



**Wandimi v Oduor & 2 others (Civil Appeal 577 of 2019)
[2023] KEHC 21877 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 577 OF 2019

AN ONGERI, J

AUGUST 16, 2023

BETWEEN

TIMOTHY NGIGE WANDIMI APPELLANT

AND

GEORGE MICHAEL ODUOR 1ST RESPONDENT

**ISAAC NJOROGE MWANGI T/A EVEREST COMPUTER
SYSTEM 2ND RESPONDENT**

**ERICK KARANJA MWANGI T/A EVEREST COMPUTER
SYSTEM 3RD RESPONDENT**

*(Being an appeal from the judgment and decree of Hon E. K. USUI
(CM) in Milimani CMCC no. 5587 of 2017 delivered on 28/8/2018)*

JUDGMENT

1. The respondent, George Michael Oduor filed Milimani CMC no 5587 vide plaint dated August 4, 2017 which was amended on November 15, 2017 seeking general damages under the *Fatal Accidents Act* and the *Law Reform Act* for fatal injuries sustained by Elizabeth Akinyi Oduor (deceased) in an accident that occurred on August 15, 2013 along Thika road involving motor vehicle registration no KBU 358G.
2. The deceased was a pedestrian when the accident occurred which the respondent attributed to the negligence of the appellant.
3. The parties entered into a consent on liability and apportioned liability at 70:30 in favour of the respondent against the appellant.



4. The court assessed general damages as follows;
Pain and suffering ksh 50,000
Loss of expectation of life ksh 150,000
Loss of dependency ksh 2,000,000
Special damages ksh 442,287
Total ksh 2,642,287
Less 30% liability ksh 792,686
5. The appellant has appealed to this court against assessment of damages on the following grounds;
 - a. That the learned trial magistrate erred in law and fact by awarding a high amount in General Damages
 - b. That the learned magistrate erred in law and fact in failing to attach due weight to appellants submission on the main suit.
 - c. That the learned trial magistrate erred in law and fact by finding that the 1st Respondent's assessment of damages was correct
 - d. The learned magistrate erred in law and fact by delivering a judgement that was lopsided and biased in favour of the 1st respondent.
 - e. That the learned magistrate erred in law and in fact in awarding a high lump sum amount of Kshs 2,000,000 as quantum for loss of dependency and Kshs. 150,000 as quantum for loss of expectation of life.
 - f. That the learned trial magistrate erred in law and fact and as a result arrived at a wrong decision to the prejudice of the appellant
6. The parties filed written submissions as follows; the appellant submitted that the sum of Kshs 2,200,000 awarded as general damages was too high. The appellant submitted that the award of Kshs 10,000 would be sufficient compensation considering the nature of the injuries. The appellant argued that the learned trial magistrate did not cite any authorities which guided his award and it is therefore not possible to tell the awards the trial court relied on in making the award of Kshs 2,200,000.
7. The appellant further submitted that a sum of Kshs 80,000 and Kshs 900,000 would be sufficient for loss of expectation of life and loss of dependency. He relied on the cases of *James Gakinya Karienyé & another (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji* (2015) eKLR and *Hellen Waruguru vs Kiarie Shoe Stores Ltd* (2015) eKLR and *Mombasa Maize Millers Ltd vs MIM suing as the representative of JAM (deceased)* 2016 eKLR.
8. The 1st respondent submitted on loss of dependency that the 1st respondent's daughter now deceased was aged 21 years at the time she perished. She was reasonably expected to complete her studies and work up to the age of retirement and support her relatives including her father, the 1st respondent. There being no proof of earnings of the deceased the idea of proving earnings by production of documents would cause grave injustice to himself and the rest of the family members as she kept no records of earnings and yet earned a livelihood in various ways that did not require documentation
9. On the award for loss of expectation of life the 1st respondent submitted that trial court relied on the Lump sum school of thought as opposed to the multiplier/ multiplicand formulae. As earlier



stated, the deceased was aged 21 years at the time of her demise. The Respondent adduced evidence showing that she enjoyed robust health that was cut short by a fatal accident negligently caused by the Appellant. The deceased age is one of the relevant factors on assessment of damages for lost years. The 1st respondent relied on the case of *Azan Enterprises Ltd v Zubura Syongit Robert (Legal representative of the Estate of Abubakar Abdalla Mwangi (Deceased))* [2020] eKLR- the Court heavily relied on *Benham v Gambling* (1941) 1 All ER, where the Court held as follows on assessment of damages-

“I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to future unhappiness or despondency, that would be circumstantial in justifying a smaller award.”

10. The 1st respondent submitted that the amount awarded of Kshs 2000,000 as quantum for loss of dependency and Kenya Kshs 150,000 as quantum for loss of expectation of life is an accurate estimate of the damage. That therefore the total amount of damages awarded to the Respondent is a reasonable amount. The Respondent is physically disabled and of humble means and his only source of income is his bicycle repair business.
11. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle -Vs- Associated Motor Boat Co* [1968] EA 123 it was held in the following terms:-

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. The sole issue for determination is whether the trial court awarded excessive damages.
13. I find that the award was based on well known principles.
14. The only time the appellate court can interfere with an award of the trial court is when it is too inordinately low or high as to warrant interference or when the trial court relied on wrong principles and reached an erroneous decision.



15. In *Butt vs Khan* [1982] 1 KAR 5 the court correctly said;

“An appellate court will not disturb an award of 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”.

16. The deceased was a young girl who had just completed her studies.

17. I find that the trial court was right in awarding a global figure of ksh 2,000,000 in respect of loss of dependency.

18. The court in *PSHMM (Suing as the administrator ad litem of the Estate of CSM-Deceased) v Attorney General* [2020] eKLR awarded Kshs 2,000,000 for loss of dependency of the plaintiff who was 18 years old.

19. I find that the appeal herein lacks in merit and the same is dismissed with costs to the respondent.

20. I uphold both findings on liability and the award of damages by the trial court.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

