



**Paleah Stores Limited & another v Nthambi (sued as the legal representative/
administrator of the estate of BENSON MUCHANGI NJUE-DCD) (Civil
Appeal E048 of 2021) [2022] KEHC 511 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E048 OF 2021
LM NJUGUNA, J
APRIL 28, 2022**

BETWEEN

PALEAH STORES LIMITED 1ST APPELLANT

KINGBROS KENYA LIMITED 2ND APPELLANT

AND

NANCY KINA NTHAMBI RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE/ADMINISTRATOR OF THE
ESTATE OF BENSON MUCHANGI NJUE-DCD**

*(An appeal from the judgment of Hon. S. Ouko, R.M. in
Runyenjes SPMCC NO. E10 of 2020 and delivered on 25.10.2021)*

JUDGMENT

1. The appellants herein were the defendants in SPMCC No E10/2020 wherein they were sued by the respondent vide a plaint dated October 29, 2020, in which they claimed general damages, special damages, cost of the suit and interest.
2. The cause of action arose from a road accident which occurred on or about November 17, 2017 along Embu- Meru Road near Kangaari Junction area. It was pleaded that on the said date, the deceased was lawfully riding motor cycle registration number KMDL 497G when motor vehicle registration number KBW 784J owned by the appellants was so carelessly, negligently and /or recklessly driven at a high speed by the appellants authorized driver without any due regard lost control and rammed into the motor cycle the deceased was riding causing him to sustain fatal injuries.
3. The particulars of negligence were particularized in paragraph Six (6) of the plaint wherein the plaintiff sought orders as enumerated in the plaint.



4. The appellants herein filed a defence in which they denied the liability and further claimed that the deceased was the author of his own misfortune. Further, they denied being the registered/beneficial owners of the motor vehicle registration number KBW 784J at the time of the alleged accident or at all as had been alleged in paragraphs 2 and 3 of the plaint.
5. The respondent filed a reply to defence wherein he reiterated all contents of the plaint in its ordinary and natural meaning and proceeded to put the appellants to strict proof thereof. Further, he went on to deny any negligence on his part and urged this court to grant the prayers in the plaint against the respondents.
6. The parties herein entered a consent on liability in the ratio of 80:20 in favour of the respondent and agreed to put in submissions on quantum and vide a judgement delivered on October 28, 2021, the court awarded Kshs.20,000.00 for pain and suffering, Loss of expectation of life Kshs.100,000.00; Loss of dependency Kshs.2,500,000.00; Special damages Kshs.11,350, reasonable funeral expenses Kshs 2,400 ;Less 20%. The respondent was further awarded costs of the suit with interest from the date of judgment.
7. The appellants being dissatisfied with the award appealed the judgment to this court vide a memorandum of appeal dated January 4, 2022, in which, they cited eight (8) grounds of appeal which generally depict discontent with the award.
8. The court directed that the appeal herein be canvassed by way of written submissions which the parties herein complied with.
9. The appellants herein submitted that the trial court's award of quantum was erroneous and excessive since the same was not subjected to any discernable standard and as such, should be set aside. Reliance was made on the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR. In regard to special damages, it was submitted that special damages must be specifically claimed and strictly proved. Reliance was made on the case of *Leonard Nyongesa v Derrick Ngula Rigba* (2013) eKLR where it was held that a receipt for which payment is required of stamp duty is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it...
10. While on general damages, it was submitted that the test of damages is not that the award must be the same as that in previous decision but that award of damages ought to be comparable to the past awards so that similar loss attracts similar awards. Reliance was made on the case of *Elizabeth Bosibori v Damaris Moraa Nyamache* (2017) eKLR. It was submitted that the trial court's reliance on the case of *Stephen Murathi v Brenda Makena* (*supra*) was in error since the facts were dissimilar in many aspects that, it led to a miscarriage of justice.
11. It was further submitted that the trial court's application of global sum was not warranted as it was difficult to estimate the earnings of the deceased who was a boda boda rider; they urged this court to interfere with the same and re-assess damages based on the multiplier method. On dependency ratio, it was submitted that no evidence of the extent thereof was provided. That the deceased's mother was aged 55 at the time of the death of the deceased and no evidence was put forward by the plaintiff to secure a conclusion that the deceased's mother was fully dependent on her son. In conclusion, they proposed an amount of Kshs. 737,080 as reasonable compensation.
12. The respondent submitted that in regards to the loss of expectation of life, she had submitted that an award of Kshs.200, 000.00 was reasonable while the appellants submitted on an award of Kshs.100, 000.00 relying on the case of *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] where the court had previously awarded an amount of Kshs.100, 000.00. The trial court



