



REPUBLIC OF KENYA



KENYA LAW
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**Ongundo & another v Omwocha & another (Civil Appeal 13 of 2021)
[2022] KEHC 15053 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 15053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 13 OF 2021
REA OUGO, J
OCTOBER 31, 2022**

BETWEEN

AMOS ONDARI ONGUNDO 1ST APPELLANT

JULIUS MORARA MOKON 2ND APPELLANT

AND

DORICAH MONCHARI OMWOCHA 1ST RESPONDENT

**BONIFACE NYANASEGE OMWOCHA (SUING AS THE
LEGAL REPRESENTATIVES OF THE JAMES OMWOCHA
NYAMASEGE) 2ND RESPONDENT**

*(Being an appeal from the whole of the judgment delivered by the Honourable Magistrate
Nathan Shiundu Lutta (Mr.) on 20th January 2021 in Kisii CMCC NO 175 OF 2019)*

JUDGMENT

1. This is an appeal arising from the Kisii CMCC No 175 of 2019 and the only issue raised in the appeal is on quantum of damages. The trial magistrate awarded compensation to the respondent, who was the plaintiff before the subordinate court, as follows:
 - a) Pain and suffering 50,000/-
 - b) Loss of expectation of life 80,000/-
 - c) Dependency $[10,000 \times 12 \times 16 \times 2/3]$ 1,278,720/-
 - d) Funeral Expenses 50,000/-Total 1,458,720/-
Less 80,000/-



1,378,720/-

Special damages 20,000/-

1,398,720/

2. The appellants dissatisfied with the finding of the court mounted this appeal raising the following grounds of appeal:

1. The learned magistrate erred in law and facts and misdirected himself when he failed to consider the applicant's submissions on points of law and facts on quantum.
2. The learned trial magistrate erred in law and in fact by relying on the sole testimony of the deceased's wife as proof of the deceased occupation and earnings.
3. The learned trial magistrate erred in law and in fact by finding that the deceased earned Kshs 330/- per day when the same had not been proved on a balance of probability.
4. The learned trial magistrate erred in law and in fact finding that the deceased earned Kshs 10,000/- per month when there was no proof of the same.
5. The learned magistrate erred in law and in fact in awarding general damages of Kshs 1,398,720/- an amount that was excessive and unjust in the circumstances considering the evidence adduced before court and principles of law.
6. That the learned magistrate erred in law and in fact and her decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law which have occasioned a miscarriage of justice.
7. That the learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the respondent which were excessive in the circumstances.

3. The appeal was canvassed by way of written submissions. The appellant filled their submissions on April 22, 2022. It was submitted that an award of Kshs 50,000/- under the head of pain and suffering was excessive and that Kshs 10,000/- was adequate compensation since the duration between the accident and the time of death of the deceased was not ascertained or proved. In *Harjeet Singh Pandal v Hellen Aketch Okudho* [2018] eKLR where the court stated:

- “ 38. In this case, there is no clear evidence about the duration of time between the time when the deceased was hit by the trailer and the time when he met his death.
39. However, taking into account the respondent's evidence, concerning the speed at which the tractor was being driven, I find that the duration between the time when the deceased was first hit by the trailer and the time when he met his death, was nominal.
40. Nonetheless, it cannot possibly be said that the death was painless.



41. Accordingly, I hold the view that an award of Kshs 10,000/= is sufficient compensation for pain and suffering”.
4. It was also submitted that the trial court erred by using the wrong multiplicand of Kshs 10,000/- and 16 years multiplier yet the deceased was 54 years. The deceased was 54 years old and a livestock trader yet there was no evidence to prove that he earned Kshs 10,000/- per month. The appellant submitted that instead of a multiplier of 16 years, the honourable court should adopt a multiplier of 9 years. They relied on the case of *Titus Ndung’u Njuguna & another v Hannab Waruguru Gichubi & another* [2019] eKLR. It was submitted that the trial magistrate ought to have adopted the statutory minimum wage guidelines provided in the *Regulation of Wages (Agricultural Industry (Amendment) Order 2013* and since the deceased was a livestock trader, the trial magistrate ought to have adopted Kshs 7,779.45 as livestock trade falls under the category stockman or herdsman. In this regard, Kshs 560,120.4/- [7,779.45 x 2/3 x 9 x 12] was sufficient.
 5. The respondent opposed the appeal through its submissions filed on May 27, 2022. They argued that the deceased was not in formal employment subject to the 60 year retirement and could have worked till the age of 70 years and thus a multiplier of 16 years was reasonable. In *China Henan International Co-operation Ltd v China Henan International Co-operation Ltd & another* [2021] eKLR this court upheld a multiplier of 15 years where the deceased died at the age of 50 years. Similarly in the case of *Caroline Leah Awino v Stephen Miheso Ashikoyo* (2014) eKLR a multiplier of 7 years was adopted where the deceased died at the age of 75 years. On the multiplicand, it was submitted that the Kshs 10,000/- was based on the minimum wage and the figure cannot be said to be high and they called into aid the case of *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita & another* (2011) eKLR. It was submitted that in any event, Kisii town within which the deceased was based has the status as that of a municipality in which the minimum wage is Kshs 12,522/-.
 6. It was also submitted that the deceased did not die at the scene but at Kisii Teaching and Referral Hospital. Therefore an award of Kshs 50,000/- was sufficient. In *Premier Dairy Ltd v Amarjit Singh Sagoo & another* (2013), an award of Kshs 75,000/- was made where the deceased died on the spot. Finally on the issue of loss of expectation of life, the respondents argue that the appellants have not challenged the award under this head in their submissions.

