



Ngila & another v Musili & another (Suing as Legal Representative of the Estate of the late Isika Musili) (Civil Appeal 67 of 2019) [2022] KEHC 12991 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEHC 12991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 67 OF 2019
RK LIMO, J
SEPTEMBER 21, 2022**

BETWEEN

PAUL NGILA 1ST APPELLANT

WATHE MBENIA 2ND APPELLANT

AND

MAKASI MUSILI 1ST RESPONDENT

MUSII MALANZA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ISIKA
MUSILI**

*(An Appeal from the Judgement of Hon. Stephen Mbungi (CM)
in Kitui CMCC No. 448 of 2017 delivered on 31st October, 2019)*

JUDGMENT

1. This is an appeal from the Judgement of Hon. S. Mbungi delivered on October 31, 2019 in Kitui CMCC No. 448 of 2017. The appeal basically is on quantum and ratio of costs awarded.
2. The suit in the Lower Court was a running down matter and it arose as a result of a fatal road traffic accident. The respondent had sued the appellant as a result of the said road traffic accident that occurred on 24th July, 2016 along Kitui-Machakos road.
3. It was the Respondents' contention that at the time of the accident, the motor vehicle was being driven by the Appellant himself and that he drove, managed, or otherwise controlled it so negligently that he caused it to hit the deceased as a result of which he sustained injuries to which he succumbed.
4. It was averred that as a result of the deceased's death, the Respondents who were named as his dependants as well as his siblings suffered loss and damage. The Respondents claimed for loss of



- dependency under the *Fatal Accidents Act* and damages for pain, suffering, lost years and loss of expectation of life under the *Law Reform Act* as well as special damages.
5. In his statement of defence dated April 6, 2018, the 2nd Appellant denied the Respondents' claim and put the Respondents to strict to proof. In particular, he denied that he was that he was negligent in his driving as alleged by the Respondents. He further contended that the accident was solely caused by the deceased who was riding his motorcycle too fast which caused it to loss control.
 6. At the conclusion of the trial, the Learned Magistrate found the Appellants to have been largely responsible for the accident and apportioned liability at 80:20% holding that the deceased was partly to blame for the accident for riding his motorcycle at a high speed. The court noted that the impact of the accident would have been so severe had the deceased moved at the required speed. As for quantum, the Learned Magistrate awarded Kshs. 100,000 for loss of expectation of life, Kshs 300,000 for pain and suffering, Kshs 2,640,000/- for loss of dependency and Kshs 37,100 for special damages. Judgement was entered against the appellant at 80% translating to Kshs. 2,505,262. The Respondents were also awarded costs of the suit and interest at court rates.
 7. The Appellants were dissatisfied with the judgment and filed this appeal *vide* a Memorandum of Appeal dated November 25, 2019 on November 27, 2019 raising the following grounds;
 - i. The Learned Magistrate erred in law and in fact in assessing damages awardable for pain and suffering at Kshs 300,000/- which is inordinately high in the circumstances
 - ii. The Learned Magistrate erred in law and in fact in assessing loss of dependency at Kshs 2,640,000/- which is inordinately high in the circumstances
 - iii. The Learned Magistrate erred in law and in fact in assessing the ration of dependency at 2/3 which is inordinately high in the circumstances
 - iv. The Learned Magistrate erred in law and in fact in failing to find that the costs of the suit should have been subjected to the same liability ration of 80:20
 - v. The Learned Magistrate erred in law and in fact and ignored the submissions of the Defendants on the assessment of pain and suffering, loss of dependency, ration of dependency and ratio of costs to be borne by each party
 - vi. The Learned Magistrate erred in law and departed and ignored the decided authorities relied upon by the Defendants without justification.
 - vii. The Learned Magistrate erred in law and in fact in not considering the submissions that the parents of the deceased were not solely dependent on the deceased given the deceased's age and work engagement as well as the age of the said parents
 - viii. The Learned Magistrate erred in law and in fact and departed from the principles applied in award of pain and suffering, loss of dependency, ration of dependency and ration of costs to be borne by each party (repeated)
 - ix. The Learned Magistrate erred in law and in fact and awarded the Plaintiff inordinately high damages in pain and suffering, loss of dependency, ration of dependency and ratio of costs to be borne by each party considering the submissions filed by the defendants.
 8. In their written submissions through Counsel, the appellant contend that the award made by the trial court was too high and excessive.



