



Kilungi v EKK & another (Suing as the legal representative of JGK – Deceased) (Civil Appeal E031 of 2022) [2023] KEHC 26078 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E031 OF 2022
EM MURIITHI, J
NOVEMBER 30, 2023**

BETWEEN

RAPHAEL MWITI KILUNGI APPELLANT

AND

MN 1ST RESPONDENT

EKK 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF JGK – DECEASED

*(Being an appeal from the Judgment of Hon. Tito Gesora
(C.M) delivered on 10/2/2022 in Maua CMCC No. 35 of 2019)*

JUDGMENT

1. The Respondents herein, the Plaintiffs in the trial court, sued the Appellant *vide* an amended plaint dated 11/3/2021 seeking Special damages, General damages for pain, suffering, loss of amenities, loss of future earning capacity and costs of the suit plus interests. The Respondents pleaded that on 18/11/2019, the deceased was off the verge of Maua-Mikinduri road near Kijji area when the Appellant and/or his authorized driver, servant, agent and/or employee so negligently, recklessly and carelessly drove, managed and/or controlled motor vehicle Registration no KCC XXXV that it knocked her down occasioning her fatal injuries.
2. The Appellant denied the claim through his statement of defence dated 5/6/2020, and prayed for its dismissal with costs.
3. Upon full hearing of the case, the trial court found the Appellant to have been 100% liable and awarded the Respondents general damages for pain and suffering of ksh30,000, ksh 1,600,000 for loss of dependency, ksh 100,000 for loss of expectation of life and special damages of ksh 101,605 together with costs and interests.



The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 4/3/2022 set out 3 grounds of appeal as follows:
 1. The learned magistrate erred in law in awarding General Damages for loss of dependency of ksh 1,600,000/= which amount is manifestly excessive.
 2. The learned magistrate erred in law and fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case while arriving at the award in damages.
 3. The judgment of the learned trial magistrate is against the law and weight of evidence on record and against the doctrine of stare decisis.

Duty of the Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1, PC Mauta Julius of Maua Police Station produced the police abstract dated 8/1/2020 and testified that, "She was involved in an accident on 18/11/2019 at about 6.30 p.m. it involved M/V Reg.KCC XXXV – Toyota Hilux. The said Joy was a pedestrian at Kijje area. The pedestrian was crossing left to right as one faces Maua from Mikinduri side. The motor vehicle knocked her. It was driven by one John Kariithi. Due to the impact the minor sustained serious head injuries and was admitted at Maua Methodist but on 13/10/2020 she succumbed. The initial I.O was CPL Mohammed but he retired."
7. On cross examination, he stated that, "I wasn't the I.O. I just came to confirm the accident was reported. No one was charged. Matter under investigations. I didn't have a sketch or investigation report. I am a Traffic Officer. The minor was 8 years old on the date of the accident. she was alone. I think she should be guided to cross the road."
8. PW2 EK, one of the Respondents herein adopted his statement recorded on 11/3/2020 as his evidence in chief. He further testified that, "JGK was my daughter. She died. I was there when the accident occurred. I saw the incident. We were many of us at the Tea centre." He produced ID card, initial treatment notes, P3 form, demand letters, copy of records, medical report of 9/1/2020, receipts for special damages, death certificate, post-mortem report, chief's letter and copy of order in succession cause no E039/2020 as exhibits in court.
9. On cross examination, he stated that, "We were there when accident occurred. We were there buying centre. The child was called to be sent by the mother. The vehicle came. It went over bumps and lost control and knocked the child. She was by the side of the road. She has just finished crossing. The vehicle hit the bumps and lost control. The child was shown far. The people were many but I couldn't bring them. The child used to go to [Particulars Withheld] School. I didn't bring school documents. She was going to class 3. The child had come from home. It was about 6.30 p.m just time she had come from school. She needed to go home."
10. The Appellant closed his case without calling any witnesses.



