



**Nderitu v Kiswii (Suing as mother and personal representative
of the Estate of Janet Kavindu Kingesi (Deceased) (Civil Appeal
E186 of 2022) [2023] KEHC 24678 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E186 OF 2022
FR OLEL, J
OCTOBER 31, 2023**

BETWEEN

ANTONY MURIITHI NDERITU APPELLANT

AND

**MARY NDINDA KISWII (SUING AS MOTHER AND PERSONAL
REPRESENTATIVE OF THE ESTATE OF JANET KAVINDU KINGESI
(DECEASED) RESPONDENT**

JUDGMENT

A. Background

1. Vide a plaint dated 22nd February 2022 the respondent did sue the appellant seeking damages under both the law reform and *fatal accidents Act* for an accident which occurred on 12.10.2020 at Koma shopping Centre along Nairobi-Kangundo road, when the appellant motor vehicle KCQ 649C Mitsubishi lorry (hereinafter referred to as the suit motor vehicle) is alleged to have knocked down the deceased who was lawfully standing as a pedestrian at Koma matatu stage and as consequence whereof she sustained fatal injuries.
2. The appellant did file a statement of defence and denied all the particulars of negligence as pleaded and in the alternative averred that it was the deceased who was negligent and caused/contributed to the occurrence of the accident. During trial the parties did record a consent judgement on 19.07.2022, In the ratio of 80:20 in favour of the Respondent. The Respondent did testify and adopted her witness statement after which parties proceeded to file submissions which the trial court considered and rendered its judgment awarding the respondent damages as follows; pain and suffering Ksh.35,000/=, loss of expectation of life Ksh.120,000/=, loss of dependency Ksh.1,800,000/=, and special damages Ksh.88,750/=, subtotal was Ksh.2,042,750 less 20% contribution ksh.408,750/= total award being ksh.1,635,00/=.



3. Being wholly aggrieved and dissatisfied with this judgment the appellant did proffer this appeal which basically challenges quantum awarded on account of loss of dependency, Ksh.1,800,000/= and raised the following grounds of appeal;
 - a. That the learned trial magistrate erred in law and in fact in awarding a sum of Ksh.1,800,000/= as damages for loss of dependency where the deceased was aged 10 years with no evidence of academic performance and also with an unpredictable future.
 - b. That the learned trial magistrate erred in law and in fact by relying on and being guided by the decision in Danial Mwangi Kimemi and 2 others versus J.G M and another (the personal representation of the estate of N.K(DCD) (2016)eKlr where the circumstances in that decisions were not analogous to this case and thereby arriving at a wrong decision on loss of dependency.
 - c. That the learned trial magistrate erred in law and in fact by relying on and or being guided by the decision in Zachary Abusa Magoma versus Julius Asiago Ogentoto and Jane Kerubo Asiago (2020) eKLR, when the circumstances in that decisions were not analogous to this case and thereby arriving at a wrong decision on loss of dependency.
 - d. That the judgment of the trial magistrate is against the law and weight of evidence.
 - e. That the learned magistrate erred in law and in fact in disregarding the appellant's submission and judicial authorities on loss of dependency.
4. The appellant prayed that this appeal be allowed and the award on loss of dependency be set aside and a new assessment on loss of dependency be award based on the unique circumstances of this case.

B. Submissions

Appellant Submissions

5. The appellant did file his submissions on 22.03.2023. He stated that the deceased was 10 years old and was school going, but no documentary proof was produced to prove the same nor was her level of performance in school proved. Therefore, the award of Ksh.1,800,000/= for loss of dependency was excessive and unwarranted in the circumstances of this instance case. The trial court also erred in relying on the case of Zachary Abusa Magima versus Julius Asiago Ogentoto and Jane Kerubo Adiago (2020)eKLR as the circumstances of the said case were completely different. In that case the deceased was 28 years and was a student at Gusii Institute scheduled to undertake her final exams before graduating. The court adopted a global sum approach and award the plaintiff therein Ksh.2,000,000/= which was reduced to Ksh.1,500,000/= on appeal.
6. The appellant urged court to reduce the award to between Ksh.600,000/= to Ksh.1,000,000/=. Reliance was placed on Chen Wambo and 2 others versus IKK and another (suing as the legal representative and administrator of CRK (deceased), *Ambrose Kiptanui and another versus Timona Wekesa (suing in as the administrator of the estate of Faith Nafula Wekesa (deceased) (2020)* eKLR and *Rosemary Onyango and another versus Mohamed Jenjewa Ndoyo and another (2019)*eKLR.



7. The appellant urged this court to find that the award of loss of dependency was excessive when compared to similar fact citations/findings and urged this court to set aside the same and reduce it to a more appropriate amount.

