



**M'ekotha & another v Kathambi (Suing as the Legal Representative of the Estate of Jacob Kinyua - Deceased) (Civil Appeal E106 of 2022) [2023] KEHC 20797 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E106 OF 2022  
EM MURIITHI, J  
JULY 26, 2023**

**BETWEEN**

**MUSA NGIRWA M'EKOTHA ..... 1<sup>ST</sup> APPELLANT**

**TANA FOLKS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALICE KATHAMBI (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF JACOB KINYUA - DECEASED) ..... RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. Tito Gesora  
(C.M) in Maua CMCC No. E237 of 2021 delivered on 28/7/2022)*

**JUDGMENT**

1. By a Plaintiff dated 16/12/2021, 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 6/11/2021 at about 1840 hours, the deceased was riding motor cycle registration number KMEM 454 D along Laare-Maua road when the 2<sup>nd</sup> Appellant so negligently and carelessly drove Motor Vehicle Registration No. KCN 422 G ISUZU FRR that it knocked down the motorcycle thereby occasioning him fatal injuries. The deceased was prior to his death aged 38 years, in good health, a businessman and the sole bread winner of his 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 27/5/2022 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 16/12/2021 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 15/8/2022 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] E.A. 123).

### **Submissions**

7. The Appellants fault the trial court for awarding Ksh.50,000 for pain and suffering yet the deceased died on the spot, 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 Kshs. 240,000 for special damages as the same was not proved. They pray for their appeal to be allowed with costs.

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 Mwangeli & 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 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 *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)”

#### DIVISION - Pain and Suffering

12. Although it is not clear from the pleadings if the deceased died on the spot or later at the hospital, this court is minded that even where the death is instantaneous, some form of pain is still endured. Therefore, the award of Ksh.50,000 made by the trial court under this head was fair.

#### Loss of dependency

13. PW1 recorded in her statement dated 16/12/2021 that, “The deceased had several Miraa shops in Lodwar and Garissa towns. He also had main Miraa shop in Laare town of Igembe North. He used to get at least 200,000/= per month out of his extensive Miraa businesses. As his wife together with our children we entirely relied on him for our everyday upkeep. We have lost his support thus we seek for compensation.”
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 4 minors from his vast miraa businesses.
16. It is therefore this court’s finding that the trial court’s award of a global sum of Ksh. 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.
18. In the end, this court is satisfied that the trial court applied the correct legal principles in arriving at the awards of Ksh.50,000 for pain and suffering, Ksh. 150,000 for loss of expectation of life and Ksh.3,000,000 for loss of dependency.

#### Special Damages

19. 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 therefore, this court finds that the sum of Ksh.190,000 for burial expenses was justified in view of the current inflation rate.



### **Consideration of the Appellants' documents and authorities**

20. 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**

21. Accordingly, for the reasons set out above, the appeal is without merit and it is hereby dismissed.

22. The Respondent shall have the costs of the appeal.

23. Order accordingly.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES**

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

M/S. Mutembei and Kimathi Advocates for Respondent.

