



REPUBLIC OF KENYA



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Reginah v Githiyi & another (Suing as the legal administrators of the Estate of the Late Nancy Wambui Githiyi (Deceased)) (Civil Appeal E021 of 2022) [2023] KEHC 21936 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E021 OF 2022
GL NZIOKA, J
AUGUST 10, 2023**

BETWEEN

JOHN NGIGE REGINAH APPELLANT

AND

DAN GITHIYI WAMBUI 1ST RESPONDENT

DAVID KAMAU GITHIYI 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
NANCY WAMBUI GITHIYI (DECEASED)**

(Being an appeal against the judgment delivered by Hon. J. Karanja (SPM) dated 13th January 2021 vide Chief 1 | Page Magistrate Civil Case No. 284 of 2019, at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. By a plaint dated February 19, 2019, the plaintiffs (herein “the respondents”) sued the defendant (herein “the appellant”) seeking for damages under the *Fatal Accident Act* (cap 32) Laws of Kenya and the *Law Reforms Act* (cap 26), Laws of Kenya, and special damages of Kshs 65,000, costs of the suit and interest.
2. The facts of the case are that on April 7, 2018, the deceased was travelling in the motor vehicle registration No. KBT 175B, along Naivasha – Mai Mahiu road at Chechenia area when the said motor vehicle was involved in an accident with another motor vehicle registration No. KVC 937.
3. That, motor vehicle registration No. KBT 175B, was being driven by the appellant and/or his servant, agent or driver and was driven negligently at an excessive speed, without due care and attention, and by



failing to; brake, stop, swerve, slow down so as to avoid the accident, failing to observe traffic rules, thus causing the accident and the deceased fatal injuries. That, the doctrine of Res Ipsa Loquitur applies.

4. It is averred that at the time of her demise, the deceased was fifty (55) years old, in good health and was employed at Flamingo Horticulture Limited earning an income of Kshs. 13,822, per month. That as a result of her death, her estate suffered loss and damage hence the orders sought for herein.
5. However, the appellant filed a statement of defence dated; October 15, 2018, amended on May 25, 2019 and denied each and every allegation in the plaint. He averred that, the accident was wholly caused and/or substantially contributed to by the negligence of one, Michael Thuku, the driver of motor vehicle registration No. KCV 937 Lorry.
6. He also denied all the particulars of negligence attributed to him in the plaint and the application of the doctrine of *Res Ipsa Loquitur* and the injuries alleged suffered by the deceased and/or any loss, damages to the estate or expenses incurred.
7. Consequent to close of pleadings, by consent of the parties, liability was agreed on a consent judgement entered in respect of the same in the ratio of; 80:20 in favour of the plaintiff as against the defendant.
8. The case proceeded on assessment of damages. The plaintiff's case was supported by the evidence of David Kamau Githinji to the effect that, the deceased was his mother and passed away on; April 7, 2018, as a result of a road traffic accident herein.
9. That, she was buried on April 14, 2018 wherein they incurred burial expenses in the sum of; Kshs. 33,000. Further, they incurred an expense of Kshs. 35,000, in the Succession cause. He stated that the deceased was employed at Flamingo Horticulture, a flower farm and earned a salary of Kshs. 13,822 as per the payslip produced as exhibit 7.
10. Further, she was survived by two sons, being himself aged 37 years old, and his brother, Dan Githinji Wambui, aged 20 years. That, he is unemployed and was being assisted by the deceased, while his brother was waiting to join college but could not proceed following the demise of the deceased.
11. The respondent did not call any witnesses in support of their case. The suit was disposed of by filing of submissions and subsequently the trial court delivered its judgment dated; January 13, 2021 wherein the respondents were granted orders:

- a. General damages for pain and suffering --Kshs. 40,000.00
- b. loss of life expectation-----Kshs. 100,000.00
- c. Loss of dependency-----Kshs. 624,746.88
- d. Special damages-----Kshs 68,000
- Sub Total-----Kshs. 832,746.88
- Less 20% contribution-----Kshs. 166,549.38
- Total award-----Kshs. 666,197.50

12. However, the appellant is aggrieved by the decision of the trial court on the grounds stated in the memorandum of appeal as follows:
 - a. The learned trial Magistrate's award of general damages for pain and suffering is manifestly excessive as and against the weight of the evidence tendered.



