



REPUBLIC OF KENYA



Ndung'u & another v Kuria (Suing as Administrator and/or Personal Representative of the Estate of Beth Nanyait - Deceased) (Civil Appeal E263 of 2023) [2025] KEHC 6335 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E263 OF 2023
SM MOHOCHI, J
MAY 20, 2025**

BETWEEN

JOSEPH MWAURA NDUNG'U 1ST APPELLANT

JOSEPH GACHERU NJOROGE 2ND APPELLANT

AND

GRACE EMASE KURIA RESPONDENT

**SUING AS ADMINISTRATOR AND/OR PERSONAL REPRESENTATIVE OF
THE ESTATE OF BETH NANYAIT - DECEASED**

(Being an appeal from the Judgment of Hon. Priscah Wamucii Nyota delivered on 6th September 2023 in Nakuru CMCC No. E707 of 2022)

JUDGMENT

Background

1. This is an Appeal against the quantum awarded by the trial Court.
2. The Appellants herein lodged the instant appeal vide a Memorandum of Appeal dated 22nd September 2023 being aggrieved by the Judgment entered in Nakuru CMCC No. E707 of 2022 on 6th September 2023.
3. In their memorandum of Appeal the Appellants fault the trial magistrate in their grounds as follows;
 - a. That the Learned Trial magistrate erred and misdirected herself in fact and law by awarding damages the various heads that were manifestly excessive in the circumstances.



- b. That the Learned Trial Magistrate misdirected herself in law and in fact by failing to appreciate and apply the principles applicable in the assessment of damages and thus awarded an excessive award under the limb of general damages.
- c. That the Learned Trial Magistrate erred in Law and in fact in making the award for loss of dependency which was excessive in the circumstances.
- d. That the Learned Trial Magistrate erred in law and in fact to critically analyze and consider the submissions made on behalf of the appellants.

Appellants Case

4. In its memorandum of Appeal, the Appellant attack the impugned judgment in their filed written submissions submits that the appellate Court, the Court ought to re-evaluate and reconsider the evidence tendered before it.
5. On the 1st refined issue as to whether the Learned Magistrate erred in law in applying awarding a global sum for Kshs. 2,000,000? The Appellant contends that, it is not in dispute that the deceased was 11 years at the time of death and without any source of oncome or prospects of getting into a specific vocation.
6. That the learned magistrate erred in awarding a global sum of Kshs. 2,000,000 and it is the Appellants 'submission that the same ought to be set-aside. As submitted in our submissions (see page 39-40 of our Record of Appeal) the Court ought to have awarded a reasonable sum of Kshs. 300,000 even going by the rate of inflation and the recent decisions.
7. Reference is made to the case of *Mwangangi & another v FKM (Suing as Legal Representative of the Estate of the Late AMK) (Civil Appeal E11 of 2021)* [2021] KEHC 291 (KLR) (22 November 20211 Judgment) the Court awarded Kshs. 800,000 as the global sum being the Loss of dependency for a 12-year-old.
8. On the 2nd issue as to whether the Court erred in awarding Kshs. 60,000 for Pain and Suffering? The Appellant submits that from the evidence and testimony tendered before the Court, the Deceased died shortly after the accident. Without downplaying the fact that the deceased did experience pain and suffering we do humbly submit that a sum of Kshs. 60,000 was excessive in the circumstances and content that as sum of Kshs. 20,000 is sufficient under this head.
9. It is the Appellants belief that the award herein by the Court was excessive based on the authorities above and urge this Court to find that the trial Court erred in awarding Kshs. 2,000,000 and set it aside.
10. On the 3rd issue as to whether the Court erred in awarding Kshs. 200,000 for Loss of Expectation of Life? The Appellant contends and submits that, it is not in dispute that the deceased died at the age of 11 years and that the Court erred in law and fact by awarding Kshs. 200,000 herein.
11. The Appellant submits that the sum of Kshs. 100,000 is sufficient under this head. The award of Kshs. 100,000 has been referred to as the "conventional sum" in numerous authorities including the above cited case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, the Court stated as follows-

“The conventional award for loss of expectation of life is Kshs. 100,000/...”
12. The Appellants thus urge that the Court to set-aside the Trial Court awards herein and make an appropriate award in tandem with the pleadings, evidence, law and decided authorities.



