No 345 of 2000* (eKLR citation not given) and *Virani t/a Kisumu Beach Resort vs Phoenix East Africa Assurance Company Ltd Kisumu High Court Civil Case No 88 of 2002* (eKLR citation not given) where similar conclusions were arrived at.
13. He also referred this court to the case of *K. Anbazhagan vs State of Karnataka & Others* (citation not given) where the holding was that the duty of an appellate court was to see that justice was appropriately administered.
14. Notably, the issue of liability was not part of the Appellant's grounds of appeal. The Respondents did not submit on the same despite having been served with the Appellant's Written Submissions in which he had raised the issue. It was not clear to this court if the Respondents opted not address the question of liability because it was not part of the grounds of appeal.
15. Be that as it may, once the issue was raised in the Appellant's Written Submissions, he was obligated to respond to the same by way of a rebuttal to give the court an opportunity to pronounce itself after considering submissions by both parties despite the issue of liability was not a substantive ground of appeal.
16. Indeed, this could not close its eyes to the same as it was evaluating the evidence that the Respondents adduced in court and the determination that the Learned Trial Magistrate made in this regard as it had a bearing on the question of quantum. This is because quantum could only awarded if liability had been determined.
17. A perusal of the Complaint dated 30th October 2020 and filed on 8th December 2020 showed that the Respondents had itemised twelve (12) Particulars of negligence against the Appellant herein. The same could only be proven by oral and/or documentary evidence.
18. In his Witness Statement that he adopted as his evidence in chief, the 1st Respondent herein stated that on 4th August 2020, he was called while he was at work and informed that his son, the deceased minor, herein was involved in an accident. When he was cross-examined, he admitted that he never witnessed the accident.
19. No 59708 PC John Koech (hereinafter referred to as "PW 2") was the Investigating Officer. He testified that on 4th August 2020, he was on duty at Vihiga Police Station when a good Samaritan informed him that there was an accident along Luanda- Majengo Road involving Motor Vehicle Registration Number KCJ 981Q (hereinafter referred to as the subject Motor Vehicle) and the deceased minor herein.
20. His evidence was that the deceased minor was trying to cross the road from left to right and that there was blood and broken glass at the scene. He took measurements and thereafter recommended that the driver of the subject Motor Vehicle be charged. He, however, stated that the said driver was never charged. On being cross-examined, he stated that the impact was on the tarmac and that he did not have anything to show that the investigations had been completed.
21. A perusal of the proceedings shows that the Appellant did not adduce evidence after the Learned Trial Magistrate declined his counsel's request to adjourn the matter so as to call a witness.



22. Whereas the 1st Respondent did not tender in evidence a Certificate of Test and Examination to prove that the subject Motor Vehicle was defective or that the matter was pending investigations as per the Police Abstract Report or that the Respondents did not call an eye witness who could have testified on the point of impact of the accident, this court nonetheless found PW 2's evidence to have been sufficient for purposes of proving that an accident between the subject Motor Vehicle and the deceased minor did occur. He was the investigating officer and was well versed with the facts of the case at the scene of the accident despite not having witnessed the accident.
23. In the absence of any other contrary proof by the Appellant herein, the Respondents' assertion that he was liable for the deceased minor's death was thus proven to the satisfaction of this court in accordance with Sections 107, 108 and 109 of the *Evidence Act*. The question of whether or not the Appellant ought to have borne full liability was a different issue altogether.
24. Notably, the deceased minor was aged six (6) years at the material time of the accident. The Respondents did not adduce any evidence to show that he was accompanied by a responsible person as he attempted to cross the road. While negligence could not be attributed to the deceased minor as he was a child of tender years, the Respondents could not escape liability as his parent and/or grandparent and/or guardian. They were negligent in their parental responsibility and supervision for leaving a child of tender years to wander in a busy road which was fraught with dangers and perils.
25. On the other hand, in view of the fact that the deceased minor sustained fatal injuries, it was conclusive evidence that the driver of the subject Motor Vehicle was driving at an excessive speed in the circumstances. It was not necessary for the Respondent to bring an eye witness to state this fact as it was *res ipsa loquitur*. In other words, the thing spoke for itself.
26. The driver of the subject Motor Vehicle ought to have driven at a speed which could have allowed him to brake in the event of an emergency such as that of careless adult pedestrian, an aged person, a child or a person suffering from a mental infirmity stepping into the road unexpectedly.
27. As the driver of the subject Motor Vehicle was in charge of what could be considered a lethal weapon as it had potential of causing serious injuries or damage to third parties and the deceased minor was only six (6) years at the time of his death, this court came to the firm conclusion that apportionment of liability at 80%-20% in favour of the Respondents was most reasonable in the circumstances of the case.

