



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 9 OF 2019

OYUGI JUMA JOSEPH.....APPELLANT

VERSUS

GRACE OMWANDA OGOLLA &

MARGARET ACHIENG SIREKA

(Suing as the legal representatives in

The estate of JANE AUMA (DECEASED).....RESPONDENTS

(Being an appeal from the Judgment/Decree from Bondo Principal Magistrate's Court Case No. 53 of 2017, delivered on 21.2.2019 before Hon. E.N. Wasike - Senior Resident Magistrate)

JUDGMENT

1. This appeal is against quantum of damages only as awarded by the trial Court, **Hon. E.N. Wasike, SRM** vide his judgment delivered on 21.2.2019 in **Bondo PMCC 53/2017**.
2. The Respondent's herein **Grace Omwanda Ogolla** and **Margaret Achieng Sereka** filed suit suing as legal representatives of the estate of the deceased **Jane Juma**, following a fatal road accident which occurred on 26.7.2015, wherein the deceased was knocked by the Appellant's motor vehicle succumbing to the injuries on the same day.
3. In his judgment which is impugned, the trial court entered judgment on liability against the Appellant in favour of the Respondents herein after a consent was entered apportioning liability at 90% : 10% in the Respondent's favour.
4. The only issue determined by the trial court in the judgment, of 22.2.2019 was quantum of damages for:

KShs.

Pain and suffering - 20,000.00

Loss of expectation of life - 100,000.00

Loss of Dependency - 168,840.00

Proven specials 21,180.00

Total 1,310,020.00

Less 10% contribution 131,002.00

Total award 1,179,018.00

Plus costs of the Suit.

5. Aggrieved by the above judgment and award, the appellant filed this appeal vide memorandum of Appeal dated 20th March 2019 and

lodged in court on 21.3.2019 complaining that:

- 1. That the award of damages in favour of the Plaintiffs was without any legal and/or evidential justification.**
- 2. The trial court failed to appreciate the long established principle of stare decisis, bringing the law into confusion and derived an erroneous finding/conclusion.**
- 3. The award of KShs.20,000/= for pain and suffering was made without any legal and or evidential justification.**
- 4. The award of KShs.100,00/= for loss of expectation of life was without legal or evidential justification.**
- 5. The award of KShs.1,158,860/= for loss of dependency was without legal/evidential justification.**
- 6. The award of KShs.21,180/= as special damages was without legal/evidential justification.**
- 7 a) the evidence adduced by the plaintiffs was incongruous with the pleadings.**
 - b) the pleadings and evidence could not sustain damages awarded.**
- 8 The damages awarded were excessive without regard to the Defendant's submissions.**
- 9 The damages awarded were excessive and beyond the scope of evidence and legal entitlement.**
- 10 The plaintiff did not prove damages Under the Law Reform Act and the Fatal Accidents Act.**

6. The appellant prayed that the appeal be allowed and the awards Under the **Fatal Accidents Act** and the **Law Reform Act** be assessed afresh. He also prayed for costs of the Lower Court and of this appeal.

7. This being a **first appeal, as required under Section 78 of the Civil Procedure Act** and espoused in the case of **Sielle Vs. Associated Motor Boat Company Limited [1968] E.A. 123**, I must reconsider the evidence afresh, evaluate it and draw my own conclusion though I should always bear in mind that I neither saw nor heard the witnesses as they testified and hence I must make an allowance in that respect.

8. Revisiting Evidence adduced in the trial court, PW1 Grace Omwanda Ogolla gave sworn testimony and stated that the deceased Jane Akinyi, was her sister's daughter and that PW1 was the guardian as the deceased was born before her mother Margaret Achieng got married hence PW1 took custody and care of the child until she was about 25 years. She stated that she learnt on 26.7.2015 at about 3 p.m. that the deceased had been knocked by a vehicle and when she rushed to the scene she found the deceased already taken to hospital at Bondo District Hospital and on her following up and arrival, PW1 found the deceased already dead. A post mortem was conducted on 5.8.2015 and PW1 reported the matter to the police and a police abstract dated 18.8.2015 was issued.

