



Kabeste Restaurant Limited v Mutie & another (Suing as the Administrator of the Estate of Johstone Makili Munyao) (Civil Appeal E008 of 2022) [2025] KEHC 9410 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KEHC 9410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E008 OF 2022
TM MATHEKA, J
APRIL 11, 2025**

BETWEEN

KABESTE RESTAURANT LIMITED DEFENDANT

AND

BENJAMIN MUNYAO MUTIE 1ST PLAINTIFF

JOSEPH MUTUA MUNYAO 2ND PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHSTONE MAKILI MUNYAO)

JUDGMENT

1. The suit in Makueni MCC 75/2019 was filed via plaint dated 6/5/2019.
2. The gist of the claim was that on 28/10/2017 the deceased and his 2 friends had lunch at the defendant's restaurant and proceeded to swim in the defendant's pool.
3. That they all began to drown - and subsequently the deceased died.
4. The Plaintiff's claim is death was due to the negligence of the defendant as there was no professional swimming pool attendant, the swimming pool water was dirty with poor visibility, and there was lack of safety swimming pool guidelines/markings.
5. The plaintiff's claim was that deceased's estate had suffered loss and damage.
6. That the deceased had dependents- his wife, 2 children and his father.
7. The plaintiff sought judgment against the defendant in their favour for :-
 1. General damage and special damages under the *[fatal accidents Act](#)* and *[Law Reform Act](#)*.



2. Special damages of Kshs. 112,500
3. Costs and interest.
8. The defendant filed a defence titled “Defendant’s holding defence.” In which it denied all the allegations of negligence and contended that the deceased came to the hotel while drunk, that he never contacted the management , that he never paid for the use of the swimming pool, that he did not even have a swimming costume.
9. The defendant put the plaintiff to strict proof of his claim.
10. The matter was heard by way of viva voce evidence .
11. The plaintiff’s father testified on 7/10/2021 - he adopted his statement dated 30/4/2021 and produced his list of documents filed on 17/5/2019 . The deceased’s widow testified and also adopted her witness statement dated 6/5/2019.
12. On 18/11/2021 the defence was allowed to re-open the case - file its defence, put in documents and proceed to file documents.
13. A hearing date was set for 27/1/2022 .
14. By 19/12/2021 the defence had not complied and the court proceeded to write its judgment which was delivered on 27/1/2022.
15. The learned trial court found in favour of plaintiff against defendant and entered judgment finding the defendant 100% liable and on quantum of damages made the following awards:.. Law Reform Act
 1. Pain and suffering - - Kshs. 50,000.00
 2. Loss of expectation of life - Kshs.100,000.00 Fatal Accidents Act
 3. Loss of dependency - Kshs. 2,500,000.00
 4. Add special damages - Kshs. 100,000.00

Total 2,750,000

The plaintiff was also awarded costs and interest at court rates
16. Aggrieved, the appellant filed this appeal on the following grounds;
 - i. That the learned Honourable magistrate erred in law and fact in awarding the respondent a lump sum of Kshs. 2,500,000 as loss of dependency which was out of line with decided cases.
 - ii. That the learned Honourable magistrate erred in law and fact in awarding damages for loss of dependency based on assumptions and speculation.
 - iii. That the learned Honourable magistrate erred in law and fact in awarding the respondent Kshs. 50,000.00 as pain and suffering failing to take into account that the deceased died instantly at the scene and on the same day of the accident.
 - iv. That the learned Honourable magistrate erred in law in awarding the respondent Kshs. 100,000.00 as loss of expectation of life contrary to the conventional sum awarded in decided cases.
 - v. That the learned Honourable magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum.



