



**Tomson Onkendi Ondimu t/a Victorian Academy v DK & FM
(Suing as the Legal Representative of LK - Deceased) (Civil Appeal
E094 of 2022) [2024] KEHC 417 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E094 OF 2022
EM MURIITHI, J
JANUARY 23, 2024**

BETWEEN

TOMSON ONKENDI ONDIMU T/A VICTORIAN ACADEMY APPELLANT

AND

**DK & FM (SUING AS THE LEGAL REPRESENTATIVE OF LK -
DECEASED) RESPONDENT**

*(Being an appeal from the Judgment of Hon. Tito Gesora (CM)
delivered on 14/6/2022 in Maua CMCC No. 186 of 2016)*

JUDGMENT

1. The Respondents herein, the Plaintiffs in the trial court, sued the Appellant vide an amended plaint dated 6/6/2018 seeking General damages under both the Law Reform Act and the Fatal Accidents Act, Special damages and costs of the suit plus interests. The Respondents pleaded that on or about 10/8/2016, the deceased who was a pupil at the Appellant's school, was a lawful passenger aboard motor vehicle Registration No. KAY 260 X Isuzu Bus along Galleria-Langata road when the Appellant's agent so negligently, recklessly and carelessly drove, controlled and managed it that it veered off the road and crashed, thus occasioning the deceased fatal injuries. Prior to her premature death, the deceased was a brilliant class one pupil aged 6 years who enjoyed good health and was living a happy and a vibrant life which was abruptly brought to a sudden end, as a result of which her estate has suffered great loss and damage.
2. The Appellant denied the claim through his statement of defence dated 20/1/2017, and prayed for its dismissal with costs.
3. Upon full hearing, the trial court found the Appellant to have been 100% liable for the accident and awarded a global sum of Ksh. 1,500,000 for lost years, Ksh. 120,000 for loss of expectation of life, Ksh.



50,000 for pain and suffering and Special damages of Ksh. 135,500 = Ksh. 1,805,500 together with costs and interest.

The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 21/7/2022 set out 7 grounds of appeal as follows:
 1. The Learned Magistrate erred in law and fact in apportioning liability at 100% in favour of the Respondent as against the Appellant, Kshs. 50,000/= for pain and suffering, Kshs. 120,000/= for loss of expectation of life, Kshs. 1,500,000/= for loss of dependency, Special damaged Ksh 135,500 which amount was exorbitantly high in the circumstances and injuries suffered by the respondent.
 2. The Learned Magistrate erred in law and fact in finding that the Respondent was entitled to Ksh. 1,805,500/= under the Fatal Accident Act as the same was too high in view of the evidence tendered and thus the sum awarded was too high and the same is not justified.
 3. The Learned Magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
 4. The learned magistrate erred in law and fact when he failed to consider the appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
 5. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 6. The learned magistrate erred in law and fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
 7. The learned magistrate erred in law and fact in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.

Duty of the Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1, Domitila Karimi, one of the Respondents herein adopted her witness statement dated 28/12/2016 as her evidence in chief together with the list of documents dated 28/12/2016 as exhibits 1 to 6. She further testified that, "She wasn't sick. She died in an accident. She died in hospital. I wasn't there but we were briefed as parents. We rushed to hospital. She was doing well. She was doing well. No. 1. She was bright. I seek compensation."
7. The Appellant and his counsel were absent, with notice, when PW1 testified, and therefore, there was no cross examination.



Submissions

8. The Appellant urges that the award of Ksh. 50,000 for pain and suffering was high considering the deceased did not suffer for a long period of time before succumbing, and cites Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) (2020) eKLR. He urges the court to substitute the award of Ksh.120,000 for loss of expectation with a sum of Ksh.100,000 and cites Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased) (2020) eKLR. He urges the court to substitute the award of Ksh.1,500,000 for loss of dependency with a sum of Ksh. 400,000, and cites Civiscope Limited v Gilbert Kimatare Nairi & Lilian Napudoi Nairi (Suing as Personal Representatives of the Estate of Gilbert Nairi Lemayian (Deceased) (2021) eKLR, GKN & another (suing as Personal Representatives of the Estate of GNL (Deceased) v Civiscope Limited (2021) eKLR and Kwamboka Grace v Mary Kimuma (2017) eKLR. He urges the court to set aside the award of Ksh. 135,500 for special damages as the same was never pleaded and allow the appeal with costs.
9. The Respondents urge that the award of Ksh. 50,000 for pain and suffering was not excessive in view of excruciating pain the deceased underwent before she died, and cite Adan Abdi Noor (Deceased) v Sigma Feeds 92012) eKLR and Nelson N. Kioko & Others v Mombasa Liners & Another (2012) eKLR. They applaud the court for awarding Ksh. 120,000 for loss of expectation of life and Ksh.1,500,000 for loss of dependency because of the manner in which the deceased's bright future was abruptly cut short by the Appellant's negligence, and cite Daniel Mwangi Kimemia & 2 Others v J.G.M & Another (2016) eKLR, Suluenta Kennedy Sita & another v Jeremiah Ruto (suing as legal representative of the Estate of Joyce Jepkemboi (2017) eKLR, Grace Kanini v Kenya Bus Services Nairobi HCCC No. 4708/1989, Sheikh Mushaq v Nathan Mwangi Kamau Transporters & 5 Others (1985-1986) 4KCA 217, DMM (Suing as the Administrator and Legal Representative of the Estate of LKM v Stephen Johana Njue & Another (2016) eKLR and China National Aero-Technology International Engineering Corporation v RL (Suing as the legal representatives of the estate of the late SL (2020) eKLR. They urge that they pleaded and proved the special damages of Ksh. 142,850 by production of receipts, and pray for the dismissal of the appeal with costs. On liability, they urge that since the deceased was a lawful passenger aboard the accident motor vehicle, she had no control over it in any way, and thus the apportionment of liability at 100% was justified. They cite Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another (2014) eKLR and Peter Wambui Kinuthia & Another v S.S Mehta & Sons Limited (2015) eKLR. They pray for enhancement of the awards by the trial court to Ksh. 100,000 for pain and suffering, Ksh, 120,000 for loss of expectation of life, Ksh. 2,000,000 for loss of dependency and special damages of Ksh. 142,850.

