



Turuka v Nyarebu & another (Suing as the legal representative of the Estate of Thadeus Ongodi Karani (Deceased)) (Civil Appeal E118 of 2021) [2024] KEHC 134 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEHC 134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E118 OF 2021
JM CHIGITI, J
JANUARY 18, 2024**

BETWEEN

ERICK OYIEGO TURUKA APPELLANT

AND

WILKISTER NYAREBU 1ST RESPONDENT

OSMUND NYABUTO KARANI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THADEUS
ONGODI KARANI (DECEASED)**

*(An Appeal against judgment delivered on 20th
September, 2021 in Ogembo CMCC No. 288 of 2018.)*

JUDGMENT

1. On 24/12/2017, the deceased was lawfully riding motor cycle registration number KMDV 257R along Nyamarambe-Etago road when at Mochengo area, he was involved in an accident with motor vehicle registration number KBS 229L.
2. After the hearing a judgment was delivered on 20th September, 2021 in Ogembo CMCC No. 288 of 2018. The Appellant was held 80% liable and judgment entered in favour of the Respondent herein for Kshs. 3,782,400.00 awarded as general damages.

Appellant's case:

3. Being aggrieved by the said judgment, the Appellant instituted this appeal vide a Memorandum of Appeal dated 04/10/2021 raising ten grounds of appeal, which were ideally on the issues of liability and quantum:



On liability

4. The Appellant submits that the Respondents did not prove their case on liability as they failed to show how the Appellant was negligent.
5. It is his case that The Police Occurrence Book, and the Police Abstract demonstrated that motorcycle registration number KMDV 257R had been blamed for causing the accident.
6. The purported eye witness who allegedly witnessed the accident was not of much help as his evidence was contradictory.
7. Also no evidence was adduced to show that the motorcycle rider was licensed to operate on a public road prior to the accident.
8. The Respondent ought to have called the investigating officer to produce the OB, sketch map, and police file to support their claim of negligence against the Appellant; but they did not.
9. Reliance is placed in the case of Daniel Toroitich Arap Moi -us- Mwangi Stephen Murithi & Another (2014] eKLR the Court of Appeal held that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

10. In the case of Lucy Muthoni Munene vs. Kenneth Muchange & Another Nairobi HCC 858 of 1988 Justice Ringera dismissed the case for lack of evidence and stated:

“it is an elementary principle of adjective law that whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In a personal injury claim that betokens that the Plaintiff must make out that the Defendant is negligent as alleged. The legal burden of proof is clearly on the Plaintiff and he must show that the loss is to be attributed to the negligence of the Defendant. If he does not discharge that burden by adducing evidence from which it could be inferred that on a balance of probability the Defendant is negligent, then he cannot succeed even though the Court may be welling with sympathy for him.”

On the issue of Quantum of General damages:

11. The Appellant relies on the case of Power Lighting Company limited & another -versus- Zakayo Saitoti Naingola & another (2008) eKLR cited in the case Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR. The court held;

“On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages;

- a. Damages should not be inordinately too high or too low
- b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.



- c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shillings, then at the time of the judgment....”
12. The Respondent was awarded a sum total of Kshs.3, 782,400.00 as general damages, with Kshs.80, 000.00 awarded for pain and suffering, Kshs.80, 000.00 awarded as loss of expectation of life, Kshs.3, 622,400.00 awarded for loss of dependency with liability assessed 80:20 in favour of the Respondent.
13. The Appellant believes that the award of Kshs.80, 000.00 for pain and suffering was high considering the deceased did not suffer for a long period of time before he succumbed to his injuries. In this he relied on the case of Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, which was cited in the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR where the court stated:
- “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.”
14. Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased) [2020] eKLR
- “On loss of Expectation of Life: the award of Kshs.100, 000/= under this head is conventional and well merited and in accordance with the applicable principles of law.”
15. On the heading of loss of expectation on life; the Appellant relies in the awarded general damages was inordinately high as the Magistrate. In Ogembo CMCC No.288 of 2018 erred by using wrong multiplicand of Kshs.28,300.00 and 20 years as multiplier yet the deceased was 40 years. The Honourable Court in using a multiplicand of 20 years did not take into consideration the vagaries and vicissitudes of life. The Appellant also relies on the case of Kwanza & Ngalah Mutua & Another cited in the case of China National Aero-Technology International Engineering Corporation v Raphael Lenamboyo [2020] eKLR Justice Ringera stated as follows on the method of calculating damages,
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where facts such as age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible; to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”