proceeded to award Kshs.100, 000.00 as was submitted by the appellants herein. In regards to loss of dependency, the respondent had urged the trial court to adopt a figure of Kshs. 14,785 and a multiplier of 34 years with a dependency ratio of 1/3 while the appellants urged the court to rely on the regulation of wages order per Legal Notice No 117 of 2015 and adopt the amount of Kshs.5,218/= being the wages of general labourer and a multiplier of 20 years and a dependency ratio of 1/3. Reliance was made on the case of Stephen Murathi v Brenda Makena HCCA No 42 of 2020 to the effect that the court was right to award a global sum in the absence of concrete evidence of earnings where the deceased was aged 26 years, a boda boda rider and whose dependant was his mother. On special damages it was submitted that on the matter of stamp duty, specifically on the question of admissibility of receipts, where the revenue or stamp duty has not been affixed, the court, have addressed the same severally. Reliance was made on HCCA No 71 of 2015 Eunice Auma Onyango v Salin Akinyi Oluoch since the appellants never objected to the production of the same during the trial. The respondent thus urged this Honourable Court to uphold the award by the trial court.

13. The appeal herein is on quantum of damages and the only issue for determination is whether the learned magistrate used the correct principles in assessing the quantum of damages that she awarded to the respondent
14. I have considered the appeal herein and the grounds thereof and equally the submissions and authorities attached by both parties.
15. It is trite that award of damages is a discretion of the court. In the case of Savana Saw Mills v George Mwale Mudomo [2005] eKLR, the court stated as follows: -

I must state from the outset that the award of general damages is a discretion of a trial court and an appellate court will be slow to interfere with such discretion unless the discretion is exercised on wrong principles of law.

16. In regard to pain and suffering, the appellants submitted that an award of Kshs.10,000.00 would be sufficient while the respondents submitted on an award of Kshs.20,000.00. I am guided by the death certificate of the deceased which indicates that the deceased died on the same day the accident occurred and as such, the court being guided by the proposals by the parties and in reliance on the case of Sukari Industries Limited v Clyde Machimbo Juma HCCA No 68 of 2015 where Majanja J in arriving at an award of Kshs. 50,000.00 was of the view that higher damages will be awarded if the pain and suffering is prolonged before the death. It is my considered view that the Kshs.20,000.00 awarded is reasonable.
17. On the limb of loss of expectation of life, the appellants proposed an amount of Kshs.100, 000.00 while the respondents proposed an award of Kshs. 200,000.00. The court relying on the case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi) (2019) EKLR, awarded an amount of Kshs. 100,000.00 under this head. Given that a party is bound by his pleadings, I am obliged to find that the amount is reasonable and as such, I uphold it. [See Independent Electoral and Boundaries Commission & another v Stephene Mule & 3 others (2014) eKLR.]
18. In regards to special damages, the respondent had submitted an amount of Kshs. 12,000.00 while the appellants submitted that special damages should only be awarded if proven by receipts in compliance with the Stamp Duty Act. The court did note that the appellants never objected to the production and admission of the said bundle of receipts and being guided by the case of Charles Sande v Kenya Cooperative Creameries Ltd Nairobi Civil Appeal No 154 of 1992 (UR) and having taken judicial notice that in an African setting, food and drinks amongst other things are bought, the court proceeded to award the amount proved by the respondents at Kshs. 11, 350.00.



