



M'ekotha & another v Karampu (Suing as the Legal Representative of the Estate of Joel Mwenda-Deceased) (Civil Appeal E105 of 2022) [2023] KEHC 20798 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E105 OF 2022
EM MURIITHI, J
JULY 26, 2023**

BETWEEN

MUSA NGIRWA M'EKOTHA 1ST APPELLANT

TANA FOLKS 2ND APPELLANT

AND

**ABUKI KARAMPU (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF JOEL MWENDA- DECEASED) RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. Tito Gesora
(C.M) in Maua CMCC No. E236 of 2021 delivered on 28/7/2022)*

JUDGMENT

1. By a Plaint dated December 16, 2021, the Respondent sued the Appellants seeking payment of special damages, damages under the *Law Reform Act* and *Fatal Accidents Act* and costs of the suit plus interest. The gist of the claim was that on November 6, 2021 at about 1840 hours, the deceased was a pillion passenger on motor cycle registration number KMEW 454 D when the 2nd Appellant so negligently and carelessly drove Motor Vehicle Registration No KCN 422 G ISUZU FRR along Laare-Maua Road that it knocked down the motorcycle the deceased was riding on thereby occasioning him fatal injuries. The deceased was prior to his death aged 37 years, in good health, a farmer and prominent businessman who used to support his young family. By the reason of his death, his family has lost the said support and his estate has suffered loss, expense and damage.
2. The Appellants denied the claim by their statement of defence dated March 1, 2022 and prayed for the Respondent's suit to be dismissed.
3. The parties recorded a consent on liability at the ratio of 80:20 in favour of the Respondent against the Appellants and the Respondent's list of documents dated December 16, 2021 was admitted to



evidence without calling the makers. Parties were then directed to file submissions on quantum and a judgment date was reserved.

4. In its judgment, the trial court awarded Ksh 50,000 for pain and suffering, Ksh. 150,000 for loss of expectation of life, Ksh 3,000,000 for loss of dependency, special damages of Ksh 240,000 less 20% contribution = Ksh 2,800,000.

The Appeal

5. On appeal, the Appellants filed their memorandum of appeal on August 15, 2022 raising 8 grounds as follows:

1. The Learned Trial Magistrate erred in law and fact in awarding the Respondent Ksh 3,000,000/= in general damages for loss of dependency are inordinately high and wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of law and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.
2. The Learned Trial Magistrate erred in law and fact in awarding the Respondent Ksh 150,000/= general damages for loss of expectation of life to constitute a miscarriage of justice in the circumstances of this case.
3. The Learned Trial Magistrate erred in law and fact in awarding the Respondent inordinate high general damages for pain and suffering amounting to Ksh 50,000/= to constitute a miscarriage of justice in the circumstances of this case.
4. The Learned Trial Magistrate erred in law and fact in awarding the Respondent Ksh 240,000/= special damages by failing to consider the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps.
5. The Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's authorities in their submission on quantum hence arriving at an erroneous decision.
6. That the Honourable trial magistrate erred in law and fact in failing to consider the Appellant's documents that were filed and produced in court.
7. That the Honourable trial magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
8. That the Honourable trial magistrate's judgment as a whole is not supported by the evidence that was tendered in court by the parties.

Duty of the Court

6. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others* [1968] EA 123).

Submissions

7. The Appellants fault the trial court for awarding Ksh 50,000 for pain and suffering yet the deceased died the same day, and urge the court to award Ksh 10,000 under this head. They fault the trial court



for failing to justify the award of Ksh 150,000 for loss of expectation of life thereby rendering the award unreasonable, arbitrary and contrary to prevailing legal principles, and urge the court to award Ksh 100,000 under this head. They urge the court to set aside the award of Ksh 3,000,000 for loss of dependency and award Ksh 90,104 under this head. They urge the court to deduct the award of loss of expectation of life from the award of loss of dependency because the dependants of the deceased under the provisions of the Fatal Accidents Act and Law Reform Act are the same. They urge the court to set aside the award of Ksh 240,000 for special damages as the same was not proved.

8. The Respondent urges that although the deceased died on the same day of the accident, he suffered severe head injury which demonstrates he underwent severe pain before he died, and therefore the award of Ksh 50,000 under this head should be upheld, and cites Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR. She urges that the global award of Ksh 3,000,000 for loss of dependency was fair, and cites Albert Ojawa v Gichuru Githinji (2007) eKLR, David Mbuba & Another v Victoria Mwongeli & 2 Others (2018) eKLR, Mary Njeri Murigi v Peter Macharia & Anor (2016) eKLR and Joseph Njuguna Mwaura v Builders Den Ltd & anor (2014) eKLR.

