



**Volcan Holdings Ltd v Wanjala (Suing as an administrator of the estate of Dan Omondi Awala (Deceased)) (Civil Appeal 14 of 2019) [2022] KEHC 13511 (KLR) (21 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 13511 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 14 OF 2019**

**DK KEMEL, J  
APRIL 21, 2022**

**BETWEEN**

**VOLCAN HOLDINGS LTD ..... APPELLANT**

**AND**

**BRANICE CLARE WANJALA ..... CROSS APPELLANT**

**SUING AS AN ADMINISTRATOR OF THE ESTATE OF DAN OMONDI  
AWALA (DECEASED)**

*((Being an Appeal from the judgement and decree of the Chief Magistrate's  
Court Bungoma in Civil Suit No. 472 of 2017 delivered on 18th  
January 2019 by Hon. C.A.S Mutai Senior Principal Magistrate))*

**JUDGMENT**

1. The appellant herein had originally been sued by the cross-appellant in CMCC No 472 of 2017 for an award of damages in tort which arose from a road traffic accident which occurred on June 4, 2017 in which the deceased had been travelling as a lawful fare-paying passenger aboard motor vehicle registration number KCC 254V make Kangaroo along Webuye-Bungoma at Sikata area wherein the deceased died.
2. As a result, the legal representative Branice Clare Wanjala duly obtained a grant of letters of administration and filed that suit seeking both general and special damages under the *Fatal Accident Act* and *Law of Reform* (Misc Act of Kenya).
3. Liability was settled by agreement of the parties where the plaintiff was to shoulder 20% while the defendant shouldered 80% thereof. After the trial on the merits, the learned trial magistrate decided awarded compensation to the estate of the deceased as follows:
  - a. Damages for pain and suffering – Kshs 170,000/=



- b. Loss of dependency - Kshs13 371,320/=
  - c. Discount for accelerated payment-Kshs 10000/=
  - d. Special damages- Kshs 806,200/=
  - e. Less 20% contributory negligence-Kshs 2,669,504/=
  - f. Net total award-Kshs 10, 678,016/=
  - g. Plus, costs and interest
4. The appellant being dissatisfied by the award filed an appeal *vide* a memorandum of appeal dated February 6, 2019. The grounds of the appeal are as follows;
- a. That the learned trial magistrate erred in law and fact in assessing damages that were so inordinately high as to amount to a gross overstatement of the loss suffered by the deceased's estate and dependents.
  - b. That the learned trial magistrate erred in law and fact in applying the wrong principles in the assessment of damages.
5. The cross-appellant filed an undated memorandum of cross-appeal on November 18, 2021. The grounds of the cross- appeal are as follows;
- a. That the learned trial magistrate erred in law and in fact by deducting Kshs 1,000,000/= under the heading of loss of dependency as the same was not backed by any legal basis.
  - b. By deducting Kshs 1,000,000/= the court considered irrelevant facts which were not backed by any evidence which occasioned miscarriage of justice.
  - c. That the finding of the court was plainly wrong.
6. On September 3, 2019 the parties entered into a consent dated July 15, 2019 in which they agreed to compromise the appeal as per the terms of the consent and agreed to proceed with the cross-appeal lodged by the cross-appellant.
7. The cross-appeal was canvassed by way of written submissions. The appellant concentrated substantially on the issue of whether the trial court erred in exercising its discretion by deducting a discount of Kshs 1,000,000/= for accelerated payment to the widow. In support of these issues and particulars, learned counsel for the appellant relied on the following authorities; -
- a. [\*Kemfro Africa Limited t/a "Meru Express Services \(1976\)" & another v Lobia & another \(No 2\)\* \(1985\) eKLR;](#)
  - b. [\*Kenya Human Rights Commission & another v Attorney General & 6 others\* \(2019\) eKLR;](#)
  - c. [\*Ponyicki v Sawayama\* \(1943\) SCR 197;](#)
  - d. [\*Kenya Ports Authority v Kuston \(Kenya\) Limited\* \(2009\) 2 EA 212;](#)
  - e. [\*Nerbert Bernard Muriuki v Multimedia University of Kenya\* \(2020\) eKLR;](#)
  - f. [\*Robin Angus Paul & 2 others v Miriam Hemed Kale\* \(2019\) eKLR;](#)
  - g. [\*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others\* \(2014\) eKLR.](#)