- vi. That the learned Honourable magistrate erred in awarding a sum in respect damages which was inordinately high in the circumstances occasioned miscarriage of justice.
 - vii. That the Honourable magistrate erred in law and fact in failing to consider conventional awards in cases of similar nature.
 - viii. That the estate has benefited twice under the Law Reform Act and Accidents Act.
17. The appellant sought orders; That the appeal be allowed; That the judgment and decree thereto of the lower court be quashed and set aside; That the court grant any other relief that it deemed fit or just to grant
 18. Parties canvassed the appeal through written submissions.
 19. The appellant raised the issue of quantum of damages - arguing that the sum of Kshs. 2, 500,000 was excessive and out of touch with other similar cases. It was urged that the widow was a business woman as per her own evidence hence the deceased was not the sole bread winner. It was also urged that the trial court did not cite any authorities of similar cases.
 20. This court was urged to find that the sum of Kshs. 1,000,000 was the reasonable sum in the circumstance of the case and to revise the and accordingly. This Court was referred to: Stanwel Holdings Limited & Another V Racheal Haluku Emanuel & Another [2020] eKLR the court stated as follows;

“Consequently, I find that the global sum would be sufficient in this case, however, from the foregoing I find that the learned trial magistrate’s award was inordinately high while the amount proposed by the Appellant was too low. I therefore award a global sum of Kshs. 1,000,000.00 under this head.”

Further in Anthony Konde Fondo & another V RMC (the Representative of FC (Deceased) [2020] eKLR where m while awarding a global sum of Kshs. 900,000.00 the court held as follows;

“In as much as there are differences on what approach a trial court will take to award damages it is prudent for the courts to have a semblance of consistent decision making with regard to this matter. I find that there are no authorities relied upon by the learned Magistrate when he expressed himself on the sum of Kshs. 2,000,000 on loss of dependency.

While compensation is the epitome of civil suits and indeed a form of healing balm on the wounds occasioned by the death of a minor, it is prudent for courts to refrain from awarding outrageously high general damages that can only be assumed to be punitive on the part of the defendants. It is therefore my considered view that the total award of Kshs. 2,000,000 as loss of dependency in the circumstances of this case was excessive.”

Also in Put Sarajevo Gen. Eng. Co. Ltd v Esther W. Njeri & Johnson Mwangi Gucha (suing as the Legal Representative of the Estate of Sylvester Muhia Gucha (deceased) & 2 others [2014] eKLR , the court awarded a global sum of Kshs. 1,000,000.00 for a deceased aged 29 years and who was said to be a businessman earning Kshs. 60,000.00 per month. In



Intex Construction Company Ltd v John Mbere Iguna & Japhet Mugambi Iguna (Suing as legal representative of John Kiura Iguna (deceased) [2020] eKLR the court set aside the award of Kshs. 1,200,000.00 as loss of dependency for a deceased 43 years old and substituted it with an award of Kshs. 650,000; In *Moses Koome Mithika & Another V Doreen Gatwiri & Another* (Suing as the legal representative and Administrator of the Estate of Phineas Murithi (deceased) [2020] eKLR the court opined as follows:-

“In awarding the global sum, these facts are relevant: The deceased was only aged 20 years at the time of his death. He had a wife, three young children and parents to take care of. He had prospects of providing support to his family for up to the age of 60 years. Therefore, deprivation of dependency for such young family and elderly parents would attract a figure of Kshs. 1,000,000. I therefore award Kshs. 1,000,000 for loss of dependency.”

21. With respect to pain and suffering and loss of expectation of life - it was urged that the sum be reduced to Kshs. 10,000 & Kshs. 80,000 respectively.
22. On special damages:- it was argued that the plaintiffs/respondents were required to plead and prove the same specifically. The appellant relied on; *Marwanga Jeffern v Jeckton Ochieng Ochieng & Another* [2015] eKLR where the court expressed itself as follows:-

“The others falling on the head of funeral expenses were never proved and bearing in mind the authorities cited above on special damages, the same cannot be awarded.”
23. It was also argued that - without evidence of those awards being taken into account the awards made under the *Law Reform Act* should have been deducted from the award made under the *Fatal Accidents Act*.
24. For the respondent - there was agreement with appellant that the learned trial court was right in adopting the global award approach to determine the award for loss of dependency. The respondent argued that that the trial court was guided by *Isaac Muriira M’Mwanie & Another V Mischeck Mutuma M’kuchina* [2021] eKLR – where the court awarded a global award of Kshs. 2,500,000 for loss of dependency stating ;“ being cognizant of the principle that comparable awards are due for comparable injury, and while guarded that the awards must remain compensatory rather than punitive and capable of being viewed as a scheme to enrich, it is, therefore, my view that a global sum of Kshs. 2,500,000 would suffice for the respondent’s loss.”
25. On special damages - it was urged that the trial court was guided by; *Premier Dairy Limited v Amarjit Singh Sagoo & Anor* (2013) eKLR where the court held that “ We do not think that 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 unfair to expect bereaved families to be concerned with issues of record and 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 than 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.”