Respondent Submissions

8. The Respondent did file her submissions on 26.04.2023 and stated that the award was reasonable and commensurate with the current court awards for similar case. The trial magistrate did consider the evidence tendered and also considered the appellants submissions and thus cannot be faulted for arriving at the right decision of as the deceased had died at a young age. Reliance was placed on Makueni HCCA courts limited and another versus Felistus Kanini Ndunda (suing as legal Representative of Estate of Enock Mutuku, Memo HCCA 24 of 2020 Mpaka Muriuki Japheth versus HMM (suing as the legal representative of the Estate of LGM (deceased) and Bomet HCCA no.12 of 2017 Antony Angweyi Okoo versus Thomas Kipurui Langat and another (suing as legal representative of Faith Chepkoech (deceased)).
9. The Respondent did urge this court to find that this appeal has no merit and the same be dismissed with costs.

C. Analysis and Determination

10. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
11. The appellant's in their memorandum of appeal had raised five (5) grounds of Appeal, which basically challenged the award of Ksh 1,800,000/= for loss of dependency.

Quantum

12. This court is guided by the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR where the Court set out the parameters under which an appellate court will interfere with an award in general damages and held that:

“An appellate court will not disturb an award for general 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...”

13. In the case of Southern Engineering Co. Ltd vs. Musungi Mutia [1985] KLR 730, the court held that:“

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case...”Whether the trial court erred in awarding an inordinately high award for loss of dependency.”



14. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another vs. P. F. Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase. “(Emphasis added)”.

15. The trial magistrate did use the global award method to assess loss of dependency and the same cannot be faulted as the court did not have enough evidence placed before it to calculate dependency using the multiplier method. It has also been held severally that use the multiplier approach to assess dependency, 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 and the court may use the Global award method in determining the level of dependency.

16. The court in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR, held as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

17. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR where the court was dealing with a similar issue, it stated:

“(23)In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

18. The appellant faulted the court for awarding high loss of dependency, whereas there was no prove placed before court the court to determine the child’s ability, academic performance and also that the child’s future was unpredictable. The court of Appeal in *Kenya Breweries limited Vrs Saro* (1991) Mombasa civil Appeal No 441 of 1990 (eklr), the court did hold that;

“the mere presence in of a child in a family of whatever age and whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact.....in our view, damages are clearly payable to the parents of a deceased child irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution. See Also *Shiekh Mushaq Vrs Nathan Mwangi Transporters & five others* (1985 -1986)



4KCA 217 & Abdullahi Vs Githenya (1974) EA 110. Damages for loss of user was thus awardable.

19. The trial court did look at the various court decisions Chen Wambo and 2 others versus IKK and another (suing as the legal representative and administrator of CRK (deceased), Ambrose Kiptanui and another versus Timona Wekesa (suing in as the administrator of the estate of Faith Nafula Wekesa (deceased) (2020) eKLR relied upon by the appellants and Zachary Abusa Magoma versus Julius Asiago ogentoto & Jane kerubo Asiago (2020) eKLR, Celina Versus John Mithika M'itabari { suing as administrator of the estate of Erustus Kirimi Mithika (Deceased), (2018) eKLR and Nairobi HCC No 814 of 2007 Peter Kibogoro Wanjohi (suing as the administrator of Lillian wangui 9Deceased) Versus christine Wakuthi Muriuki & Another, relied on by the respondent and came to the conclusion that a global award of Kshs 1,800,000/= would suffice, considering the circumstances of this case.
20. The general principle is that assessment of damages is a matter of discretion; and generally, the appellate court will hardly disturb the award made by the subordinate court unless warranted. The appellant urged this court to reduce the award to a lower figure of Ksh.500,000/= given the age of the child whose level of ability was unknown. Reliance was placed on Daniel Mwangi kimemi & 2 others Vrs J G M & Another (personal representative of the estate of N.K (DED) (2016) eKLR.
21. In Makueni courts ltd & Another Vrs Felistus Kanini Ndunda (Suing as personal representative of the Estate of Eric Mutuku)(2020) eKLR, where the deceased was 12 years old , the court did award the deceased a sum of Kshs 1,800,000/=, In Mpaka Muriuki Japheth Vrs HMM & Another (2021) eKLR, where the deceased was 13 years the court awarded loss of dependency of Kshs 1,500,000/=, also in Antony Angwenyi okoba vrs Thomas Kipkurui langat & Another (2021) eKLR, where the deceased was 10 years old, the court awarded loss of dependency of Kshs 1,400,000/=
22. Looking at similar awards, the age of the minor and factoring in inflationary rates, i find that the award of Ksh 1,800,000/= is not excessive nor was it too high or fraught with lack of regard for the due principles. The said award is within the normal range of similar awards and thus there is no basis upon which this court can disturb the said award.

Disposition

23. I hold and find that that this appeal is unmerited and the same is dismissed with costs to the Respondent.
24. The costs of this appeal are hereby assessed at Ksh.180,000/= all inclusive.
25. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF OCTOBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

