Bengcom Communications Limited & another v Manje & another (Suing as Legal Representatives of the Estate of Elvise Odhiambo Manje - Deceased) (Civil Appeal 119 of 2019) [2025] KEHC 8430 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8430 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 119 OF 2019

BM MUSYOKI, J

JUNE 16, 2025

BETWEEN

BENGCOM COMMUNICATIONS LIMITED ..... 1ST APPELLANT

JOHN JUMA OGUTU ..... 2ND APPELLANT

AND

JULIUS OTIENO MANJE ..... 1ST RESPONDENT

WALTER MANJE ..... 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ELVISE ODHIAMBO MANJE - DECEASED

(Being an appeal against part of judgment and decree in the Chief Magistrate's Court at Kisumu (R.K. Ondieki SPM) civil case number 534 of 2016 dated 23rd July 2019)

JUDGMENT

1. This is an appeal on quantum only liability having been determined by a consent recorded in court on 23-07-2019 at 15:85 for the plaintiff and defendant respectively. In the lower court, the respondents who had sued as the legal representatives of the estate of the late Elvise Odhiambo Manje were awarded damages as follows;

    a. General damages for pain and suffering Kshs 100,000.00

    b. Loss of expectation of life Kshs 100,000.00

    c. Loss of dependency Kshs 2,000,000.00

    d. Special damages Kshs 30,000.00

2. The appellants being dissatisfied with the said judgment on quantum, preferred this appeal raising five ground all of which revolve around the award of damages. The argument of the appellants is that the damages for pain and suffering, loss of expectation of life and loss of dependency were excessive. Having read the submissions of the parties, it appears that the appellant has raised the issue of double compensation in that the damages under the Law Reforms Act should have been discounted since the dependants are the same as those benefiting from the awards under the *Fatal Accidents Act*. In the memorandum of appeal dated 17th October 2019, there is no ground of appeal which complains about the double compensation. Order 42 Rule 1 provides as follows;

> " The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.'

3. Based on the above provision, I will not consider the issue of double compensation or discounting of the damages as urged by the appellant because it was not part of the memorandum of appeal neither did the appellants seek permission or leave of the court to argue it.

I will proceed to deal with each head of damages as below.

Pain and suffering

4. The appellant has argued that the damages for pain and suffering were excessive. I have stated that the deceased died the same day of the accident. It is not shown how long it took him to succumb to the injuries. The onus lied with the respondents to proof that fact. Damages for pain and suffering are awarded to compensate for the pain and suffering the deceased went through before he died. Where the deceased died instantly, it is assumed that the death was accompanied or preceded by minimum pain and the courts have been awarding damages for the same in the region of as little as Kshs 10,000.00 and Kshs 50,000.00. It was held in Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir (Suing as admin of the estate of Benard Soita Nyongesa (DCD) [2022] KEHC 2839 (KLR), that

> " The above case law points to the fact that the ward of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this latter case, the presumption is that the deceased experienced pain and suffering prior to his or her death unlike in the former."

5. In my assessment, the amount awarded by the trial court was too high that it amounted to a wrong estimate as compared to other cases of similar nature. In this regard I am minded to reduce the same to Kshs 30,000.00. In Joseph Gatone case cited above, the court awarded Kssh 50,000.00 for the deceased who died instantly.

Loss of expectation of life

6. I find no basis for interfering with the award of Kshs 100,000.00 for loss of expectation of life. The same is to me reasonable and comparable to other decided cases. My decision is guided by awards in

the cases of Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another [2019] KEHC 10319 (KLR) where the court awarded Kshs 100,000.00 on 6-02-2019 and Njoroge (Suing as the Legal Administrator of the Estate of Francis Karanja Wainaina-Deceased) v Ponderosa Logistic Ltd [2024] KEHC 1606 (KLR) where an award of Kshs 100,000.00 was given on 22-02-2024.

Loss of dependency/lost years

7. The other issue for determination is whether the Kshs 2,000,000.00 awarded under the head of loss of dependency was too high. The deceased was on 19-12-2015 involved in an accident with motor vehicle registration number KCF 630U which was being driven by the 2nd appellant and owned by the 1st appellant while riding a motor cycle. According to the death certificate, the deceased succumbed to injuries on the same date. The accident was said to have occurred at 3.30 am but there is no indication at what time the deceased passed on.