9. On pain and suffering, the Appellants submit that the deceased passed away 5 days after the accident which they consider to be a very short period of time. He faults the trial magistrate for awarding Kshs 300,000/- and propose an award of Kshs 30,000/-
10. They have relied on two authorities under this head being
 - a. *Mercy Muriuki & Anor vs Samuel Mwangi Nduati & Anor (suing as legal representatives of the estate of the late Robert Mwangi)* (2019) eKLR where the court awarded Kshs 10,000/- being damages for pain and suffering. The deceased died instantly as a result of the accident in this case.
 - b. *Kimunya Abednego alias Abednego Munyao vs Zipporah S Musyoka & Anor* (2019) eKLR where the court awarded Kshs 20,000/- as damages for pain and suffering where the deceased died the same day from injuries sustained from a traffic road accident.
11. On loss of dependency, the Appellants submit that the deceased was 22 years old and even though it was alleged that he as motorcycle rider earning approximately 1500/- per day, there was no evidence produced as a proof of income. They also fault the dependency ratio adopted by the trial court stating that there was no evidence presented indicating that the deceased gave his parents 80% of his income for their subsistence. They propose a dependency ratio of 1/3. As to the multiplier, they submit that the 33 years adopted was not appropriate because the deceased was engaged in a high risk occupation. They propose a multiplier of 20 years. They have relied on the case of *MMG vs Muchemi Teresa* (2015) eKLR where the court used a multiplier of 20 years while calculating damages for loss of dependency in a case where the deceased died at the age of 12 years.
12. On costs, the Appellants submit that they should have been awarded at 80:20 since that was the liability determined by the court. They have cited the case of *Peter Gatimu Mwangi vs Danford Ofwori & Anor* (2018) eKLR where the court apportioned liability at 80:20 and further apportioned costs at the same ratio
13. The Respondent did not file any submissions in rebuttal but nonetheless I will consider this appeal on merit.
14. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. *In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123*, this principle was enunciated 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...”
15. This appeal as I have observed above is only on quantum and assessment/quantum of damages is a matter of discretion to the trial court. An appeal court should always be reserved in interfering with it unless it is shown that the award is either too excessively high or inordinately as to represent entirely wrong/unjust estimate. The decision in *Butler versus Butler* [1984] eKLR provided useful guide in that regard when it held as follows: -

“...that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge’s findings unless he has



either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision...”

16. The appellant is aggrieved on the awards made on different heading and for ease of reference, I will determine them as per different heading.

17. Pain and Suffering

The Appellants have taken issue with the award for pain and suffering awarded at Kshs 300,000/- stating that the five days within which the deceased died were a very short period of time. They have cited two cases as referenced at paragraph 11 above where damages under this head were awarded at Kshs 10,000/- and Kshs 20,000/- respectively in the accidents, victims in the two cases however died instantly and a day after respectively.

18. The trial in its judgment in this instance opined that the deceased endured a lot of pain and suffering in the five days that he was alive and cited the case of *PNM & Anor (Legal representatives of the estate of LMM (deceased) vs Telkom Kenya Limited & 2 Other* (2015) where the court awarded Kshs 100,000/- on this head in respect of an accident victim who died five days after the accident.

19. Evidence adduced in the trial court in form of a death certificate indicates that the deceased died on July 29, 2019, five days after the accident while undergoing treatment at Kenyatta National Hospital following a transfer from Kitui District hospital where he was first treated. The death certificate also indicated the cause of death to be raised intracranial pressure due to subdural subarachnoid hemorrhage. A post mortem report dated August 2, 2019 was also produced in court which confirmed the cause of death as raised intracranial pressure due to subdural subarachnoid hemorrhage secondary to blunt force trauma. It also confirmed that the deceased sustained several injuries from the accident.

20. The general rule is that the award for pain and suffering depends on whether after the accident, the deceased suffered any such pain. In *Joseph Kivati Wambua versus SMM & Another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* [2021] eKLR, Hon. Odunga J observed as follows: -

“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 sometimes 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.”

21. It is my view that the two authorities cited by the Appellants are not comparable, instead I found the following authorities similar to the facts of this case;

a. *Bon Ton Limited v Beatrice Kanaga Kereda suing as Administrators of Estate of Richard Alembi Ochenga (Deceased)* [2018] eKLR in which the deceased sustain severe injuries after being knocked down while riding a motorcycle. He was hospitalized for one week. An award of Kshs. 200,000/= was made by the trial court for pain and suffering which was upheld on appeal. The High Court, on appeal, held that:

“...the deceased died after a week in hospital. According to the death certificate, he had suffered a fractured femur and for that week, he must have suffered considerable



pain. Thus, the award of Kshs. 200,000/- cannot be said to be excessive. I also find and hold that the award of Kshs. 100,000/- set out in the judgment for loss of expectation of life was reasonable...”

- b. In *Mohammed Huka (suing as personal representative of the Estate of Huka Wako) v Adan Kosi & 2 others* [2017] eKLR where the deceased who was involved in accident died five days as a result of the sustained. Under the head of pain and suffering, the plaintiff had claimed a sum of Kshs. 2,000,000/- but court awarded Kshs. 200,000/-
- c. In *Theuri Kihira versus Gerhard Matthiessen* [2019] eKLR the Court awarded Kshs 100,000/- under this head and held as follows;

“The deceased died five days after the accident. He was initially admitted at the Nyeri Provincial General Hospital and later transferred for more specialized treatment at Kenyatta National Hospital in Nairobi. The scanty information in the death certificate shows that he died of massive internal bleeding; he also sustained a torn lung and liver. There is no doubt that he must have experienced a lot of pain before he finally succumbed. Taking all these factors into consideration, I will make an award of Kshs. 100,000/= under this head.”