8. The gist of learned counsel's submissions is that the cross-appellant did not deny that she is likely to marry, nor did she refute that she stands to benefit from the estate of the deceased as a dependent and that the deductions made by the trial court were not unfounded nor without basis and urged the court to refrain from making such a finding. He further submitted that this court ought to consider that the trial court was exercising its discretionary power when making the deduction from the awarded quantum. Therefore, learned counsel urged the court to agree with the submissions by upholding the judgment of the trial court.
9. When it came to the cross-appellant's version, learned counsel submitted that the cross-appellant is dissatisfied with the deduction of Kshs 1,000,000/= made by the learned trial magistrate under the sub-heading of loss of dependency as it was unfair and lacked legal basis. Counsel submitted that the trial court relied on the wrong principles and irrelevant facts in making the deduction as the same is not supported by the evidence thus occasioning a miscarriage of justice. Counsel relied on the case of *Selle & another v Associated Motor Boat Co Ltd & another* (1968) EA 123. Counsel further submitted that the trial court failed to make any award under the sub-heading of loss of expectation of life. Counsel urged the court to allow the cross-appeal by directing that the judgement of the trial court regarding the deduction of Kshs 1,000,000/= be set aside and that the court do proceed to award the cross-appellant the Kshs 1,000,000/= that was erroneously deducted as well as the costs of the cross-appeal be awarded to the cross-appellant and further that the interest to be calculated at the rate of 14% per annum with effect from February 8, 2019 (the date of the lower court decree).
10. I have considered the record of appeal as well as the submissions. I find the key issues for determination are:
  - a. Whether this court should make an award for loss of expectation of life.
  - b. Whether this court should interfere with the award of the trial court
11. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co* [1968] EA 123 that:
 

“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 which 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.”
12. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering that it did not hear or see the witnesses testify and to give allowance for that as the trial court had the advantage of hearing the parties.
13. It was therefore held by the Court of Appeal in *Ephantus Mwangi and another v Duncan Mwangi* civil appeal No 77 of 1982 [1982-1988] 1KAR 278 that:
 

“A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if



the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. In the celebrated case of *Kemfro Africa Limited t/a Meru Express Services (1976) and another v Lubia & another* (1987) KLR 30, the Court of Appeal expressed itself as follows; -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor 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 the damage...”

15. In *Mariga v Musila* (1984) KLR 251 the same court also stated as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the number of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles.”

16. Being guided by the above authorities, I now turn to the cross-appellant’s submission that the learned magistrate failed to give the award of loss of expectation of life. The cross-appellant is entitled to seek damages under both the *Law Reform Act* and the *Fatal Accidents Act* given the provisions of section 2(5) of the *Law Reform Act* which confirms that the right conferred by or for the benefit of the estate of a deceased person shall be in addition to and not in derogation of the rights conferred on the dependants of a deceased person under the *Fatal Accidents Act*.

17. The Court of Appeal in the *Kemfro Africa Limited t/a Meru Express Services (1976) and another v Lubia & another* (1987) KLR 30 where the court after analyzing section 2(5) of the *Law Reform Act* and section 4(2) of the *Fatal Accidents Act* held *inter-alia* as follows:

“The words to be “taken into account” and to “be deducted” are two different things: - The words used in section 4(2) of the Fatal Accidents Act are “taken into account”. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction”.

18. I will start with the damages awarded under the *Law Reform Act*. It is important to point out at this juncture that general damages under the *Law Reform Act* are awarded for the benefit of the deceased’s estate in two categories only namely for pain and suffering and secondly, for loss of expectation of life.

19. There is no doubt that the deceased died after some time which included being taken to hospital. Therefore, the deceased must have suffered some considerable pain before dying. In the instant case, the trial magistrate in his judgment did not give any indication that in assessing damages for loss of dependency, he had taken into account the award for loss of expectation of life.

20. In addition, the court in the *Kemfro Africa Limited case* emphasized that the award should only be deducted from the damages awarded for loss of dependency if it was proved that the people named as dependants were the same ones who would inherit the net estate of the deceased, the rationale being



that the dependants should not be allowed to benefit twice from the same death. In practice, however, the awards under the Law Reform Act are only conventional sums capped to a minimum to ensure that the beneficiaries of an estate are not over-compensated for their loss.

21. For the award under loss of expectation of life, this court is guided by the decisions in Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) eKLR and in civil appeal No 113 of 2012 Makano Makonye Monyanche v Hellen Nyangena (2014) eKLR in which the learned judge R.N Sitati held: -

“I find no reason to interfere with the award on the loss of expectation of life under Law Reform Act as the same is always awarded at Kshs 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries.”

22. This court finds a good ground has been adduced to award the cross-appellant Kshs 100,000/= under the loss of expectation of life. The award shall eventually be taken into consideration when making the final award to avoid double compensation to the estate of the deceased.

