Momanyi v Otwoma & another (Suing as the Legal Representative of the Estate of AMO - DeceasedSuing as the Legal Representative of the Estate of AMO - Deceased) (Civil Appeal 140 of 2019) [2025] KEHC 2971 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2971 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 140 OF 2019

RN NYAKUNDI, J

FEBRUARY 17, 2025

BETWEEN

WYCLIFFE MOMANYI ..... APPELLANT

AND

DANIEL ABSOLOM OTWOMA ..... 1ST RESPONDENT

CATHERINE MBAISI MACHUMA ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF AMO - DECEASEDSUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF AMO - DECEASED

(Appeal from the Judgment and Decree of the Chief Magistrate Honorable C. Obulutsa in Cmcc No. 1120 of 2017 Eldoret delivered on 20th September 2019)

JUDGMENT

1. The respondent herein had sued the appellant at the lower court seeking for special damages and damages under the *Fatal Accidents Act* and the *Law Reform Act* after the respondents' son was killed in a road traffic accident involving the appellants' motor vehicle. Parties entered consent on liability in the ratio of 80:20 in favour of the respondent. The trial magistrate proceeded to assess the damages and entered judgment for the respondent as follows:

    Pain and suffering – Kshs. 100,000/=

    Loss of dependency - Kshs. 1,809,640/=

    Special damages - Kshs. 288,010/=

    Kshs/=2,197,650

Less 20% contribution Kshs. 439,530/=

Total Kshs. 1,758,120/=

2. The appellant was aggrieved by the judgment and filed a memorandum of appeal on the 14th October 2019 on the grounds that:

    1. That the learned trial magistrate erred in law and in fact by awarding a sum of Kshs. 100,000 for pain and suffering a sum which was excessive and not supported by the evidence on record.

    2. That the learned trial magistrate erred in law and in fact by adopting a Multiplier approach in the absence of proof of earnings as opposed to adopting a global award in contravention of the laid down principles.

    3. The learned trial magistrate erred in law and in fact by adopting a Multiplicand of Kshs. 12,926 which was excessive and not supported by the evidence on record.

    4. The learned trial magistrate erred in law and in fact by failing to consider that the deceased was a minor aged 6 years and thereby adopting a multiplier of 35 years which was excessive and not supported by any evidence on record.

    5. The learned trial magistrate erred in fact and in law in failing to consider the defendants submissions and authorities supplied on the issue of quantum.

    6. The learned trial magistrate erred in fact and in law in failing to consider the evidence that was tendered on quantum during the hearing of the suit.

    7. The learned trial magistrate erred in fact and in law in relying on extraneous circumstances not supported by the evidence on record.

    8. The learned trial magistrate erred in fact and in law by awarding special damages of Kshs. 288,010 which were strictly proved.

    9. The learned trial magistrate erred in fact and in law by awarding a net sum of Kshs. 2,197,650 which was excessive and in contravention of the principles for award of damages.

3. The appellant's prayer is for this Court to allow the appeal with costs and that the finding on the issue of quantum be discharged and set aside with costs to the appellant.

4. At the hearing of this appeal, directions were taken to have both counses file their respective submissions.

Background

5. The Respondents filed suit against the Appellant vide a plaint dated the 21st October 2017 for general damages under the *Law Reform Act* and the Fatal Accident Act, special damages, costs of the suit and interest thereof arising from a road traffic accident which was alleged to have occurred on or about 11th June 2017 while the deceased (minor) was walking as a pedestrian along Eldoret -Kitale road at Baharini, , when Motor Vehicle Registration Number KCB 491Z lost control and knocked down the minor as a result whereof the deceased sustained fatal injuries.

6. The Respondents alleged that the motor vehicle was negligently driven and particulars of negligence were set out. They sought compensation under the *Law Reform Act* and the Fatal Accident Act, burial expenses, special damages and costs of the suit and interest thereof. Catherine Mbaisi Machuma testified as PW1 and called two other witnesses in furtherance of their case.

7. The Appellant on the other hand filed a defence dated 6th February 2018. A consent was recorded on liability was recorded at a ratio of 80:20 in favour of the respondents.

Submissions at trial

8. The respondents filed their submissions on 2nd August, 2019. They submitted that the issue of liability had been settled as parties recorded a consent in favor of the plaintiffs against the defendants at 20:80.

9. On the issue of quantum, Mr Murithi, advocate for the Plaintiff submitted that the claim was brought under the Law Reforms Act for the deceased's estate and under the *Fatal Accidents Act* for the benefit of the dependants of the Estate of the Deceased.

