M'Imunya alias Paul M'Imunya v Muroko (Legal Representative of Estate of Alex Muriki Kainyongi - DCD) (Civil Appeal E198 of 2023) [2025] KEHC 2443 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2443 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E198 OF 2023

HM NYAGA, J

FEBRUARY 13, 2025

BETWEEN

PAUL MURITHI M'IMUNYA ALIAS PAUL M'IMUNYA ..... APPELLANT

AND

DAVID KAINYONGI MUROKO ..... RESPONDENT

LEGAL REPRESENTATIVE OF ESTATE OF ALEX MURIKI KAINYONGI - DCD

(Being an appeal from the judgment from the Chief Magistrate's Court at Maua in CMCC 192A of 2015 delivered on 16/10/2023)

JUDGMENT

1. The Respondent filed a suit in the Chief Magistrate's court at Maua seeking general and special damages against the Appellant. The Respondent averred that on 5th July 2012, the deceased was lawfully walking along the Meru-Maua Road, when the defendant negligently drove motor vehicle registration Number KBQ 903 Y Toyota Carina that he permitted it to lose control and it violently knocked the deceased, who suffered severe injuries and subsequently succumbed to them while undergoing treatment at Maua Methodist Hospital.
2. The Appellant entered appearance and filed an amended statement of defence. He denied the allegations of negligence against him.
3. At the conclusion of the trial the Learned Magistrate rendered a decision on 16th October 2023 and entered judgement for the Respondent against the Appellant as follows:-
    a. Liability 100%.
    b. Pain and suffering Kshs. 70,000/-.

c. Loss of expectation of life – Kshs. 110,000/-.

d. Loss of dependency – Kshs. 1,800,000/-.

e. Special damages Kshs. 96, 740/-.

4. The Learned Magistrate also awarded the respondent costs and interest at court rates from the date of the judgement.

5. Aggrieved by the said Judgement the Appellant filed a memorandum of Appeal dated 7th November 2023.

The appeal

6. The Appellant set out the following grounds of Appeal:-

a. That the Learned Trial Magistrate erred in fact and in law by awarding inordinately high general damages for loss of dependency of Kshs. 1,800,000/- to the Respondent constituting a miscarriage of justice in the circumstances of the case.

b. That the learned trial magistrate erred in fact and in law by failing to consider the Appellant's submissions and authorities on quantum hence arriving at an erroneous decision

c. That the Learned trial magistrate erred in fact and in law by awarding an exorbitant sum on the loss of life expectation.

d. That the Learned trial magistrate erred in fact and in law by failing to consider that the Minor was of tender years who abilities could not be ascertained.

e. That the Learned trial magistrate's judgement was wholly not supported in law by evidence (especially the medical reports) tendered by the parties.

7. When the Appeal came up for directions, the parties agreed to argue it by way of written submissions

Appellants submissions

8. The Appellant posited that the issues for determination were as follows:-

a. Whether the trial magistrate's award of compensation of general damages for loss of dependency was based o wrong principles and if so how should the damages be quantified?

b. Whether the trial magistrate's a ward of compensation for pain and suffering and loss of expectation of life was based on wrong principles and if so how should the damages be quantified.

c. Who should bear the costs of the suits.

9. It is submitted that for damages under the *Fatal Accidents Act*, the court can quantify damages by applying a multiplier approach or a global sum approach. That the trial court adopted on erroneous approach and adopted a global sum of Kshs. 1,800,000/- which is against the trending and authoritative case law.

10. In asking the court to re-assess the general damages the Appellant submitted that a multiplier approach will be problematic as it would be speculative of the minors future income. The Appellant cited the case of Rosemary Onyango and Anor vs Mohammed Jenjewa Ndoyo and Anor (2019)Eklr.

11. The Appellant thus urged the court to adopt a global sum approach and submitted for an award not exceeding Ksh. 800,000/-. Cited were the cases of:-S.M.K VS Josephat Ngari Makasa Civil Appeal No. 66 of 2011.H.K.M VS Francis Mwongela Mabere (2017) eKLR.

