



**West Kenya Sugar Co Ltd v PWM (Suing as the Legal Representative/  
Administrator of the Estate of UM alias UM - DCD) (Civil Appeal  
E032 of 2021) [2022] KEHC 16585 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16585 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E032 OF 2021  
DK KEMEL, J  
NOVEMBER 28, 2022**

**BETWEEN**

**WEST KENYA SUGAR CO LTD ..... APPELLANT**

**AND**

**PWM (SUING AS THE LEGAL REPRESENTATIVE/ADMINISTRATOR OF  
THE ESTATE OF UM ALIAS UM - DCD) ..... RESPONDENT**

*(Being an Appeal against the judgement and decree of the Hon. N. N Barasa Principal  
Magistrate delivered on 25th May, 2021 in Webuye SPMCC No. 129 of 2018)*

**JUDGMENT**

**Background**

1. This appeal is against the award of quantum by the trial court in respect of an accident involving motor vehicle registration number KBT 891 Z towing trailer ZE 3913 and the deceased herein who was a minor aged about nine years' old which occurred on August 29, 2016 along Webuye-Kakamega Road and resulted in the deceased sustaining severe bodily injuries resulting in his instant death.
2. On March 2, 2021 the parties recorded a consent order dated October 16, 2018 before the trial court and agreed on liability at 80:20 in favour of the respondent herein. The trial court duly endorsed and proceeded to receive evidence on quantum.
3. According to PW1, Peter Wanjala Mandu, a businessman, relied on his witness statement dated August 6, 2021 as his evidence in chief. The same was adopted. He produced a *grant ad litem* in sUccession Cause Number P & A No 4 of 2018 at Kakamega as P exhibit 2(a); a letter from the chief indicating the deceased was his son as P exhibit 3; a postmortem report as P exhibit 4(a); death certificate as P exhibit 4(b); demand letter as P exhibit 5(a); receipt of Kshs 5000/= as P exhibit 5 (b). He further told the trial court that he spent Kshs 10,000/= in funeral expenses but lacked the documents to support the same.



4. On cross-examination, he told the court that the deceased died on the spot and was then aged about 7-8 years old. He also stated that he did not avail any document to show that the deceased was attending class. That was the close of the appellant's case.
5. The trial court issued a judgment on quantum as follows:
  - Pain and suffering Kshs 50,000/=
  - Loss of expectation of life Kshs 100,000/=
  - Loss of dependency Kshs 1,100,000/=
  - Special damages Kshs 105,000/=
  - Total Kshs 1,355,000/=
  - Less 20% Kshs 271,000/=
  - Amount payable Kshs 1, 084,000/=
  - Costs on the above figures and interest at court rates from the date of judgement.
6. Aggrieved by the judgment of the trial court, the appellant filed its memorandum of appeal dated July 10, 2021 raising the following grounds:
  - i. That the learned trial magistrate erred in law and fact in adopting the wrong principles in assessment of damages for loss of dependency under *Fatal Accidents Act*.
  - ii. That the learned trial magistrate erred in law and fact in failing to take into account the appellant's submissions thereby awarding excessive damages in the circumstances.
  - iii. That the learned trial magistrate erred in law and fact in failing to take into account relevant factors/issues in reaching a determination on the global award/figure payable.
  - iv. That the learned trial magistrate erred in law and fact by failing to take into account the vagaries and vicissitudes of life in arriving at the global award.
7. The appellant therefore sought for the appeal be allowed and the subordinate court's judgement on the global award be set aside and be re-assessed downwards, and that the costs of the appeal be awarded to the appellant.
8. Vide the directions of this court dated July 26, 2022, the appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
9. The appellant through its submissions dated August 24, 2022 submitted that the appellant's contention with the trial court judgement is mainly on the award of damages for loss of dependency under the *Fatal Accidents Act*. Counsel contended that damages under the *Fatal Accidents Act* are meant for the benefit of dependents and in this case the deceased was a minor aged nine years old and who was dependent on his parents. It was submitted that in this instant appeal there was no loss of dependency in its literal sense and thus no award ought to have been made under the *Fatal Accidents Act* for loss of dependency. Counsel submitted that the appropriate award ought to have been made for lost years under the *Law Reform Act* and that the trial court correctly adopted the global sum approach in making a determination on the damages payable for lost years though the same were on the higher side. Counsel contended that the trial court ought to have taken into consideration the totality of the evidence adduced. Counsel relied on the case of *PI v Zena Roses Ltd & another* [2015] eKLR.