9. PW1 produced certificate of insurance, Chief's letter dated 11.9.2015 and death certificate for the deceased as exhibits. She also produced as exhibits grant of letters of administration ad litem dated 3.5.2017, demand letter and 2 receipts for KShs.21180 for funeral expenses.

10. PW1 stated that the deceased was survived by an 8 months old child and prior to her death she used to do casual jobs earning about KShs 6000 per month and that she used to assist her mother, PW1 and her child. She prayed for compensation plus costs.

11. In cross-examination, PW1 stated that the deceased had 5 other siblings and had a small child hence she had not resumed work. Further that PW1 had no documents showing the deceased's earnings.

12. PW2 No. 72471 Sgt. Silas Cheror the in-charge of Traffic, Bondo testified that the Police Station received a report of a fatal accident involving Motor vehicle Registration No. KWT 874 Toyota Hilux being driven by Joseph Juma at Bondo-Misori road at Owens area and injured 3 other pedestrians. He produced a Police abstract as an exhibit.

13. On 18.10.2018 the parties advocates entered a consent on liability at 90:10 in favour of the Plaintiff against the Defendant and judgment was later delivered on 22.2.2019.

SUBMISSIONS

14. This appeal was canvassed by way of written submissions. The appellant's Counsel filed on 7.9.2020 whereas the Respondent's submissions were filed on 21.9.2020.

15. The judgment was to be delivered on 18.11.2020 but due to my bereavement, the same was rescheduled to this date.

16. In support of the appeal challenging each of the awards made by the trial court in favour of the Respondent against the Appellant, the appellant's Counsel submitted that:

- 1) As the deceased died on the same day of accident, an award of KShs.10,000/= would suffice and not**

KShs.20,000/= awarded.

He relied on K.R.C. Vs. Samuel Magwe Gioche [2012]eKLR.

2) On the award for loss of expectation of life, the Appellant's Counsel submitted that a figure of KShs.60,000/- would have been sufficient as opposed to KShs.100,000 awarded. The case of Wanjiko Kaluga & Elizabeth Murugi Kaluga (dcd) Vs. World Vision Kenya & 2 Others [2014]eKLR was relied on.

3) On loss of dependency it was submitted that the Respondent never proved dependency and the deceased's earnings prior to her demise. Reliance was placed on Arthur Nyamwate Omutondi & Others Vs. United Millers Ltd & 2 Others [2009]eKLR where Mwera – J stated that if income is not proved and if dependency is not proved, no award can issue.

17. The appellant's Counsel further submitted that should this court find that dependency was proved then the award made should be varied and the multiplicand, multiplier and dependency ratio used/considered. The appellant submitted that the dependency ratio of 2/3 adopted by the trial court was not applicable or justifiable since there was no direct proof of dependency on the deceased by the Respondents hence 1/3 would be reasonable. Reliance was placed on **Benedeta Wanjiku Kimani versus Changwon Cheboi & Another [2013]eKLR** where it was held, citing **HCC 1438/1998 – Beatrice Wangu Thaim Vs Hon Ezekiel Barngetuny** that there is no rule that 2 thirds of the income of a person is taken as available for family expenses. That the extent of dependency is a question of fact to be established in each case.

18. On special damages it was submitted that the receipts produced for KShs.21,180 had no revenue stamps contrary to **Section 19(1) of the Stamp Duty Act**. Reliance was placed on **Bernard Nyongeo versus Danck Ngula Righo [2013]eKLR**.