12. On the award for pain and suffering it was submitted that the deceased was declared dead on arrival. That no evidence was adduced as to how long the deceased lasted in pain. The Appellant urged the court to award Kshs. 10,000/- under this head. To buttress their argument, the appellant cited Hyder Nthenya Musili vs China Wu Yi Ltd and Another (2017)eKLR.

13. On the award under loss of expectation of life, the Appellant submitted that on conventional award of Kshs. 100,000/- would suffice.

14. The Appellant did not contest the award of special damages.

15. The Appellant sought costs in this appeal and the lower court.

Respondent's submissions

16. The Respondent submitted that the award of damages by the trial court were reasonable.

17. For the award under the loss of dependency, the Respondent submits that the court correctly referred to the case of Kwanzia vs Ngalali Mutua and Another in adopting a global sum rather use a multiplier. It is submitted that the evidence tendered showed that the respondent was educating the deceased, who lived a life full of satisfaction, optimism, hope and promise. This was cut short by the Appellant.

18. It was further submitted that the authorities relied upon by the trial magistrate were relevant. That even in NMK vs Mucheni Teresa (2015) eKLR the court awarded the plaintiff whose child was 12 years old, a sum of Kshs. 3,600,000/- under this head.

19. As to the award for pain and suffering the Respondent submits that the court was well guided by Butler vs Butler (1984) KLR 225 and was reasonable.

20. On Loss of expectation of life. It was submitted that the award of Ksh 110,000/- was not out of range as compared to other cases including Mini Bakeries Ltd and Another vs ZamZam Josephine Akinyi Aride [2019] eKLR and Daniel Mwangi Kilemi and 2 others vs J.E. M and Another (2016) eKLR among other cases.

21. The Respondent urged the court to dismiss the appeal with costs.

Analysis and determination.

22. Being a first appeal, the duty of other court is to evaluate the evidence adduced and came up with its own independent decision. That duty was aptly stated in Selle and Another vs Associated Motor Boat Co. Ltd and others (1968)EA 123 as follows:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.''

23. Similar Principles were set out in Abok James Odera T/A A. J. Odera and Co advocates vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR cited by the Appellant. The court held that:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

24. The only issue for determination is the assessment of damages, which the appellant feel was inordinately high. The Respondent urged the court not to disturb the award of the lower court.

25. The Principles guiding the court in such an appeal were laid in Butt vs Khan (1978] eKLR cited by the Appellant where it was held that;

> " 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 arrived at a figure which was either inordinately high or low"

26. Similarly, in the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR the court stated as follows: -

> " It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ..."

27. With the above in mind, it is now the duty of the court to look at each award under the *Law Reform Act* and the *Fatal Accidents Act*.

28. On the question of pain and suffering, the evidence adduced was to the effect that after the accident, which occurred around 1.00 pm the deceased was taken to the hospital. It is evident that he died on the same day, but there is no clarity on how long he was alive.

29. In my view, the award by the trial magistrate was reasonable and within the range of awards, noting their ages. For instance in Alice Ombachi and Anor vs Jerusha Kemunto Mokaya and Another [2019]eKLR the deceased died just 45 minutes after the Accident. The court awarded Kshs. 50,000/- under the head of pain and suffering.

30. Having stated the above, I find that the proposal by the Appellant is based on very old authorities. Times have changed, there is need to move awards that reflect the current socio-economic situation. I find no reason to disturb the award. I uphold it.

31. On loss of expectation of life, there is no dispute that the deceased died at the age of seven. He is said to have been of good health.

32. Under this head, the courts have always adopted what is called conventional sum across board. There is really no much difference between the award by the trial magistrate and the proposal by the Appellant, which is a mere Kshs. 10,000/-. That is not enough to find the award by the trial magistrate to be

inordinately high. In Hyder Nthenya Musili (supra) the court awarded a sum of Kshs. 100,000/- under this head. Therefore, I do not see any reason to disturb this award.