16. Reliance is also placed in the case of *Petronila Muli vs Richard Muindi Savi & Catherine Mwende Mwindu*(2021) eKLR, the court stated that the, “guiding principles of assessment of damages are age of deceased at the time of death, his income and dependency ratio. The assessment thereof is based on multiplicand, multiplier and dependency ratio.” In the instant case that the age of the deceased was 40 years, confirmed from the testimony of the Respondent that the deceased earned an income from teaching and also that he was the bread winner of the family as per the testimony of the Respondents.
17. The Appellant suggests a multiplier of 10 years in which rely on the case of *Midland Media Limited & another v Pauline Naukot Aule* (Suing as the Legal Representative of the Estate of the late Esinyon Esokon Ekai) [2020] eKLR

“The deceased was 57 years and not in formal employment. It was not said he was of poor health. Without a doubt, vicissitudes of life and its uncertainty must be considered as necessary factors in arriving at a reasonable multiplier. In self-employment business ventures, it is not uncommon that a person may work up to the 60’s, 70’s and even 80’s, depending on the type of venture. To conform to uniformity in awards of damages, I reduce the multiplier to a more rational and reasonable figure of 10 years.”
18. In *Benham v Gambling* [1941] AC 157 it was held that-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.” (emphasis added).
19. The Appellant suggests the sum of Kshs.30, 000.00 for pain and suffering, the sum of Kshs.80, 000.00 for loss of expectation of life, and the sum of Kshs.2, 264,000 for loss of dependency less contribution.

The Respondents case:

20. On the issue of liability, the Respondent argues that the court should not disturb the finding on the issue of liability. It is the Respondents case that ‘PW-III’ testified that the motor vehicle Probox overtook him went into opposite lane and hit the motor cycle.
21. The appellant did not controverted the credibility and veracity of the eye witness (PW-III)
22. ‘PW-II’ the Investigating Officer in his oral testimony testified that the accident involved a motor vehicle (Reg. No. KBS 229 L) and a motor cycle (Reg. No. KMDV 257 R) and that the driver of the motor vehicle lost control, crossed into the motor cycle’s lane and knocked the said motor cycle.
23. That the motor vehicle was 1.5 meters into the wrong lane.
24. During cross examination, DW 1 the driver of the motor vehicle testified that he saw the motor cycle at a distance of about 15-meters.
25. DW-II’ having not been the investigating officer, having not visited the scene, having not taken any independent witness account, completely lacks the competence and capability to produce, ascertain, establish and defend the veracity of the said OB-entries.



26. The trial Court awarded Ksh 100,000/= as general damages for pain and suffering, which figure it subjected to 80%:20% deduction of liability arriving at Ksh 80,000/= which it decreed in its final award.
27. In the instant suit, the deceased's death was a culmination of immense pain and suffering.
28. That the Deceased was involved in a gruesomely painful accident – succumbing to injuries more than 3 whole hours after the accident is a fact that is uncontroverted herein.
29. In the foregoing respect reference is made to the Eye Witness's oral testimony as 'PW-III' who states that he helped rush the Deceased at first rushed to Nduru Hospital and then to Tabaka Mission Hospital where he succumbed to the accident injuries at around 0100h;
30. On the issue of Loss of expectation of life from paragraph '8' of the amended plaint the deceased died at 40-years.
31. Reliance is placed in the case of E M K & another v E O O [2018] eKLR where this Honourable Court correctly observed as follows: -“The conventional award for loss of expectation of life is Ksh 100,000/- ... In the present appeal PW2 testified that the deceased died after a period of hospitalization ... I therefore award Ksh 150,000/= as damages for pain and suffering and Ksh 100,000/= as damages for loss of expectation of life...”
32. On the issue of Loss of dependency, it is the Respondents case that the chief's letter adduced as 'PExh. 2'; the Respondent's oral testimony as 'PW-I'. The Deceased was survived by 6 children.
33. Documentary evidence, in the form of a pay slip, was tendered as 'P.Exh.-4' conclusively showing that the Deceased was making a monthly income of Ksh 31,450/=.The trial Court taking cognizance of statutory deductions from the Deceased resorted to a multiplicand of Ksh 28,300/-.The Deceased died aged 40-years old occupied as a primary school teacher.
34. Thus, that the Appeal should be dismissed.