10. Under the head of pain and suffering, counsel submitted that from the evidence on record, the deceased passed on while undergoing treatment at Moi Teaching and Referral Hospital and must have undergone excruciating shock, pain and suffering before his untimely death.It was submitted that from the death certificate produced by the plaintiff, the deceased died of " severe headache injury due to blunt force trauma due to road traffic accident"

11. Counsel relied on the case of Maurice Odiwuor Ogada (Suing as personal representative of the estate of Dorothy Anyango Vs John Jumu Obungo & Another where the deceased did not die instantly an award of Kshs. 100,000.00 for pain and suffering. They urged that due to inflation Kshs. 100,000.00 was fair and reasonable.

12. On loss of expectation of life, it was submitted that a conventional figure of Kshs. 210,000 was sufficient since the deceased was aged 6 years and in superb health. They relied on the case of Daniel Kuria Nganga (Suing as personal representative of the estate of Samson Njoroge Kuria Vs Nairobi City County, where the deceased (minor)who was 14 years old at the time of his death was awarded Kshs.210,000 under this head

13. On loss of dependency they submitted that the deceased although a child was depended on for the normal physical help in form of chores and that he was a source of companionship to the parents and his siblings. A dependency ratio of 2/3 was proposed and a multiplier of 60 years and a multiplicand of Kshs 12,925.55 being the minimum amount of money earned by Kenyan workers making it 2/3 x 30 x 12 x 12,926.55/- = Kshs. 6,204,744

14. On special damages they submitted that they had pleaded and proved Kshs. 648,040.00 as special damages, being payments for advocate's fees and court fees for grant.

15. The appellant on the other hand submitted that under the *Fatal Accidents Act*, as at the time of death, the deceased was aged 6 years and that his future earnings prospects were not proved and that the court ought to adopt a global award of Kshs. 180,00. The case of Oyugi Judith & Another Vs Fredrick Odhiambo Ongong & 3 others (2014)eKLR where Justice Majanja while reducing a global award to a form two student aged 18years adopted the reasoning by J. Ringera in Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J., in Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view;

> 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 dependancy, and the expected length of the dependancy 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.

16. The appellant urged the court to adopt a sum of Kshs. 180,000 owing to inflation rates and passage of time.

17. As regards the claim under the *Law Reform Act*, it was submitted that the plaintiffs are not entitled to benefit under that heading owing to the fact that, they cannot benefit twice from the estate of the deceased if the beneficiaries are the same. The case of Kemfro Africa Ltd T/A Meru Express Services(1976) & Ano V Lubia & Another (1987)Eklr.

18. Under the head of special damages, the defence submitted that the plaintiff pleaded special damages of Kshs 648,040 being funeral expenses and costs of pursuing succession case and that the said amount was highly unreasonable in the circumstances. A sum of Kshs 60,000 was proposed as funeral expenses.

The Trial Court's judgment

19. Judgment was delivered by the trial court on 22.01.2020. The Learned trial Magistrate awarded general and special damages as follows;

    (a) Pain and Suffering Kshs. 100,000.00/=

    (b) Loss of dependency Kshs. 1,108,640.00/=

    (c) Special Damages Kshs. 288,010.00/=

    Total.....Kshs.2, 197, 650.00/=

    Less 20% contribution.....Kshs. 439,530.00/=

    Net.....Kshs. 1, 758,120.00 =

    The Learned Chief Magistrate also awarded costs of the suit and interest thereon

Appelant's Submissions on the Appeal

20. The Appellant filed his submissions on 30th September 2021 and outlined the issues for determination as follows: -

    i. Whether the award made of Kshs. 100,000 for pain and suffering was excessive and not supported by the evidence on record.

    ii. Whether the award made and approach adopted by the trial magistrate in making the award under the *Fatal Accidents Act* was proper/justified in view of the evidence adduced during trial.

    iii. Whether the trial magistrate erred by failing to consider the defendant's(appellant's) submissions and the evidence tendered during trial on the issue of quantum.

    iv. Whether the trial magistrate erred by awarding special damages of Kshs. 288.010 which were not strictly proved.

21. On the first issue, it was submitted that the trial magistrate did not give any justification for adopting an award of Kshs.100,000/= for pain and suffering and the learned magistrate did not cite any precedent and/or authority and neither did he make any reference to the evidence adduced during trial to justify the award made for pain and suffering. Counsel cited the case of Acceler Global Logistics Vs Gladys Nasambu Waswa & Anor (2020)eKLR where it was observed that 'the position laid down in Rose vs Ford[28] is that where the period of suffering is short, only nominal damages are awarded.'It was

submitted that from the testimony of the Catherine Mbaisi,one of the respondents herein, stated that the deceased died on the same day of the accident. It was submitted further that the police officer who testified in the matter stated that the minor died on the way to hospital. The appellant submitted that an award of Kshs. 10,000/= would suffice which is a conventional sum where a deceased dies shortly after the occurance of the accident. The case of James Gakinya Karienye & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR was cited.