8. According to the amended plaint dated 6th October 2016, the deceased did not have wife or children. When the 1st respondent testified, he stated that the deceased's wife who he did not name had died. He alleged that the deceased and his wife had children though they had not been mentioned in the amended plaint. He also did not mention their numbers, names and ages in his testimony. None of the ten exhibits produced by the plaintiff is a birth certificate of any of the children or anything to show that the deceased was married or had children. The letter from the area chief dated 26-01-2016 which was produced as exhibit 2 does not indicate that the deceased had children or wife. The letter only shows the respondents herein as mother and father. The plaint in addition adds one Julius Otieno Manje as a brother.

9. There is no evidence that the deceased used to help or assist his parents or brother. I have gone through the proceedings and I see there was no attempt anywhere to prove dependency. The 1st respondent didn't in his testimony tell the court that he depended on the appellant for anything. I am aware that children are expected to spend in helping their parents but in my view, there must be at least a demonstration even if it is by way of mouth that the parents depended on the deceased. The court cannot be left to assume that the parents depended on the deceased without any evidence especially where the deceased was fairly young and there was no proof of earnings or income.

10. In awarding the sum, the trial court used the global approach as opposed to multiplier and multiplicand approach. The appellant has argued that the lower court should have used the multiplier and multiplicand approach. The multiplier and multiplicand approach is best suited in cases where there is demonstration that the deceased used to work or earn some income in a certain field such that the court would be able to make guided calculation based on the minimum wage based on what the deceased used to do. Where there is no certainty of what kind of work the deceased used to do, the global approach is more suitable.

11. However, the choice of which approach to take is in the discretion of the court to choose which approach to adopt depending on the circumstances of the case and an appellate court should not interfere with this discretion unless it is shown that the same was applied capriciously, unreasonably or whimsically or injudiciously. In this case, I see no reason of changing the approach adopted by the Honourable Magistrate.

12. On whether the amount was excessive, this court finds that it was. The deceased was aged 27 years. He was alleged to have been a mechanic because the death certificate showed so. A death certificate in my considered view cannot be proof of the deceased person's occupation. The respondents should have adduced evidence to show that he was a mechanic. As I have stated above, there was no proof of dependency and although the court adopted a global approach, I take position that proof of

dependency should be a factor of consideration when the court is awarding damages through global approach. This is because the proof of dependency or lack of it would determine what ratio the court would adopt if it were to adopt the multiplier and multiplicand approach. In Ngila & another v Musili & another (Suing as legal Representative of the Estate of the late Isika Musili) [2022] KEHC 12991 (KLR), Honourable Justice R.K. Limo held that;

> " However, in resorting to the lump sum principle, a trial Court should be guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages."

13. In considering whether the award by the trail court was too high, I have looked at two fairly comparable authorities as it is hard and not necessary to get two cases with similar. In Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR) Honourable Justice F. Muchemi awarded a global sum of Kshs 1,000,000.00 for a deceased who died at the age of 24 years. Honourable Justice AK Ndungu in Mogusu & another (Suing as the Legal Representative of the Estate of Peter Isoe Oyugi- Deceased) v Nganga & another [2024] KEHC 2656 (KLR) awarded a global sum of Kshs 1,000,000.00 in respect of the deceased who died at the age of 30 years leaving behind a five year old child. Considering that these judgments were delivered in 2019 and 2024 respectively which is not long ago, I will factor in a little inflation. In my view, an amount of Kshs 1,200,000.00 would have been adequate compensation.

14. The final decision herein is that this appeal partially succeeds and I proceed to set aside the trial court's judgment and substitute it for judgement for the respondents against the appellants as follows;

    a. Liability 15:85 as entered by consent of the parties in the trial court.

    b. Pain and suffering Kshs 30,000.00

    c. Loss of expectation of life Kshs 100,000.00

    d. Lost years Kshs 1,200,000.00

    e. Special damages Kshs 30,000.00

    f. The respondents shall have costs of the suit in the lower court.

    g. The appellant shall have half costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Abande for the respondent and in absence of the respondent.