II. *Law Reform Act* CAP 26 (laws Of Kenya)

A. Pain and suffering

28. The Appellant argued that where a deceased remained unconscious after an accident had occurred until he died, there was no pain and hence the appropriate award should be Kshs 10,000/=. In this regard, he relied on the case of *Techarad Steam & Power Limited vs Mutio Muli & Mutua Ngao* [2019] eKLR which was cited with approval in the case of *Suleimani Muwanga vs Walji Bhimji Jiwani & Another* (1964) EA 171 where it was held that no award would be made for pain and suffering where the court was satisfied that immediately after the accident, the deceased was unconscious and died immediately on admission.
29. On their part, the Respondents averred that the facts that were pleaded in the Plaintiff were reflected in the Post-mortem Report and the Death Certificate. They argued that although the evidence that was tendered was that the deceased died two (2) days after the accident and their submissions and the Judgment of the Trial Court showed that the deceased minor died after three (3) days, the variance in



the date of death was not an issue that would warrant the disturbance of the award by the Learned Trial Magistrate as it was only a day's discrepancy.

30. To this end, they relied on several cases among them the cases of *Ndungu Wambui Christine & 2 Others vs Muusi Nzivo Maingi aka Muusi Uzivo & Another* [2020] eKLR, *Citi Hoppa Bus Limited & Another vs Maria Clara Rota* [2021]eKLR and *Petronila Muli vs Richard Muindi Savi & Catherine Mwendu Mwindu* [2021]eKLR where the courts therein awarded Kshs 100,000/= for pain suffering where the deceased persons died one (1) day, four(4) days and three (3) days after the accident respectively.
31. They thus urged this court to uphold the Trial Court's award under this head as the same was within range of the recent authorities which were commensurate with the varying length of time taken by a deceased before he or she died and that the same took the issue of inflation into consideration.
32. The Respondent herein testified that the deceased died after three (3) days. PW 3 corroborated his evidence. He told the Learned Trial Magistrate that the deceased minor was rushed to Vihiga Referral Hospital for treatment and that he died on 7th August 2020.
33. As was held in the case of *Kiwanjani Hardware Limited & Another vs Nicholas Mule Mutinda* [2008] eKLR, an appellate court will not disturb an award of damages unless the same was inordinately low or high so as to represent an erroneous estimate or was based on an entirely wrong principle.
34. In the cases of *Acceler Global Logistics vs Gladys Nasambu Waswa & Another* [2020] eKLR and *Sukari Industries Limited vs Clyde Machimbo Juma* [2016] eKLR as quoted in the case of *Wachira Joseph & 2 Others v Hannah Wangui Makumi & Another* [2021] eKLR, the courts therein awarded a sum of Kshs 50,000/= for pain and suffering.
35. In the case of *Nancy Ann Wathithi Gitau & Another* [2016] eKLR, the court therein awarded a sum of Kshs 100,000/= where the deceased died thirty (30) minutes after the accident.
36. Whereas the Trial Court erred in not having relied on any past decisions to justify how it arrived at the sum of Kshs 100,000/= for pain and suffering, the sum of Kshs 10,000/= that the Appellant proposed was low bearing in mind the inflationary trends. The deceased did not die on the spot and must have suffered a lot of pain for the two (2) days that he was in hospital.
37. The very fact that he was unconscious and never gained consciousness was evidence of the serious injury that he sustained to his head. It was therefore immaterial that he could not feel the pain because he was unconscious as the Appellant herein had been argued.
38. As was rightly pointed out by the Respondents, a discrepancy of a day regarding when the deceased minor died was immaterial because an award of Kshs 100,000/= can also be made where a deceased died on the same day.
39. Taking into account comparative awards for pain and suffering and the inflationary trends, this court was thus not persuaded that it should disturb the award of Kshs 100,000/= that was made by the Learned Trial Magistrate under this head as the same was fair and reasonable in the circumstances of the case.

B. Loss of expectation of life

40. The Appellant did not submit on this head but proposed that an award of Kshs 80,000/= be awarded instead of the Kshs 100,000/= that was awarded by the Trial Court.



