



**Susan & another v Kavingu (Suing as the administrator to the estate of the late Bosi Kanini-Deceased) (Civil Appeal 495 of 2019) [2022] KEHC 14517 (KLR) (Civ) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 495 OF 2019**

**JN MULWA, J**

**OCTOBER 27, 2022**

**BETWEEN**

**IRUNGU SUSAN ..... 1<sup>ST</sup> APPELLANT**

**DANIEL MURUNGI NJENGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JANE KANINI KAVINGU ..... RESPONDENT**

**SUING AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE BOSI  
KANINI-DECEASED**

*(Being an appeal against the Judgement and Decree of the Chief Magistrate's Court at Milimani in CMCC No. 5516 of 2016 delivered by Hon. D. O. Mbeja (SRM) on 24th July, 2019)*

**JUDGMENT**

1. This appeal arises from Milimani CMCC No 5516 of 2016 in which the respondent sued the appellants for general and special damages arising from a road traffic accident that led to the demise of Bosi Kanini (the deceased). According to the plaint dated July 4, 2016, the deceased was a pedestrian walking along Mombasa road on February 23, 2014 when he was knocked by the 1<sup>st</sup> appellant's motor vehicle registration number KBM 717M. The motor vehicle was being driven by the 2<sup>nd</sup> appellant herein and the deceased sustained fatal injuries as a result of the accident.
2. The appellants filed a joint statement of defence in which they denied the respondent's claim and attributed the accident to the negligence of the deceased whom they accused of walking on the wrong side of the road without due care and attention.



3. After trial, the trial court found the respondents fully liable for the accident and awarded damages in the sum of Kshs 2,246,014/- comprising of Kshs 50,000/- for pain and suffering, Kshs 100,000/- for loss of expectation of life, Kshs 2,000,000/- for loss of dependency, and Kshs 96,014/- for special damages.
4. Being dissatisfied with the quantum of damages, the appellants lodged the instant appeal *vide* a memorandum of appeal dated August 26, 2019 and raised the following grounds:
  - a. That learned trial magistrate erred in law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at a figure so inordinately high as to represent an entirely erroneous estimate.
  - b. That the learned trial magistrate erred in law and in fact in making an award of Kshs 2,000,000/- as general damages for loss of dependency which is excessive in the circumstances.
  - c. That the learned trial magistrate erred in law and in fact by using the global award method in awarding Kshs 2,000,000/- lump sum under loss of dependency.
  - d. That the learned trial magistrate erred in law and in fact in generally applying the wrong principles in arriving at the award of Kshs 2,000,000/-.
  - e. That the learned trial magistrate erred in law and in fact by failing to weigh all the evidence placed before him and the circumstances of the case in assessing damages and/or relying on insufficient evidence.
  - f. That the learned magistrate erred in law and in fact in failing to be guided by recent authorities thus arriving at an unconscionably high award.
5. The appeal was canvassed by way of written submissions which the court has duly considered.

### **Analysis and Determination**

6. The court has examined the record of appeal and the grounds of appeal. It has also given due consideration to the parties' respective submissions and authorities cited. The only issue for determination is whether the learned magistrate erred in assessing the quantum of damages. This issue shall be determined under different headings herein below.
7. As a general principal, assessment of damages is a matter of the exercise of court's discretion and as such, an appellate court will normally be slow to interfere with such discretion unless it is very necessary. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR stated as follows in this regard:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge 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...”

#### **a. Pain and suffering**

8. On this, the appellants contended that the trial court's award of Kshs 50,000/- is inordinately high because the deceased died almost immediately after the accident while undergoing treatment. In their view, an award of Kshs 20,000/- would have been sufficient and reasonable compensation in the circumstances. They relied on the case of *Lochab Brothers Limited v Julius Kipchirchir Yego* [2017]



eKLR wherein an award of Kshs 10,000/- for pain and suffering was upheld on appeal over a cause of action that arose on May 17, 2008. Reliance was also placed on the case of *Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR wherein the appellate court upheld an award of Kshs 20,000/- for pain and suffering for a deceased who met her untimely demise in a road traffic accident on May 14, 2015.

9. The respondent on the other hand contended the award made on account of pain and suffering was reasonable and appropriate in the circumstances of the case as the deceased sustained severe bodily injuries to which he succumbed while undergoing treatment at Kenyatta National Hospital on the same day of the accident. Reliance was placed on the case of *Beatrice Mukulu Kang'uta & another v Silverstone Quarry Limited & another* [2016] eKLR, where the court awarded Kshs 200,000/- for pain and suffering for a deceased who died on the same day of the accident. The respondent also cited *Violet Jeptum Rabedi v Albert Kubai Mbogori* [2013] eKLR where the court awarded Kshs 100,000/- under pain and suffering.
10. Damages for pain and suffering are recoverable by the estate of a deceased person as compensation for the pain suffered before death which results from an accident. In *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, Majanja J observed thus:

“...it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.”

