



**Sammy & another v Gaicugi (Suing as the legal representative of the Estate of Nicholas Kirema Ntutumi - Deceased) (Civil Appeal E139 of 2022) [2023] KEHC 21194 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E139 OF 2022  
EM MURIITHI, J  
JULY 26, 2023**

**BETWEEN**

**PAUL KIMEU SAMMY ..... 1<sup>ST</sup> APPELLANT**

**UNIVERSAL TRADERS SACCO SOCIETY LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PHILIS GAICUGI (SUING AS THE LEGAL REPRESENTATIVE OF HE ESTATE OF NICHOLAS KIREMA NTUTUMI - DECEASED) ..... RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. L. N. Juma (S.R.M) in Meru CMCC No. E161 of 2021 delivered on 20/9/2022)*

**JUDGMENT**

1. By a Plaintiff dated March 23, 2021, the Respondent sued the Appellants seeking general damages under the [Law Reform Act](#) and [Fatal Accidents Act](#) plus interest, special damages as pleaded plus interest together with costs of the suit and interest thereon. It was pleaded that on January 1, 2020, the deceased was a lawful pedestrian along Giaki-Meru road at Kiborene area when the 1<sup>st</sup> Appellant so negligently drove, managed and/or controlled Motor Vehicle Registration No KCP 427 U Isuzu Lorry that it lost control, veered off its rightful lane and hit him thereby occasioning him fatal injuries. The deceased was prior to his death enjoying robust, healthy and promising life, aged 25 years, a farmer and the breadwinner of his family and his estate has suffered loss and damage.
2. The Appellants denied the claim by their statement of defence dated November 11, 2021 and prayed for the Respondent's suit to be dismissed.
3. Upon full hearing, the trial court found the Appellants to be 100% liable for the accident and awarded general damages for pain and suffering of Ksh 250,000, Ksh 250,000 for loss of expectation of life, Ksh



1,500,000 for loss of dependency and special damages of Ksh 35,550 = Ksh 2,035,550 together with costs and interest.

## The Appeal

4. On appeal, the Appellants filed their memorandum of appeal on October 7, 2022 raising 5 grounds as follows:
  1. The Honourable Senior Resident Magistrate erred in law and fact as respects the assessment of general damages for loss of dependency by awarding damages where no dependant under the Fatal Accidents Act had been pleaded and proved.
  2. The Honourable Senior Resident Magistrate erred in law and fact by failing to appreciate the limitations of the Grant of Letters of Administration Ad Litem produced as Plaintiff's Exhibit 3 which only authorized the filing of the suit and nothing more.
  3. The Honourable Senior Resident Magistrate erred in law and fact by awarding a manifestly excessive amount in general damages for pain and suffering, which amount was not within the range of conventional awards and as such arrived at an erroneous figure.
  4. The Honourable Senior Resident Magistrate erred in law and fact by awarding a manifestly excessive amount in general damages for loss of expectation of life, which amount was not within the range of conventional awards and as such arrived at an erroneous figure.
  5. The Honourable Senior Resident Magistrate erred in law and fact by awarding interest on costs without recording reasons for such an award.

## Duty of the Court

5. 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).

## Evidence

6. PW1 PC Robert Tomno of Meru Traffic Department, testified that, "On the 1<sup>st</sup> of January 2020 a report of serious road traffic accident was reported at our station. The accident was along Meru-Gaiki road at a place known as Kiborini. Patient died on January 19, 2020 19 days after accident. On February 3, 2021 a police abstract issued for Nicholas Kirema signed by base commander CIP Wambua. Abstract was filed by PC Wambulwa. I worked with both officers. I know their handwritings. Nature of accident – Fatal. Police abstract P Exh – 1. I confirm I have the police file that contains investigations dairy. Driver of motor vehicle not charged from the file. Officer initially dealing with it was transferred. The other officer is supposed to complete investigations and take file to the DPP. The matter is still ending under investigations. According to the OB the matter is still pending the investigations."
7. On cross examination, he stated that, "The driver of the motor vehicle was not charged in this matter. I have only produced the police abstract. We usually do not produce police file. The time of the accident was 1800 hours. Accident involved KCB 427 U Isuzu lorry which was being driven by one Josphat



Ntoiti and pedestrian by the name of Nicholas Kirimi. The said vehicle was heading towards Meru direction and reaching on the location of the accident the said pedestrian was hit by the said vehicle. He was walking off the road. Motor vehicle and pedestrian were on the same direction. Pedestrian sustained head injuries. He was taken to Meru Level Five Hospital. Motor vehicle driven to Giaki police station. Scene visited by 2 officers PC Lawrence Lassile and PC Kariuki whereby they booked the report vide OB 9 of the first of January 2020. They did not find the vehicle at the scene but it was Giaki police station. Vehicle had been removed from the scene of the accident. The pedestrian later on died on January 19, 2020. Accident occurred on January 1, 2020 and the vehicle had been removed from the scene hence no sketch plan. We only have the road view. To date the matter has never been concluded.”