41. On their part, the Respondents submitted that the award that was made by the Trial Court under this head was a conventional award made for most cases and was thus not inordinately high as had been expressed by the Appellant. They thus urged this court to uphold the same.
42. It was the considered view of this court that a sum of Kshs 100,000/= was a fair and reasonable assessment for the award of loss of expectation of life. In arriving at this conclusion, this court had due regard to the case of Jackson Kariuki Ndegwa (suing as the administrator of the estate of Fabius Munga Kariuki vs Peter Kungu Mwangi [2016] eKLR where the court therein awarded a sum of Kshs 150,000/= under this head.
43. This court was thus not persuaded that it should disturb the award of Kshs 100,000/= that was awarded by the Trial Court for loss of expectation of life as the same was fair and reasonable in the circumstances of the case

III. Fatal Accidents Act CAP 32 (laws Of Kenya)

A. Loss of Dependency

44. The Appellant further submitted that the assessment of quantum was a claim for general damages and that the same was based on the discretion of the court. He argued that, however, the said discretion had to be exercised judiciously at all times. He added that in assessing damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two (2) cases were exactly the same as was held in the case of Stanley Maore vs Geoffrey Mwenda [2004] eKLR. He further relied on the case of Mbaka Nguru & Another vs James George Rakwar [1998] eKLR where it was held that the award must reflect the trend of previous, recent and comparable awards.
45. He argued that the Trial Court's award of Kshs 800,000/= was not based on any arithmetic and evidence and the same was disproportionately high in the circumstances. In this respect, he relied on the case of Bashir Ahmed Butt vs Ahmed Khan (1982-88) KAR 5 where it was held that an appellate court will not disturb an award of damages unless it was so inordinately high or low as to represent an entirely erroneous estimate.
46. He also cited the cases of West (H) & Son Ltd vs Shepherd [1964] A.C 326 pg 345 and Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd [2013] eKLR where the common thread was that comparable injuries should be compensated by comparable awards and that the amounts that were awarded were to considerable extent, conventional.
47. He was emphatic that no birth certificate was ever produced to ascertain the age of the deceased minor. He urged the court to rely on the authorities he had cited in his submissions during trial. He further placed reliance on the cases of Mwanzia Ngalali Mutua vs Kenya Bus Services Limited & Another (eKLR citation not given) that was quoted in Albert Odawa Gichimu Githenji [2007] eKLR and Palm Transporters & Another vs WWW [2015] eKLR where an award of Kshs 400,000/= was upheld on appeal for the estate of a thirteen (13) year old deceased.
48. He also cited the case of Kwamboka Grace vs Mary Kimuma [2017] eKLR where an award of Kshs 720,000/= for the estate of a five (5) year old deceased was reduced to Kshs 300,000/= on appeal.
49. He thus proposed that general damages under the Fatal Accident Act be awarded at Kshs 300,000/=.



50. On their part, the Respondents submitted that the global award of Kshs 800,000/= made by the Trial Court under this head was within the regime of awards made on loss of dependency for similar ages. He referred the court to comparable awards made in several cases as follows:-
1. Trustees Registered Maua Methodist Hospital vs Penina Thirindi Koome [2021] eKLR where an award of Kshs 2,500,000/= was reduced to Kshs 1,000,000/= for a deceased who was six (6) years old at the time of his death in 2021.
 2. China National Aero Technology International Engineering Corporation vs Raphael Lenamboyo [2020] eKLR where an award of Kshs 1,000,000/= was upheld where the deceased was eight (8) years and school going.
 3. Azan Enterprises Ltd vs Zuhura Syongit Robert [2020] eKLR where the court upheld an award of Kshs 900,000/= for a deceased minor who was six (6) years old in 2020.
 4. Nairobi Bottlers Ltd & Another vs M W (Suing as the Legal Representative of the Estate of KMW) [2021] eKLR where Kshs 1, 752,000/= was reduced to Kshs 1,000,000/= for deceased who was three (3) years at the time of death in 2021.
51. They argued that from the aforesaid cases and in light of the flaring inflation in the country currently, the Trial Court did not apply wrong principles of law or err in any way so as to arrive at an inordinately high and erroneous award. It was their contention that the award was within the regime of awards made on loss of dependency for similar ages.
52. Notably, the Kenyan legal system is based on common law. It places the principle of stare decisis or precedent on a very high pedestal. Indeed, a court is bound by the decisions of courts above it. This is for purposes of ensuring that there is consistency in the decisions that are delivered to provide certainty in the judicial system.
53. Whereas a court has the discretion to decide the amount of damages to award, courts must derive guidance from comparable past decided cases so that the award is as close as possible to damages awarded in other comparable cases. Decisions of courts of equal and competent jurisdictions are merely persuasive and not binding on each other.
54. A perusal of the Post Mortem Report showed that the deceased was about six (6) years old at the time of his death. It was the 1st Respondent's evidence that the deceased was a jovial boy who attended school at Vihiga Primary School and was to join grade one (1) the following year. He asserted that the deceased minor had a promising future.
55. Notably, the ambition of a child in nursery school is not guaranteed in reality. This is because of the vagaries of life such as dropping out from school, ill health, death, unemployment, change of career and many other factors. It was easier to discern the career path of children who were in college or universities. It was for that reason that awarding a global sum for damages in a case where a child of tender years had died as a result of negligence was most reasonable to compensate his estate.
56. Any decision that is arrived at by a court must be justifiable and based on some sort of rationale that could be followed and understood by all and sundry. Save for its observation that Article 26(1) and (3) of *the Constitution* of Kenya provides that a person shall not be deprived of his life, the Trial Court did not refer to any past decided cases or give its reasoning of how it arrived at the global sum of Kshs



