



**Peter & another v VOO & another (Suing as the legal representative of the Estate of CJAJ)
(Civil Appeal E043 of 2021) [2023] KEHC 26124 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E043 OF 2021
RE ABURILI, J
NOVEMBER 29, 2023**

BETWEEN

MAGANI PETER 1ST APPELLANT

SHADRACK WAWERU GICHU 2ND APPELLANT

AND

VOO 1ST RESPONDENT

RJO 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CJAJ

*(An appeal arising out of the Judgement of the Honourable P. Olengo in
the Principal Magistrate's Court at Nyando delivered on the 30th January
2020 & Reviewed on the 5th May 2020 in Nyando SPMCC No. 190 of 2017)*

JUDGMENT

Introduction

1. The appellants herein were sued for general and special damages by the respondents following a fatal accident that occurred on the 5th January 2017 at Daima area along the Kendubay – Katito road.
2. The appellants did not, however, offer any evidence in rebuttal of the respondents' case.
3. In his judgement delivered on the 30th January 2020, the trial magistrate awarded the respondents a total quantum of Kshs. 881,180. Following an application by respondents for review of the judgement to reflect the true calculation of the trial court, the trial magistrate proceeded to correct the error and



found the appellants 100% liable for causing the accident and awarded the respondents damages as follows;

Pain & suffering – Kshs. 20,000

Loss of expectation of life - Kshs. 140,000

Lost years – Kshs. 1,500,00

Proven Specials – Kshs. 21,180

Total Kshs.1, 681,180

4. Aggrieved by the said decision, the appellants filed a memorandum of appeal dated 3rd May 2021 and filed on the 7th May 2021 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact when he manifestly awarded excessive sum on quantum.
 - b. That the learned trial magistrate erred in law and fact by awarding the plaintiff an excessive sum on quantum delivered on 30/1/2020 and subsequently reviewed on 5/5/2020.
5. The parties agreed to file submissions to canvass this appeal but only the respondents filed written submissions.

The Respondent's Submissions

6. On pain and suffering the respondents submitted that the deceased died on the same day of the accident and must have endured excruciating pain as a result of her injuries before succumbing and as such an award of Kshs. 20,000 as awarded by the trial court was sufficient.
7. Reliance was placed on the case of *Sukari Industries Limited v Clyde Machimba Juma* [2016] eKLR where the court awarded Kshs. 50,000 for pain and suffering where the deceased had died immediately after the accident, *Josephine Kiragu v Vyas Hauliers Ltd* [2017] eKLR where the award of Kshs. 10,000 for pain and suffering was increased to Kshs. 30,000 on appeal and the case of *Simon Bogonko v Alfred Mongare Mecha & Another (Suing as the Legal Representative of the Estate of Akama Mong'are (Deceased))* [2019] eKLR where the court on appeal reduced an award of Kshs. 100,000 for pain and suffering to Kshs. 20,000.
8. The respondents submitted that the award of Kshs. 140,000 for loss of expectation of life was reasonable as the deceased died at the age of 12 years. Reliance was placed on the cases of *Moses Akumba & another v Hellen Karisa Thoya* [2017] eKLR where the court held that an award of Kshs. 200,000 for loss of expectation of life of a deceased who was a fisherman, *Anthony Konde Fondo & Another v RMC (The Representative of FC (Deceased))* [2020] eKLR where the deceased was a minor and the court upheld an award of Kshs. 150,000 and the case of *Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir Suing as admin of the estate of Benard Soita Nyongesa DCD* [2022] eKLR where the court upheld an award of Kshs. 150,000 for loss of expectation of life.
9. On loss of dependency, the respondents submitted that a global sum of Kshs. 1,500,000 would suffice. Reliance was placed on the cases of *Daniel Mwangi Kimemi & 2 others v JGM & Another (the personal representatives of the estate of NK(DCD))* [2016] eKLR where the court adopted a global sum of Kshs. 1,000,000 for a deceased minor who died at the age of 9 years, *Erick Nyarangi Ondora & Another v JMO & 3 others* (2019) eKLR where the court awarded Kshs. 1,680,000 in general damages for loss of dependency for a minor aged 11 years and the case of *Anthony Angwenyi Okoba v Thomas Kipkurui*



Langat & another (2021) eKLR where the court awarded Kshs. 1,400,000 for loss of dependency where the minor was 10 years old.

10. It was submitted that the trial court's award was reasonable and was not overly in excess in the circumstances or inordinately high as to represent an entirely erroneous estimate based on some wrong principle, on a misapprehension of the evidence nor was it injudicious.
11. On costs awarded to the respondents it was submitted that the respondent was 100% successful in the trial and further that the award of costs was not a subject of this appeal and should therefore not be interfered with.

Analysis and Determination

12. The issues for determination, which have emerged from the grounds of appeal and written submissions, are whether the trial court acted on wrong principles in making the award of damages, and, if the above is answered in the affirmative, which sum would be sufficient compensation in the circumstances.
13. The Court of Appeal, in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, set out the parameters within which an appellate court will interfere with an award of general damages, when it stated 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..”

14. Similar sentiments were expressed in *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 (UR), by the same court, when it said:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257).”