23. I must now determine whether the learned trial magistrate erred in fact and law in deducting a discount of Kshs 1,000,000/= for accelerated payment to the widow under loss of dependency. The test to be applied is found in section 4 of the Fatal Accident Act and the pertinent principles developed over time by the superior courts. In Cookson v Knowles (1979) AC 556 the court held as follows that; -

“The court has to make the best estimates. That it can having regard to the deceased’s age and state of health and to his actual earnings immediately before his death as well as to the prospects of any increases in his earnings due to promotion or other reasons. But it has always been recognized, and is clearly sensible, that with events have recorded, between the date of death, and the date of trial, which enable the court to rely on ascertained facts rather than on or mere estimating. They should be keen into account in assessing damages.” Also in Pickett v British Rail Engineering Ltd (1980) AC 136”

24. Of the concepts of multiplicand and multiplier; meaning, scope and application in the assessment of damages for loss of dependency, see the case of Beatrice Wangui Thairu v Hon Ezekiel Barngetuny & another, Nairobi HCCC No 1638 of 1988 where 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 of 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. Turning to the award for loss of dependency under the Fatal Accident Act, there is evidence that the deceased was an employee. PW1 who was the deceased’s wife testified that he used to earn Kshs 57, 635/=per month and produced a pay slip marked as Pexh-xiv from his casual job with Zahelien Construction Company Ltd and that he was the family’s sole breadwinner. They had been blessed with two children; one had not been born when the deceased died. The deceased was responsible for paying the school fees, provision of food and clothing for the 1<sup>st</sup> child and the same was expected of



- him for the 2<sup>nd</sup> child. In computing damages under this head, the trial magistrate used a multiplicand of Kshs 57, 635/= with a multiplier of 28 years. This was not challenged on appeal and the same is consequently upheld.
26. Turning to the multiplier, my analysis of the evidence shows that the deceased died at the young age of 31 years. He was an engineer as per the pay slip which means that his working life was dependent on the prescribed retirement age. There is evidence that he was in good health before the accident. He would thus have continued with his work and would have continued earning probably up to about 60 years of age given the kind of business he was engaged in and the vagaries of life. The multiplier of 28 years adopted by the trial magistrate was in the circumstances not unreasonable and uncontested. The same is upheld.
  27. I have noted that the appellant did not challenge the dependency ratio of 2/3 adopted by the trial magistrate. As noted earlier, the deceased was the family's sole breadwinner. He was married and blessed with two children; one had not been born when the deceased died. The deceased was responsible for paying the school fees, provision of food and clothing for the 1<sup>st</sup> child and the same was expected of him for the 2<sup>nd</sup> child. The said dependency ratio is thus maintained.
  28. At this stage, I wish to point out in passing that the only dependants recognized under the Fatal Accidents Act are supposed to benefit from damages awarded for loss of dependency. Section 4(1) of the Fatal Accidents Act defines dependants as the wife, husband, parent and child of the deceased person.
  29. About the submission that the total award has been discounted, counsel for the appellant submitted that the total amount of damages awarded to the cross-appellant should be discounted by a reasonable amount where appropriate for the widow's re-marriage.
  30. The cross-appellant on the other hand submitted that the deduction of Kshs 1,000,000/= made by the learned trial magistrate under the sub-heading of loss of dependency was unfair and lacked legal basis.
  31. The trial magistrate and counsel for the appellant did not cite any law or authority which they relied upon to justify the said discount. I am not aware of any law or legal principle which allows for such discounts to be made from the total award due to a successful litigant and therefore, I am persuaded that the trial magistrate erred in discounting the amount from the total sums awarded to the cross-appellant.
  32. Lastly, on special damages, it is trite law that special damages must be specifically pleaded and proved. I do wish to note that the cross-appellant did adhere to the law as the specials were duly pleaded and specifically proved and further that the same was not contested by the appellant.
  33. In the result, I do not find any merit in the appeal and hereby dismiss it. I find merit in the cross appeal and consequently set aside the judgment entered by the lower court and substitute it with a judgment for the cross-appellant against the appellant on the following terms;
    - a. Pain and suffering – Kshs 170,000.00
    - b. loss of dependency – Kshs 13, 371, 320.00
    - c. Special damages – Kshs 806, 200.00  
Total – Kshs 14, 347,520.00
    - d. Loss of expectation of life –Kshs 100,000.00  
(less)



c. Less 20% –Kshs 2, 669, 504.00

Contributory negligence)

Net –Kshs 11, 578, 016.00

34. The above sum of Kshs 11, 578, 016.00 shall attract interest at court rates from today's date until payment in full.

35. The appellant shall bear the cross-appellant's costs and interest in the lower court but as the cross-appeal has partially succeeded, each party shall bear their costs of the cross-appeal.

It is so ordered

**DATED AND DELIVERED AT BUNGOMA THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**D.Kemei**

**Judge**

**In the presence of:**

No appearance for Appellant

Anwar for Mukisu for Cross-Appellant

**Ribba Court Assistant**

