



Kenga & another (Suing as Administrators of the Estate of Patrick Mwayi Wafula - Deceased) v Cheruyoit (Civil Appeal 128 of 2021) [2023] KEHC 27225 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 128 OF 2021
DKN MAGARE, J
DECEMBER 19, 2023**

BETWEEN

JANET MAPENZI KENGA & MAIKUMA WAFULA PILISI (SUING AS ADMINISTRATORS OF THE ESTATE OF PATRICK MWAYI WAFULA - DECEASED) APPELLANT

AND

STANLEY CHERUYOIT RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. F. Kyambia, SRM dated 13/8/2021 arising from Mombasa CMCC No. 1961 of 2016.)

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. F. Kyambia, SRM dated 13/8/2021 arising from Mombasa CMCC No. 1961 of 2016.
2. The Appeal is on quantum only. In the Memorandum of Appeal, the Appellant substantially appeals against the Judgment of the Trial Court on the ground that the court erred in its assessment of damages for Loss of Dependency and arrived at an erroneous estimate of damages that were inordinately low. The main issues the appellant, who was the plaintiff in the lower court had were 4:-
 - a) Damages that were inordinately low, that is 3,411,290.20
 - b) Law damages for loss of expectation of life.
 - c) Applying a wrong dependency ratio of 1/3
 - d) Failure to award burial expenses



3. There was a fifth ground of failing to consider submissions. I shall dismiss the ground in limine. It has no basis in law and in fact.
4. The Plaintiff claimed damages for an accident that occurred on 20/6/2016 involving the Deceased and the Defendant's Motor Vehicle Registration Number KBJ 129T a consequence of which the Deceased sustained fatal injuries.
5. It was pleaded that the Deceased was at the time of his death 26 years in good health and earned income as Casual laborer at Kshs. 28,427.42/= per month.
6. The Plaintiff set forth particulars of negligence for the accident motor vehicle and pleaded Special Damages of Ksh. 50,150 /= with General Damages.
7. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaintiff.
8. The Trial Court heard the parties and proceeded to render judgement on 13th August 2021. In the Judgement, the Court awarded in favor of the Respondent as follows:
 - a) Liability 70:30
 - b) General Damages for Loss of Dependency Kshs. 3,441,290.40/=
 - c) Damages for Loss of Expectation of Life Kshs. 80,000/=
 - d) Damages for pain and suffering Kshs. 100,000/=
 - e) Special Damages Kshs. 10,150/=Total Kshs. 3,601,440.40/=.
Less 30% liability
9. Aggrieved by the finding of the Trial Court, the Appellant whom was the Plaintiff lodged a Memorandum of Appeal against the finding on damages for loss of dependency and pain and suffering, Special damages and Damages for Loss of Expectation of Life.

The Appellant's case

10. The Appellant as Plaintiff in the lower court suit testified as PW1. She relied on her witness statement and bundle of documents. It was her case that she was the widow and personal representative of the estate of the Deceased.
11. Further, the PW1 testified that they had one child aged 1 year old with the Deceased and he used to support them.
12. PW2, the Police Officer testified that he was attached to Makupa Police Station blamed the accident motor vehicle.
13. The Respondent did not call any witnesses.

The Appellants' Submissions

14. It was submitted that the court erred awarding damages for loss of dependency that were inordinately low and occasioned injustice to the Appellant.



15. Counsel submitted that the trial court wrongly awarded damages for loss of dependency ratio of 1/3 instead of 2/3.
16. It was further submitted that did not assess the damages based on the evidence presented in Court and comparative cases and arrived at an erroneous estimate thereof. He relied on Gordon Ouma Sunda v Adan Abdikadir Omar & Another (2019) eKLR.
17. Further, counsel submitted that the award of Kshs. 80,000/- for pain and suffering was low and not supported.
18. Further, it was submitted that the court erred on not awarding funeral expenses.
19. I was urged to allow the Appeal.

The Respondent's Submissions

20. On the part of the Respondent, it was submitted that the assessment of damages was at the discretion of the court and the award was reasonable just and fair.
21. Counsel cited authorities which I have considered.

Analysis

22. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
23. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
24. In the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

25. Similarly, in the case of *Mbogo and Another v Shah* [1968] EA 93 the Court stated:

“... that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

26. The duty of the first Appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“... 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

27. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion ... ”

28. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. Damages must be commensurate with similar injuries.

29. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd v Meru Express Servcie Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.”

30. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda v Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

31. Furthermore, in *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo v*



George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:-
"Because this is the evidence of an expert, I believe it ..."

32. There is no dispute that the Deceased was 26 years at the time of his demise.
33. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that

“... comparable injuries should attract comparable awards”
34. The principle on the award of damages is settled. In *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to:-
 - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
35. I have perused the impugned judgment and I note that the trial court adopted a multiplier of 30 years and a multiplicand of 1/3 with income of Kshs. 28,427.42/-. The salary is deductible. The same should be Kshs. 24,000/- The application of 30 years was not proper in the circumstances of this case and failed to take into consideration the lumpsum award and the vicissitudes of life. The proper award should be 20 years.
36. I also find that the award of dependency based on the ratio of 1/3 was erroneous and did not take into consideration that the deceased was married with one child. I will interfere with it. This works out to Kshs. 24,000/- X 12X20X2/3 = Kshs. 3,840,000/=. I therefore substitute the award under loss of dependency to this extend.
37. As was held by Odunga J (as he then was) in *JWN v Kassam Hauliers Limited* [2020] eKLR
 17. Conventionally Courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other had they have taken unmarried people to spend more on themselves more than their dependants more so parents hence have apportioned a dependency ratio of 1/3 which has over time been



enhanced to 1/2. In this case it was submitted that as the deceased was married with 3 children he spent more on his family than self hence a dependency ratio of 2/3 would suffice.

38. The Court in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988* (unreported), Ringera J, as he then was, held at page 248 that:

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

39. In my analysis, the deceased was 26 years old and left a widow and a minor aged 1 year. In *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

40. As for the damages for pain and suffering, it was not in dispute that the deceased died on the same day and so the trial court’s award of Kshs. 80,000/- which is challenged as low.

41. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was 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 Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

42. Furthermore, in Civil Appeal No. 42 of 2018 *Joseph Kivati Wambua v SMM & Another* (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness ... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo



pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis mine).

43. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this case, the deceased passed away on the same day of the accident. There is not evidence that he was taken to any hospital prior to his death.
44. The question therefore is whether the award of Kshs 80,000 was high considering that the deceased died on the same day. I have looked at the case law submitted by both parties. I have also had a look at other cases as highlighted below.
45. In Nairobi HCCC No. 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v Elijah Oketch Adellah [2015] eKLR, the Court awarded Kshs 50,000/= on 6th February 2015 for pain and suffering where the deceased died shortly after the accident.
46. In Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & another v Hellen Karisa Thoya [2017] eKLR the court upheld an award Kshs 50,000/= on 4th October, 2017 and observed that although there was sudden death, it is clear that the deceased must have suffered a lot of pain.
47. Similarly, in Machakos High Court Civil Appeal No 50 of 2016 - Kenya Power and Lighting Co Ltd v Sophie Ngele Malemba & Another [2019] eKLR where the deceased who had died on the spot was awarded Kshs 50 000/= for pain and suffering by the Trial Court which award was upheld on appeal.
48. Based on the above case law, I am persuaded that the award of Kshs. 80,000/= for the deceased was slightly higher. I will not interfere with it because the Respondent did not appeal.
49. On special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
50. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the trial court failed to award special damages that were pleaded and proved.
51. In Joseph Kipkorir Rono v Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether



pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities ... special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages ... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

52. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited* Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, *Gulhamid Mohamedali Jivanji v Sanyo Electrical Company Limited* Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, *Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others* Civil Appeal No. 192 of 1992.
53. I have perused the record filed in court and I find the Appellant indeed proved Kshs. 40,000/= for funeral expenses which the court erroneously failed to award. Special Damages awarded were Kshs. 10,150/=. Kshs. 40,000/= is included making a total of Kshs. 50,150/-.

Determination

54. In the upshot, I make the following Orders:



- i) Judgement on damaged for loss of dependency is set aside and substituted with Kshs. 3,840,000/=
- ii) Judgement on Special Damages is set aside and substituted with Kshs. 50,150/=
- iii) The Appeal on Damages for Pain and Suffering is dismissed.
- iv) Each party to bear their own costs in the Appeal.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 19TH DAY OF DECEMBER, 2023.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Imeli Inyangu and Partners Advocates for the Appellant

C.B. Gor & Gor. Advocates for the Respondent

