



REPUBLIC OF KENYA



Mwanzi & another v Otego & another (Suing on their own Behalf and as the Administrators of the Estate of the Late Ann Kighonyi alias Ann Kigonya alias Anne Kigonya) (Civil Appeal E006 of 2020) [2022] KEHC 11151 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E006 OF 2020
A. ONG'INJO, J
JUNE 23, 2022**

BETWEEN

FREDINAH KANINI MWANZI 1ST APPELLANT

NGUKULA MWAE LATA 2ND APPELLANT

AND

AGNES MAKUNGU OTEGO 1ST RESPONDENT

HENRY OTEGO 2ND RESPONDENT

SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE ANN KIGHONYI ALIAS ANN KIGONYA ALIAS ANNE KIGONYA

(Being an appeal from the Judgment and Decree of the Wundanyi Senior Resident Magistrate Hon. E.M. Nyakundi delivered in Wundanyi Senior Principal Magistrate Civil Case No. 52 of 2019 on 17th December 2020)

JUDGMENT

1. Ngukulai Mwai Lata & Fredinah Kanini Mwanzia 2nd and 1st Appellants herein were 1st and 2nd defendants in Wundanyi SPMCC.C. No. 2 of 2019 where they were sued as registered and beneficial owners respectively of motorvehicle Registered KBL 103V which caused an accident on January 21, 2018 and violently knocked the late Anne Kighonyi alias Ann Kigonya alias Anne Kigonya and she sustained fatal injuries.
2. The accident was said to have occurred along Taveta-Mwatate road at Mwashoti area when 2nd defendant so carelessly and negligently drove, managed and/or controlled the subject motorvehicle and knocked the deceased who was lawfully standing off the said road.



3. The plaintiffs Henry Otego Olungue and Agnes Makungu Otego sued the defendants on their own behalf and as administrators of the estate of the deceased seeking special and general damages as well as costs and interest.
4. The 2nd plaintiff – Agnes Makungu Otego testified as PW 1 and adopted the statement she recorded on filing the suit. The parties had entered into consent on liability in the ratio of 20:80 for the plaintiff and defendant respectively.
5. The trial court delivered judgement on December 17, 2020 in which damages were quantified as follows: -
 - i. Liability 80%:20% in favor of plaintiff.
 - ii. General damages - 1,330,000/-
 - iii. Special damages - 31,475/=
 - Total - 1,361,475/=
 - iv. Less 20% - 272,295/=
 - v. Net Award - 1,089,180/=
6. Interest on special damages from date of filing and on general damages from date of judgment till payment in full.
7. The defendants were aggrieved by the judgment and decree of the Magistrates Court and they appealed on the following grounds: -
 - i. That the assessment of damages for loss of dependency and lost years and loss of expectation of life is inordinately high as to represent an entirely erroneous estimate.
 - ii. That the learned trial Magistrate in assessing damages under the *Law Reform Act* viz loss of dependency and lost years under the *Fatal Accidents Act* by failing to apply the correct principles in determining the same hence arrived at an erroneous assessment or estimate of damages.
 - iii. That the learned trial Magistrate misapprehended the evidence and misapplied, misunderstood and/or overlooked the correct legal principles and judicial precedent and submissions by parties that he made an award under the *Law Reform Act* and the *Fatal Accidents Act* that was inordinately high hence an erroneous estimate of damages which the deceased and his estate suffered.
 - iv. That the learned trial Magistrate erred in law and fact in failing to take into account the fact that the beneficiaries both under the *Law Reform Act* and the *Fatal Accidents Act* were the same while assessing damages under both heads.
8. The appellants/defendants urged the court to allow the appeal and issue orders that assessment of damages under the *Fatal Accidents Act* and the *Law Reform Act* for loss of dependency and loss of expectation of life be set aside and the awards be assessed downwards.
9. The appeal herein was canvassed by way of written submissions.
10. The appellants' submissions dated February 4, 2022 were filed on February 7, 2022 and were to the effect the trial Magistrate was guided by case law that was totally different to assess general damages



as the age of the deceased in the case law was 31 years as opposed to age of the deceased herein who was 11 years old.

11. It was argued that the circumstances of the case law relied upon was totally different and it led the trial Magistrate to make an award that was inordinately high and the court should interfere with it.
12. Several authorities have been relied upon by the Appellant to urge the court to re-assess damages at Kshs. 500,000/= as opposed to the trial Magistrates assessment of Kshs. 1,330,000/=
13. The Respondents submission were that the court in its appellate jurisdiction can only interfere with the trial Magistrates award of damages if it is demonstrated that the learned Magistrate acted on wrong principles or misapprehended the evidence. The Respondent submitted that there was no need to interfere with findings of the trial court as the Magistrate appreciated the evidence adduced and applied the correct principles.
14. The holdings in *Kemfo Africa Ltd and another v Lubia & another* (1982-88) ECLR and *Catholic Diocese of Kisumu v Sophia Achieing Tete* –Kisumu Civil Appeal No 284 of 2001 were relied on to support this argument by the respondent.
15. The respondent further argued that awards made for loss of expectation of life and pain & suffering were fair as the trial Magistrate was guided by the precedents supplied by the parties herein and exercised discretion judiciously on sound principles and correctly. the respondent urged the court to affirm the awards.
16. On lost years/loss of dependency therespondent argued that the parents of the deceased were entitled to an award under this head which the trial court assessed at Kshs. 1,200,000/- and awarded it as a global sum as opposed to a proposal by theappellants that a multiplier/multiplicand principle be applied.
17. It was submitted that the appellant had not demonstrated which wrong principles the trial court had applied and it had not been shown the discretion was exercised capriciously. The respondents urged the court to affirm the 30 years’ multiplier and adopted by the trial court.
18. The Respondents also argued that their proposal of Kshs.19,909.45/= as a multiplicand as the deceased wanted to be a police woman was not controverted and the same should be left intact.
19. The respondent further submitted that section 4 of the *Fatal Accidents Act* enjoins a court to take into account the awards under *Law Reform Act* when assessing awards in *Fatal Accidents Act* and note that such awards should be deducted from each other. The holding in *Peris Wambui Kinuthia & another v SS Mehta & Son Ltd* NRB HCA No 568 of 2010 was relied upon in this respect.
20. The holding in *Hellen Waruguru Waweru v Kiarie Shoe Stores Ltd* [2015] eCLR also fortified the respondents arguments that there is no requirement in law or otherwise for the court to engage in a mathematical deduction of awards from different headings.
21. The Respondent urged the court to dismiss the appeal with costs as it lacks merit.