22. The award made by the trial court on this head in view of the above authorities can be termed high and on that basis I find that an award of the respondent Kshs. 200,000 in line with the principle that comparable damage should attract comparable award. The deceased died 5 days after the accident and in those days in light of injuries suffered, he suffered pain and suffering. Flowing from the cited authorities the awards of Kshs. 200,000 was fair.

23. Loss of expectation of life

The trial court award Kshs. 100,000 being the conventional sum awarded under *Law Reform Act*. The appellant has not contested the award under that heading and therefore, the same is upheld.

24.

(c) Loss of dependency under *Fatal Accidents Act*

Loss of Dependency is a claim that arises from the *Fatal Accidents Act*. Section 4 (1) of the *Fatal Accident Act* which 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 the action is brought.”

25. The applicable principles used to calculate the loss of dependency are: -

- i. Multiplicand – These dependents under Fatal Accident Act on the income of deceased prior to death.
- ii. Multiplier – These dependents on the age of deceased and the number of years lost.
- iii. Dependency Ratio- This depends on ratio of support given to dependants.



26. The proceedings show that the deceased was a boda boda rider and though he was said to be earning Kshs. 1,500 per day there was no evidence to prove his actual earning. In cases where the income of a deceased is uncertain, courts are more inclined to award a global figure since it would be unfair to use an uncertain figure as multiplicand when the income cannot be ascertained.
27. In this matter the trial court found that the deceased must have been earning around Kshs. 10,000 per month and used of 33 years as the deceased was aged 22 years when he met his death. The trial court also dependency ratio of $\frac{2}{3}$. The trial court adopted a multiplier approach yet there was no evidence of how much the deceased earned. That in my respectful view was speculative and to that extent the trial court fell into error.
28. Mabeja J in *Michael Rimiri M'ingetha & another v Zipporah Mukomua M'ituri* [2020] eKLR stated as follows on dealing with situations where proof of income is not presented to the court;

“ All that documentary evidence does is to give the Court an estimation of the actual income a person derives from his economic activities. Where there is no such documentary evidence, the Court should then resort to the principle of lump sum.

In *Albert Odawa versus Gichimu Gitbenji* [2007] eKLR, Koome J (as she then was) quoted Ringera J in *Mwanzia versus Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another* wherein he stated: -

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do”.

Because of the inexactitude in ascertaining the income of the deceased, the trial Court was right in resorting to the lump sum principle.

However, in resorting to the lump sum principle, a trial Court should be guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages.”

29. The same principle was adopted in *Mary Khayesi Awalo & Another versus Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR where Nambuye J., (as then was) stated that: -

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels(*sic*) have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

30. The best approach in this instant would have been to give a global figure and that is common approach taken by many Courts.
31. Ngaah J in *John Mwangi Macharia v Jeniffer Keiya Mutegi* [2020] eKLR awarded global sum of Kshs 900,000/- on this head to an 18 year old boda boda rider who died from injuries sustained from a traffic road accident. It was submitted in this case that the deceased supported his mother and gave her Ksh 500/- per day for her upkeep. He was also not married.



32. Patrick J.O Otieno J in *Joseph Muthuri versus Nicholas Kinoti Kibera* [2022] eKLR also set aside an award on this head and replaced with a global figure of Kshs 1,000,000/- The deceased was 19 years old at the time of his death. The court held as follows;

“Although the deceased herein was a student at the time of his death, it would reasonably be expected that he would finish his studies, get into the job market and support his father. I will therefore adopt a global figure to assess the damages payable under this head. Taking into account the evidence that was adduced in court that the deceased was a healthy young man, enjoying robust life, but also considering the uncertainties and vicissitudes of life, I will award Kshs. 1,000,000 for loss of dependency.”

33. In the case cited by the Appellant of *Bon Ton Ltd vs Beatrice Kanaga suing as Administrator of the estate of Richard Olembi Ochenga* [2018] eKLR a motor cycle rider was awarded Kshs. 800,000.

34. Going by the above decisions which are comparable to this present case, an award of Kshs. 900,000 would be just and fair in my considered view given the fact that boda boda riders face risks of accidents and even health given the conditions or environment of their work.

35. I am also persuaded that the costs and interests awarded should have reflected the finding on liability which was in the ratio of 80:20 in favour of the Respondent.

In sum, this appeal is allowed. The award given by the trial court is set aside. In its place, the Respondent is awarded as follows: -

- i. Pain and suffering Kshs. 200,000
 - ii. Loss of expectation of life Kshs. 100,000
 - iii. Loss of dependency Kshs. 900,000
 - iv. Special damages Kshs. 91,578
- Subtotal Kshs. 1,291,578.0
- Less 20% liability Kshs. 258,315.6
- Total Kshs. 1,033,262.40

The Respondent shall have costs and interests of the above from date of the judgement at the Lower court at the ratio of 80:20 in his favour. The appellant shall have 80% costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF SEPTEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