22. On the second issue as regards the award and the approach adopted by the trial court, the appellant faulted the trial magistrate for adopting the multiplier approach instead of the global approach while making an award of loss of dependency under the *Fatal Accidents Act*.It was submitted that the deceased was a minor aged 6 years and that he was not engaged in any employment and as such the multiplier approach was not ideal in making an award for loss of dependency. The case of Kitale Industries Ltd & Another V Zakayo Nyende & Another (2018)eKLR was cited where Njagi J observed that the global approach method would be appropriate where it is difficult to ascertain the multiplicand and the multiplier.

23. As to whether the trial magistrate failed to consider the defendant's submission, the appellant submitted that the trail magistrate ignored his submissions on the analysis section and ended making a judgment which was speculative at best against the evidence adduced during trial on the issue of quantum.

24. Lastly on the issue of special damages, it was submitted that the trial magistrate while making an award for special damages, did not give a proper analysis on how the Kshs 288,010 was arrived at. According to the appellant, only receipts totaling to Kshs 197,800 were produced as exhibits.

25. The court was then urged to allow the appeal with costs.

Respondent's Submissions

26. The respondents filed their submission on 7th October 2021 and counsel for the Respondents, Mr. Murithi , submitted that the issues for determination were;

    i). Whether the trial court erred in law and fact by adopting the multiplier approach instead of a global award

    ii). Whether the multiplicand of Kshs 12,926 adopted by the trial court was excessive; and

    iii). Whether the award made by the trial court in general and special damages was excessive in light of the evidence presented during hearing.

27. On the first issue, it was submitted that different courts have adopted different approaches when determining general damages for loss of dependency where the deceased is a minor because the same is not cast on stone and thus courts have the discretion to adopt either the global sum or the multiplier approach. Reliance was place on the case of Kenya Power & Lighting Compant Ltd v E K O & another [2018] eKLR where Justice Njugi observed

> " It thus emerges that the Superior Courts are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It is was, in my view, therefore, upon the discretion of the Learned Trial Magistrate to use the Multiplier method in this case. This Court cannot review that decision merely because it would have used the "global assessment method" advocated by other High Court decisions. The Learned Trial

Magistrate did not proceed on wrong principles merely for choosing to use the multiplier method and then choosing the minimum wage as the multiplicand."

28. It was thus argued that the multiplier approach was not speculative as submitted by the appellant but rather, is scientific and easily workable as opposed to the global sum. It was submitted that, under the multiplier approach, there is a formula to work out the damages unlike the global sum which has no formula and greatly relies on the discretion of the court that can easily be abused as one makes guesses and speculations on how much to award without laid down factors to consider. It was thus submitted that this court cannot interfere with the trial court's discretion to choose one approach over the other merely because the court would have used a different approach itself or subscribe to a different school of thought.

29. On special damages, Counsel submitted that it the same was not excessive and that the same was supported by evidence on record. He further submitted that court although the plaintiff pleaded for Kshs 648,040 as special damages, the court only awarded Kshs 288,010.

30. Consequently, the court was urged to dismiss the appeal with costs.

Analysis and Determination.

31. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties. I therefore find that the main issues for determination, are whether the trial court acted on wrong principles in making the award of damages, and, if the above is answered to the affirmative, which sum would be sufficient compensation in the circumstances and the award on special damages.

32. The Court of Appeal, in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR, set out the parameters within which an appellate court will interfere with an award of general damages, when it stated:

> " 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..."

33. On the issue of the award for pain and suffering, it is evident that the deceased died shortly after the accident. PW2, the police officer concurred that the deceased passed on while being taken to the hospital. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

> " (5) 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'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. 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."

Being guided by the above authority,I find that award of Kshs.100,000/= as being excessive and do substitute it with Kshs.50,000/=.

34. The trial magistrate made an award of Kshs. 1,108,640.00 on loss of dependency using the multiplier method. The advocates for the appellants submitted that this was a wrong approach considering the deceased was a minor and had not attained the age of employment and that the magistrate should have adopted the global method.

35. The opposing parties in their submissions cited authorities in support of their claims and it is evident that there is no uniform method of assessing damages for estates of minors for loss of dependency.

36. In the recent case of Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu – Now (Deceased) [2018] eKLR Justice Njagi observed that,

> " I take the my view that the multiplier method where it involves minors is only speculative. In this appeal, the minor died at the age of 12 years. The court cannot know what the minor would have turned out to be in life. There was no basis for the trial magistrate holding that the deceased would not have earned anything less than the minimum wage of 10,000/ =. The magistrate did not even refer to the gazette notice that sets the minimum wage at Kshs. 10,000/ =. Though he adopted a multiplier of 30 years he did not consider the age of the dependant (the mother to the deceased) so as to determine the proper multiplier. The multiplier and the multiplicand were therefore speculative. The multiplier method was therefore not the most appropriate in assessing the damages for loss of dependency in this case. The global lumpsum method was the better approach in the circumstances of the case. I will therefore set aside the award made on the basis of the multiplier method in favour of an award based on the lumpsum/ global method"

