



Atieno alias Phoebe & another v Onyango & another (Suing as the legal representatives of the Estate of Rose Akinyi Juma (Deceased)) (Civil Appeal 21 of 2017) [2022] KEHC 16810 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 21 OF 2017
RB NGETICH, J
DECEMBER 20, 2022**

BETWEEN

PHOEBE ATIENO ALIAS ODANGA PHOEBE 1ST APPELLANT

LEEMAN ONYANGO ODUO 2ND APPELLANT

AND

PAUL JUMA ONYANGO 1ST RESPONDENT

FELIX ONYANGO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ROSE
AKINYI JUMA (DECEASED)**

*(Being an appeal from the judgment of honourable Magistrate, L. Gicheha
in Nakuru CMCC No. 880 of 2014 delivered on 26th January 2017)*

JUDGMENT

1. This appeal arises from suit filed by the respondent as the plaintiff in the trial court. Plaintiff filed the plaint dated August 1, 2014 and amended on October 6, 2014 against the appellants seeking the following orders: -
 - a. Special damages at Kshs 143,700/=
 - b. General damages under the fatal accident act
 - c. General damages under the Law Reform Act
 - d. General damages for pain and suffering.
 - e. Costs of the suit.



- f. Interest on a, b, c and d at court rates
 - g. Any other relief the court deems fit.
2. From the plaint, the victim was a lawful passenger in motor vehicle registration No KAZ 455F Nissan Matatu while the driver of motor vehicle KBX602S negligently managed the motor vehicle KBX602S, thereby causing it to collide with motor vehicle KAZ445F at Kinungi Naivasha. Plaintiff blamed the driver of motor vehicle KBX602S for the accident.
 3. In response to the plaint, defendant filed the statement of defence dated September 22, 2014 and amended on October 29, 2014. The 2nd appellant denied all the averments in the plaint, the occurrence of the accident was denied but contended if the same happened it was solely on the negligence of the driver of motor vehicle KAZ 445F.
 4. After trial, delivered by honourable L. Gicheha delivered judgment on January 26, 2017 as follows: -
 - a. Apportioned 100% liability to the appellant for the injuries sustained by the respondent.
 - b. Awarded the respondent loss and dependency Kshs 2,464,000/=, pain and suffering Kshs 20,000/=, loss and expenditure Kshs 100,000/=, and special damages Kshs 143,500/=. A total sum of Kshs 2,727,500/=
 - c. Ordered the appellant to pay costs of the suit and interest.
 5. Aggrieved by the said judgment the appellant filed a memorandum of appeal dated February 22, 2017 citing the following five 5 grounds: -
 - a. That the learned trial magistrate erred in law and in fact in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.
 - b. That the learned trial magistrate erred in law and in fact in disregarding the appellants' submissions and on all points of fact and law in as far as the award of damages is concerned.
 - c. That the learned trial magistrate erred in law and in fact in awarding loss of dependency in the sum of Kshs 2,464,000/= by applying the wrong multiplier and basic salary payable and arrived at an erroneous award.
 - d. That the learned trial magistrate erred in law and in fact in awarding loss of expectation of life and pain and suffering in addition to the loss of dependency.
 - e. That the learned trial magistrate erred in law and fact in awarding a sum of Kshs 143,500/= and yet the same was not proved.
 6. Directions were given that the appeal is disposed of by way of written submissions, in which parties have complied.
 7. In the trial court, the appellants did not call any witnesses.

Appellant's Submissions

8. The appellants filed the submissions dated November 11, 2021 and submitted that the trial magistrate erred in awarding the appellants 100% liability despite the evidence on record; that the production of the police abstract and the traffic court proceedings doesn't amount to proof of negligence.



9. Counsel for appellant submitted that the driver of KAZ 445F Toyota Matatu also contributed to the accident.
10. On the issue of general damages, the appellant submitted that the trial court erred in arriving at the wrong principles to arrive at the high awards under the heading loss of expectation of life and loss of dependency. Under the loss of expectation of life, the award was inordinately high and contrary to the comparable recent decisions; and cited the case of James Gakinya Karienyé & another suing as personal representative of the Estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji where the court awarded Kshs 80,000/= for loss of expectation of life for death taking place immediately after the accident.
11. Counsel submitted that the award of Kshs 2,464,000/= under loss of dependency by the trial magistrate was too high in that, the deceased met his death at the age of 43 years and was an employee earning a salary of Kshs 30,000/= and expenditure of Kshs 28,200/= the remainder is Kshs 1,800/= and submitted that the trial court was supposed to adopt a salary of Kshs 1,800 in place of Kshs, 22,000/= and therefore the trial court applied the wrong multiplicand and the basic salary; that multiplicand of 10 years would be appropriate considering the age of the victim and the imponderables of life.
12. Counsel for the appellant further submitted that the trial magistrate failed to give a basis of how she arrived at the amount contrary to order 20 rule 4 of the Civil Procedure Rules and added that the trial court failed to consider the appellant's submissions and awarded damages that were too high; that an award of Kshs 80,000/= for loss of expectation and Kshs 144,000/= for loss of dependency was sufficient compensation.
13. Counsel submitted that the trial court ought to have deducted the amount awarded under the *Law Reform Act* from the sum awarded under the *Fatal Accidents Act* as the beneficiaries in both acts are the same and thus amounts to double compensation and urged this court to interfere with the award of Kshs 2,464,000/= under loss of dependency and deduct Kshs 100,000/= awarded for loss of expectation of life and Kshs 20,000/= awarded for pain and suffering.
14. On special damages of Kshs 143,500/=: the appellant submitted that the respondent only proved special damages of Kshs 103,500/= and urged court to allow the appeal to interfere with the trial court's award and substitute the same with the judgment of this court.

