



Awale Transporters Ltd Mombasa v Wakhungu & another (Suing as Legal Representatives of the Estate of Alfred Sabwami Namasambu -Deceased) (Civil Appeal E103 of 2022) [2024] KEHC 2680 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E103 OF 2022
REA OUGO, J
MARCH 6, 2024**

BETWEEN

AWALE TRANSPORTERS LTD MOMBASA APPELLANT

AND

RECHO NANJEKHO WAKHUNGU 1ST RESPONDENT

MOSES WAFULA NAMASAMBU 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ALFRED
SABWAMI NAMASAMBU -DECEASED**

(Appeal from the Judgment and Decree of Hon. P.Y Kulecho, Senior Principal Magistrate, Webuye in Civil Suit No. E47 of 2020 delivered in 4/10/2022)

JUDGMENT

1. At the lower court, the respondents filed a plaint seeking damages under the [Fatal Accidents Act](#) and the [Law Reform Act](#). According to the plaint, on 22/1/2020 the deceased was a lawful passenger abode on motor vehicle registration KCL 560Q, a matatu. The appellant was the beneficial, registered owner and or insured of Motor Vehicle registration No. KAV 053A/ZC 622. The matatu travelled along Eldoret-Webuye road and at Turbo Bridge, near Turbo Centre, the appellant's driver/agent drove its vehicle negligently that it lost control and rammmed into the and in consequence the deceased sustained severe injuries and as a result of which he died on the spot. A trial ensued and on 16/8/2022 the parties by their consent recorded by the court settled the issue of liability in the ratio of 90:10% in favour of the respondent.
2. The trial court after considering the entire evidence on record entered judgment in favour of the respondent:



Pain and suffering Kshs 50,000/-

Loss of expectation of life Kshs 200,000/-

Lost years Kshs 1,500,000/-

Special damages Kshs 238,000/-

Grand Total Kshs 1,988,000/-

Less 10% Contribution Kshs 198,800/-

Net Total Kshs 1, 789,200/-

3. The appellant is aggrieved by the finding of the lower court and has filed its memorandum of appeal dated 24/10/2022 challenging the judgment of the subordinate court based on the following grounds:
 1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 2. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited on the written submissions presented and filed by the appellant.
 3. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 4. The Learned Trial Magistrate erred in awarding a sum in respect which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
 5. The Learned Trial Magistrate failed to apply himself judicially and adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
4. The court directed the parties to file their written submissions in support of their respective cases. Both parties complied.
5. The appellant in its submissions argues that the respondent was required to prove its claim before the lower court to the required standard. However, the respondents never called any eyewitness who witnessed the accident. It was submitted that the Pw1 failed to prove that the deceased was her husband and further, the birth certificates produced as Pexh 6 (a) & (b) do not belong to any of the dependents listed in paragraph 7 of the plaint. That the respondents also failed to produce tangible evidence showing that the deceased was a retired teacher and after his retirement received income from his farming business.
6. On the award of pain and suffering, it was argued that since there was evidence that the deceased died on the spot, then the court should find it just and fair that an award of Kshs 10,000/- is sufficient. The appellant relied on the case of Suleimani Mwanga v Walji Bhimji Jiwani & Another [1964] EA 171.
7. On the head loss of expectation of life, the appellant submits that there was no evidence that the deceased died at the age of 61 and that he was a teacher. It cited the decision of Mohamed Abdi v Paul Muturi Mwangi [2019] eKLR Nyeri HCCA No. 1 of 2017 where the award of Kshs 150,000/- by the subordinate court was set aside and the appellate court awarded Kshs 60,000/-. The appellant seeks that this court should set aside the award of Kshs 200,000/- and substitute the same with Kshs 60,000/-.



