



**Midland Sacco v Kirui & another (Suing as the legal representatives
of the Estate of Richard Kipngeno Kirui - Deceased) (Civil Appeal
E010 of 2021) [2023] KEHC 22839 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E010 OF 2021
RL KORIR, J
SEPTEMBER 29, 2023**

BETWEEN

MIDLAND SACCO APPELLANT

AND

SELINA CHELANGAT KIRUI 1ST RESPONDENT

MICHEAL KIPKEMOI KIRUI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF RICHARD
KIPNGENO KIRUI - DECEASED**

*(Being an Appeal from the Judgment of the Resident Magistrate, Aduke
J. at the Magistrate's Court at Bomet, Civil Suit Number 51 of 2019)*

JUDGMENT

1. The Respondents (then Plaintiffs) as the Legal Representatives of the estate of Richard Kipngeno Kirui, sued the Appellant (then Defendant) for General and Special Damages that arose when the deceased Richard Kipngeno Kirui was allegedly knocked down by Motor Vehicle Registration Number KCF 534E which allegedly belonged to the Appellant.
2. The trial court conducted a hearing and after hearing one witness for the Respondents, the parties entered into a consent for liability in the ratio of 70:30 in favour of the Respondents.
3. In its Judgment dated 26th March 2021, the trial court awarded Kshs 3,500,000/= as General Damages to the Respondents (then Plaintiffs).
4. Being aggrieved with the Judgment of the trial court, the Appellant through its Memorandum of Appeal dated 20th April 2021 appealed against the quantum of damages and relied on the following grounds:-



- I. That the learned trial Magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.
 - II. That the learned trial Magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellants.
 - III. That the learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
 - IV. That the learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis a vis the Respondent's claim.
 - V. That the learned trial Magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 Others Vs Attorney General (2016) eKLR*.

The Plaintiffs/Respondents' case.

6. Through their Complaint dated 4th April 2019, the Respondents stated that on 25th January 2019, the deceased while walking beside the road along Silibwet-Kapkoros road was knocked down by Motor Vehicle Registration Number KCF 534E.
7. The Respondents stated that the Appellant being the owner or proprietor of Motor Vehicle Registration Number KCF 534E, was negligent in causing the accident and particularized the negligence in paragraph 6 of the Complaint. It was the Respondents' further case that the deceased had dependants and the said dependants were listed in paragraph 8 of the Complaint.
8. It was the Respondents' case that at the time of the death of the deceased, he was aged 50 years and that he earned approximately Kshs 30,000/= per month, 2/3 of which he used to support his family members. That by his demise, the deceased's estate and dependants suffered grave loss.
9. The Respondents' claim against the Appellant was for Special and General Damages under the *Law Reform Act* and *Fatal Accidents Act*.

The Appellant's/Defendant's case

10. Through its statement of defence dated 15th May 2019, the Defendant/Appellant denied that it was the registered owner of Motor Vehicle Registration Number KCF 534E and further denied the occurrence of the accident.
11. The Appellant denied the particulars of negligence levelled against it. That if any accident happened, it was contributed to by the negligence of the deceased. It particularized the negligence in paragraph 6 of its statement of Defence.



12. The Appellant stated that while its driver was driving along Silibwet-Kapkoros road, he saw a boda boda riding in a zig zag manner heading towards his direction. That the boda boda hit the deceased and that its driver rushed the deceased to the Tenwek Mission Hospital for treatment.
13. Pursuant to the directions of this court on 15th March 2023, the Appeal was canvassed by way of written submissions.

The Appellant's Submissions.