19. Opposing the appeal, the Respondent's Counsel filed written submissions on 21.9.2020 contending that-The appeal was fatally defective as the record of appeal is in-complete and as such the appeal cannot be canvassed on merit and should be struck out because - **The Plaintiff's list of documents as annexed to the plaint lacks copies of identification cards, demand letter, letters of administration ad litem and certificate of insurance; Reply to defence and pre-trial questionnaire; Plaintiff's exhibits 3, 6, 7; Authorities annexed on the plaintiff's written submissions; A decree.**

20. Counsel relied on **Section 79G of the Civil Procedure Act Order 42 Rules 12, 13(4) 33, 35 of the Civil Procedure Rules** to support his contention and the cases of **Ndegwa Kamau t/a Sideview Garage versus Fredrick Isika Kalumbo [2018]eKLR** and **Prime Rock Company Ltd versus Joseph Mwangi Ndegwa [2019]eKLR**.

21 He argued that the appellant was only served with a record of appeal after being filed on 12.11.2019, 8 months after filing of memorandum of appeal which was out of time without seeking leave to extend time for service of the same. He urged the court to strike out the appeal in limine.

22. On the grounds of appeals it was submitted that:

1) The award of KShs.20,000/= for pain and suffering was justified. Reliance was placed on Kimunya Abednego versus Ziporah S. Musyoka and Another [2019].

2) On the award of KShs.100,000 for loss of expectation of life, it was submitted that the award was conventional. Reliance was placed on Florence Mumbua Ndoo and Another versus Ezra Koiri Kepngeno and Another Court of Appeal 158 of 2011.

3) On the award for loss of dependency it was submitted that the award was justifiable as the evidence adduced was that the deceased left a 2 year old baby, mother and grandmother and earned KShs.6,000/= was not rebutted. Reliance was placed on Nelson Rintari Versus CMC Group Limited [2015]eKLR

23. On the award of special damages, it was submitted that there was no objection to the production of the receipts for KShs.21280 being funeral expenses and that the issue of stamp duty was never raised at the trial hence it was an afterthought. Reference was made to the **Kimunya Abednego (supra)** case. Counsel prayed for dismissal of the appeal with costs.

DETERMINATION

24. I have considered the appeal herein, the evidence adduced before the trial court, the grounds of appeal, submissions for and against the appeal and the legal authorities relied on.

25. In my humble view, the main issue, with ancillary questions, to be resolved, is whether the quantum of general and special damages awarded to the Respondent by the trial court was legally justifiable.

26. This being an appeal against quantum of damages alone, the commencement point is whether this court should interfere with an award of damages made by the trial court, such decision being a discretionary one.

27. It is trite Law that an assessment of damages is a matter of Judicial discretion which an appellate court should not disturb unless the same was inordinately low or high as to be an erroneous estimate of damages (see **Loice Wanjiko Kagunda versus Julius Gachachu Mwangi Court of Appeal 142 of 2003**).

28. In **Kemfro Africa Limited trading as Meru Express service and Gathogo Kanini versus A.M. Lubia and Olive Lubia (1982 – 88)**1 KAR 727 P. 730, Kneller – J. stated:

“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 court were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that the 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 high that it must be a wholly erroneous estimate of the damage. See Kanga versus Manyoka [1961]E.A. 705, 709, 713, Lukenya Ranching and Farming Co-operative Society Limited versus Kavoloto [1970]E.A. 414, 418, 419. This Court follows the same principles.

29. See also **Gicheru versus Morton and Another [2005] 2 KLR, 333** and **Major General Peter M. Kariuki versus Attorney General Court of Appeal 79 of 2012**.

30. In the instant case, the trial magistrate found that the deceased died on the same day of the accident and that she must have experienced some excruciating pain as she died a couple of hours after the accident. He awarded KShs.20,000 for pain and suffering.

31. The evidence of PW1 is that the deceased died on the way to hospital. This is according to the post mortem dated 5.8.2015. However, PW1 testified as per her witness statement filed on 14.6.2017 *that “Jane died on the spot while the other pedestrians were injured.”*

32. In an Article in the **International Review of Law and Economics: Pain and Suffering in product Liability Cases. Systematic compensation or capricious Awards** by W. Kip Vicussi, it is argued:

“Pain and Suffering is generally recognized as being legitimate component of compensation but one for which we have not accepted procedure of measurement. Pain and Suffering is by no means a negligible component of awards. The general implication is that pain and suffering awards are not entirely random or capricious.”

