



**Ngei & another (Suing as the administrators to the Estate of the Late Benjamin Ngei Mbelenzu) v Sifa Investments Limited & another (Civil Appeal 129 of 2022) [2023] KEHC 24905 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 129 OF 2022  
JM CHIGITI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**FLORENCE MUENI NGEI ..... 1<sup>ST</sup> APPELLANT**

**JOHN MBELENZU NGEI ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE ADMINISTRATORS TO THE ESTATE OF THE LATE  
BENJAMIN NGEI MBELENZU**

**AND**

**SIFA INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JACKOBETH RADIDO WALLOGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Hon. N. Chepchirchir (SPM) dated 15th November 2022 in Mariakani Senior Principal Magistrates Court Civil Case No. E100 of 2021)*

**JUDGMENT**

1. Florence Mueni Ngei & Joshua Mbelenzu Ngei (Appellants) being aggrieved by and dissatisfied with the judgment of the Hon. N. Chepchirchir dated 15<sup>th</sup> November, 2022 in Mariakani Senior Principal Magistrates Court Civil Case No. E100 of 2021 hereby appeal partly against the judgment on the following grounds as set out in the Memorandum of Appeal dated 30<sup>th</sup> November, 2022, namely;
  1. The learned magistrate erred in law and in fact by awarding manifestly low damages to the Appellant against evidence placed before the Honourable Magistrate.
  2. The learned magistrate erred in law and in fact by reaching at a conclusion on award of damages that is contrary to the evidence before him, the established principles on awarding of damages under the [Fatal Accidents Act](#) and Law Reforms Act and the appellants' submissions.



3. In all the circumstances of the case, the findings of the learned magistrate were characterized by misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion.
2. The Appellant prays that:
  - a. The appeal be allowed.
  - b. The impugned judgment of the learned magistrate on quantum be set aside.
  - c. The Honorable Court be pleased to assess the damages awardable to the Appellants.
  - d. The cost of this Appeal and the trial court with interest from date of filing Mariakani Civil Case No. E100 of 2021 be awarded to the Appellant.
3. The Respondents have not opposed the appeal. They did not file any submissions, and even though their appeal is unopposed, this court is still under a duty to analyze hear and/or review the appeal.

### **Brief Facts**

4. The Appellants herein were the Plaintiffs in Mariakani SMPC No. E100 of 2021 which suit was initiated by way of a Plaint on 5<sup>th</sup> July 2021. The Plaintiffs sought for compensation by the Defendants therein for fatal injuries sustained by the late Benjamin Ngei Mbelenzu as a result of a Road Traffic Accident of 5<sup>th</sup> July 2018 involving the Respondents' motor vehicle registration No. KAU 015X.
5. The suit was defended by the 1<sup>st</sup> Defendant vide a Statement of Defence dated 5<sup>th</sup> August 2021 while the 2<sup>nd</sup> Defendant filed a defence dated 31<sup>st</sup> August, 2021. The Judgment in the matter was delivered on 15<sup>th</sup> November, 2022 whereof, the Defendants were jointly and severally held 100% liable for the accident. The trial court proceeded to assess damages as below;
  - i. Pain and suffering - Kshs. 50,000/=
  - ii. Loss of expectation of life -Kshs. 100,000/=
  - iii. Loss of Dependency - Kshs. 517,062/=
  - iv. Special damages - Kshs. 90,770/=Total Kshs. 757,832/=

### **Analysis and determination:**

6. In *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA, the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect. This principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”



7. The matter proceeded to hearing on 1<sup>st</sup> March 2022 in the absence of the Defendants or their representatives after the Honourable Court was satisfied of a proper service of notices whereof, the Appellants called Four (4) Witnesses in support of their case.
8. By consent of parties, the Plaintiff's witnesses were recalled for cross examination by the counsel for the 1<sup>st</sup> Defendant on 27<sup>th</sup> September, 2022. The Plaintiff's case was therefore closed and as well the Defence case was closed without calling any evidence before the court.
9. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango V. Manyoka* [1961] EA 705, 709, 713; *Lukenya Ranching and Farming Co-Operatives Society* Civil Appeal No. E252 of 2021 Page 7 Ltd V. Kavoloto [1970] EA 414, 418, 419. This Court follows the same principles.”