Analysis and Determination

9. The court wishes to address the contention by the Appellants in their submissions that the award under loss of expectation of life ought to be deducted from the award of loss of dependency. That issue was succinctly discussed by this court in KBT HCCA No 1 of 2018, (Formerly NAKURU HCCA No 147 of 2015) David Kenei Julius Cheretei v Zipporah Chepkonga (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii - Deceased), as follows:

“7. It is therefore clarified by the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited (supra), which is binding on this Court, that there is no requirement for the trial court to discount or reduce the damages in Fatal accidents Act with the awarded recovered under the Law Reform Act. The submission by the appellant that the trial court “the trial magistrate erred by failing to deduct the award [under the Law reform Act of Ksh 100,000 for loss of expectation of life and Ksh 50000/- for pain and suffering] and thus made a double award is therefore erroneous.”

10. From the grounds of appeal as framed, the issues for determination are whether the awards made under the different heads were excessive, and whether the Appellants’ documents and authorities were considered.

Excessive damages

11. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some



relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470)”

Pain and Suffering

12. As per the plaint, the accident is said to have happened at 1840 hours while the post mortem says the deceased died at 1930 hours. It is therefore clear that the death was prolonged but not instantaneous, and therefore the award of Ksh 50,000 under this head was justified.

Loss of dependency

13. PW1 recorded in her statement dated December 16, 2021 that, “The deceased was a livestock farmer and a business man who reared livestock in large scale for sale. He was also a prominent Miraa business man and out of his business we had so much income which he used to cater for his family and other developments at home. In the livestock trade we could make an average of Kshs 200,000/= while Miraa trade we could make at least an average of Kshs 70,000/= per month. He was the family breadwinner and my children all depended on him....Out of the said accident I lost a husband and my children lost their father and now we are left poor and helpless and no one to depend on.”
14. While the Appellants urged the trial court to adopt the multiplier approach and the minimum wage as the multiplicand, the Respondent proposed a global sum approach. The trial court, in awarding the global sum of Ksh 3,000,000 under this head rendered thus, “The issue therefore is the method to apply in determining loss of dependency. The multiplier method or the global sum approach. There are 2 schools of thought both have been applied by the superior court. There’s therefore nothing under state decision to tie lower court to any. In the circumstances of this case, the statement of the plaintiff is basically unchallenged as the income of the deceased and the dependants. It will be totally unfair to attribute minimum wage to a businessman. The global sum approach commends itself to one as the more reasonable method, therefore loss of dependency – Kshs 3,000,000/...”
15. This court finds that, like every married man, the deceased supported his wife and 3 minors from his livestock rearing and miraa businesses.
16. It is therefore this court’s finding that the trial court’s award of a global sum of Ksh 3,000,000 for loss of dependency was justified in the circumstances.

Loss of expectation of life

17. The Appellants contend that the sum of Ksh 150,000 awarded by the trial court under this head was excessive and it should be reviewed downwards to Ksh 100,000. As rendered by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete (Supra)*, this court will not interfere with an award made by the trial court simply because it would have awarded a different figure had it tried the matter. The Appellants have not met the threshold set out in *Butt v Khan* (1978) eKLR to warrant this court’s interference with the award of Ksh 150,000 made under this head.

Special Damages

18. The Respondent produced 2 receipts for Ksh 10,000 and Ksh 40,000 for demand notice and filing the Misc. Succession cause respectively. She did not however produce any receipt for burial expenses which was estimated to be Ksh 190,000. This court accepts that burial expenses must be incurred because the body of the deceased must be interred and the mourners fed. For that reason, and in view of the current inflation rate, this court finds that the sum of Ksh 190,000 for burial expenses was justified.



Consideration of the Appellants' documents and authorities

19. This court finds this fault to be manifestly unfounded because the trial court duly considered the Appellants' submissions together with the authorities cited therein in reaching the decision it did. In its judgment, the trial court even made reference to a case cited by the Appellants as follows, "Defence has cited *Tobias Odoyo Oburu v Jane Kerubo Miruka & Anor* (2018) eKLR to the point that where there is no proof of income the court should revert to minimum wage."

ORDERS

20. Accordingly, for the reasons set out above, the appeal is without merit and it is hereby dismissed.
21. The respondent shall have the costs of the appeal.
22. Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

M/S. Kariuki and Kayika Advocates for the Appellant/Applicant.

M/S. Mutembei and Kimathi Advocates for Respondent.