19. The guiding principle is that special damages must be both pleaded and proved and that is why Lord Goddard CJ in *Bonham Carter v Hyde Park Ltd* [1948]64 TLR 177 said -

“... Plaintiffs must understand that, if they bring actions for damages it is not enough to write particulars and so to speak, throw them at the court, saying “this is what I have lost, I ask you to give these damages, they have to be proved.”

20. The respondent pleaded for a sum of Ksh 12,100 by way of special damages. Counsel for the appellants submitted that they are not opposed to the respondent’s claim for special damages for expenditures with corresponding receipts bearing the requisite revenue stamp in compliance with Section 19(1) of the *Stamp Duty Act* (Cap 480, Laws of Kenya). They averred that the receipts were inadmissible because they bore no revenue stamps.

21. I have looked at the invoices and the receipts, and they do not appear to bear any revenue stamp. That does not, however, conclusively determine that the respondent did not pay for the various services rendered in the course of the deceased's funeral expenses. In the case of *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013]eKLR the court was of the view that:

It is the duty of the receiver of the revenue and not the payer to affix the revenue to receipt of all the prescribed amounts. It is the receiver of such payments who should be interrogated and not the poor widow who would be mourning her husband and cannot be penalised for failing to ascertain whether the receipt she was receiving in acknowledgment of the payments she was making had a revenue stamp affixed them.

22. In the instant case, the parties herein having entered a consent on liability in the ratio of 80:20 in favour of the respondent, it is my view, therefore, that having admitted the receipts by consent, the appellants are estopped from challenging their admission. I therefore find no error in the trial court awarding the amount of Kshs.11, 350.00 as proved by the respondent.

23. In regards to damages for lost dependency, the appellants had urged the trial court to adopt the minimum wage of Kshs 5,218/= as the deceased’s monthly earnings. It was their submission that no evidence was produced to prove that indeed the deceased’s mother was dependent on the deceased and considering that the mother was aged 55 years, it was then reasonable to assume that the said dependent was actually engaged in income generating activity and not dependent on the deceased. The appellants urged the court to rely on the Regulation of Wages Order and thus proposed an amount of Kshs. 5218x 12 months x20 years x1/3. The respondent on the other hand urged the court to adopt a figure of 14,785 per month and multiplier of 34 years with a dependency ratio of 1/3. In the end, the court relying on the case of *Stephen Murathi v Brenda Makena* (Supra) awarded the sum of Kshs. 2,500,000.00 as damages for loss of dependency.

24. The general scope on assessment of damages was considered in the case of *Beatrice Wangui Thairu v Hon. Ezekiel Barngatuny & another*, Nairobi HCCC No 1638 of 1988 wherein Ringera J as he then was stated:

“The principles applicable to an assessment of damages under the Fatal Accidents Acts 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 purchase. 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.”

25. In determining loss of dependency and calculation of damages for death arising from a fatal accident, Lord Diplock in *Cookson v Knowles* (1978) 2 ALL ER 604, discussed the degree of speculation that a court must embark as herein:

“This kind of assessment artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow’s death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill-health? Would they have increased and if so, when and by how much? To what extent if any would he have passed on the benefit of any increases to his wife and dependent children?”

26. In awarding loss of dependency, the trial magistrate stated :

“From the circumstances of this case, there was uncontroverted evidence that the deceased was 26 years old and at the prime of his life when he met his death. He left behind his mother who in our traditional African Society would rely on him. Taking into account all the circumstances in this case, I find the sum of Kshs. 2,500,000.00 damages for loss of dependency would be adequate”.

27. In *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] 1 KAR 278, Hancox J A (as he was then) stated:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did.”

28. In the case herein, the trial court proceeded to award a global figure of Kshs. 2,500,000.00 as damages for loss of dependency on account that the deceased died at a prime age and the fact that he had a mother and brother who depended on him.

29. In respect to loss of dependency, the appellants herein submitted that no proof was produced to prove the amount that the deceased was earning and given the uncertainties and vicissitudes of life, they submitted that a multiplier would suffice. However, in the case of *Kenya Breweries Ltd v Saro* [1991] eKLR the Court of Appeal awarded KShs.100, 000.00 for loss of dependency to a parent of a child and stated that:

“damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution.”