And also Capital Fish Kenya Vs Kenya Power & Lightining Company limited [2016 eKLR

Upon careful consideration of the record- and the submissions by counsel - the only issue for determination is whether the appeal has any merit on all the heads.

26. I note that there is no issue raised with regard to liability - hence the same remains 100%.
27. On quantum - on pain and suffering and loss of expectation of life the conventional sums are Kshs. 50,000 and 100,000. I do not find that the trial court applied any wrong principle or went beyond the conventional sum herein.
28. The respondent arguing in support of the awards for pain and suffering made by the trial court relied on the following cases
 - # Acceler Global Logistics Gladys Nasambu Waswa & Another [2020] eKLR,..ksh 50,000 awarded
 - # Sukari Industries V Clyde Machino Jume HB HCCA No. 68 of [2016]eKLR ...ksh 50,000 awarded
 - # Hyder Nthenya Musili &Another Vs China Wu Yi Limited &Another [2017] Eklr where the court said that the award ranges between ksh 10,000 and ksh 50,000.With respect to loss of expectation of life the respondent relied on the cases below where the sum of ksh 100,000 was awarded.
 - # Makano Makonye Monyane Monyanche V Hellen Nyangena (2014) eKLR
 - # Mercy Muriuki & Another Vs Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR,
 - # Paul Ouma Vs Sarah Akinyi and Monica Achieng Were (Suing as the legal representative in the Estate of Paul Otieno Were (deceased) [2018]eKLR.
 - # The trend of authorities are such that this is conventional in our jurisdiction. Even where it is alleged that a person died on the spot how would we be certain that they did not suffer pain?. The clear thing is that the death is not natural cause but caused by a happening that can only be determined to be painful.
29. In this case the deceased drowned - Anyone who has witnessed a drowning incident/or lost balance in the swimming pool can attest to the fact that death by drowning cannot be described as death on the spot.
30. I need not say more, what is inescapable conclusion is that death in this case was by drowning. I will therefor not disturb those awards.
31. On the issue of special damage for funeral expenses - I find that the submissions by the respondent are persuasive - that more often than not, funeral expenses will not be accounted for to the shilling - and within our jurisprudence it has been allowed to assess reasonable funeral expenses.
32. Regarding costs of obtaining limited grant - I do agree that the appellants ought to have availed receipts. Counsel for the appellant submitted this ought to have been claimed in accordance with the Advocates Remuneration Order. There is no doubt that there is a limited grant on the file. It is this that grants the respondent to file this suit. It must have cost the respondent money to obtain it. The appellant does not propose any figure, but they have a genuine concern as the respondent did not produce a receipt. I would allow the sum of Ksh 25000.
33. On loss of dependency - the assessment of damages is discretionary. I have considered the authority relied upon by the by the trial court, and those cited by both parties in this appeal. The appellant has



urged this court to review it to Ksh 1000,000. The respondent wants the court to retain the award made by the subordinate court.