37. In the case of Oshivji Kuvenji & Another vs. James Mohammed Ongenge [2012] eKLR, said:

> " In as much as the Appellants in the instant case argue that a global sum would be the best suited to the deceased aged only six (6) years at the time of her death, I have not come across an authority that has overturned a decision of the trial court on account of granting general damages based on expected earnings and tabulated on a multiplier. It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor.
>
> Even as early as 1986 as is in the Case Luduwa (Suing by her next friend) And Another vs. Ayuku & Another, (1986) KLR, 394, a Judgment of Apaloo, J – High Court, the Court considered that an award of only Ksh. 8,000/= under loss of expectation of life in the case of a minor aged only one month who had died alongside her mother. In granting the figure the court said that she lived for just a month and her prospects of a future happy life are less than her mother's. However, loss of dependency was awarded for death of her mother which was tabulated based on her average earnings and a multiplier of twenty-five (25) years used. Nothing was awarded for lost years or loss of dependency in respect of this minor ... There is therefore no golden rule in the assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in superior courts. What is beyond doubt is that irrespective of the age of a deceased child, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents - See decisions of the Court of Appeal in Kenya Breweries Limited vs. Saro [1999] KLR 408

and Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporter & 5 Others [1986] KLR 457; [1986] eKLR.

Equally, there can be no dispute that the estate of a deceased minor is entitled to damages for pain and suffering, loss of expectation of life, funeral expenses etc., under the *Law Reform Act*. I would therefore agree with Mr. Waigwa's submission that the adoption of a heads approach in the award of damages in respect of a deceased minor is not ipso facto evidence that the award is excessive or erroneous. Indeed, the Appellants at the close of their submissions sought to persuade the court to use a multiplier approach in arriving at damages payable under the head of lost dependency.

The deceased was aged 12 years at death. There is no evidence that he was in school or as to the level of his abilities and therefore future prospects. The award in respect of lost dependency in my view was excessive and erroneous. I hereby set it aside and substitute therefor a global award under the *Fatal Accidents Act* in the sum of Shs 600,000/= bearing in mind the awards under the *Law Reform Act*. I have upheld general damages for loss of expectation of life, pain and suffering whose total is Shs 100,000/=. Special damages had been agreed at Shs 35,000/=."

38. From the above authorities, I am persuaded that in adopting the principles applicable to loss of dependency for the deceased who was aged 6 years old and was so young for any evidence to be tendered as to future prospects, or career path,I find that the learned trial magistrate committed an error of principle . What he ought to have done was to award a lumpsum based on comparable awards. I associate myself with the decision of Mulwa J in Simon Kibet Langat & Anor. vs. Miriam Wairimu Ngugi (Suing as the Administrator of the estate of Daniel Mwiruti Ngugi [2016] eKLR where she stated that:

> " For young minors, it is not clear how a child may turn out to be when they mature despite good grades in school and high expectations of parents. Further, minors cannot be said to strictly have dependants. All children from all walks of life, given equal opportunities could become anything in future. It is not predictable."

39. In the case of Chen Wembo & 2 Others Vs IKK & Another (suing as the legal representatives and Administrators of the estate of CRK (deceased) (2017) eKLR the court awarded a global sum of Kshs 600,000.00 as lost years for a minor aged 12 years

40. Considering that the above case is recent, the court therefore adopts the global lump sum method and set aside the award made by the trial court and the same is substituted with a global award in the sum of Kshs 600,000/=

41. On special damages, the respondent had pleaded special damages of Ksh 648,040.00. At the hearing, the receipts produced supporting an amount of Kshs 197,800. The Court of Appeal, in Premier Diary Limited vs. Amarjit Singh Sagoo & another [2013] eKLR, said as follows on the issue:

> " We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/

= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

42. Similarly, the Court of Appeal, in Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR, said:

> "We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class."

43. In the instant suit, the respondent pleaded funeral expenses of Kshs.648,040/= but the trial court awarded Kshs. 288,080.00. I am persuaded that the trial court properly made the award on special damages.

44. In a nutshell, it is my finding that the appeal herein succeeds, in part, and that the same is hereby allowed in the following terms;

Pain and suffering Kshs. 50,000/=

Loss of dependency Kshs 600,000/=

Special damages Kshs. 288,080/=

Less 20% contribution Kshs 187,616/=

Total award Kshs 750,404/=

Each party to bear their own costs of the appeal.

30 days interim stay of execution.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2022.

.....

R. NYAKUNDI

JUDGE

In the presence of:-

1. Amihanda for the appellant

2. M/S Kimondo, Gachoka & CO Advocates for the appellant

3. M/S Alwang'a & CO Advocates for the respondent