14. In its submissions dated 31st March 2023, the Appellant submitted that the trial court erred in awarding Kshs 100,000/= for pain and suffering as the same was excessive. That PW1 testified that the deceased had already died when he was taken to hospital and the same was corroborated by the Post Mortem Report which indicated that the deceased had died on the same day the accident occurred. The Appellant proposed that the amount of Kshs 20,000/= would be sufficient and relied on *Sukari Industries Limited vs Clyde Machimbo Juma (2016) eKLR*.
15. It was the Appellant's submission that the trial court pegged the deceased's monthly income at Kshs 20,000/= without any evidence. That the trial court also erred when it found the deceased's life expectancy to be 80 years old. It was the Appellant's submission that in the absence of the proof of earnings, the trial Magistrate ought to have reverted to the minimum wage of Kshs 7,240.98/= for a general labourer for all other areas as per the Regulation of Wages (General) (Amendment) Order 2018.
16. The Appellant submitted that the retirement age was 60 years and the trial court should have used the multiplier of 10 years. The Appellant further submitted that the award under loss of dependency should be Kshs 579,278.40/=. It relied on *Shiva Carriers Ltd vs Loise Jepkoech Sang & another (2018) eKLR* and *Osman Mohammed & another vs Saluro Bundit Mohamed Civil Appeal No. 38 of 1997*.

The Respondents' Submissions.

17. Through their submissions dated 24th April 2023, the Respondents submitted that the award of Kshs 100,000/= for pain and suffering was reasonable. That in addition to the testimony of PW1, Joyce Koskei who was an eye witness testified that the deceased was knocked down from behind and was pronounced dead on reaching Tenwek Hospital. It was their further submission that the deceased went through a lot of pain and suffering before he succumbed to his injuries. They relied on *Bidii Muimi & another vs Patricia Munanie Mutemi & another (2020) eKLR* and *Rahima Tayab & others vs Anna Mary Kinanu (1983) KLR 114, KAR 90*.
18. It was the Respondents' submission that the award for pain and suffering was reasonable and that comparable injuries should be compensated by comparable awards. They relied on *Mercy Muriuki & another vs Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Mwangi) (2019) eKLR*.
19. The Respondents submitted that the award under loss of dependency was just, fair, reasonable, commensurate and comparable to similar awards. That in assessing damages under loss of dependency, courts are guided by the facts and evidence on record, the lost years and the income of the deceased. They relied on *Beatrice Wangui Thairu vs Hon. Ezekiel Barngetuny & Another HCC No. 1638 of 1988 (UR)* The Respondents further submitted that the principles that guided a court on appeal to interfere with an award were espoused in *Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini vs AM Lubia and Olive Lubia (1982-88) 1 KAR 727* and *Gicheru vs Morton and Another (2005) 2 KLR 333*.



20. It was the Respondent's submission that where there were no supporting documents for proof of income, the courts have based the earnings on the minimum wage as per *Beatrice W. Murage vs Consumer Transport Ltd & another* (2014) eKLR.
21. On the issue of loss of expectation of life, the Respondents submitted that the deceased was of good health, aged 50 years and was an active man. That the award of Kshs 100,000/= by the trial court was reasonable. They relied on *Crown Bus Service Ltd & 2 others vs Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala) (Deceased)* (2020) eKLR.
22. I have gone through and carefully considered the Record of Appeal dated 25th October 2022, the Appellant's written submissions dated 31st March 2023, the Respondents' written submissions dated 24th April 2023 and the issue for determination is whether the amount assessed as quantum by the trial court was just and fair.
23. For an appellate court to interfere with the award by the trial court, it must be convinced that the trial Magistrate acted upon some wrong principle of the law or that the award was extremely high or extremely low so as to make it erroneous. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001* (2004) 2 KLR 55 stated that:-

“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.”

24. In regard to the pain and suffering, the trial court awarded Kshs 100,000/=. The Police Abstract produced by PW1 (Selina Chelangat Kirui) and marked as P.Exh 4 stated that the accident occurred on 25th January 2019. The Post Mortem Report produced by PW1 and marked as P.Exh 2 indicated that the deceased died on 25th January 2019. The same was supported by the Death Certificate that was produced by PW1 and marked as P.Exh 6 which indicated that the date of death was 25th January 2021. PW1 testified that she was called on 25th January 2019 by her brother in law and informed that her husband (the deceased) had been involved in a road traffic accident and upon reaching the hospital at around 6.30 p.m., the doctor informed her that he had passed on. It was also clear from this testimony that the deceased died on the same day and that his pain was not prolonged.
25. It is my finding that the award of Kshs 100,000/= by the trial court for pain and suffering was excessive. I therefore substitute the award of Kshs 100,000/= and adopt the reasonable award of Kshs 50,000/= . I am guided by the persuasive case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (2017) eKLR, where Nyamweya J. (as she then was) held that:-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to



Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

26. Similarly in *West Kenya Sugar Co. Limited vs Philip Sumba Julaya* (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) (2019) eKLR, the court observed that-

“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

27. On the issue of the loss of expectation of life, the trial court awarded Kshs 100,000/=. The Appellant did not submit under this head and the Respondents submitted that the award of Kshs 100,000/= was the conventional award for loss of expectation of life. I agree with the Respondent that Kshs 100,000/= is the conventional award under this heading thus I am hesitant to interfere with the award by the trial court under this head.

28. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death 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, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

29. The claim for loss of dependency constitutes the multiplicand, the dependency ratio and the multiplier.

30. The Respondents claimed that the deceased was a farmer who used to earn Kshs 30,000/= per month of which 2/3 of his income went to supporting the Respondents and other family members. I have gone through the trial court proceedings and there was no evidence on record to sustain the claim that the deceased earned Kshs 30,000/=. It was evident that the deceased’s income was unknown. In such circumstances, courts are minded to use the minimum wage as the base income when calculating the loss of dependency as was held by the Court of Appeal in the case of *Isaack Kimani Kanyingi & another* (Suing as the legal representative of the Estate of *Loise Gathoni Mugo* (Deceased) vs *Hellena Wanjiru Rukanga* (2020) eKLR thus:-

“We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased’s net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs.11,995/- was an appropriate place to begin.....”

31. I have gone through the *Regulation of Wages (General Amendment) 2018* and among the occupations listed in the 15 categories, there is nowhere where a farmer can be placed. That leaves this court with no option than to award a reasonable sum under this head. In the case of *Mwanzia vs Ngalali Mutua*



Kenya Bus Ltd cited in *Albert Odawa vs Gichumu Githenji* (2007) eKLR, where Ringera J. (as he then was) made the following observation:-

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

32. It is my finding that an award of Kshs 15,000/= would be reasonable as income from the deceased's farming activities.

33. On the issue of multiplier, the trial court used a multiplier of 30 years. The Appellant submitted that the adoption of the multiplier of 10 years would be reasonable as the retirement age was 60 years. The Respondent submitted that the trial court was correct in adopting the multiplier of 30 years. In the case of *Roger Dainty vs Mwinyi Omar Haji & another* (2004) eKLR, the Court of Appeal held that:-

“To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life.”

34. The life expectancy in Kenya as per the 2019 World Bank Data was 67 years. The deceased worked in the informal sector with no statutory retirement age. There is also nothing on record to show that the deceased may have suffered from an ailment as life expectancy is dependent on good health at the very least. Taking into consideration the vicissitudes and vagrancies of life and the fact that the deceased died aged 50 years old, it is my finding that the use of 17 years as a multiplier to be reasonable.

35. On the issue of the dependency ratio, all parties agreed that the ratio should be 2/3. I will not depart from the use of 2/3 as the dependency ratio by the trial court.

36. In summary therefore, the loss of dependency comes to $Kshs\ 15,000 \times 12 \times 17 \times 2/3 = Kshs\ 2,040,000/=$

37. With regard to Special Damages, the Respondents did not produce any receipts to indicate that they had incurred the expenses listed in paragraph 8 of the Plaint and as such their claim for special damages fails.

38. In the final analysis, quantum is computed as below:-

- i. Pain and Suffering Kshs 50,000/=
 - ii. Loss of expectation of life Kshs 100,000/=
 - iii. Loss of dependency Kshs 2,040,000/=
- Kshs 2,190,000/=
- Less 30% Contribution Kshs 657,000/=
- Kshs 1,533,000/=

39. In the final analysis, the Appeal dated 20th April 2021 succeeds to the extent that the amount awarded to the Respondents is reduced from Kshs 3,500,000/= to Kshs 1,533,000/=.



40. The Appellant is awarded half the costs of the Appeal while the costs of the suit shall remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF SEPTEMBER , 2023

R. LAGAT-KORIR

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgement delivered in the presence of Ms. Miheso for the Appellant, N/A for the Respondent and Siele (Court Assistant)