The Respondent's Case

15. At the hearing, the respondent testified as PW1. He testified that Rose Akinyi Juma was his wife, who died on December 31, 2013 aged 43 years. PW1 testified they had 7 children with the deceased who depend on them. He testified the wife was involved in a road traffic accident at Kinungi- Naivasha, while abode motor vehicle KAZ 445F, when the same collided with motor vehicle KBX 602S. for which the deceased sustained and suffered fatal injuries. The respondent blamed the drive of KBX602S for negligence. PW1 adduced in evidence a copy of the police abstracts.
16. According to the respondent, the 1st appellant was the registered owner of the motor vehicle KBX602S while the 2nd appellant was the driver, and thus an agent of the 1st appellant.
17. The respondent testified that the 2nd appellant the driver of KBX 602S was charged in Naivasha criminal case No 1 of 2014 and was fined Kshs 100,000/= and in the alternative 8 years' imprisonment. He adduced copies of the proceedings.
18. Further the respondent stated the deceased was in self-employment of selling and buying computer services earning a basic salary of Kshs 45,000/= to Kshs 50,000/=. The deceased had three casual



employees who used to earn about Ksh 5,000/=, Kshs 6,800, and Kshs7,800; he adduced a copy of the payout vouchers for the workers. He contends the deceased paid rent of Kshs 6,000/= per month.

19. It was the testimony of the respondent that he paid for the mortuary, post-mortem, and for the hearse to transport the body from Naivasha to Kisumu.

Respondent's Submissions

20. The respondent submitted that the award of Kshs 20,000/= for pain and suffering is adequate and it was in line with the appellant's submissions and the assertion that the court failed to consider the appellant's submissions do, therefore, hold water.
21. Counsel further submitted that the award of Kshs 100,000/= for loss of expectation of life is adequate considering the victim died on the same day the accident happened cutting short her life and cited the case of *David Kaburuka Gitau & Anor v Nancy Ann Wathithi Gitau & Anor* (2016) eKLR where Mativo J upheld an award of Kshs 100,000/= for loss of expectation of life for a deceased that died immediately after the accident.
22. In addition, counsel contends the case relied upon by the appellants was delivered in the year 2015, where the court awarded Kshs 80,000/= for loss of expectation of life, but the trial court considered the issue of inflation when arriving at an award of Kshs 100,000/=
23. Under loss of dependency, counsel submits the victim earned a monthly salary of Kshs 30,000/= after deduction of the expenditure of Kshs 28,200/=. Counsel argues it's illogical for the deceased to earn a monthly income of Kshs 1,800/= while paying salary and house rent of Kshs 6,800/=: Kshs 7,000/= and 6,000/=as alleged by the appellants.
24. Counsel submitted that the deceased used to support her family before her demise and urged the court to uphold the trial court's findings of dependency ratio of 2/3 and a monthly salary of Kshs 22,000/= using a multiplicand of 14 years as the deceased was 43 years at the time of his death.
25. Counsel further submitted that the award for loss of expectation of life and loss of dependency does not amount to double compensation and urged this court to uphold the findings of the trial court.
26. On the issue of special damages, counsel submitted that they were specifically pleaded and proved. The respondent attached the necessary receipts to support the claim. Counsel contends the court only awarded what was specifically proved and thus the award of Kshs 143,500/= is sufficient. Further, the assertion by counsel that special damages proved were Kshs 103,500/= was not proved.
27. Counsel urged the court to dismiss the appeal with costs.

Analysis And Determination

28. This is the first appeal, this court is under an obligation to re-evaluate the evidence of the trial court and come up with its own conclusion. The court must have in mind that it did not have the chance to hear or heard the witnesses. As was held in the case of *Okeno v Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) E.A 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957] E.A 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own



findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters v Sunday Post* 1978) E.A 424.”