30. In this case, given the deceased was a boda boda rider whose earnings could not out rightly be determined and the fact that the trial court chose to award a global sum rather than adopt the multiplier



formula, the court cannot be faulted since its within its discretion to do so since multiplier is just one of the tools to assess damages.

31. A trial court does not necessarily err simply by choosing one method over another. As such, it is my considered view that the trial Magistrate did not proceed on wrong principle by choosing to use the parameter of a global sum on assessment of loss of dependency. As signaled in *Livingstone v Rawyards Coal Co* {1880} 5 APP Cas 25, 29 Lord Blackburn where the court stated:

“where an injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong.”

32. I therefore find no error in the application of such an approach by the trial court and the only issue that I now have to determine is whether the awarded amount was too high as alleged by the appellant. See *Kemfro Africa Ltd v Gathogo Kanini v A M M Lubia & another* as follows: -

“I think it is well settled that this court will not interfere with the exercise of its 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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

33. In calculating the damages for the loss of dependency, the loss to the estate is what the deceased would have been likely able to save, spend or distribute after meeting the cost of his living at a standard of her job and career prospects at time of death (See *Hassan v Nallia Mwangi Kamau Transporters & 4 others* {1986} KLR 457). It is no doubt as held by the Court of Appeal in the case *Kenya Breweries Limited v Saro*, [1991] KLR 408:-

“the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.”

34. The rational principle should in my view be as underscored by Dickson J of the Supreme Court of Canada in *Andrews v Grand & Toy Alberta Ltd* {1977} 83 DLR in which it was stated:

“The monetary evaluation is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being ganged by earlier decisions, but the award must also of necessity not be arbitrary or conventional. No money can provide true restitution.”

35. The appellants argued that the trial court’s reliance on the case of *Stephen Murathi v Brenda Makena* was per incuriam since the facts are different from the case herein. This court has had a chance to peruse the said case and takes notice of the fact that, the deceased in the said case was married and had left behind a widow and three children as his dependents unlike the instant case where the deceased had left his mother and brother.



36. It follows therefore, the object of an award of damages is to compensate the plaintiff for his loss and not to punish the defendant for his wrong doing. In the ultimate analysis, this case turns on a question of principles fundamental in the assessment of damages. Against this background the argument in favour of the appellants carries the day that in damages award for loss of dependency the parameters applied by the Learned trial Magistrate eventually occasioned an excessive and inordinately high quantum.
37. Hence, its necessary to interfere with the award on loss of dependency.
38. In *Bon Ton Ltd v Beatrice Kanaga suing as Administrator of the estate of Richard Olembi Ochenga* [2018] eKLR a motor cycle rider was awarded Kshs 800,000/= . In *Oyugi Judith and Anor v Fredrick Odhiambo & 3 others* [2014] eKLR, similarly a motorcycle rider was awarded Kshs. 700,000/= as a global sum.
39. In the case of *Ann Kanja Kithinji (suing as the legal representative of the estate of Patrick Koome (Deceased) & 2 others v Jacob Kirari & another* [2018] eKLR where the deceased was equally a motor cycle rider ,the court awarded an amount of Kshs.1,000,000.00 as damages for loss of dependency.
40. In this case, given that the deceased died at his prime age and had a mother and brother who were dependent on him, I am inclined to find an award of Kshs. 1,000,000.00 for loss of dependency to be adequate. In the end, I find that the respondent’s award in terms of damages should be as here below:
- i. Loss of dependency – Kshs. 1,000,000.00
 - ii. Special damages - Kshs. 11,350.00.
 - iii. Loss of expectation of life Kshs. 100,000.00.
 - iv. Pain and Suffering Kshs. 20,000.00.
 - v. Reasonable funeral expenses Kshs. 2,400.00.
 - vi. Less liability of 20 %
41. Each party will meet its own costs of the appeal.
42. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF APRIL 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