8. On loss years, the appellant argues that the court awarded Kshs 1,500,000/- yet the deceased was 61 years old. It referred this court to the decision in *John Wamae & 2 others v Jane Kituku Nziva & Another* [2017] eKLR where the court reversed a multiplier of 9 years for a person aged 61 years and awarded a global sum of Kshs 400,000/-. In *Moses Wetangula & Another v Eunice Titika Rengetiang* [2018] eKLR, the court adopted a global sum of Kshs 500,000/- for a 42-year-old retired officer of the Kenya Defence Force since there was no document to prove that he had been employed. The appellant urged the court to award Kshs 300,000/- for lost years.
9. The respondents opposed the appeal and submitted that the major contention is on quantum. The respondents submitted that the deceased died on the same day and the award of Kshs 100,000/- was sufficient compensation for pain and suffering. However, the trial court awarded only Kshs 50,000/- which amount is reasonable. On loss of expectation of life, they referred the court to the decision in *Moses Akumba & Another v Hellen Kasa Thoya* [2017] eKLR where the court held that an award of Kshs 200,000/- for loss of expectation of life for a deceased who was a fisherman was not inordinately high. They submit that the award by the trial magistrate therefore ought not to be disturbed.
10. On the award for loss of dependency, the respondents contends that the deceased's death certificate shows that he was 61 at the time of his death and his occupation was farming. The respondents testified that the deceased after retirement went into the farming business and was making Kshs 20,000/- per month. The respondents argue that the deceased could have worked up to the age of 80 years. It was further argued that the deceased was the sole breadwinner and maintained his family of 8 and some of his children were still minors in school. The appellant failed to rebut the evidence of the respondent which remains unchallenged. It was argued that in the case of *Mary Njeri Murigi v Peter Macharia & Another* [2016] eKLR the deceased was 60 years old at the time of his death and a contractor and a matatu operator who did not keep proper books and was awarded Kshs 4,000,000/-. That the magistrate did not misdirect herself in finding that Kshs. 1,500,000/- could suffice as sufficient compensation. On special damages, the respondent submits that the respondent pleaded and proved a special damage claim for Kshs 238,000/-.

Analysis And Determination

11. In this appeal, the only issue before the court is damages as liability was settled in the lower court through the consent of the parties and there is no doubt that the deceased as a result of the accident. In cases where the assessment of damages has been challenged, an appellate court must exercise caution and refrain from intervening in the trial court's discretion unless specific conditions are satisfied. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984* [1985] eKLR thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

12. On the head of pain and suffering the appellant submitted that the award of Kshs 50,000/- was excessive and that the court ought to have made an award of Kshs 10,000/-. The fact that the deceased died on the spot was not in issue. Nonetheless, the deceased must have suffered some pain before his death. In the case of *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No 68 of 2015*



[2016] eKLR the award of Kshs 50,000/- was upheld for a deceased who died immediately after the accident. The court stated:

“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.”

13. I therefore find no reason to interfere with the trial court’s award under the head pain and suffering.

14. The appellant argues that the award of loss of expectation of life was inordinately high. In this case, it was established by the death certificate that the deceased was 61 years old at the time of his death. In *Mosonik & another v Cheruiyot* (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment) the court observed as follows:

“44... I note that *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR, Hon Emukule J, reasoned that:

...In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death....”

45. That was in 2013. Thereafter, in the case of *Citi Hoppa Bus Limited & Another v Maria Clara Rota* [2021] eKLR an award of Kshs 200,000/= was made for loss of expectation of life where the deceased was aged 33 years old.”

15. In the case of *Mosonik* (supra) and *Citi Hoppa Bus Limited* (supra) the deceased persons were 27 and 33 years respectively and this would explain the award of Kshs 200,000/-. In this case, the deceased was 61 years old and retired a conventional award of Kshs 100,000/- would be reasonable.

16. On loss of dependency, the trial magistrate in arriving at the award applied a global sum on account that it was not possible to discern the respondent’s wage. The appellant in their submissions before the lower court urged the subordinate court to apply the minimum wage and the multiplier approach. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR the stated:

“(23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary



into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

- (24). The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”
17. Therefore, the trial magistrate was right when it applied the global award, however, it ought to have considered awards made in similar cases. In this case, the deceased’s wife, Racho Nanjekho Wakhungu (Pw1) testified that the deceased was a retired teacher and was earning an income from farming. There was no concrete evidence of the deceased’s earnings from his farming activities. According to his death certificate, he was 61 years old. In *Joseph Maina Kimura v Ann Nkirote Mwaniki* (Sued as the Legal Representative and Administrator of the Estate of Silvan Mwaniki Nyamburano - Deceased) [2020] eKLR the deceased was a 61-year-old retired Administration Police Officer who had a wife and children. The court awarded a sum of Kshs 800,000/- for loss of expectation of life and loss of dependency. I therefore substitute the award made by the trial court with an award of Kshs.800,000/- under this head.
18. There was no appeal on the award of special damages. Accordingly, the award made to the Respondent is as hereunder:
- a. Pain and Suffering Kshs. 50,000/-
 - b. Loss of expectation of life Kshs. 100,000/-
 - c. Loss of dependency Kshs. 800,000/-
Kshs. 950,000/-
Less 10% Kshs. 95,000/-
Kshs. 855,000/-
 - d. Special damages Kshs. 238,000/-
Total award Kshs 1,093,000/-
19. The Appellant shall only have the costs of the appeal and the Respondents costs of the suit in the trial court. The general damages shall attract interest at court rates from the date of judgment of the lower court while special damages will attract interest from the date of filing the suit. It is so ordered.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 6TH DAY OF MARCH 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Mugasia -For the Appellants

Respondents – Absent

Wilkister -C/A