33. In **Rose versus Ford**, it was held that where the period of suffering is short, only nominal damages are awarded. The decision above was made in 1935 were 500 pounds then were awarded for a two days suffering.

34. The question is whether KShs.20,000/= awarded by the trial court was excessive or inordinately high as the deceased died on the same day of the accident and before she reached the hospital, from the post mortem report produced in evidence. The other question is whether that award is erroneous or unreasonable.

35. In **Sukari Industries versus Clyde Machumbo Jumbo Juma H.B.[2016] eKLR** the court held:

“On the first issue, I hold that 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 estate is entitled to compensation. The generally accepted principle is that normal 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 and before death. 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 KShs.50,000/= awarded under this head is unreasonable.”

36. The trial court awarded KShs.20,000 for pain and suffering as the deceased died the same day of accident. I find this award reasonable and not excessive. I find no reason for interfering with the award. I uphold it.

37. On loss of expectation of life, there was no dispute and the death certificate for the deceased showed that the deceased was aged 25 years. The trial court awarded KShs.100,000/=, which the Appellant claims was unjustified. In **Paul Ouma versus Sarah Akinyi and Monica Achieng Were(suing as legal Representative of the estate of Paul Otieno were (deceased) [2018]eKLR**, the court held:

“On loss of expectation of life, the trial court awarded KShs.140,000/= which the appellant urged is excessive and should be reduced to KShs.70,000/=. The Respondent did not agree. The appellant has not urged why an award of KShs.140,000/= is excessive for loss of expectation of life for the deceased who died at the age of 26 years. The death certificate produced as an exhibit reveals the deceased died at the age of 29 years. I have considered the authorities relied upon and evidence on record and find an award of KShs.100,000/= for loss of expectation of life would be proper.”

38. The above decision was cited by **Ndungu – J in Civil Appeal No. 74 of 2019 in Zakary Abusa Magoma versus Julias Asiago Ogembo and Another** where the learned Judge upheld the award of KShs.100,000/= for loss of expectation of life for a deceased who died aged 28 years old.

39. The Respondents pleaded that the deceased Jane Auma was aged 25 years at the time of her death and that she was a house help worker and survived by her 2 year old daughter, her 44 year old mother and her 70 year old grandmother her dependant. In her testimony, the plaintiff testified that the deceased was a casual worker. The court believed the evidence that the deceased was a house help and adopted the multiplier of 25 years and a multiplicand of 5,844.20 being minimum wage for general workers pursuant to Legal Notice No. 117 of 2015. He also adopted the dependency Ratio of 2/3 to arrive at KShs.1,168,840 for loss of dependency.

40. As correctly stated by the trial Magistrate there was no records of the deceased’s earnings. The claim for loss of dependency is a claim under **Section 4(1) of the Fatal Accidents Act** which provides:

“Every action brought by virtue of the provision of this Act shall be for the benefit of wife, husband, parent and child of the person whose death was so caused.”

41. However, **Under Section 2 of the Fatal Accidents Act**, which is the interpretation Section:

“Child means a son, daughter, grandson, granddaughter, stepson or step daughter; Parent means a father, mother grandfather, grandmother, a step father or step mother”

42. In my humble view, in the absence of any evidence of the actual earnings by the deceased, the trial magistrate was correct in applying the **Regulation of wages (General) Amendment Order, 2015**. Under the said Regulation, the deceased would fall under the category of general labourer, whose minimum wage would be KShs.5,844.20 which sum is below the taxable income. In **Philip Mutua versus Veronicah Mule Mutiso [2013]eKLR**, the court found that where income is not proved, the income of an unskilled worker ought to apply.

