PN Mashru Limited & another v Namachanja & 2 others (Civil Appeal E039 of 2023) [2025] KEHC 2999 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2999 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E039 OF 2023

REA OUGO, J

MARCH 13, 2025

BETWEEN

PN MASHRU LIMITED ..... 1ST APPELLANT

FRANCIS WACHIRA MWANGI ..... 2ND APPELLANT

AND

REBECCA NASIMIYU NAMACHANJA ..... 1ST RESPONDENT

BENSON WAFULA NAMACHANJA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GEOFREY SIMIYU WANYAMA (DECEASED) ..... 2ND RESPONDENT

TRANS AFRICA MOTORS LIMITED ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon Charles Soi Mutai (SPM) delivered on 20/4/2023 in Bungoma CMCC No E208 of 2020)

JUDGMENT

1. This is an appeal against the decision of the trial magistrate on quantum. The background to the appeal is that Geoffrey Simiyu Wanyama (deceased) on 9/8/2020 was involved in a road traffic accident and sustained fatal injuries. Liability was entered in the ratio of 70:30 as against the appellants.
2. The trial magistrate entered judgment in favor of the 1st respondent as against the appellants as follows:
    1. Pain and suffering Kshs 35,000/-.
    2. Loss of expectation of life Kshs 100,000/-
    3. Loss of dependency Kshs 3,456,000/-
    4. Special Damages Kshs 29,580/-

5. Loss of consortium Kshs 200,000/-

   Sub-total Kshs 3,820,500/-

   Less 30% contribution Kshs 1,146,174/-

   Net Award Kshs 2,674,406/-

3. The appellant, aggrieved by the award of damages, has lodged this instant appeal on the following grounds:

   1. That the learned trial magistrate erred in law and fact in adopting the wrong principles in making a determination as to the damages payable to the respondents entitling this honourable court to interfere.

   2. That the learned trial magistrate erred in law and fact in awarding excessive damages for pain and suffering considering the evidence on record and relevant authorities.

   3. That the learned trial magistrate erred in law and fact by adopting a sum of Kshs 18,000/- as the multiplicand despite the fact that the same was not proved thereby arriving at erroneous decision.

   4. That the learned trial magistrate erred in law and fact by adopting a multiplier of 24 years without taking into account life's vicissitudes and vagrancies of life of life and/or comparable authorities.

   5. That the learned trial magistrate erred in law and fact by adopting a dependency ratio 2/3 when the same was not proved.

   6. That the learned trial magistrate erred in law and fact in awarding loss of consortium in the sum of Kshs 200,000/- despite the fact that it was not pleaded and not provided for in the statutes governing this claim therefore leading to a miscarriage of justice.

   7. That the learned trial magistrate erred in law and fact in failing to consider the submissions and/or authorities cited by the appellant on the issue of quantum.

4. The appellant seeks that this court sets aside the trial magistrate's court finding on quantum.

5. The appeal was canvassed by way of submissions. The appellants in their submissions argues that the deceased died on the spot and the trial magistrate ought to have awarded nominal damages on pain and suffering, therefore an award of Kshs 10,000/- would have been sufficient. It was also argued that an award of Kshs 18,000/- was neither the minimum wage nor the proven income of the deceased. They have urged the court to adopt a multiplicand of Kshs 8,109/- being the monthly income of a general labourer as per the Regulation of Wages (Amendment) Order 2022. On the multiplier of 24 years, they submit that taking into account the vicissitudes and vagaries of life, a multiplier in the range of 16-18 years would be sufficient. In Elizabeth Chelagat Tanui & Another v Arthur Mwangi Kanyua [2013] eKLR a multiplier of 18 years was used for a 36-year-old deceased. On the dependency ratio, it was submitted that there was no evidence that the deceased's uncle and grandmother depended on him. Additionally, no documentary evidence (birth certificates) were adduced to show that the deceased had children. The chief's letter was not conclusive evidence of the paternal relationship between the deceased and the alleged children. The grandmother testified that she takes care of the deceased's children with the assistance of the 2nd respondent. Therefore, the dependency ratio of 2/3 was not justified and they urged the court to apply a dependency ratio of 1/3. On loss of consortium, it was argued that the respondents are grandmother and uncle, respectively, therefore lack the capacity to

seek an award for loss of consortium. Further, such an award in not provided for by the statute that govern fatal claims. In Jeremiah Njuguna & Another v Anagleta J. Yator & Edel J. Biwott (Suing as the administrators of the estate of the late Paul K. Kiplagat) [2016] eKLR the court stated that the *Law Reform Act* and the Fatal Accident are the only statutes that govern the award of general damages in fatal accident and they recognize an award of damages under three heads and loss of consortium is not one of them. They submit that the court should set aside the award for loss of consortium in its entirety.

6. The respondent on the other hand submit that the trial magistrate correctly exercised its discretion by awarding Kshs 35,000 as the court in Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No 38 of 2015 [2016] eKLR held that an award of Kshs 50,000/- cannot be said to be unreasonable. They argued that the deceased was a farmer and this was indicated in his death certificate. He did not have a payslip to prove his earnings but there was testimony that he made Kshs 50,000/- from his farming activities. The court in David Kimathi Kaburu v Gerald Mwobobia Murungi (Suing as Legal Representative of the Estate of James Mwenda Mwobobia (Deceased) [2014] eKLR the court held that the deceased's job was not one where you are expected to get a payslip or voucher, the deceased was earning Kshs 700-1000 per day therefore the trial court did not err when it awarded Kshs 18,000/-. On the multiplier, it was argued that the deceased was 36 years old and would have engaged in his farming business until the age of 70. Therefore, the multiplier of 24 years was reasonable. In Grace Njoki Kanai v George Ogwilla & 2 Others HCCC No 5 of 2012 and in Naomi Nyambura Karanja (suing as the administrators of the estate of Simon Karanja Mirungu (deceased) v Zacharia Muteru Kadunga & Another [2017] eKLR the deceased persons were 34 years old and a multiplier of 24 was applied.