29. I have looked at the appeal and the submissions by counsel for both parties. The issues for determination are: -
- a. Whether the trial court erred in awarding 100% liability to the appellants?
 - b. Whether the award of damages herein is excessive in light of the injuries sustained.
30. The award on assessment of damages is a discretion of the trial court and the appellant court will not interfere with the discretion of the trial court unless it is satisfied that the trial court awarded excessive damages. General damages are aimed to compensate the injured party. The compensation must be fair to the injured person.
31. An appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles.
32. In *Butt v Khan* [1982-88] KAR 1- the court held: -
- “ An appellate court will not disturb an award for damages unless it is 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”.
33. The appellant contends the trial court's award of damages under the head, loss of dependency was inordinately high, and the trial magistrate used the wrong multiplier. The trial court adopted a multiplier of 14 years and a ratio of 2/3, taking into account that the deceased earned a salary of Kshs 1,800/=.
34. In the trial court, the respondent adduced evidence that the deceased was self-employed and earning a salary of Kshs 50,000/= and Kshs 30,000/= after deduction of bills and payment of salary of the three employees. The respondent contends the trial court correctly adopted the multiplicand of Kshs 22,000/=
35. The deceased died at the age of 43 years, she was in self-employment, I know in self-employment retirement age could go beyond 70 years. therefore, I find the trial court considered the retirement age at 57 years and adopted a multiplicand of 14 years. At the hearing, the respondent contends the deceased helped in supporting the family and thus adopted a ratio of 2/3. Thus I find the trial court was appropriate in adopting the ratio of 2/3. On the issue of salary earned the deceased was in self-employment she paid salaries and bills, the respondent stated the deceased earned a salary of roughly Kshs 50, 000/= inclusive of the bills and salary to be paid. The deceased after clearing all the bills remained with a salary of Kshs 22,000/= which the trial court adopted.
36. In *David Makau v Maua Mutie Ndunda* [2014] eKLR, the court awarded a multiplier of 10 years where a deceased was aged 51 years.
37. In the instant appeal, I do not find the trial court adopted the wrong multiplicand. I thus uphold the trial court award on the heading loss of dependency.



38. On the issue of special damages, the respondent in the trial court pleaded for special damages of Kshs 143,700/= as follows: -Hearse serviced - Kshs.55,000/=Coffin - Kshs 35,000/=Corpse clothing - Kshs 18,000/=Advocates in Succ No 215 of 2014 Kshs 35,000/=Motor vehicle search - Kshs 500/=Police abstract - Kshs 100/=Death certificate - Kshs 100/=
39. At the trial, the respondent adduced the following receipts as proof of payments of the motor vehicle search Exhibit 9, a receipt from Rodi Orengo Advocate exhibit 10, a receipt for a coffin and corpse clothing paid to Ofunyu Jerusalem on January 14, 2014, MFI12, hearse services two receipts of Kshs 40,000/= dated January 2, 2014MFI13 the other for Kshs 15,000/= dated January 16, 2014 MFI 14
40. From the record, I do find the special damages pleaded and specifically proved are Kshs 143,500/=
41. The general rule is that for special damages they must be specifically pleaded and proved. I thus do not find the trial court erred in awarding damages of Kshs 143,500/=
42. On loss of expectations of life, the trial court awarded Kshs 100,000/= for pain and suffering. The appellant contends the award of Kshs 80,000/= is sufficient as the deceased died immediately after the accident. cited the case of James Gakinya Karienyé & another suing as personal representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji the court awarded Kshs 80,000/= for loss of expectation of life for death taking place immediately after the accident.
43. On the other hand, the respondent contends the award of Kshs 100,000/= is sufficient considering the inflation of time.
44. 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.”
45. With respect to the above decision, I find the trial court award was within the limits and the court having been called to exercise discretion to interfere with the trial court award of Kshs 100,000/=. I find the award was appropriate and thus I will not interfere with the finding of the trial court.
46. The appellant has further alleged that the trial magistrate disregarded their submissions. I have looked at the trial court judgment and I note the trial court did consider the arguments raised by the appellants, the only issue is the trial court did not agree with the appellants' submissions.
47. The other issue counsel has raised in the appeal is the trial court awarded damages under the heading of loss of expectation of life, pain and suffering and the loss of dependency thus amounting to double compensation.
48. The Court of Appeal in *Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased)) v Kiarie Shoe Stores Limited* [2015] eKLR, held as follows: -
- “This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough;



duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependents under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the *Kemfro case* (supra) which was heavily relied on by Mr Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another v Lubia & Another (No 2)* and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered. The Law Reform Act (cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in section 4 (2) of the Fatal Accidents Act are 'taken into account'. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." The deduction of the entire amounts made under the LRA, in this case, was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh 100,000 awarded for Loss of life expectation to Sh 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

49. From the above decision, there is no basis as to why damages for loss of expectation of life should be deducted from the award under loss of dependency. I thus do not find that the trial court erred in awarding loss of expectation of life of Kshs 100,00/=.
50. In the circumstances, I find the appeal filed herein lacks merit and the same is dismissed with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2022

RACHEL NGETICH

JUDGE

In the presence of

Martin - Court Assistant

No appearance for the parties

