



Wandiriani & another v PWM (Suing as the Legal Representative of the Estate of the Late Jehoshat WW alias JWW - Deceased) (Civil Appeal 10 of 2021) [2023] KEHC 25911 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 10 OF 2021
MA ODERO, J
NOVEMBER 30, 2023**

BETWEEN

MARGARET WANGARE WANDIRIANI 1ST APPELLANT

PETE SWAKALA WANDIRIANI 2ND APPELLANT

AND

PWM (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JWW ALIAS JWW - DECEASED) RESPONDENT

JUDGMENT

1. Before this court is the Memorandum of appeal dated 16th April 2021, by which the appellants Margaret Wangare Wandiriani and Peter Swakala Wandiriani seek to have the judgement delivered by the trial court on 17th March 2021 set aside.
2. The Respondent PWM suing as the legal representative of the estate of the late JWW alias JWW (deceased) opposed the appeal.
3. The matter was canvassed by way of written submissions. The appellants filed the submissions dated 15th March 2023 whilst the Respondent relied upon their submissions dated 1st May 2023.

Background

4. The Respondents commenced the suit vide a Complaint dated 14th December 2018 alleging that on or about the 4th November 2017 at about 11.30am, along the Nanyuki-Marua road near Kagumo High school area the authorized driver servant agent or employee of the Appellants drove managed steered and or controlled motor vehicle registration number KCM 358J Nissan Note negligently, and permitted the same to cause a road traffic accident as a result of which the deceased an eight (8) year old boy suffered fatal injuries.



5. The respondent blamed the appellants entirely for negligence and breach of duty of care as particularized in paragraph 5 of the plaint.
6. The Respondent in their plaint sought for judgement against the appellant for:
 - a) General damages under the Fatal Accidents Act and Law Reform Act
 - b) Special damages Kshs.48,275/-
 - c) Costs and Interest on (a) and (b) at court rates
 - d) Any other relief the court would deem fit.
7. The appellant opposed the suit vide a statement of defence dated the 14th October, 2019 in which it denied negligence on its part and also denied that the deceased succumbed to injuries inflicted as a result of the said accident.
8. The parties recorded a consent on liability on 2nd December 2020 by which consent was agreed that liability be apportioned in the ratio of 80:20 in favour of the plaintiff. Thus the only issue left for the trial court to determine was that of quantum.
9. On 17th March 2021 by Hon. F. Muguongo, Senior Resident Magistrate delivered a judgement which she made an award of Kshs.1,078,620/= in favour of the Respondent which award was made up as follows:-
 - i. Pain and suffering – Kshs.100,000/=
 - ii. Loss of expectation of life –Kshs.200,000/=
 - iii. Loss of Dependency – Kshs.1,000,000/=
 - iv. Special damages – 48,275.00
 - v. Less 20% contribution
 - vi. Interest at court rates
10. Being dissatisfied with the judgement and award by the trial court the Appellants filed the memorandum of Appeal dated 16th April 2021 in which the following grounds were raised:-
 1. "The learned trial magistrate erred in fact and misdirected herself in awarding exorbitant quantum damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased [sic] of closely related age.
 2. The Learned trial magistrate erred in law in making such a high award on loss of dependency so as to show that the magistrate acted on a wrong principle of law.
 3. That the learned magistrate award on damages was so high as to be entirely erroneous.
 4. That the learned trial magistrate award on pain and suffering was inordinately high as to entirely be erroneous and based on wrong principal of the law.
 5. That the learned magistrate erred in law and in fact by awarding inordinately high award on loss of expectation of life as to be entirely erroneous and based on wrong principal of law.
 6. That the learned magistrate erred in law and fact in failing to consider the likely uncertainties in life in awarding a global figure on loss of dependency.



7. That the whole judgement on quantum was against the weight of evidence before the court and without any consideration to the pleadings and the appellants submissions and authorities on quantum”
11. As stated earlier the appeal was opposed.

Analysis And Determination

12. I have carefully considered the appeal filed in this matter as well as the written submissions filed by both parties.
13. This being a first appeal the duty of this court is to re-evaluate the evidence on record and draw its own conclusion on the same.
14. In *Abok James Odera & Associates –vs- John Patrick Machira T/o Machira & Company Advocates* [2013]eKLR it was held that

“This being a first appeal, we are reminded of our primary role as a first appellate court namely , re-evaluate, re-assess and re-analyse the extract on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way”
15. The Appellants submitted that the award made by the trial court was not commensurate with awards made for deceased minors in other comparable cases and that no evidence had been adduced to merit such an award. That dependency had not been pleaded as the deceased was a minor who still depended on his parents. As such the award of Kshs.1,000,000/= for loss of dependency ought not have been made.
16. The Appellant further submitted that given that all indications were that the deceased died instantly the award of Kshs.100,000/= for pain and suffering was not warranted. That the trial court ought to have made an award for lost years rather than for dependency as the deceased was an eight(8) year old minor.
17. The appellants state that the trial court failed to give reasons for its award and prays that the same be scaled downwards.
18. The respondents counter that the trial court did not err in awarding Kshs.100,000/= for pain and suffering. They pointed out that in the case of *Riziki Fresh Limited & Another –vs- JKM (Suing as next of kin on behalf of the estate of JNK(deceased))*[2020]eKLR, the court made an award of Kshs.1,500,000/= for lost years where the deceased was aged fifteen(15) years old.
19. The Respondents urged the court to uphold the judgement and award of the trial court.
20. As stated earlier the parties had, before the trial court, entered into a consent on the question of liability. Therefore the only outstanding issue was that of quantum.
21. On the limb of quantum this court is guided by the decision in *Bashir Ahmed Butt Vs Uwais Ahmed Khan (1982-88)*KAR where the court of Appeal set out the parameters under which an appellant court will interfere with an award in general damages as follows:-

“ 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 approved at a figure which was either inordinately high or low.....”