8. On re-examination, he stated that, “I confirm I have the original police file containing all the investigators of the file. I have produced a police abstract containing the survey of the accident from OB and police file.”
9. PW2 Philis Gaicugi, the Respondent herein adopted her statement dated March 23, 2021 as part of her evidence in chief. She also produced the death certificate, limited grant ad litem, copy of motor vehicle records, demand letter and bundle of receipts for specials as exhibits in court. She testified that, “I stay at Gakoromone. I sell tomatoes at Gakoromone market. I know Nicholas Kirima. He is my younger brother. Our parents passed away a long time ago. Nicholas Kirimana was left as a young child. On January 1, 2020 Nicholas was in a group going for an outing. He was coming out of a gate and was hit by a lorry from behind. He got injuries on the head. He was taken to hospital Meru Teaching and Referral hospital. He went to hospital same day. He stayed in hospital for 19 days. He did not recover. He passed away. At the time of his death he was 25 years old. He was married but he did not have a child. We paid hospital bill and buried the deceased. For now I pray the court grants me orders as per the plaint for costs of the accident. He had finished form four. He had gone to college. He died as we prepared to take him to college.”
10. On cross examination, she stated that, “I did not witness the accident. Deceased was my young brother. He was farming to get money for college. He had a girlfriend and they were yet to marry. No child. I used a lot of money for his burial. I have not availed documents to show vehicle had a problem.”
11. On re-examination, she stated that, “He was married with a child.”
12. The Appellants closed their case without calling any witnesses.

### Submissions

13. The Appellants fault the trial court for failing to exercise its discretion judiciously by acting outside the scope of express statutory provisions and on wrong principles in assessment of damages, and cite *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123 and *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR. They urge that the deceased was survived by his sisters who are not dependants within the meaning of section 2 (1) of the *Fatal Accidents Act*, and cite *Chania Shuttle Bus v Rebecca Mbogho (suing as the legal representative of the estate of Joseph Mwanyikia Mbogho)* (2021) eKLR. They urge that the grant ad litem was limited to the filing of the suit only, and it behoved the Respondent to seek further powers to enable her prosecute the suit on behalf of the estate, and cite *Stanley Muiru Njuguna & Another v SK* (2019) eKLR. They urge that the award of Ksh 250,000 for pain and suffering was excessive, because it is not the length of time the deceased was alive that determines the quantum, but the period the deceased was alive and conscious, and cite *Joseph Kivati Wambua v SMM & Another (suing as the legal representatives of the estate of EMM - Deceased)* (2021) eKLR. They urge that the award of Ksh 250,000 for loss of expectation of life was not within the conventional range, and cite *Benham v Gambling* 1 ALL ER (1941) 7,12, *Mercy Muriuki & Another*



*v Samuel Mwangi Nduati & Anor (Suing as the legal administrators of the estate of the late Robert Mwangi)* (2019) eKLR and *Theuri Kihira v Gerhard Matthiessen* (2019) eKLR. They urge the court to set aside the award of interest on costs and cite *Hassanali v City Motor Accessories Ltd and Others* (1972) 1 EA 423 and *Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others* (2018) eKLR. They urge the court to dismiss the claim under *Fatal Accidents Act*, award Ksh 10,000 for pain and suffering and Ksh 100,000 for loss of expectation of life.

14. The Respondent faults the trial court for awarding special damages of Ksh 35,550 when she had proved the sum of Ksh 40,550. She urges that the limited grant Ad Litem gave her the *locus standi* to file a suit, represent the deceased in that suit, and the locus subsists until a final decree is made and carried to execution. She urges that the award of Ksh 250,000 for pain and suffering was within the prevailing trend of awards and based on the prolonged hospitalization of the deceased. She urges the court to maintain the award of Ksh 250,000 for loss of expectation of life as it was based on principle. She urges that as the administrator of the estate of the deceased, she was entitled to an award of the damages of Ksh 1,500,000 for loss of dependency under the *Fatal Accidents Act*. She urges that to the victor goes the spoils and she is entitled to costs of the appeal.