34. The learned trial magistrate was clear that there was on the part of the plaintiff 'paucity of evidence of earnings'. This is because the only evidence of the earnings of the deceased was an MPESA statement which the plaintiff produced to prove that the deceased was earning Ksh 100,000 per month. The trial court found that 'the said receipts do not offer clarity of earning since the same are simply the normal money transfer transactions . the court is unable to pick out earnings amounting to Ksh 100,000 that can be attributed to the deceased's real estate business. Additionally no evidence was produced as proof that the deceased was engaged in the real estate business ... it is my finding that the evidence of earnings fell short of proof'
35. I have carefully considered the pleadings. It is evident that there was no pleading on the earnings of the deceased or the work the deceased was doing before he died. Even the MPESA statement was just thrown at the court without any analysis or any other accompanying evidence to support the allegation that the deceased was running any form of business. Neither of the two witnesses testified to that. In fact, the widow simply stated that her husband used to support her and the children and after his demise she became the sole breadwinner.
36. I have perused the Judgment of the trial court. The court did not cite any authorities for the award of Ksh 2.5million and it is not correct that it was guided by Isaac Muriira M'mwanie & another v Misheck Mutuma M'kuchina [2021] KEHC 6194 (KLR) because it does not say so. The trial court simply stated that the deceased was 30 years old and would have supported his family for a very long time.
37. While such awards are discretionary it would have been appropriate for the trial court to indicate that it had looked at the submissions by the appellant as well the authority it had relied upon.
38. I have looked at the case relied upon by the respondent. Isaac Muriira M'mwanie & another v Misheck Mutuma M'kuchina [2021] eKLR. The judge therein stated
39. The burden upon the respondent was at all times within a balance of probabilities and no higher. The record reveals that the evidence by the respondent including that the deceased would support him and his mother was never meaningfully challenged even by way of cross examination. However, the proof availed was that the respondent would get a regular sum of Kshs 500 per month with nothing being said about what the deceased gave to the mother regularly.
40. The claim by the respondent was on for loss of dependency rather than lost years. While lost years go to the estate, lost dependency is due to the dependants who then must prove as a fact that they depended upon the deceased in his lifetime. In both situations however the principles of calculation remain the multiplier formula or a global award when there are no firm facts as to earning. In the matter at hand the evidence adduced was not the kind that proved earning on a preponderance. It was not enough that he was a miraa trader with nothing to show just as it was not enough that the father said that he ran a shop. It would have been different if there had been produced the records said to have been in the shop. I find that there was no proof of monthly income to ground the application of the multiplier formula and that its application was thus erroneous for which reason I do set aside the award of damages for lost dependency.
41. Having set aside the award it then falls on my laps to undertake the duty of assessment and as said before, I am mandated to make a global award. In doing so I do appreciate that the deceased was aged 24 years and it is not the appellants case that no damages were due at all. I also proceed from the stand point that assessment of damages is a discretionary matter for the court to exercise. I have taken notice of the decisions in Charles Makanzie Wambua vs. Nthoki Munyao & Prudence Munyao (suing as personal



representatives of the Estate of Lilian Katumbi Nthoki (Deceased) [2020] eKLR, upheld a global award of Kshs 1,320,000.00 for loss of dependency, in Twokay Chemicals Limited vs. Patrick Makau Mutisya & another [2019] eKLR, the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a minor aged sixteen (16) years and Zachary Abusa Magoma vs. Julius Asiago Ogentoto & Jane Kerubo Asiago [2020] eKLR, the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency. Being cognizant of the principle that comparable awards are due for comparable injury, and while guarded that the awards must remain compensatory rather than punitive and capable of being viewed as a scheme to enrich, it is, therefore, my view, that a global sum of Kshs. 2,500,000.00 would suffice for the respondent's loss.

42. The appellant did not file any submission in the subordinate court. The respondent did not cite Isaac Muriira M'mwanie & another v Misheck Mutuma M'kuchina but other cases supporting their proposal for the multiplier approach. Hence the trial court drew its own conclusions and exercised its discretion to arrive at the award.
43. I have considered that all the submissions filed by both parties in this appeal are in support of the global sum approach. They only differ in the sums proposed. In their light the award of Ksh 2.5 million made appears to be within reason within our jurisdiction for a similar cases. Hence I find no reason to disturb the award.
44. On whether there was double benefit to the estate the deceased, the respondent relied on Hellen Warunguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) V Kiarie Show Stores Limited [2015]eKLR where the Court of Appeal held and stated that

“this court has explained the concept of double compensation in several decisions 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 year and dependency will go to the same persons. It does not mean that claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only award under the *Law Reform Act*, hence the issue of duplication does not arise.”
45. It is instructive from the above that there was no double benefit to the estate. The trial court was not in error.
46. I have carefully set out the analysis of the evidence in the subordinate court, the submissions by each party and the authorities cited for each head of the awards.
47. I find that the appeal is not merited.
 - i. The appeal fails.
 - ii. The Judgment of the subordinate court is upheld in its entirety.
 - iii. The appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA CTS WITH NOTICE THIS 11TH APRIL 2025

MUMBUA T MATHEKA

JUDGE

Chrispol Court Assistant

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

