



Dijitech Enterprises Limited & another v Nyakeno & another (Suing as the Administrators of the Estate of William Omondi Ochieng (Deceased)) (Civil Appeal E034 of 2024) [2025] KEHC 2714 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E034 OF 2024
AB MWAMUYE, J
FEBRUARY 6, 2025**

BETWEEN

DIJITECH ENTERPRISES LIMITED 1ST APPELLANT

HAPEX CONTRACTORS LIMITED 2ND APPELLANT

AND

SHARON ACHIENG NYAKENO 1ST RESPONDENT

DALMAS OCHIENG NJAGE 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF WILLIAM OMONDI OCHIENG (DECEASED)

(Being an appeal from the Judgment and Decree of Hon. Robert M. Oanda (SPM) delivered on 17th January, 2024 in WINAM Civil Suit No. E197 of 2022)

JUDGMENT

1. The Appellants herein have approached this Court aggrieved by the judgment of the Trial Court delivered on 17th January, 2024 in WINAM Civil Suit No. E197 of 2022. The Memorandum of Appeal dated 17th February, 2024 has five Grounds of Appeal which revolve around one issue of award of quantum. The Trial Court awarded damages amounting to Kshs.3,267,982.40/= in favour of the Respondents after apportioning liability at 80%:20% against the Appellant as per the consent of the parties. The Appellants being dissatisfied by the quantum of damages awarded, contends that the Trial Court erred in awarding inordinately high damages, failing to consider relevant facts, evidence and applicable legal principles.
2. The Appellants filed their written submissions dated 6th November, 2024 while the Respondents filed their written submissions dated 8th October, 2024.



3. In their written submissions, the Appellants argues that the quantum awarded was inordinately high and the Trial Magistrate ignored material facts, their submissions and applicable legal authorities. The Appellants sought a quantum reduction. They relied on several authorities which I have considered. They urge this Court to set aside the judgment of the Trial Court and substitute it with Kshs.339,601.6/= as quantum for damages.
4. The Respondents in their written submissions maintained that the Trial Court's findings were supported by the record and consistent with established case laws and that the award was neither excessive nor based on any misapprehension of the evidence. To buttress their case, they relied on several authorities urging this Court not to interfere with the judgment of the Trial Court.
5. I have examined the judgment of the Trial Court in light of the testimony given and the evidence tendered by the parties during the Trial, and have considered the pleadings and submissions filed at this appellate stage. The issues to be determined by this Court is whether the amount awarded is so inordinately high that it is an entirely erroneous estimate of the Respondent's entitlement.
6. This being a first appellate Court, I am guided by the dictum in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate Court has to re-consider and re-evaluate the evidence that was tendered before the Trial Court, assess it and make its own conclusions in the circumstances.
7. The principles on which an appellate Court will disturb an award of damages are well settled: That an appellate Court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the Trial Court took into account irrelevant factors in assessing the damages. It was held in the case of *Butt v. Khan* Civil Appeal No. 40 of 1997 thus: -

“An appellate Court will not disturb an award of 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 arrive at a figure which was either inordinately high or low.” See also *Kemfro Africa Ltd and Another vs A.M. Lubia & Another* (1982-1988)
8. Intervention is justified only if it is evident that the Trial Court acted on wrong principles, misapprehended the evidence, or awarded an amount that is inordinately high or low, suggesting an erroneous estimate.
9. On the issue of pain and suffering, the appellants contends that the deceased died on the spot, and thus, an award of Kshs.10,000/- would have sufficed. However, the evidence adduced, particularly the post-mortem report and death certificate, shows that the deceased succumbed six days after the accident. Courts have consistently held that the longer the deceased survived after an accident, the higher the award. (See *Mayfair Holdings Ltd v Christine Rutto* [2018] eKLR). Similar decisions have recognized that even when the period of suffering is relatively short, the award must compensate for the intensity of pain endured prior to death. The Appellant's argument that the award is inordinately high fails to establish that the figure is wholly erroneous. The Court is not persuaded that the Trial magistrate's award for pain and suffering was based on any misapprehension of evidence or an erroneous application of law. The Trial Court's award aligns with *Bon Ton Limited v Beatrice Kanaga Kereda suing as Administrators of Estate of Richard Alembi Ochenga (Deceased)* [2018] eKLR where Kshs. 200,000/- was upheld where the deceased died after one week in hospital. Given the deceased's six-day survival, Kshs.100,000/- is reasonable and upheld.