11. In the instant case, it is clear from the evidence of PW1, No 54551 PC Jean Zamora and PW2, Jane Karimi Kavingi that the deceased died on the same date of the accident being February 23, 2014 although not on the spot. This was confirmed by the post-mortem report, death certificate no 0080207 and burial permit no 672765 produced in evidence by the respondent. PW1 testified that the deceased was taken to hospital by red-cross but he later succumbed to death.
12. In *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, Majanja J while declining to upset an award of Kshs 50,000/- for pain and suffering where a deceased died on the spot in an accident that occurred on May 11, 2014, rightfully noted that:

“According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”

13. Similarly, in *Jecinta Ruguru v Beatrice Muthoni Muthike (suing as the legal representative of the estate of the late Isaac Muthike Nyaga)* [2021] eKLR and *Joseph King'ori Wandurwa & another v Loise Karimi Nyaga & another* [2021] eKLR, the courts declined to upset awards of Kshs 50,000/- and Kshs 60,000/- where the deceased persons died on the same day of the accident. In view of the above authorities, I find that the trial magistrate’s award of Kshs 50,000/- for pain and suffering was not inordinately high and I therefore uphold it.

#### **b. Loss of Expectation of life**

14. The appellants took issue with the trial court’s award of Kshs 100,000/- under this head and contended that the same was made without any justification from past precedents. They argued that



since the occupation of the deceased was unknown at the time of his death, an award of Kshs 80,000/- would have sufficed under this limb. They cited the case of *Charles Masoso Barasa & Another v Chepkoech Rotich & another* [2014] eKLR where the court made a similar award for a cause of action that arose in September 2009. They also relied on the case of *Hyder Nthenya Musili & Anor v China Wu Yi & anor* [2017] eKLR, where the court opined that very nominal damages are generally awarded under the *Law Reforms Act* if the death occurred immediately after an accident.

15. According to the respondent however, it is an uncontroverted fact that the deceased was of good health before the said demise. He was energetic and would have probably lived a long, happy and productive life were it not for the accident which cut short his life at only 26 years of age. In her view therefore, the award of Kshs 100,000/- was reasonable and comparable to past precedents.
16. Damages for loss of expectation of life are also awarded under the *Law Reform Act*. 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 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.” (Emphasis mine).
17. From the above authority, it is clear that the trial magistrate’s award of Kshs 100,000/- is comparable to conventional awards. I therefore see no reason to interfere with the learned magistrate’s discretion in this regard. It is upheld.

### c. Loss of dependency

18. On this, the appellants contended that the global approach adopted by the trial court in assessing the damages under this limb resulted in an award that was inordinately high in the circumstances of the case. They held the view that the multiplier approach would have resulted in reasonable damages and urged the court to adopt the same in reviewing the trial court’s award of Kshs 2,000,000/-. They asked the court to adopt the minimum wage for casual workers within the Municipality of Nairobi as at February 23, 2014 as the multiplicand claiming that no evidence was tendered to support the allegations that the deceased used to work at Ad Gifts Limited and earned Kshs 9,600/- per month. As for the multiplier, they urged the court to use fifteen (15) years since in their view, the nature of work that the deceased was engaged in must have been a risky one.
19. They relied on the case of *New Kenya Co-operative Creameries Ltd (Formerly Kenya Co-Operative Creameries) & another v Chebusit Arap Langat* [2013] eKLR where Seron J replaced the dependency ratio of 2/3 adopted by the trial court with 1/3 and used a 15 years multiplier where the deceased died at 23 years of age. In totality therefore, they urged that the loss of dependency be calculated as follows; (Kshs 9,780.95 x 15 x 12 x 1/3 = Kshs 586,857/-).
20. In the alternative, the appellants submitted that if this court is minded to use the global approach, then the trial court’s award should be substituted with Kshs 1,000,000/-. They relied on the case of *Daniel Mwangi Rugano v Julius G Macharia (Suing as the legal representative of the estate of Humphrey Maina Macharia)* [2018] eKLR where the high court did away with the multiplier approach used by the trial court to arrive at an award of Kshs 1,600,000/- and instead made a global lump sum award of Kshs 1,000,000/-.