Submissions

11. The Appellant cites *Barnabas Biwott v Thomas Kipkorir Bundotich* (2018) eKLR and *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR on the court's mandate as the first appellate court. He proposes a sum of ksh 800,000 for loss of dependency since the deceased was a minor aged 8 years and there was no evidence tendered on her performance in school, and cites *Chen Wembo & Others v IKK & Another (suing as the legal representatives and administrators of the estate of CRK – Deceased)* (2017) eKLR, *Cbbhabadiya Enterprise Ltd & Another v Gladys Mutenyo Bitali (suing as the legal administrator and personal representative of the Estate of Linet Simiyu)* (2018) eKLR, *Anthony Konde Fonda & another v RMC (The Representative of FC – Deceased)* (2020) eKLR, *Savannah Hardware v EOO (Suing as representatives of SO – Deceased)* (2019)eKLR and *Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and Another* nrb HCC 1638 of 1998 (UR).
12. The Respondents submit that courts have over a long period of time acknowledged the relevance and importance of the concept of a child within the confines of the legal system which has become part of law, and rely on *Sheikh Mushtaq v Nathan Mwangi Kamau Transporters & Others* (1985-1988) 1 KAR 217 and *Kenya Breweries Ltd v Saro* (1991) KLR 408. They urge that the parents of the deceased had reasonable expectations that she would in future become someone and later on assist them while in their old age, and cite *Daniel Mwangi Kimemi & Others v Representative of estate of N.K* (2016) eKLR, *Simon Kibet Langat & Another v Miriam Wairimu Ngugi (suing as the administrator of the estate of Daniel Mwiruti Ngugi)* (2016) eKLR and *Sluentia Kennedy Sita & Another v Jeremiah Ruto (suing as legal representatives of the estate of Joyce Jepkemoi)* (2017) eKLR. The court notes the Respondents' submissions on special damages and proof of the case on a balance of probabilities although they are not among the grounds of appeal.

Analysis and Determination

13. The twin issues for determination are whether the award of general damages of ksh 1,600,000 for loss of dependency was excessive and whether the Appellant's submissions and authorities were considered.
14. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows: "The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v British Columbia Electric Railway co ltd* (1951) AC 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, v-P. and Newbold, JA agreed) in *Henry H. Ilanga v M. Manyoka* [1961] EA 705, 713 as follows: "The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 KB), approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries ltd* [1942] AC 601."
15. Dependency is a matter of fact and must be proved by evidence. PW1 testified that the deceased was his daughter who was a school going pupil, although he did not produce any documents to ascertain her performance in school.



16. In awarding a global sum of ksh 1,600,000 for loss of dependency, the trial court noted that, "... Considering that the deceased suffered for 1 year before succumbing. The emotional strain that must have been in the family, the ksh 1.6 Million prayed for should be awarded. In the cases cited by defence that long period was not there."
17. This court in *Adan Huka Halake v Priscilla Kendi Alias Priscila Kendi (Suing as the Administrator of the Estate of Brenda Gachui Mwiti (Deceased)* Meru Civil Appeal no E147 of 2021, upheld the trial court's award of ksh 1,400,000 for loss of dependency for a PP2 pupil aged 9 years. Similarly in *China National Aero-Technology International Engineering Corporation v RL (Suing as the legal representatives of the estate of the late SL)* (2020) eKLR, the court (R.P.v Wendoh J) declined to interfere with the trial court's award of ksh1,400,000 for loss of dependency of a deceased who was aged 13 years.
18. After due consideration of the Appellant's submissions and authorities, the trial court found that none of the cases he cited was similar to the case herein where the deceased suffered for a whole year before succumbing to the injuries.
19. This court is therefore satisfied that the trial court's award of ksh1,600,000 for loss of dependency was reasonable.

Orders

20. Accordingly, for the reasons set out above, this court finds that the is without merit and it is dismissed.
21. The Respondents shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER 2023.

EDWARD M. MURIITHI

JUDGE