22. The amount to be awarded as quantum is left to the discretion of the judicial officer [see Southern Engineering Co-ltd-vs- Musungi Mutia [1985]KLR]
23. This is a case where the deceased was only eight (8) years old. As such there could have been no dependency upon the deceased by his parents. Rather it would be the other way round.
24. In Kenya Breweries –vs- Saru [1991]eKLR, the court of Appeal made an award of Kshs.100,000/= for loss of dependency to the parent of a child and in so doing stated that
“damages are clearly payable to a parent of a child irrespective of the age of the child and irrespective of whether there is no evidence of pecuniary contribution”
25. The deceased was a young boy who was still in school. There was nothing to indicate that he was exceptionally gifted and would have had a particularly glorious future had he lived out his natural lifespan. It is difficult to determine what the deceased would have turned out to be in the future. Indeed in the judgement the learned trial magistrate observed as follows:-
“Although he had prospects in life, as a court I really can’t tell what he would become in his adulthood unlike a 16 year old girl who is in secondary school and almost taking a career path. Doing the best I can I award Kshs.1,0000,000/= under this heading.....”
26. In the authority of Chen Wambo & 2 others Vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK(deceased))[2017]eKLR where Hon. Meoli J stated:-
“Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables. The speculative nature of the matter renders the court’s exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants”
27. On the loss of expectation of life the case of Hyder Nthenya Musili & Another Vs. China Wu Yi Limited & Another [2017]eKLR, the Court stated as follows:-
“...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.”(emphasis added).
I therefore uphold the award of Kshs.100,000/= for the loss of life expectation.
28. The principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in Sheikh Mustaq Hassan Vs. Nathan Mwangi Kamau transportes & 5 others Civil Appeal No. 123 of 1983[1986]KLR 457; [1982-1988] 1 KAR 946; [1986-1989]EA 137 as follows:-
 - a) Parents cannot insure the life of their children;
 - b) The death of a victim of negligence does not increase or reduce the award for lost years;
 - c) The sum to be awarded is never a conventional one but compensation for pecuniary loss;
 - d) It must be assessed justly with moderation;



- e) Complaints of insurance companies at the awards should be ignored;
- f) Disregard remove inscrutable speculative claims;
- g) Deduct the victim's living expenses during the "lost years" for that would not be part of the estate;
- h) A young child's present or future earning would be nil;
- i) An adolescent's would real, assessable and small;
- j) The amount would vary from case to case as it depends on the facts of each case including the victim's station in life;
- k) Calculate the annual gross loss;
- l) Apply the multiplier(the estimate number of the lost years accepted as reasonable in each case;
- m) Deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her; and
- n) Living expenses reasonable costs of housing, heating, food, clothing insurance travelling, holiday, social and so forth.

29. The court of Appeal in *Kenya Breweries Ltd Vs Saro* [1991] KLR 408 stated that;

"...in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those in awardable in the case of a four year old one who has not been to school and whose abilities are not yet ascertained. That, we think, is a question of common sense rather than the law.

30. Considering a global sum was not awarded by the trial magistrate, where the victim was a child, taking into account inflation and the awards in the above cited court decisions. I find a global sum of Kshs.800,000/= is reasonable. As such the award of Loss of Dependency is hereby set aside and replaced by the global sum.

31. In *Sukari Industries Limited Vs. Clyde Machimbo Juma Homa Bay HCCA No. 38 of 2015* [2016]eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs.50,000/= for pain and suffering, Majanja J, held that:

"On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs.10,000/= to Kshs.100,000/= over the last 20 years hence I cannot say that that the sum of Kshs.50,000/= awarded under the head is unreasonable."

32. In this case the deceased died on the same day of the accident. There was no prolonged suffering in this instance. The Respondents submitted that the learned trial magistrate was correct in awarding



Kshs.100,000/= for pain and suffering. This court agrees with trial court finding upholds the award of Kshs.100,000/=.

33. Accordingly I find that the award that ought to have been made to the Respondent was as hereunder:-

Pain and suffering	Kshs.100,000/=
Loss of expectation of life	Ksh.100,00/=
Loss of dependency	Ksh.800,000/=
Special damages	Ksh.48,275/=
-Less 20% of	Kshs.209,655/=
Total award	Kshs.838,620/=

34. The appellants shall only have the costs of the appeal and the Respondent costs of the suit in the Trial Court.

35. The general damages shall attract interest at court rates from the date of judgment of the lower court while special damages will attract interest from the date of filing the suit.

36. It is so ordered.

DATED IN NYERI THIS 30TH DAY OF NOVEMBER, 2023

.....

HON. MAUREEN.A ODERO

JUDGE