Analysis and Determination

22. This court has considered this appeal and the submissions made. As a cardinal rule, being the first Appellate Court, it is the duty of this courtto review evidence tendered at the trial Court and make its own conclusion. This principle was well articulated in *Selle & another versus Associated Motor Boat Co. Ltd, & others* 1968 EA 123, where the court stated thus; - "...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

23. The issue for determination in the appeal herein is; Whether the principle adopted in assessing general damage for loss of dependency was correct?

Whether the principle adopted in assessing general damages for loss of dependency was correct?

24. A claim of loss of dependency is anchored on *Fatal Accidents Act*, section 4 of the said Act provides: "Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit action is brought"
25. From the above provision the respondents were rightly entitled to damages for loss of dependency following their child's death in a road accident.
26. It is trite law that an Appellate court can only interfere with an award of damages if it is satisfied that the court acted on wrong principles of law. This was aptly articulated in *Loice Wanjiku Kagunda - vs- Julius Gachau Mwangi* C A No. 142 of 2003 (UR) where it was held as follows: "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 or 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 *Mariga v Musila* (1984) KLR 257.)
27. The same was reiterated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal said: "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."
28. From the submissions by the respondent Advocate it is apparent that the trial magistrate used both principles of global sum and multiplicand /multiplier to assess damages for loss of dependency. This approach is obviously wrong and erroneous in the circumstances as only one principle can be applicable at a time. The mixed breed cannot be applied simultaneously.
29. In *Power Lighting Comp. Ltd & another v Zakayo Saitoti Naingola & another* [2008] eKLR, the court said: "On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages (1) Damages should not be inordinately too high or too low; (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered; (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts; (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment ... This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others The award is inordinately too high or too low. It is based on cursory principles. The principles applied by the lower



court in the assessment was that of taking a narrative of the injuries by the witnesses Calling for proof of the same by visual observation if pointed out and medical records.”

30. In consideration of the finding that the trial Magistrate used both principles to asses’ general damages for loss of dependency and inconsideration that the precedent relied on i.e Moses Mairua Muchiri (*supra*) Mary Khayesi Awala (*supra*) in arriving at the award was not relevant to the circumstances of this case and this Court finds that the award was inordinately high where the deceased was an 11-year-old child whose future could not be ascertained. Moreover, no evidence was provided of her grades in school to prove that she was likely be to a police woman in future as claimed.
31. I have considered the authorities provided by both parties as well as the evidence and submissions in the lower Court and find that the global sum principle would be appropriate in the circumstances of this case. Taking into account inflationary trends, I do hereby award the sum of KSH 750,000 as general damages for loss of dependency.
32. The trial Magistrate awarded KSH 100,000 /= for loss of expectation of life and KSH 30,000 for pain and suffering which the Appellant were opposed to, but this Court is in agreement with the interpretation of the Respondent that there is no requirement in Law for the Court to engage in a mathematical deduction of awards from the different headings save that it should take into account the awards under the Law Reform Act where the beneficiaries are the same as in section 4 of the Fatal Accident Act.
33. In regards to pain and suffering evidence shows that deceased died on the same day of the accident on arrival at Moi Hospital. I find the award of KSH 30,000/= inordinately high and I substitute it for KSH 20,000/=.
34. In conclusion, the Appeal is allowed in the following terms; -

GENERAL DAMAGES

- i. Loss of dependency - KSH 750,000/=
- ii. Loss of expectation of life- KSH 100,000/=
- iii. Pain and suffering - KSH 20,000/=

SPECIAL DAMAGES - KSH 31,475/=

TOTAL -KSH.851,475/=

TOTAL - KSH.901,475/=

Less 20%- KSH.170,295/=

Less 20% KSH.180,295/=

NET AWARD -KSH. 681,180/=

NET AWARD KSH 721,180/=

35. Interest on general damages from date of filing in the lower court and Interest on special damages from the date of filing of the suit in High Court.

Interest on general damages from date of judgment in the lower court and interest on special damages from the date of filing of the suit in lower court.
36. Each party will bear their own costs.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 2022 BY
MICROSOFT TEAMS/OPEN COURT

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Respondent – No Appearance

Appellant – No Appearance

Hon. Lady Justice A. Ong'injo J

23/06/2022