Respondent's Submissions

13. The Appeal dated 22nd September 2023 is opposed by filed written submissions dated 16th January 2025 by refining four issues for the consideration by this Court as follows:
 - a. Whether the Learned Trial Magistrate erred in awarding Kshs. 60,000/= for Pain and Suffering.
 - b. Whether the Learned Trial Magistrate erred in awarding Kshs. 200,000/= for Loss of Expectation of Life.
 - c. Whether the Learned Trial Magistrate erred in awarding a Global Sum of Kshs. 2,000,000.00/ =.
14. On the first issue as to whether the Learned Trial Magistrate erred in awarding Kshs. 60,000/= for Pain and Suffering? the principles on which an Appellate Court will disturb an award in damages are now well settled. The principle is 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. In *Butt vs. Khan (1982-88) I KLR* cited with approval in the case of *Ngooro Timothy & another vs. Daniel Mutuga Wangechi [2020] eKLR* the Court stated 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 arrive at a figure which was either inordinately high or low.”
15. As a matter of law, assessment of damages is at the discretion of the Trial Court. It is therefore our submission that the Appellate Court should not interfere with the exercise of that discretion except where it is shown that the Trial Court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages.
16. In the case of *Peter Gakere Ndiangui v Sarah Wangari Maina [2021] eKLR* the Learned Judge quoted with approval the case of *Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini vs A.M. Lubia and Olive Lubia*, where it was held that: -

“...the principles to be observed by this appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages”.
17. Furthermore in the case of *Mbaka Nguru and Another v James George Rakwar [1998] eKLR* cited with approval in the case of *Reuben Okuku v Emmah Nyamoita Mogendi [2018] eKLR*, the Court of Appeal held as follows on what should guide a Court in making an appropriate award:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this Court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”
18. That in in paragraph 4 of the impugned Judgment, the Learned Trial Magistrate explicitly denotes the consideration she took before making the award of Kshs. 60,000/= for pain and suffering. The



Honourable Trial Magistrate clearly considered the Appellants and Respondent's submission that the deceased's death was not instant and she died at the hospital while undergoing treatment. (See page 34 and 39 of the Record of Appeal).

19. That the Trial Court also considered the Appellants and Respondent's cited authorities and noted that the same vary greatly. The Learned Magistrate considered the most recent authority which was proposed by the Appellants and in the exercise of her discretion found that a sum of Kshs. 60,000/= was reasonable in the circumstances of the case. (See page 42 of the Record of Appeal).
20. In that regard, it is the Respondent's considered view that the Honourable Trial Magistrate did not apply any wrong principles in awarding a sum of Kshs. 60,000/= for pain and suffering. It is our submission that the Trial Magistrate correctly exercised her discretion and rightfully took into account the principles and parameters of assessment of damages.
21. It is the Respondent's further submission that the award herein was more than fair and sufficient taking all factors into consideration. The award falls within the range and even on the lower side of cases decided before the impugned judgment. The Respondent cites the case of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR the deceased died immediately upon impact, the Trial Court awarded Kshs. 50,000/= for pain and suffering. In upholding this finding on Appeal, the Learned Judge stated as follows:

“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.” [Emphasis Ours]

22. It is the Respondent's submission that, in view of the circumstances of the case, no sufficient reason has been established by the Appellants to warrant disturbance of the award on pain and suffering. We humbly submit that the award was adequate and reasonable and urge the Court to so find.
23. On the 2nd issue as to whether the Learned Trial Magistrate erred in awarding Kshs. 200,000/= for Loss of Expectation of Life.?. The Respondent contends that, the deceased was aged 11 years at the time of her demise. She enjoyed good health and had prospects of a long, healthy and happy life. The deceased's life was therefore cut short and her bright future dimmed by the material accident.
24. That, the Learned Trial Magistrate considered the Appellants and Respondent's cited authorities and made a finding that some superior Courts do not apply the 'conventional sum' of Kshs. 100,000/= proposed by the Appellants. The Court held that in its view every case should be determined on its own merits. It was the Learned Magistrates further finding that a child has more prospects of a longer life than an adult or older person and thus awarded a sum of Kshs. 200,000/= (See page 43 of the Record of Appeal).
25. The Respondent submit that the award of Kshs. 200,000/= was reasonable in view of the fact that the deceased who was a minor had a promising life that was suddenly cut short by the accident. We further submit that the award falls within the range of recent decided and more comparable cases.
26. The Respondent urges the Court to take into consideration the following authorities:



- a. Moses Akumba & Another vs Hellen Karisa Thoya [2017] eKLR, the High Court upheld an award of Kshs. 200,000/= on loss of expectation of life.
 - b. Patrick Kariuki Muiruri & 3 Others vs Attorney General [2018] eKLR the High Court awarded Kshs. 200,000/= under the head of loss of expectation of life.
 - c. West Kenya Sugar & Co. Ltd –Vs- Philip Sumba Julaya & Another [2019] eKLR where the Court upheld the Lower Court’s award of Kshs. 200,000/= for loss of expectation of life.
 - d. Mwaura v Asingo & Yugu (Suing as Administrator and Personal Representative of the Estate of Maurice Oketch Asingu - Deceased) (Civil Appeal E88 of 2022) [2024] KEHC 7842 (KLR) (27 June 2024) which is the most recent case where the High Court upheld the Lower Court’s award of Kshs. 200,000/= for loss of expectation of life in June 2024.
27. That in the light of the above decided cases, the Respondent submit that the sum of Kshs. 200,000/= was in line with similar awards for similar loss and humbly urge the Court to uphold the same.
28. On the 3rd issue as to whether the Learned Trial Magistrate erred in awarding a Global Sum of Kshs. 2,000,000.00/=. the Respondent submits that, before the Trial Court, the parties herein proposed for the application of a Global approach in the assessment of damages under the head of Loss of Dependency (See page 43 of the Record of Appeal). The Respondent proposed that a Global Sum of Kshs. 2,000,000/= would be sufficient for Loss of Dependency.
29. In so opining, the Respondent relied and urged the Court to be guided by the decision in Makueni Courts Ltd & another v Felistus Kanini Ndunda (Suing as the legal representatives of the estate of Eric Mutuku) [2020] eKLR where the Court held that an award of Kshs. 1,800,000/= was sufficient compensation for a deceased aged 12 years old.
30. In the impugned judgment, the Learned Trial Magistrate found the above authority more comparable to the circumstances of this case in terms of the age of the deceased. The Learned Magistrate also took into account inflation and awarded a sum of Kshs. 2,000,000/= which she held was reasonable (See page 43 of the Record of Appeal). It is the Respondent’s submission that the award falls within the range of recently decided and more comparable cases.
31. The Court is urged to take due consideration to the following authorities:
- a. Antony Angwenyi Okoba v Thomas Kipkurui Langat & Another [2021] eKLR, where the deceased was 10 years old, the Court awarded loss of dependency of Kshs 1,400,000/=.
 - b. Mpaka Muriuki Japheth v HMM & Another [2021] eKLR, where the deceased was 13 years, the Court awarded loss of dependency of Kshs 1,500,000/=.
 - c. Makueni Courts Ltd & another v Felistus Kanini Ndunda (Suing as the legal representatives of the estate of Eric Mutuku) [2020] eKLR where the Court held that an award of Kshs. 1,800,000/= was sufficient compensation for a deceased aged 12 years old.
 - d. Nderitu v Kiswii (Suing as mother and personal representative of the Estate of Janet Kavindu Kingesi (Deceased) (Civil Appeal E186 of 2022) [2023] KEHC 24678 (KLR) (31 October 2023) (Judgment) where the Court upheld that an award of Kshs. 1,800,000/= for a deceased minor aged 10 years old.
32. That based on the above authorities, it is clear that the compensation for the minors aged between 10 and 13 years ranges between Kshs. 1400,000/= and Kshs. 1,800,000/=. The above cited authorities were for the years between 2020 and 2023.



33. The Trial Court's assessment of Loss of Dependency was therefore within the accepted range. It cannot be said that the Trial Court erred in awarding a sum of Kshs. 2,000,000/=, which according to the Respondent was adequate and reasonable for the loss suffered by the Respondent. Also, owing to inflation, the sum of Kshs. 2,000,000/= takes into account the decreasing value of the Kenyan shilling and prevailing state of the economy.
34. The Respondent humbly urge the Court to uphold the same. the Respondent submit that she has proved that the appeal herein is unmerited and ought to be dismissed with costs. We therefore urge the Court to dismiss the same with costs.

Analysis and Determination

35. Being a first appeal this Court lays emphasis on the principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...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 into account of particular circumstances or probabilities materially to estimate the evidence.”

36. The only solo issue for this Court to consider is whether the award made in judgment was inordinately excessive to warrant the disturbance by the Court.
37. This Court is alive to the fact that this is not a retrial and the 1st hurdle on the Appellants is to demonstrate the inordinate and excessive award granted as a basis of inviting the Court to disturb the same. As this Court can only intervene if the award meted out is too large or too small as to demonstrate a wholly erroneous estimate of damages.
38. On the issue as to whether the award of kshs 60,000/- under pain and suffering, nothing has been laid to demonstrate the same as excessive inordinate and that by the Appellant suggesting that kshs 20,00 should suffice appears to invite the Court to disturb the award without any basis I respectfully decline
39. I have considered the record of Appeal and the trial proceedings noting that the trial took into considerationsimilar judicial authorities to award the Global Sum of Kshs. 2,000,000.00/=. the parties herein conceded for the application of a Global approach in the assessment of damages under the head of Loss of Dependency I have not seen anything that would deem the same as excessive inordinate such that it would lead to an erroneous estimate.
40. Finally, as to whether the Award under the head of loss of expectation of life of kshs 200,000 was excessive and inordinate and gave rise to an erroneous estimate I think not the precedents on the scope under this head ranges from 100,000 to 200,000 and that this Court can only disturb such an award where it is shown to have been inordinate and excessive.
41. The Court respectfully declines the overtures by the Appellant to engage in a bargaining exercise on quantum unless of Court it is demonstrated that the awards were made in an injudicious manner
42. This cumulatively brings me to the conclusion that the Appeal lack merit and qualifies for dismissal with costs to the Respondent.

It is So Ordered



SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF MAY 2025.

MOHOCHI S. M.

JUDGE