Analysis and Determination:

35. In *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA, the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
36. This principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”

Liability:

37. 'PW-III' testified that the motor vehicle Probox overtook him went into opposite lane and hit the motor cycle.
38. The appellant did not controverted the credibility and veracity of the eye witness (PW-III).



39. 'PW-II' them Investigating Officer in his oral testimony testified that the accident involved a motor vehicle (Reg. No. KBS 229 L) and a motor cycle (Reg. No. KMDV 257 R) and that the driver of the motor vehicle lost control, crossed into the motor cycle's lane and knocked the said motor cycle.
40. That the motor vehicle was 1.5 meters into the wrong lane.
41. During cross examination, DW 1, the driver motor vehicle testified that he saw the motor cycle at a distance of about 15-meters.
42. DW-II' having not been the investigating officer, having not visited the scene, having not taken any independent witness account, completely lacks the competence and capability to produce, ascertain, establish and defend the veracity of the said OB-entries.

General damages:

43. In the case of Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, which was cited in the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando(Deceased) [2020] eKLR where the court stated:

“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 Kshs10,000 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.”

Pain and suffering

44. The trial Court awarded Ksh 100,000/= as general damages for pain and suffering which figure it subjected to 80%:20% deduction of liability arriving at Ksh 80,000/= which it decreed in its final award.
45. In the instant suit the deceased's death was a culmination of immense pain and suffering.
46. That the Deceased was involved in a gruesomely painful accident – succumbing to injuries more than 3 whole hours after the accident is a fact that is uncontroverted herein.
47. In the foregoing respect, I make reference to the Eye Witness's oral testimony as 'PW-III' who states that he helped rush the Deceased at first rushed to Nduru Hospital and then to Tabaka Mission Hospital where he succumbed to the accident injuries at around 0100h.
48. It is this courts finding that the award of Kshs.80, 000.00 for pain and suffering was a reasonable amount and consequently I do not find any justification to interfere with the award, and I so hold.
49. In the case of Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (UR) which was cited in the case of Francis Odhiambo Nyunja & 2 others v Josephine MalalaOwinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR where the court said:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or



has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs. Musila [1984] KLR 257).”

Loss of expectation of life

50. From paragraph ‘8’ of the amended plaint the deceased died at 40-years.
51. E M K & another v E O O [2018] eKLR where this Honourable Court correctly observed as follows: -“The conventional award for loss of expectation of life is Ksh 100,000/- ... In the present appeal PW2 testified that the deceased died after a period of hospitalization ... I therefore award Ksh 150,000/= as damages for pain and suffering and Ksh 100,000/= as damages for loss of expectation of life...”

Loss of dependency

52. The chief’s letter adduced as ‘P.Exh. 2’; the Respondent’s oral testimony as ‘PW-I’. The Deceased was survived by 6 children.

Multiplicand

53. Documentary evidence, in the form of a pay slip, was tendered as ‘P.Exh.-4’ conclusively showing that the Deceased was making a monthly income of Ksh 31,450/=.
54. The trial Court taking cognizance of statutory deductions from the Deceased resorted to a multiplicand of Ksh 28,300/-.
55. The Deceased died aged 40-years old occupied as a primary school teacher.
56. In choosing the multiplier and multiplicand approach to assess damages the court is guided by the case of Cornelia Elaine Wamba versus Shreeji Enterprises Ltd. & Others 2012 eKLR cited in the case of Petronila Muli v Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR and which stated,

“.....the choice of a multiplier or multiplicand is a matter of the Court’s discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was aged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and, lastly, possibility of death through natural causes and departure for greener pastures elsewhere”.
57. It is my finding that the trial court exercised its discretion judicially. There is no reason that has been advanced by the Appellant to warrant the setting aside of the judgment. This ground fails.

Disposition:

58. This court does not find any reason to interfere with the trial court’s discretion since the same was exercised judiciously.

Order:

The Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY, 2024

.....

J. CHIGITI (SC)



JUDGE