10. Under the *Law Reform act*, In *Rose vs Ford*, (1937) AC 826 it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in *Benham vs Gambling*, (1941) AC 157 it was further held that only moderate awards should be granted under this head for the following reasons:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

11. 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.
12. The Trial Court awarded Kshs.100,000/- for loss of expectation of life. The Appellants submits that, given the deceased's age of 22 years and the lack of clear evidence regarding his earnings and future prospects, the award should be reduced to an alternative figure of Kshs.60,000/-. He placed reliance on the case of *Mohamed Abdi Ali v Paul Muturi Mwangi* (2019) eKLR. However, the evidence on record including the death certificate and witness testimony supports the proposition that the deceased, despite being young, had a tangible prospect of future earnings and a longer productive life.
13. The appellant has not demonstrated that the Trial magistrate misapplied the law or misapprehended the evidence on this head. The mere fact that the deceased was only 22 years does not, in itself, justify a lower figure when weighed against the loss of future earnings and life prospects. Courts have consistently awarded Kshs.100,000/- or more for young adults. (See *Joseph Gatone Karanja v John Okumu Soita* [2022] eKLR). Therefore, I find the award is fair and is upheld.
14. On loss of dependency, the appellants challenge the multiplicand, multiplier, and dependency ratio applied by the Trial Court. The Trial magistrate adopted a multiplicand of Kshs.15,383.45/- based on the Regulation of Wages (General) (Amendment) Order 2018, considering that the deceased was an informal tailor without proof of income. The appellants proposed Kshs.5,744.20/- based on the 2015 Regulation of Wages. It should be noted that the law moves in a retrospective way and not non-retrospective way. Courts have established that where there is no proof of earnings, the minimum wage applicable at the time should be used. (See *Beatrice Murage v Consumer Transport Ltd* [2014] eKLR). As the deceased was described as a tailor assisting his father, the Trial Court correctly applied the 2018 wage order and I find no reason to interfere with that decision.
15. The Trial Court applied a multiplier of 30 years. The appellants proposed 15 years, arguing that the deceased was unskilled and uncertain of working up to 60 years. The retirement age in Kenya is at 60 years. However, the deceased was 22 years old and, barring unforeseen circumstances, could have worked up to at least 55 years, the Trial Court applied a multiplier of 30 years. Courts have upheld multipliers of 25–30 years for persons in their early twenties. (See *Muthike Muciimi Nyaga v Dubai Super Hardware* [2021] eKLR). The Trial Court's application of 30 years is within reasonable limits and is upheld.



16. The Appellants contends that the Trial magistrate erred by attributing dependency to persons who were not proved to have been maintained by the deceased, and alternatively suggests a calculation based on a lower dependency ratio. However, the chief's letter and evidence of PW1 establish that the deceased had a wife and child. Courts have stated that a chief's letter suffices as proof of dependents in fatal accident claims. (See Ngania *Et 2 others v Adulu (Suing as the Legal Representative of the Estate of Clinton Morgan Kiprotich) Civil Appeal E005 of 2023*[2024] KEHC 4005 (KLR))

The Respondents have demonstrated through the chief's letter and other evidence that the deceased was married and had a child, which justifies the use of the 2/3 dependency ratio. The dependency ratio of 2/3 is therefore upheld.

