



Joseph & another (Suing as legal representatives of the Estate of the Late Kyrazaninka Jeanne) v Buscar (EA) Limited (Civil Appeal 32 of 2021) [2024] KEHC 280 (KLR) (11 January 2024) (Judgment)

Neutral citation: [2024] KEHC 280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 32 OF 2021
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

KAZANA JOSEPH 1ST APPELLANT

SEBATU ERRIC 2ND APPELLANT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
KYRAZANINKA JEANNE**

AND

BUSCAR (EA) LIMITED RESPONDENT

(Being an appeal from the Judgement of Hon. C. A. Mayamba (PM) delivered on 30th April 2021 in Kilungu Law Courts CMCC No. 229 of 2019)

JUDGMENT

1. In a judgment delivered on 30th April 2021, the Magistrate's court at Kilungu entered judgment for the plaintiff's (now appellants) and concluded as follows:-

"I do make the following orders:

- a. Liability 100%
- b. Pain and suffering Kshs. 50,000/=
- c. Loss of expectation of life Kshs. 100,000/=
- d. Loss of dependency Kshs. 1,800,000/=
- e. Special damages Kshs. 1,815/=



f. Costs and interest

2. Dissatisfied with the judgment and award of the trial court, the appellants, who were the plaintiffs in the trial court, have come to this court on appeal through counsel S. N. Ngare & Company on the following grounds:-
 1. The learned Magistrate erred in law and in fact in failing to consider and apply comparative decisions on pain, suffering before death.
 2. The trial Magistrate misdirected himself in law and fact by failing to appreciate the applicable standard on proof of special damages.
 3. The trial Magistrate erred in law and in fact by failing to consider the appellant's submissions on special damages and funeral expenses.
 4. The learned trial Magistrate misdirected himself in law and in fact by failing to award damages for funeral expenses.
 5. The learned Magistrate misdirected himself in law and in fact by failing to consider the totality of the evidence adduced.
3. The respondents also filed an appeal (cross-appeal). The appeal and cross-appeal were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by S. N. Ngare & Company Advocates for the appellants, as well as the submissions filed by Kimondo Gachoka & Company Advocates for the respondents.
4. This is an appeal on the quantum of damages awarded. This court has thus to be guided by what was stated by the Court of Appeal in *Kemfro Africa Ltd & Another =Versus= AM Lubia & Another*(1982 – 88) 1KLR wherein Kneller J.A stated as follows:-

“In deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the Judge in assessing 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 or low that it must be a wholly erroneous estimate of the damage. In assessment of damages the general method of approach should be that comparable injuries should, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
5. In the proceedings before the trial court herein, the appellants called two witnesses that is PW1 Ernest Nzira Bakunzi and PW2 Kazana Joseph. PW1 was a refugee and neighbor of the deceased, and both were travelling to Mombasa in the same bus when the accident occurred.
6. According to PW1, the deceased was burnt to death in the bus. Deceased was a seller of clothes, but he did not know how much deceased earned per month. It was his evidence that he was also a vendor of clothes and earned Kshs. 40,000/= per month.
7. PW2 testified that he was a watchman at Umoja in Nairobi and the husband of the deceased who died in a road traffic accident. He testified that deceased was aged 46 and had 5 children. It was also his evidence that the deceased earned Kshs. 40,000/= per month from her business. He relied on several documents and stated that burial was on 12th August 2018 at Langata cemetery.
8. The two witnesses of the appellants were cross-examined, but the respondent did not call any witnesses, and parties counsel filed written submissions.



9. I note that in submissions before the trial court, the appellants counsel asked for damages of Kshs. 1,000,000/= for loss of life expectation, Kshs. 300,000/= for pain and suffering, Kshs. 6,080,000/= for loss of dependency and Kshs. 107,315/= for special damages.
10. On their part, the respondent's counsel asked for Kshs. 50,000/= for loss of expectation of life, Kshs. 10,000/= for pain and suffering, Kshs. 800,000/= for loss of dependency. Both sides relied on a number of decided court cases.
11. Did the trial court take into account an irrelevant factor or fail to take into account a relevant factor, or did the trial Magistrate misapprehend the evidence?
12. The burden was on the appellants or their counsel to demonstrate to this appellate court, the justification or basis for it to interfere with the award of damages made by the trial court.
13. The appellants counsel has relied on several cases on the principles for assessment for both general damages and special damages. I agree with the reasoning in those cases.
14. Coming to the facts established herein through evidence in this case, the details are scanty. Starting with pain and suffering where the Magistrate awarded Kshs. 50,000/= there was no evidence tendered during trial that there were screams or struggles from the deceased or any of the people who were trapped in the bus. It cannot thus in my view be said that the figure of damages awarded by the trial court was manifestly low in the circumstances.
15. Also from the evidence on record, and submissions before the trial court and on appeal, the award of Kshs. 100,000/= for loss of expectation of life is within the conventional range.
16. With regard to the award of Kshs. 1,800,000/= for loss of dependency, again with the evidence on record of the used clothes and shoes selling business of the deceased, with no description of existence of any shop or kiosk, and no single document tendered as evidence, not even a photo of the type of wares, in my view, the global award figure made by the trial court was reasonable, and cannot be justifiably interfered with on appeal. I note also that all the pleaded dependants were above 18 years of age.
17. With regard to special damages, the rule of thumb is that special damages, must be pleaded and proved. I appreciate that Kshs. 107,315/= was pleaded as special damages. No document was however produced in court to support the stock allegedly lost of Kshs. 75,500/= The body of the deceased was burnt beyond recognition and no credible documentary evidence was relied upon or produced to support the claim of funeral expenses of Kshs. 30,000/= I thus find no error made by the trial court in assessing the modest figure of special damages herein.
18. In the result, I find no merits in the appeal and will dismiss the same. I also find no merits in the respondent's appeal. In view of the special circumstances of the whole matter, I order that parties bear their respective costs of the appeal and cross-appeal.
19. Consequently and for the above reasons, I dismiss the appeal and cross-appeal. I order that parties bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Mr. Mutua for appellant