Analysis and Determination

7. The appeal being solely on damages, I am aware of the well laid principle that an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate; or where it is established that the magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. [See *Butt v Khan* [1981] KLR 349].
8. The appellant’s contention is that the trial magistrate used a high multiplicand and multiplier and thus the award on damages was inordinately high warranting the court’s interference. The Court of Appeal in *Roger Dainty v Mwinyi Omar Haji & another* MSA CA Civil Appeal No 59 of 2004 [2004]eKLR, observed that;

“To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.”



9. No 88300 PC Moses Kasera (Pw1) testified that deceased was involved in an accident on March 30, 2018 and succumbed to the injuries while undergoing treatment. Dorica Monchari Omwocha (Pw2) who adopted her witness statement testified that the accident took place on March 30, 2018 at Marani-Nyamataro road near the Junction when motor vehicle registration Mark KBN 139C lost control hit the house and fatally injured the deceased. They spent Kshs 20,000/- on legal fees and Kshs 550/- for a search at the registrar of motor vehicles. She averred that the deceased left behind dependants (a wife and children) and earned Kshs 10,000/-. She testified that they spent Kshs 50,000/- for the funeral.
10. According to the respondent the deceased was 54 years earning Kshs 10,000/- per month. The certificate of death produced as PExh3 reveal that indeed the deceased was 54 at the time of death. According to the evidence of Pw2 the deceased was a peasant farmer earning Kshs 10,000/-.
11. The fact that the deceased was a farmer was proved through the evidence of Pw2. However, it was unclear how much money the deceased was bringing in through his farming business as no evidence was tabled showing the profits made by the deceased from the farming business. Although the appellant proposed that the court should adopt the minimum wage provided in the *Regulation of Wages (Agricultural Industry (Amendment) Order 2013* under the category of stockman/herdsman, there was clear evidence that the deceased was a 54 year old farmer and not a herdsman. In *Mwanzia Ngalali v Mutua Kenya Bus Ltd* cited in *Albert Odawa v Gichumu Githenji* [2007] eKLR, the court stated:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 the 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.”

12. The deceased in this case was a farmer but it was unclear how much he made from his farming business. When a deceased person's income cannot be determined with complete accuracy, the best approach would be to adopt a global award. In the case of *Dora Mwawandu Samuel (Suing on her behalf and on behalf of the Estate of Samuel Muweliani Jumamosi - Deceased) v Shabir M Hassan* [2021] eKLR where the deceased was a 59 year old farmer with an unascertainable income, the court awarded a global sum of Kshs 400,000/-. In this case the deceased was 54 years and in the circumstances I find that a sum of 600,000/- would be adequate compensation.
13. I now turn to consider the award made under the *Law Reform Act* being Kshs 50,000/- for pain and suffering and Kshs 80,000/- for loss of expectation of life. In *West Kenya Sugar Co Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR the court observed that-

“The principle is that 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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”



14. Both Pw1 and Pw2 testified that the deceased did not die immediately but died while undergoing treatment. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, the court stated as follows-

“As regards damages awarded under the Law Reform Act, the principle is that 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.... 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 awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

15. The trial magistrate awarded Kshs 50,000/- for pain and suffering and Kshs 80,000/- for loss of expectation of life. In my view, the trial magistrate cannot be faulted for the awards made under the head pain and suffering; and loss expectation of life as they were not excessive.

16. The special damages awarded was pleaded and proved. According to the plaint, Kshs 20,000/- was paid towards as legal fees for procuring letters of administration, and a receipt issued by Khan & Associates Advocates was produced.

17. In the end, I find the appeal successful to the extent that I set aside the trial court’ award of 1,278,720/- and substitute it with a global sum of Kshs 600,000/- as damages under the *Fatal Accidents Act*. For avoidance of doubt there shall be judgment for the appellants against the respondent as follows:

- a) *Fatal Accidents Act* Kshs 600,000/-
 - b) Pain and suffering Kshs 50,000/-
 - c) Loss of expectation of life Kshs. 80,000/-
 - d) Special damages Kshs 20,000/-
 - e) Funeral Expenses Kshs 50,000/-
- Total Kshs 800,000/-

18. The appellant shall have the half cost of the appeal.

DATED, SIGNED, AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2022

R.E. OUGO

JUDGE

In the presence of:

Mr. Ng’ang’a for Mr. Njuguna for the Appellant

Respondent – Absent

Ms Aphline – Court Assistant.