43. In my humble view, the deceased’s child wholly depended on her mother. On the other hand, it is not expected that the deceased with her income of KShs.5,844.20 would expend 2/3 of it to her mother and grandmother and her young child of 2 years for a very long time. Accordingly, I find that the dependency ratio of 2/3 was not supported.

44. On the multiplicand, the trial court applied 25 years meaning the deceased was expected to work until 50 years. I find the multiplicand of 25 years excessive. I set it aside and apply 20 years as was held in **Civil Appeal No. 59 of 2018 Mumbi Ngumbi Kasamu versus mutual Mulaa and Another [2019]eKLR where Odunga – J** applied a Multiplicand of 20 years where the deceased, a casual labourer died aged 25 years. I adopt the same multiplicand as reasonable. Therefore, loss of dependency would be **5,844.20 x 20 x 1/3 x 12 =467,536. .**

45. On special damages, the appellant claims that the receipts produced had no stamp duty affixed hence not admissible. The Respondent produced an official court receipt for KShs.1,180/= being court fees paid on 5.4.2017 for succession cause No. 97 of 2017 being for a limited grant. She also produced a receipt for KShs.20,000/= being professional fee to obtain letters **ad litem**. The receipt is dated 19.8.2018 issued by her Counsel Geoffrey Okoth and Company Advocates. In my humble view, no stamp duty is necessary for fees paid into court as the money goes into the exchequer.

46. The limited grant was however issued **on 3.5.2017** whereas the receipt by the advocate is dated **19.8.2018** over one year later. The said receipt states categorically that the fee was professional fee **to obtain** letters **ad litem**. It does not state **“professional fee for obtaining letters ad litem”** In my humble view, that receipt is not a genuine receipt for purposes of legal fees charged for obtaining Limited grant as the grant to be obtained was already in place by the time that fee was alleged paid nearly one year later. Furthermore, no stamp duty is affixed. Therefore, albeit pleaded, the claim of KShs.20,000/= was not strictly proved. The same should have been declined. I hereby set it aside and allow only KShs.1180 paid into Court on 5.4.2017 being court fees for limited grant.

47. The Respondent’s counsel raised several objections to the competency of the appeal. Having considered the said objections, I find them not merited as the Respondent did not raise issues of the record of appeal not being complete or failure to serve him with memorandum of appeal within time, which memorandum was in the record of appeal, at the time of giving of directions by the court. Furthermore, the objections are mere procedural technicalities curable by application of the overriding objective of the law and Article 159 of the Constitution. Accordingly, the objections are hereby dismissed.

48. On the whole, this appeal succeeds only to the extent that the award for loss of dependency is set aside and substituted with an award of KShs.467,536 using a multiplier of 20 years, a multiplicand of 5,844.20 and dependency ratio of 1/3.

49. In addition, I set aside the award of special damages. In the sum of KShs.21180/= and substitute it with an award of KShs1180 only. In the end, there shall be judgment for the Respondent against the appellant in the following terms:

Pain and Suffering Kshs.	20,000.00
Loss of Expectation of life	KShs.100,000.00
Loss of Dependency	KShs.467,536.00
Total	<u>KShs.587,536.00</u>
Less 10% contribution	<u>KShs.166,753.06</u>
Add Special Damages	KShs. 1,180.00
TOTAL DAMAGES	<u>KShs.419,602.00</u>

50. As the appellant has only succeeded in the reduction of damages for loss of dependency and Special damages which reduction is nonetheless substantial, I order that each Party shall bear their own costs of this appeal.

51. The Respondent shall however, have costs of the lower court based on the re-assessed damages, together with interest on the re-assessed damages from date of judgment in the lower court(in the case of general damages and in the case of Special Damages, interest accrues from the date of filing suit until payment in full.

52. It is so ordered.

53. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF NOVEMBER, 2020

R.E. ABURILI

JUDGE