#### **The loss of dependency:**

10. The appellant submits that their submissions addressed the Honourable Court on this line. The deceased was 50 years of age at the time of his death, and privately engaged as a truck driver for commercial long distance vehicles. It was also the evidence of the Appellants that the deceased was engaged in farming and therefore, earning a living therefrom.
11. The appellants submitted that the deceased, being employed in the private sector and with no particular retirement age as a truck driver and a farmer, he would work well past 70 years. As such, the Appellants sought for a multiplier of 15 years.
12. The trial court adopted a multiplier of 7 years after considering the retirement age in Kenya was 60 years. The Appellants submit that the deceased was not subject to the said strict retirement timelines as was employed in private sector and also economically earned from farming.
13. In adopting a multiplier of 7 years, the Honourable Magistrate failed to consider the evidence presented before her and further on the submissions of the appellants. The appellants submitted an array of authorities in support of the proposal to the trial court to adopt a multiplier of 15 years.
14. The Appellants were guided by the decisions of *Jacob Aviga Maruja & another Simeon Obayo* [2005] eKLR where the Court of Appeal held as follows with regards to a multiplier for a deceased at the age of 53 years.

“On ground two, we know of no law or any other requirement that a self-employed carpenter must retire at age 55. Mr. Kasamani did not point out to us any such provision. The deceased was 53 years old at the time of his death. The learned trial Judge thought he probably would have pursued his carpentry business for some eight more years. There is absolutely no basis upon which we can interfere with that finding. Ground two must also fail.”



15. Further reliance was also placed on the case *Chania Shuttle v Mary Mumbi* [2017] L where it was held that;

“...25. As has been stated hereinabove, the Appellant did not rebut the Respondent’s evidence that the deceased was a businessman who could have worked beyond sixty (60) years. Barring the vagaries and uncertainties of life, an average Kenyan man can engage in economic activity up to about seventy (70) years or even beyond especially where he or she is engaged in business. Indeed, there is no retirement age for businessmen or businesswomen.

26. It is important to point out that an appellate court ought not to disturb an award by a trial court merely because it could have adopted a lower figure. The Learned Trial Magistrate exercised his discretion judiciously and adopted a multiplier that was not unreasonable.”

16. In the case of *Jacob Ayiga Maria & another v Simeon Obayo* (Supra) where the Court of Appeal proceeded to hold as follows with regards to proof of income and employment;

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail.”

17. From the police abstract, the driving license and the death certificate I am satisfied that the deceased was a driver. The Appellants submitted that as per the Legal Notice No. 2 of January 2019, the minimum wage for a driver (medium sized vehicle) was set at Kshs. 30,627.45/=. However, the same was referred to in the submissions by the appellant.

18. In the judgment the trial court made the following finding: The deceased was 50 years of age at the time of his death. He is said to have been a driver. His death certificate indicates his occupation as driver. There was no proof of earnings produced by the plaintiff to prove that the deceased was indeed a driver and that he earned Kshs. 35,000/- per month as alleged. As such, I shall adopt the minimum wage of a general worker in Mombasa as at 2017, being that his place of death is Kokotoni, which was Kshs. 12,926.55/- at the time.

19. The deceased was 50 years of age and though the retirement age in Kenya is 60 years, putting into context the vagaries and vicissitudes of life, I shall adopt 7 years as a reasonable multiplier and  $\frac{2}{3}$  as dependency ratio given that he had a wife and four children.

20. I must now do the calculations based on the above findings. The same shall be calculated as follows; (Earnings per month x No. of months in a year x Multiplier x Dependency ratio)  $12,926.55 \times 12 \times 5 \times \frac{2}{3} = 517,062/-$

21. It is the courts finding that indeed there was evidence on a balance of probability that the deceased was a driver. The court should have applied Legal Notice No. 2 of January 2019, the minimum wage for a driver (medium sized vehicle).



22. This court has reasons to interfere with the finding of the court on the issue, and I hereby grant the following Kshs. 30,627.45/= (minimum wage) x 12 x 15 (lost years) x 2/3 (dependency) = Kshs. 3,675,294/=.

**Funeral expenses:**

23. The appellants had pleaded as follows in the plaint:

Particulars Of Special Damages

b) Special Damages.

d) Burial expenses - Kshs. 74,020/=

24. In the judgment, the trial magistrate made a finding that the plaintiff prays for Kshs. 250,000/- being funeral expenses and special damages of Kshs. 90,770/-. The plaintiffs pleaded Kshs. 90,770/- in their plaint and had produced receipts in support. It is trite that special damages must be specifically pleaded and strictly proved. I shall award that which was pleaded and proved which is Kshs. 90,770/-

**Disposition:**

25. The appeal has merit and the same is allowed.

**Order**

The appeal succeeds and judgment is entered as follows:

1. General damages under Law Reform Act  
Pain and suffering - Kshs. 50,000/-  
Loss of expectation of life - Kshs. 100,000/-
2. General damages under Fatal Accidents Act-  
Loss of dependency-30,627.45/= (minimum wage) x 12 x 15  
(lost years) x 2/3 (dependency) - Kshs. 3,675,294=
3. The special damages remain Kshs 90,770.
4. Costs
5. Interest

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023**

**J.CHIGITI (SC)**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