21. On the other hand, the respondent lauded the global award made by the trial court submitted that the circumstances of the case called for the application of that approach. In support of this, the respondent cited the cases of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the Personal Representative of the Estate of Mercy Nzula Maina (Deceased))* [2016] eKLR and *Albert Odawa v Gichimu Gichenju* HCCA No 15 of 2003 (2007) where courts explained the circumstances that call for the adoption of a global award. She submitted that the award was reasonable because the deceased who was just 26 years old at the time of his demise, was working and used to support his parents and siblings with his earnings.
22. Damages for loss of dependency are anchored on the *Fatal Accidents Act* and there are two methods of calculating the same; namely a multiplier approach or a global lump-sum approach. The decision of whether to adopt a multiplier or a global award approach is entirely an issue of discretion of the trial court which depends on the circumstances of each case. See *Seremo Korir & another v SS (Suing as the legal representative of the estate of MS, deceased)* [2019] eKLR and *Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased))* [2020] eKLR.
23. In the instant case, the trial magistrate elected to make a global lump sum award for the reason that no cogent evidence had been adduced by the plaintiff, the respondent herein, to prove the deceased's earnings. Nothing has been presented before this court to demonstrate that the learned magistrate applied the wrong principles in using the said approach hence this court has no reason to interfere with his discretion in that regard. I find guidance in the case of *Albert Odawa v Gichimu Gichenji* [2007] eKLR in which the court cited with approval the case of *Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & another*, where Hon Ringera J took the view that:
- “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.”
24. In the premises, this court's only duty, in as far as this limb is concerned, is to consider whether the award of Kshs 2,000,000/- is comparable to past precedents as the appellants contend that it is inordinately high. In *Put Sarajevo Gen Eng Co Ltd v Esther W Njeri & Johnson Mwangi Gucha (suing as the legal representative of the estate of Sylvester Muhia Gucha (deceased) & 2 others)* [2014] eKLR, a global sum of Kshs 1,000,000/- was awarded to the estate of a deceased person aged 29 years. In *Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another* [2019] eKLR, the court awarded a global sum of Kshs 1,200,000/- for loss of dependency where the deceased was a 25-year old man and there was no evidence to show his income or the nature of work he used to undertake. In *Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR, Ndungu J set aside the trial court's global award of Kshs 2,000,000/- for loss of dependency as being excessive for a deceased who died at 28 years of age and substituted it with an award of Kshs 1,500,000/-.
25. Guided by the above authorities, I find the sum of Kshs 2,000,000/- awarded by the trial court under loss of dependency to be excessive and substitute the same with an award of Kshs 1,700,000/-.



#### **d. Special Damages**

26. The appellants contended that no receipts were produced to justify the award of Kshs 96,014/- made by the trial court on account of special damages. They therefore urged this court to dismiss this claim. On the other hand, the respondent faulted the appellants for intentionally and cunningly failing to include in the record of appeal part of her bundle of documents which contains all the receipts in support of the special damages claim and a letter from Ad Gifts Limited where the deceased was working at the time he met his death.
27. The court has carefully studied the record of appeal. At page 20 thereof is a list of the documents that the respondent relied in support of her case in the trial court. The record contains all the documents thereon save for items (15) and (16) which are, a letter from Ad Gifts Ltd dated October 26, 2015 and receipts for special damages amounting to Kshs 96,014/- respectively. From the typed proceedings of the lower court at page 51 of the record of appeal, it is evident that PW1 produced the said letter and a couple of receipts which were duly admitted in evidence. Further, in the judgment of the trial court at page 62 of the record, the learned magistrate clearly stated that the plaintiff, the respondent herein, pleaded and proved special damages in the sum of Kshs 96,014/-. Additionally, the respondent's submissions herein that the appellants intentionally omitted the receipts in proof of the special damages from the record were uncontroverted. Instead, the appellants contended that the respondent ought to have filed her own record of appeal to include the receipts yet they are the ones who filed the appeal. This only goes to prove that the receipts were intentionally omitted from the record of appeal.
28. In the premises, I find that the special damages claim of Kshs 96,014/- was specifically pleaded and proved to the required standard. The award shall not therefore be disturbed.

#### **Conclusion**

29. Consequently, the appeal succeeds partly. I therefore enter judgment for the respondent in the sum of Kshs 1,946,014/- tabulated as follows:
- a. Liability at 100% as against the appellants.
  - b. Quantum
    - i. Pain and suffering Kshs 50,000/-
    - ii. Loss of expectation of life Kshs 100,000/-
    - iii. Loss of dependency Kshs 1,700,000/-Total Kshs 1,946,014/-
  - c. The respondent shall have the costs of the primary suit and this appeal.
- Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2022**

**J. N. MULWA**

**JUDGE**