Analysis and Determination

10. The issues for determination from the grounds of appeal are whether the apportionment of liability at 100% was proper; whether awards under the various heads were excessive and whether the Appellant's submissions and authorities cited thereon were considered.

Liability

11. The evidence on record is that the deceased was travelling aboard the Appellant's school bus when the accident happened. There is therefore nothing the deceased could have done to avoid the accident.
12. This court finds that the Appellant and/or his driver were wholly to blame for the accident because they failed to exercise care and take reasonable steps to avoid the accident.



Excessive Damages

13. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows:
14. “The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”

Loss of Dependency

15. Fredrick Mutembei, one of the Respondents herein recorded in his statement dated 28/12/2016 which was adopted as evidence that, “My daughter was aged 6 years and was a very bright and intelligent girl. She always said she would be a doctor and I believed she would be such and would support me and my family in future. Her loss devastated our entire family.”
16. This court finds that the Respondents proved on a balance of probabilities by unchallenged testimony, that they reasonably expected that the deceased, who was undeniably a bright pupil, would support them in future.
17. While there is no doubt in this court’s mind that the deceased was indeed a bright pupil who would have certainly supported her parents in future, it feels that the award of Ksh.1,500,000 was excessive in the circumstances.
18. This court accepts the Court of Appeal’s observation in *Denshire Muteti Wambua v Kenya Power and Lighting Co. Ltd* [2013] eKLR, that:

“...monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.”
19. This court in *Dan Muriuki Gitonga v Joseph Mwigiria & Margaret Wanjiku* (Suing as the legal representatives of the Estate of the late Dennis Kinyanjui) Meru Civil Appeal No. E070/2021 A75/23 upheld the trial court’s award of a global sum of Ksh.800,000 for loss of dependency where the deceased was a minor aged 5 years.
20. This court finds that an award of Ksh. 1,000,000 for loss of dependency would suffice.



Loss of Expectation of Life

21. In awarding the sum of Ksh.120,000 for loss of expectation of life, the trial court relied on the case of Suluenta Kennedy Sita & another v Jeremiah Ruto (suing as legal representative of the Estate of Joyce Jepkemboi (2017) eKLR cited as Suluerita Kennedy Sifa & Anor v Jeremiah Ruto (Administrator of Estate of Joyce Jepkemboi (2017) eKLR, where a sum of Ksh.100,000 was awarded under this head.
22. Taking into account the inflation rate, this court finds that the sum of Ksh. 120,000 for loss of expectation of life was reasonable.

Pain and suffering

23. This court notes the holding of the court (D.S Majanja J) in the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR cited by the Appellant, 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.”

24. The award of Ksh.50,000 was fair considering that the minor subsequently died in the hospital after going through excruciating pain.

Special Damages

25. Fredrick Mutembei, one of the Respondents herein, recorded in his statement that, “I spent Kshs. 100,000/= in her burial. I also paid Kshs. 30,000/= as advocates fees for succession.”
26. The special damages pleaded by the Respondents totalled to Ksh.130,500 being hospital fees of Ksh. 500, funeral expenses of Ksh. 100,000 and advocates fees for filling succession cause of Ksh.30,000 which corresponds with the receipts produced as exhibits. The award of special damages of Ksh. 135,500 was thus erroneous as it was not in tandem with the evidence adduced.

Consideration of the Appellant’s submissions and decisions

27. This complainant is unfounded because the trial court duly considered the Appellant’s submissions and authorities alongside those of the Respondents before reaching at the decision on the damages.

Orders

28. Accordingly, for the reasons set out above, this court finds the appeal to have partially succeeded and allows it to the extent only and in the following terms:
 1. The award of Ksh.1,500,000 for loss of dependency is hereby set aside and substituted with an award of Ksh.1,000,000.
 2. The award of special damages of Ksh.135,500 is hereby set aside and substituted with an award of Ksh.130,500.
 3. The rest of the judgment of the trial court remains unaffected.
29. The appellant shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2024.



EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co. Advocates for Appellant.

M/S Gikonyo & Ngugi Advocates for the Respondent.