10. Counsel for the appellant further submitted that the award of Kshs 1,100,000/= in damages was excessive and should be set aside and re-assessed downwards. Counsel argued that an award of Kshs 500,000 to Kshs 600,000/= would have been sufficient in the circumstances. Counsel relied on the cases of *Chen Wembo & 2 others v IKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased))* [2017] eKLR and *Kengan Limited & another v Jane Nesunga Khala (Suing as the Personal Representative of Alex Wekesa Nyongesa (Deceased))* [2017] eKLR.
11. Vide submissions dated July 6, 2022, the respondent's counsel on whether the trial court's award was in error in law and fact submitted that despite the deceased being a minor, the same did not negate the fact that the trial court had power to award damages for loss of dependency. Counsel relied on the case of *Magundandu Company Ltd & another v Mwalukombe Myaka Mwamlongo & another* [2018] eKLR. Counsel submitted that the trial court did not adopt any wrong principle of law as it could not ascertain what the minor would have become in the future and what his earnings would have been and thus adopting the global award approach. Counsel relied on the case of *Makueni Courts Ltd & another v Felistus Kanini Ndunda (Suing as the legal representatives of the estate of Eric Mutuku)* [2020] eKLR.
12. On the issue that the trial court failed to take into account the submissions of the appellant thus making an excessive award, it was submitted that the trial court in its judgement did concur with the appellant's submissions when it adopted the global award approach. Counsel placed further reliance on the case of *Makueni Courts Ltd & another v Felistus Kanini Ndunda (suing as the legal representatives of the estate of Eric Mutuku)*.
13. On the issue of the trial court's failure to factor in the vagaries and vicissitudes of life when making its award, it was submitted that the appellant did not conform to the principles under section 107 of the *Evidence Act* and that the trial court did consider the same factors on vagaries and vicissitudes of life when arriving at the global award. Counsel placed reliance on the case of *Daniel Mwangi Kimemi & 2 others v JGM & SMM* Civil Appeal No 18 of 2014.
14. It was therefore submitted that this appeal should be dismissed with costs to the respondents as it is unmerited.

### **Analysis And Determination**

15. This is the first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am duty-bound to re-evaluate and reconsider the evidence adduced before the trial court in order to draw my own independent conclusions remembering that, unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See *Selle v Associated Motor Boat Company Ltd* (1968) EA 123; *Williamson Diamond Ltd v Brown* (1970) EA 1.
16. In this appeal, it is clear from the appellants' submissions that the appellant is only challenging the quantum of damages, to be specific, under the head of loss of dependency. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong



principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate).”

17. It was therefore held by the same court in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

18. Similarly, in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

19. I have considered the evidence tendered before the trial court, the learned trial magistrate’s brief judgment, the grounds of appeal, the submissions filed by the parties and all the authorities cited.

20. This being an appeal challenging the trial magistrate’s decision on quantum of damages only, it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with the damages awarded by the trial court. In the celebrated case of *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No 2)* [1985] eKLR, 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...”.

21. 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 amount 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...”.

22. It is the law in Kenya that general damages must be compensatory. When one looks at the impugned judgment, it must be fair in the sense of what the claimant suffered. In my view whether at the trial



- court or on appeal, claimants should not aspire to a perfect compensation. They should take what has reasonably been found by the court as a fair compensation since the said award cannot by any chance replace a damaged part of a human body but that the same suffices as the tortfeasor's earnest response (sorry for the accident).
23. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in the assessment of damages under the loss of dependency awarded to the respondent in view of the evidence on record. 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.
  24. At this stage, I wish to point out in passing that 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.
  25. I do stand guided by the principle that there is no golden rule in the assessment of damages in respect of a deceased. The heads, global or mixed approaches have been applied in the superior courts. What is beyond doubt is that irrespective of the age of a deceased, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents.
  26. Under the heading of pain and suffering, the trial court held that the deceased died on the spot and made the award of Kshs 50,000/= and relied on the case of [Acceler Global Logistics v Gladys Nasambu Waswa & another](#) [2020] eKLR. I do note that the appellant had no contention with this award. I, therefore, uphold the award by the trial magistrate.
  27. Under the heading of loss of expectation of life, the trial court held that the deceased died at the age of 9 years and made the conventional award of Kshs 100,000/=. The trial court relied on the case of [Chabhadiya Enterprises Ltd & another v Sarah Alusa Mwachi \(suing as the legal administrator and personal representative of the estate of the late Faiz Musa \(Deceased\)\)](#) [2018] eKLR. I do note that the appellant had no contention with this award. I, therefore, uphold the award by the trial magistrate.
  28. Under the heading of loss of dependency, the trial court held that the deceased was a minor aged 9 years and that it was not able to ascertain what he would have become in the future and his earnings. The trial court did adopt the use of a global figure award. The trial court relied on the case of [Daniel Mwangi Kimemi & 2 others v JGM & another \(the personal representative of the estate of NK \(DCED\)\)](#) [2016] eKLR noting that in this matter the child was of the same age as the deceased in this instant appeal and that the court did make a global sum award of Kshs 1,000,000/= under this heading for the same reason that earnings could not be ascertained. The trial court making reference to this matter proceeded to make an award of Kshs 1,100,000/= taking into consideration the inflation rate. The appellants contended that the same was excessive and an award of Kshs 500,000/= to Kshs 600,000/= would have been appropriate in this instant appeal. Counsel did rely on the case of [Kengan Limited & another v Jane Nesunga Khala \(Suing as the Personal Representative of Alex Wekesa Nyongesa \(Deceased\)\)](#) [2017] eKLR where the multiplier approach was set aside and a global sum of Kshs 500,000/= for the deceased who was aged 17 years and 6 months was adopted.
  29. The damages for death as a cause of action are pain and suffering, loss of expectation of life and loss of dependency. It is trite principle of law that in determining the amount to award in cases of loss or injury