- b. The learned trial Magistrate erred in both fact and in law by using a dependency ratio of 2/3 which finding was against the weight of evidence tendered.
 - c. The learned trial Magistrate erred in both fact and in law by ignoring the defendant's written submissions and authorities cited therein in determining liability and assessing general damages.
13. The appellant prays that, the award on general damages for pain and suffering and loss of dependency be set aside, and substitute with an assessment thereof at a much lower amount commensurate with the injuries sustained by the deceased. That, costs of the appeal and in the subordinate court be to the appellant.
 14. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated; October 12, 2022. He submitted that as held in the case of; *Butt v Khan* [1978] eKLR an appellate court will not interfere with the trial court's award on damages unless it is demonstrated that, the same was inordinately high or low so as to represent an entirely erroneous estimate or the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect arriving at a figure that was inordinately to high or low.
 15. He submitted that the award of; Kshs. 40,000 awarded by the trial court as damages for pain and suffering was made without any reference to any authority. That, in the trial court, he had sought for an award of Kshs. 10,000 as the deceased died on the same day of the accident and at Mai Mahiu, which was the *locus* of the accident. That, the trial Magistrate neither distinguished nor relied on the case of *Felister Nduta Muthoni & another v A.G* [2004] eKLR which he relied on.
 16. Further, the respondents did not adduce any evidence in the form of birth certificates, a chief's letter or any document identifying them as sons of the deceased and hence dependents within the meaning of section 2 (2) of the *Fatal Accidents Act*. That, dependency was a matter of fact to be proved by the claimant to justify adoption of any dependency ratio. That, the trial court ought to have interrogated the facts whether actual dependency was established.
 17. That, it was unbelievable that David Kamau Githiyi aged 37 years old with his own family was dependant on his mother. Further, that no evidence was produced to show that Dan Githiyi Wambui completed his secondary education and could not pursue his tertiary education.
 18. That, the appellant submitted for a dependency ratio of; 1/3 and relied on the case of *Doren Atieno Anyona & anor v Aldo Moschion Kinceid* [2012] eKLR where the court in adopting a dependency ratio of; 1/3 observed that the deceased had three children who were adults though still dependent on him.
 19. That further reliance was placed on the case of Kajiado HCCA No. 22 of 2019 *Allan Owiti Awour & anor v Tabitha Micere* where the deceased left behind a widow and three adult children between 25 and 29 years and the Judge set aside the ratio of 2/3 and substituted it with a ratio of 1/3, stating that dependency was a fact to be proved by evidence and that there was no proof of dependency as concerns the children, thus the trial court fell into error in assuming all the children were dependent on the deceased.
 20. The appellant urged the court to set aside the dependency ratio of 2/3 and substitute it with a ratio of 1/3, as follows: $9,761.67 \times 12 \times 8 \times 1/3 = 312,373.44$ and then reduce the total award as follows: -
 - a. General damages for pain and suffering-----Kshs. 10,000;



b.	loss of life expectation-----	Kshs. 100,000
c.	Loss of dependency-----	Kshs. 312,373.44
d.	Special damages -----	Kshs 68,000
	Sub Total-----	Kshs. 490,373.44
	Less 20% contribution-----	Kshs. 90,074.68
	Total award-----	Kshs. 392,298.70