### **Analysis and Determination**

15. Before delving into the merits of the case, the Appellants fault the trial court for awarding interest on costs, which is evidently erroneous. The trial court only awarded costs and interest of the suit, which is premised on the provisions of sections 26 and 27 of the *Civil Procedure Act*.
16. From the grounds of appeal as framed, the issues for determination are whether the Respondent had *locus standi* to prosecute the suit on behalf of the estate of the deceased whether awards made under the different heads were excessive.

### **Locus standi**

17. The Appellants contend that the limited grant Ad Litem only gave the Respondent powers to file the suit only and not to prosecute it. Section 54 of the *Law of Succession Act* provides that, “A Court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.”
18. Section 14 of the Fifth Schedule of the *Law of Succession Act* provides for administration limited to suit as follows; “When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”
19. It is clear from the foregoing that the Respondent, as the legal representative of the estate of the deceased had the *locus standi* to not only file the suit but also prosecute it. A suit is filed for purposes of prosecuting it.



### Excessive damages

20. 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)”

### Pain and Suffering

21. PW1 and PW2 testified that the deceased died 19 days later while undergoing treatment at Meru Level 5 Hospital. It is on the basis of the prolonged hospitalization that the trial court awarded Ksh 250,000 for pain and suffering which according to the Appellants is excessive. Although this court finds that the deceased indeed endured a lot of pain during the 19 days he had been hospitalized, it feels that the award of Ksh 250,000 for pain and suffering was on the higher side.

### Loss of dependency

22. PW2 testified that deceased was unmarried with no children and she and her sisters were his dependants. This court has previously dealt with the issue whether sisters are dependants within the meaning of section 4 of the *Fatal Accidents Act*, in *Mohamed Hirbo Shande & another v George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena)* [2021] eKLR as follows:

“For this reason, this Court finds that for purposes of determining compensation due, the applicable law is the *Fatal Accidents Act*. Section 4 thereof describes the persons for whose benefit an action under the Act may be brought. It provides as follows: -

4. Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.

28. There is no mention of brothers and sisters of a Deceased, and the Court, therefore, finds that no damages were awardable for loss of dependency. In so finding, I respectfully agree with the finding of Majanja J in the case of *John Mungai Kariuki & Another Vs Kaibei Kangai Ndethiu & 2 Others* Kiambu Civil Appeal No 29 of 2018 at paragraphs 12 to 15 thereof where it was held that: -



‘...Back to the issue at hand, the appellants elected to make their case under the *Fatal Accidents Act* which at section 4(1) states;

Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ..... be brought by and in the name of the execution or administrator of the person deceased]..... [Emphasis mine]

The brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation, to expand the list of dependants to include siblings of the deceased. Even in the cases relied on by the appellant, the principle that in African culture children are expected to support their parents is supported by the words of the statute as the deceased parents are named a dependants.....

....For the reasons I have set out above, the trial magistrate did not err in failing to award damages for loss of dependency and for lost years as urged by the appellants....”

23. This court finds that the Respondent and her sisters were not dependants within the meaning of the Fatal Accidents Acts, and, therefore, no sum was awardable under this head.

### **Loss of expectation of life**

24. The Appellants contend that the sum of Ksh 250,000 awarded by the trial court under this head was excessive and it should be reviewed downwards to Ksh 100,000. This court considers that indeed the award of Ksh 250,000 made by the trial court was excessive and although the conventional sum awardable under this head has been Ksh 100,000, this court considers the sum of Ksh 150,000 to be sufficient considering the recent steep loss in the value of the shilling.

### **Orders**

25. Accordingly, for the reasons set out above, the Court finds that the appeal is merited and it is allowed upon the following terms:
1. The trial court’s award of Ksh 1,500,000 for loss of dependency is set aside.
  2. The award of Ksh 250,000 for pain and suffering is hereby set aside and substituted with an award of Ksh 100,000.
  3. The award of Ksh.250,000 for loss of expectation of life is hereby set aside and substituted with an award of Ksh 150,000.
  4. The Appellants shall have the costs of the appeal.

- 26 Order accordingly.

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

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

M/s. Kaimba Peter & Co. Advocates for the Appellant/applicant.

M/S. J.M. Mwangi & Co. Advocates for Respondent.