15. The same position was reiterated in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal stated as follows:

“It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

16. The foregoing decisions set out the law and the guiding principles, which I am bound to apply in the determination of this appeal.



17. On damages for pain and suffering, the court, in *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR, observed that:

“It is settled law that the personal representative of a deceased person can recover damages that the deceased could have recovered had he survived and which were a liability on the wrong doer at the date of death. This was enunciated in the celebrated decision of Lord Green in *Rose v Ford*. [26]

37. It is not in dispute that the deceased sustained serious injuries and that the deceased died on the spot. This raises a fundamental question of what each unit of pain and suffering is worth. This question has in my view been authoritatively discussed in an article in the International Review of Law and Economics [27] entitled “Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards” by W. Kip Viscusi who argues that: -

“Pain and suffering is generally recognized as being legitimate component of compensation but one for which we have no accepted procedure of measurement ... Pain and suffering is by no means a negligible component of awards ... The general implication is that pain and suffering awards are not entirely random or capricious.”

38. The position laid down in *Rose v Ford* [28] is that where the period of suffering is short, only nominal damages are awarded. That was in 1935 and 500 pounds was awarded for a two days suffering. I am persuaded that the amount of Ksh. 50,000/= awarded under the said head is not in my view excessive nor has it been shown to be erroneous or unreasonable.”

18. In *Sukari Industries Limited v Clyde Machimbo Juma* Homa Bay [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

“(5) 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 nevertheless pain for which the deceased’s estate 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 this head is unreasonable.”

19. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the court observed that:

“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 Ksh. 100,000/- while for pain and



suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

20. The evidence contained in the postmortem report (PEXh 5) and the death certificate (PEXh 6) was that the deceased died on the same day. I am persuaded, in the circumstances, that the damages of Kshs. 20,000 awarded under this head, are suitable, and, therefore, the award ought not to be disturbed.
21. On loss of expectation of life, the trial court awarded damages of Kshs. 140,000. In *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased))* [2020] eKLR, Justice R. Nyakundi upheld an award of Kshs 150,000 where the deceased was a minor.
22. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR the Court observed that:

“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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
23. In the case of *Moses Akumba & another v Hellen Karisa Thoya* [2017] eKLR, Chitembwe J. held that an award of Ksh. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high.
24. In the cases of *Patrick Kariuki Muiruri & 3 others v Attorney General* [2018] eKLR Serگون J. made an award of Ksh. 200,000/= under this heading. In *Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samuel Kiprotich Tanui (Deceased) vs Mogogosiek Tea Factory Co. Ltd & another* [2018] eKLR an award of Ksh. 200,000/= was made.
25. Furthermore, in *Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased)* [2020] eKLR, the court found an award of Kshs 100,000 as reasonable and not excessive and upheld the same.
26. Finally, in *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR, the court held that an award of Kshs 200,000 was not excessive.
27. The above case law indicates that there exist authorities that support the award made by the learned trial magistrate. In any case, it has not been shown that the trial court used the wrong principles in making the award for loss of expectation of life and in the absence of the same, there is no reason to interfere with the award of the lower court. It is therefore my considered view that the award of Ksh. 140,000/= for loss of expectation of life was not excessive and the same is hereby upheld.
28. On damages for loss of dependency, the trial court awarded a global sum of Kshs. 1,500,000. The deceased herein was a minor aged 12 years old and studied in standard 6 at [Particulars Withheld] Academy.
29. The appellate court in *Charles Makanzie Wambua v Niboki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Niboki (Deceased))* [2020] eKLR, upheld a global award of Kshs 1,320,000.00 for loss of dependency where the deceased was 16 years old. Similarly, in *Twokay Chemicals Limited v Patrick Makau Mutisya & another* [2019] eKLR, the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a minor aged sixteen (16) years. In *Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020]



eKLR, the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency. In *Maingi Celina v John Mithika M'itabari suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased)* [2018] eKLR the court awarded Kshs 1,000,000/- where it was proved that the deceased at the time of death was an 18-year-old who was about to be admitted to the University. Finally, in *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD))* [2016] eKLR the court awarded Kshs. 1,000,000 as damages for loss of dependency where the minor was 9 years old.

30. It is, therefore my view that the global award of Kshs. 1,500,000.00 by the trial court was excessive for a minor aged 12 years old. Taking into consideration the cases I am of the view that a median sum of Kshs. 1,000,000 would suffice as damages for loss of dependency.
31. The special damages pleaded by the respondent were proven and thus awarded.
32. The upshot of the above is that the trial court's judgement and subsequent review are hereby set aside and replaced as follows;
 - Pain & suffering – Kshs. 20,000
 - Loss of expectation of life - Kshs. 140,000
 - Lost years – Kshs. 1,000,000
 - Proven Specials – Kshs. 21,180
 - Total Kshs. 1,181,180
33. The general damages to earn interest at court rates from the date of judgment in the lower court until payment in full. Special damages will earn interest at court rates from date of filing suit in the lower court until payment in full.
34. I order that each party bear their own costs of this appeal.
35. The lower court file, this judgment and decree arising from this judgment be returned to the lower court forthwith.
36. This file is closed.
37. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