33. For the claim under the *Fatal Accidents Act*, I have considered the circumstances of the case and the submissions by the parties.

34. The Appellant argues that in case of a child like the deceased herein, the best approach is to award a global sum.

35. There is really no fixed method to assess damages. What the court does is to come up with a method that best suits the situation in each case. This was reiterated in Albert Odawa v. Gichimu Githenji [2007] eKLR, where Koome J (as she then was) quoted Ringera J in Mwanzia v. Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another where he stated that;

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. Can and must be abandoned where facts do not facilitate its application. It is plain that it is useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency and the expected length of the dependency 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"

36. The difficulty in assessment of damages was well illustrated by the court in Ugenya Bus Service V Gachiki, (1976-1985) Ea 575, at page 579 where Madan J held that :

> " General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."

37. The position taken by the courts is that they have a discretion to apply either the global sum, separate heads or even mixed approaches. The assessment of such damages is not cast in stone, as was stated in Seremo Korir & Anor vs S. S. [2019]eKLR. The Court held that:

> " It is in evidence in this case that the deceased was 12 years old and was in class 7. There was no evidence indicating his performance in school or that he would grow up to be enterprising as was stated by the respondent in his plaint. Much of what was presented invited the trial court to largely speculate. It is my considered view that in the absence of weighty and sufficient evidence, it is difficult for a court to adopt the multiplier and multiplicand approach in awarding loss of dependency under the *Fatal Accidents Act*. I therefore find that the learned trial magistrate erred in applying a multiplicand of Kshs. 12,000/- and a multiplier of 35 years as there was scanty evidence to support such an award. It is further my considered view that a lump sum global award would have been appropriate in the current circumstances for loss of dependency under the *Fatal Accidents Act* and as Madan J. A noted that in these matters we are not aiming at precision. A global award of Kshs.500,000/- would, in my view, suffice."

38. In the instant case the trial magistrate found it better to award a global sum. She cannot be faulted for that. I have no reason to set aside that decision.

39. As regards the award under the global sum approach, the Appellant feels that the same was too high. The Respondent submits that the award is reasonable.

40. It is obvious that no amount of damages can replace a loved one. It would not be right to state that merely because the deceased was a child, the damages awardable should be low. Every life is precious. As wisely stated by the trial court, a child is a blessing to a family, most parents struggle to bring up their children with the hope that the children grow to be independent and even take care of them in old age.

41. That said I am of the view that the award of Kshs. 1,800,000/- for the deceased seems to be inordinately high. It is not really within the range of awards made in similar cases.

42. For instance in Daniel Wangi Kimeme vs J. E.M and S.M.N [2016] eKLR, a decision cited by the trial court, the High Court awarded the Respondent a global sum of Kshs. 1,000,000/- in 2016.

43. The said, award made in 2023 cannot be expected to remain at that figure. Whilst the court is to take note of inflationary rates over time, it must remember that both the Appellant and Respondent are affected equally. The mere fact that a defendant has been adjudged to be liable to pay damages is not a go ahead to mete out punitive awards. The courts must exercise reasonable assessment, so as not to distort the economy, or to make the inflation worse.

44. After considering the matter, I am inclined to set aside the award of the trial court and substitute it with an award of Kshs. 1,400,000/-under the *Fatal Accidents Act*.

45. In the end the appeal partly succeeds and the following awards shall apply.

    a. Pain and suffering – Kshs. 70,000/-

    b. Less of expectation of Life Kshs. 110,000/-

    c. Less of Dependency – Kshs. 1,400,000/-

    d. Special Damages Kshs. 96,740/-

    Total Kshs. 1,676,740/-

46. Since the Appeal is partly successful, each party shall bear its own costs on this appeal.

H. M. NYAGA

JUDGE

DATED, SIGNED & DELIVERED AT MERU THIS 13TH DAY OF FEBRUARY, 2025.

H. M. NYAGA

JUDGE