17. On double compensation, the appellants argues that the award under the *Law Reform Act* (pain and suffering and loss of expectation of life) should be deducted from the *Fatal Accidents Act* award. In *Mercy Muriuki & Uwezo DTM Limited v Samuel Mwangi Nduati & anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) (Civil Appeal 194B of 2016) [2019] KEHC 9014 (KLR)*, the Court held as follows:

“On the issue of double compensation as raised by the appellant's counsel and having read the Court of Appeal decision in *Kemfro* (supra) I do not find the interpretation assigned by the Appellants' counsel on the issue acceptable. The counsels have argued inter alia that: -

“where a claim is made under both the *Fatal Accidents Act* and the *Law Reform Act*, and where the claimant succeeds in both, the award under the *Law Reform Act* must be deducted in full from the award made under the *Fatal Accident Act* as the deceased's estate cannot benefit twice.”

33. With respect, that is not the dictum of the *Kemfro* case. The brief passage in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR* quoted on this appeal by the Appellants does not do justice to the true import of the dictum therein. I therefore find it necessary to quote in extenso what the Court of Appeal said in *Hellen Waruguru* (supra) on the matter.

34. The learned judges of appeal had this to say:

“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 dependants 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 *Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- 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 dependants 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.....”

35. In my considered view, it would be a futile exercise for a Court to labour to make an award under the Law Reform Act and then proceed to deduct it from the award under the Fatal Accidents Act. Effectively such deduction would nullify the benefits intended by the two Acts of Parliament for deserving claimants.
36. It is my finding that the Trial Court herein was entitled to make awards under both the Law Reform Act and the Fatal Accidents Act.”

This Court inclines with the above provisions and therefore this ground fails.

18. Special damages must be pleaded and proved with precision. The respondents pleaded a sum of Kshs.192,950/- and supported this claim with documentary evidence by way of receipts and other records tendered at Trial which is also attached on the record of appeal. The Appellant argues that the amount should be reduced to Kshs.149,850/- on the basis that the receipts do not add up to the claimed figure. However, on careful review, the Trial magistrate’s finding that the respondents had established their claim for special damages is supported by the record. The principle that special damages must be both pleaded and proved has been clearly enunciated in authorities such as Hahn v Singh and Macharia & Waiguru v Muranga Municipal Council. The Court of Appeal in Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 held that: -

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is called upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

19. Also, in Abdalla Ali Abdalla v Teita Estate Ltd [2004] eKLR, the Court held that: -

“The second issue relates to the proof of special damages. Counsel for the Applicant submitted that special damages must be specifically pleaded and strictly proved. He is



correct. That is trite law. However, he is wrong in his submission that these were not proved merely because the vouchers presented were “invoices” and not “receipts”. The invoices exhibited show the stamp mark “paid” with an indication of the cheque number and date of the payment. What more “proof” of payment did the Appellant expect? I am satisfied that the special damages were pleaded and proved.”

In this instance, the evidence tendered was found sufficient by the Trial Court, and the Appellants have not demonstrated any error or proof the same in this regard and therefore the award is upheld.

20. The Trial Court appropriately deducted 20% on the basis of the parties’ contributory liability. There is no dispute in the record that liability was apportioned on an 80:20 basis. The deduction is proper and needs no further comment.
21. In assessing the quantum of damages, this Court reiterates that an appellate Court should only interfere where there is clear evidence of a wrong principle being applied or a manifest misapprehension of the evidence. In the present case, the Trial magistrate’s award is supported by a detailed record, by documentary and oral evidence, and by a considered application of relevant legal principles and precedents. The Appellant’s submission that the award is inordinately high does not meet the required threshold for appellate interference. Rather, the detailed submissions of the Respondents and the authorities relied upon clearly demonstrate that the Trial Court’s awards are within the permissible range.
22. In the premises, I find the appeal lacks merit and is dismissed with costs. The Trial Court judgement delivered on 17th January, 2024 is hereby upheld.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF FEBRUARY, 2025.

BAHATI MWAMUYE

JUDGE

In the Presence Of:

Counsel for the Appellants – Mr. Njoga

Counsel for the Respondents – Mr. Okoth

Court Assistant – Mr. Guyo