as a result of negligence of another, the fundamental principle of law to be followed was enunciated by Lord Blackburn in *Livingstone v Raw Yards Coal Co* (1880) 5 App Case 25 at 39. As being

"...that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting his compensation or reparation. "

30. However, it should be noted that it is not easy to maintain consistency and achieve fairness to both the victim and the defendant at the same time without well-defined reference parameters unless the court awards damages on the basis of comparable awards in cases of similar nature. Lord Diplock in *Wright v British Railway Board* (1938) AC 1173, 1177, stated that; ...

"Non-economic loss...is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigation should be even handed instead of depending on idiosyncrasies of the assessor, whether judge or jury, the figure must be basically a conventional figure derived from experience and from awards in comparable cases." Be that as it may, this is a clarion call to the rules committee to set guidelines on conventional awards to be awarded by Kenyan courts just like the House of Lords has been setting guidelines on the conventional sums to be awarded by courts in the England and Wales, (See *Cramwell v Wilson* [1982] AC 27).

31. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR the Supreme Court held *inter alia*:

"The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue". Emphasis ours.

32. This court will not lose sight of the fact that even though money can compensate to an extent, it cannot create an experience to be the same as it were before the event giving rise to the action. Lord Morris in *West v Sheppard* [1964] AC 326 stated;

"All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation. "

33. Recent awards range between Kshs 200,000/- and Ksh 1,000,000 irrespective of the age of the deceased minor. In the case of *Board of Governors Friends School Kamusinga & another v MNS* (suing as administrator of the estate of IKS (deceased)) [2015] eKLR Kshs 6,000,000 was awarded in respect of the estate of a deceased minor.

34. In *Daniel Mwangi Kimani & 2 others v JGM & another (the personal representatives of the estate of NK (DCD))* [2016] eKLR Kshs 1,000,000 was awarded for loss of dependency in respect of the estate of a 9-year child.

35. As regards the case before this court, the evidence that was adduced by the respondent who testified as PW1 is that the deceased child was 9 years old in good health. Further, that he was in good health and performing well in school and had ambitions of becoming a doctor.



36. In my view, a child of the age like that of the deceased was capable of articulating his desires and there was a guarantee that his dreams of joining a given profession would be fulfilled. Guided by the decisions I have cited above, an award of Kshs 1,100,000 for loss of dependency was not excessive in respect of the estate of the deceased. Inflation is also a factor to be considered to ensure that the wrongdoer does not gain an advantage over the victim. I therefore uphold the award by the trial magistrate under this head of damages.
37. The appellant failed to discharge its duty under section 107 of the *Evidence Act* to warrant this court to interfere with the award of the trial court.
38. Lastly, on special damages, the respondent pleaded Kshs 156,100/=. The amount proved by way of receipts were the ones regarding the letters of administration and the demand notice and which were allowed as prayed. The appellant conceded a sum of Kshs 50,000/= in their submissions as funeral expenses which the trial court found to be reasonable. The trial court made an award of Kshs 105,000/= under this head. I do note that the appellant had no contention with this award. I therefore uphold the award by the trial magistrate.
39. The upshot is that the appeal lacks merit and that the same is dismissed. The lower court's award of Kshs 1,100,000/= as damages for loss on dependency is hereby upheld. The other amounts not being disputed shall remain undisturbed. The total sums shall attract 20% contribution. The respondent is awarded costs in this appeal as well as in the lower court.

It is hereby so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**D KEMEI**

**JUDGE**

**In the presence of:**

Miss Inwe for appellant.

No Appearance for Abok Odhiambo for respondent.

Kizito Court Assistant.