21. However, the respondent in their submission dated; October 22, 2022 opposed the appeal submitting that the award of Kshs. 40,000 awarded by the trial court was fair. That, the deceased died on her way to hospital and there being no precise time when she died, it is erroneous to infer she died on the spot.
22. That, in the case of; *Hyder Ntbeya Musili & anor v China Wuyi Limited & ano* (2017) eKLR the court held that the accepted principles are very nominal damages will be awarded where death followed immediately after the accident and that conventional award for loss of life expectation is. 10,0000 while pain and suffering ranges from Kshs. 10,000 to Kshs. 100,000.
23. Further, in the case of; *Ainu Shamsi hauliers Limited v Moses Sakwa* Mombasa Civil Appeal No. 10 of 2020 the court dismissed the appellants' contention that the award was excessive.
24. That the evidence of PW1 on dependency was on oath and uncontroverted. That, the trial court exercised its discretion in a manner that did not cause injustice by adopting a ratio of; 2/3. That in the case of; *Mbogo v Shah* [1968] EA 93 the Court of Appeal stated it would not interfere with the discretion of a judge unless he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest in the case from a whole that the judge was clearly wrong in exercise of his discretion.
25. Having considered the appeal in the light of the material placed before the court and the arguments advanced vide submissions, I find that, the main issue is to determine whether the learned trial magistrate properly guided herself while determining quantum herein and in particular on the sum Kshs 40,000 for pain and suffering and applying a multiplier of 2/3 instead of 1/3.
26. The law is settled that, as properly stated by the parties herein that, the 1st appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice (see; *Mbogo & another v Shah* (1968) EA and *Mkuba v Nyamuro* 1983 KLR 403.)
27. In the same vein, the Court of Appeal *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 (unreported) stated that:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257).”
28. To revert back to the matter herein, the plaintiff witness testified David Kamau Githinji testified as regards the time the deceased died as follows: “ I was called and went to Naivasha District Hospital



where I was told she passed on” and reiterated the same in cross examination by stating that, “when I got to the scene, I was told she had been taken to hospital and when I got there I was told she had passed away. I cannot know whether she passed away on the way to hospital. Yes she died on the way to hospital”

29. It is clear from the aforesaid that the deceased did not die on the spot and she likely died on her way to hospital. In that case she definitely experienced pain and suffering before she died. In awarding Kshs 40,000. For pain and suffering the learned trial Magistrate stated that; “it is not known how soon after the accident the deceased passed on, however, I find a figure of Kshs 40,000/= is fair”
30. It is clear that the trial court did not justify why the figure awarded was fair. It is also clear the authorities cited by the parties were not considered as such the figure awarded is not supported. I have considered the authorities cited in the trial court and I find that, the decision of *Felister Nduta Muthoni & another v The Hon, the Attorney General* Civil Case 1210 of 2003 relied on by the defendants was rendered on December 2, 2004 a period of nineteen (19) years ago and therefore with inflation, as sum of Kshs 10,000. is not tenable.
31. Indeed, the general principle is that nominal sum is awarded for pain and suffering if death followed immediately after the accident and conventional award range from Kshs 10, 000 to Kshs 100,000. The award of Kshs 40,000 is within the range and taking into account the 20% contributory negligence the defendant is paying only Kshs 32, 000 for the same and I don’t find the figure too high to interfere with, I uphold the same.
32. As regards the issue of dependency ratio, the trial court stated as follows; “the deceased was a family woman. The dependency ratio will be two - thirds”. Again the submissions and/or authorities cited by the parties were not considered nor the issue of the extent of dependency of the family members.
33. In the authority cited by the defendant in the trial court, of *Doreen Atieno Anyona v Aldo Moschini Kinceid* (2012) eKLR, the children were adults as herein and a multiplier of 1/3 was adopted. In the instant matter PW1 testified that he was aged 37 years and his brother was 20 years. They were both adults and indeed in cross examination he admitted that he had a family. It is not plausible that a person aged 37 years with a family would be fully dependent on the mother.
34. I find that he has the capacity to fend for himself and his family and only be aided by the mother and even taking into account the income of the mother averaging Kshs. 10,000, how much would he get from the mother and how much would the mother spend on herself and his younger brother? In my considered opinion I find the ratio of 2/3 untenable and not justifiable.
35. The upshot of the aforesaid, I revise the award of the trial court and set it as follows:
 - a. General damages for pain and suffering--Kshs. 40,000.00
 - b. Loss of life expectation-----Kshs. 100,000.00
 - c. Loss of dependency-----Kshs. 312,373.44
 - d. Special damages -----Kshs 68,000.00Sub Total-----Kshs. 520,373.44
Less 20% contribution-----Kshs. 104, 074.00
Total award-----Kshs. 416,299.44



36. The respondent shall have costs and interest on the sum awarded from date of this judgment until payment in full.

37. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 10TH DAY OF AUGUST 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mega for the appellant

Mr. Mboga for the respondent

Ms. Ogutu: court assistant