7. It was further submitted that the appellants never controverted the evidence by the 1st respondent that the deceased had 2 children who were minors. The oral testimony by the 1st respondent was not challenged, and the court was right in applying the ratio of 2/3. On loss of consortium, it was argued that the deceased's children lost the love, care and devotion of the deceased who was their father. They cited the case of Salvatore De Luca v Abdullahi Hemedi Khalil & Another [1194] eKLR to support the award by the trial court under this head.

Analysis And Determination

8. I have considered the grounds of the appeal, the appellant's submissions in support of the appeal, the respondents' rival submissions and the only issue before the court is whether damages awarded by the trial magistrate was excessive. I am guided by the decision of the Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 where the court 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"

9. On the award of loss of dependency, the appellant argues that the court should adopt the minimum wage calculating the award. The respondent on the other hand, supports the finding of the trial court.

10. In this case, it is not in dispute that the deceased was 36 years old. The respondents testified that the deceased had 2 children whom they cared for after the deceased's death and that the deceased's wife left their home. They look after the children of the deceased. This was sufficient to prove that the deceased had two children. The 1st respondent testified that they, as uncle and grandmother, were dependents of the deceased. However, there was no evidence to show that the deceased was earning Kshs 50,000/- from his farming business. The figure seems to be an estimate by the trial magistrate, who in his decision

did not also give reason why he adopted the multiplicand of Kshs 18,000/-. It is clear that in this case it was not possible to ascertain how much the deceased was earning. The appellant's argument for adopting the minimum wage would only lead to more speculation of the deceased's income, as the evidence establishes that the deceased was a farmer, a fact duly recorded in the death certificate. In Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the Estate of Mercy Nzula Maina (deceased) 2016 eKLR when the court stated:

> "It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case"

11. According to the testimony of Benson Wafula Namachanja (Pw1) the deceased's children had not attained the age of 18 years. In Kiilu v Namurwa & another (Suing as the administrators of the Estate of Gladys Nasimiyu Maasika - Deceased) & 2 others (Civil Appeal E029 of 2022) [2024] KEHC 16032 (KLR) (18 December 2024) (Judgment) where the deceased was aged 42 years farmer with a spouse and children the court awarded a global award of Kshs 1,500,000/- for loss of dependency. In Sagini & another (Suing as the Personal Representatives and Legal Administrators of the Estate of Josephat Nyamweya Nyakioga - Deceased) v Mariga [2024] KEHC 6525 (KLR) the deceased was a 38-year-old farmer with a spouse and children and the court found that a global sum of Kshs. 2,000,000/= would be fair compensation for the Estate of the deceased considering that he died at the prime of his life. Therefore, having considered the circumstances of this case, I find that a global award of Kshs 2,000,000/- would be sufficient damages for Loss of Dependency.

12. The appellant also challenged the award made under the heads pain and suffering and loss of expectation of life. This court is guided by the decision in Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR where the court observed that:

> "...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."

13. In Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment) the court observed as follows:

> "44...I note that Benedeta Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR, Hon Emukule J, reasoned that:...In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering ..... determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Shs 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head

claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death...."

14. It is not in dispute that the deceased died at the scene of the accident. However, considering the above decisions of this court, I find that damages awarded for pain and suffering and loss of expectation of life were reasonable.

15. On loss consortium, I am guided by the holding of the Court of Appeal in Mbaaru & another v Kenya Bus Services Limited also known as Stage Coach Bus International & another [2024] KECA 432 (KLR):

> " This Court in the case of Salvatore De Luca vs. Abdullahi Hemed Khalil & Another [1994] eKLR awarded loss of consortium in a fatal accident claim; the Justices of Appeal held thus:
>
> "So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re- married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs.40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgement in the superior court until payment in full."
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> 71. We cite the above case to show that loss of consortium is a recognised claim in law, and to show the principles that apply. We know that the award in the cited case was granted in a fatal accident case. The instant case was not a fatal accident. It is nevertheless an appropriate case for such an award. The principles to be considered include proof that the appellant loved the spouse before the accident. Loss of consortium means loss of any or all of the following; companionship, love and affection, comfort, mutual services and sexual intercourse."

16. However, I note that the respondents did not plead for damages for loss of consortium. The trial magistrate, therefore, erred in awarding Kshs. 200,000/-.

17. In conclusion, I find the appeal partly successful, and the award of damages by the subordinate court is set aside. I hereby substitute it with the following award in favor of the 1st respondent:

    1. Pain and suffering Kshs 35,000/-.
    2. Loss of expectation of life Kshs 100,000/-
    3. Loss of dependency Kshs 2,000,000/-
    4. Special Damages Kshs 29,580/-

    Sub-total Kshs 2,164,580/-

    Less 30% contribution Kshs 649374/-

    Net Award Kshs 1,515,206/-

18. The appellants shall have half the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH 2025

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Mr. Nabibia -For the Respondent

Wilkister -C/A