800,000/=. This court thus agreed with the Appellant that the Trial Court erred in this regard as all decisions of the court must be reasoned in line with Order 21 Rule 4 of the Civil Procedure Rules, 2010 that provides as follows:-

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision (emphasis court).”

57. Having said so, this court noted that both the Appellant and the Respondents herein did not object to this mode of assessment of damages. What was in contestation was whether or not the global sum of Kshs 800,000/= was inordinately high as had been contended by the Appellant herein warranting this court to disturb the same.
58. It is important to point out that courts must be cautious not to give exaggerated awards as they ought to cut a reasonable balance to ensure that deceased’s estates’ are compensated fairly and reasonably while insurance companies are given time and space to thrive economically. They must also not award very low awards as to make a mockery of compensation to families of deceased persons.
59. Having had due regard to the cases the Appellant relied upon which gave awarded between 2007 and 2017, this court came to the firm conclusion that a global sum of Kshs 300,000/= he had proposed was inordinately low as the cases were older and did not take inflationary trends into considerations.
60. On the other hand, the cases the Respondents relied upon were more recent and therefore more relevant in the circumstances of the case. Taking the effects of inflation into account, it was the considered view of this court that a global sum of Kshs 800,000/= was not unreasonable as compensation to the Respondents for the loss of the deceased minor’s life that was cut short due to the negligence of the Appellant and/or its driver and/or agent and/or servant as it was in line with similar and/or comparable cases that were cited hereinabove.
61. This court was thus not persuaded to find and hold that the Trial Court misapplied the law and misdirected itself thus arriving at an erroneous estimate of the damages necessitating it to disturb its award.

IV. Special Damages

62. The Appellant submitted that the Respondents never spent any monies on special damages as the same was never pleaded. The Trial Court did not award special damages and hence this court did not see any value in addressing the issue that was not in contestation.

V. Costs

63. The Appellant invoked Section 27 of the *Civil Procedure Act* and placed reliance on the case of *Impressa Ing Fortunato Federice vs Nabwire* [2001] 2 EA 383 as cited with authority in the case of *Matigari General Merchants Ltd & Another vs Nelly Wairimu Muthoni & Another; Rose Wamuyu Wandaka (Interested Party)* [2021] eKLR where it was held that a court’s discretion on costs must be exercised judiciously and that how a judge exercises such discretion depends on the facts of each case. He urged the court to allow his appeal with costs. The Respondents did not submit on this issue.
64. As this was really not an issue in dispute, this court agreed with the Appellant that costs follow the event but the court retains the discretion to depart from the said principle under exceptional circumstances.



VI. Interest

65. The Respondents implored upon the court to dismiss the Appellant's appeal and urged it to grant and state the applicable interest rate of fourteen (14%) per cent in the Judgment in line with the provisions of Section 26 of the *Civil Procedure Act*. They also prayed for costs of the appeal and interest accruing thereon at (14%) interest rates. The Appellant did not submit on this issue.
66. This was also not an issue that was in contestation as the Respondents did not file any Cross-Appeal on this issue or demonstrate that the interest that was awarded was unlawful and/or had no legal basis. This court merely noted that interest on any sums awarded would be at court rates.

Disposition

67. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 15th September 2021 was partially merited.
68. The effect of this decision is that the Judgment of Kshs 1,000,000/= that was entered by the Learned Trial Magistrate in Vihiga in SPMCC No 215 of 2020 on 24th August 2021 be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondents herein against the Appellant for the sum of Kshs 800,000/= made up as follows:-

Pain & Suffering Kshs 100,000/=

Loss of Expectation of Life Kshs 100,000/=

Loss of Dependency Kshs 800,000/=

Kshs 1,000,000/=

Less 20% contributory negligence Kshs 200,000/=

Kshs 800, 000/=

Plus costs and interest thereon. For the avoidance of doubt, interest on damages both under the *Fatal Accidents Act* Cap 32 (Laws of Kenya) and the *Law Reform Act* Cap 26 (Laws of Kenya) will accrue at court rates from the date of judgment of the judgment of the Trial Court until payment in full.

69. As the Appellant was partly successful in his Appeal, each party will bear its own costs of the Appeal herein.

70. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2023

J. KAMAU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

