



**Climax Coaches Bus Ltd & another v Atsole (Suing as the legal representation of the Estate of Wycliffe Atsole Ingutia) (Civil Appeal E089 of 2022) [2024] KEHC 2845 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2845 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E089 OF 2022  
PJO OTIENO, J  
MARCH 8, 2024**

**BETWEEN**

**CLIMAX COACHES BUS LTD ..... 1<sup>ST</sup> APPELLANT**

**PETER KINUTHIA KIMANI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LINET OKHOBA ATSOLE (SUING AS THE LEGAL REPRESENTATION OF THE ESTATE OF WYCLIFFE ATSOLE INGUTIA) ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. G. Ollimo (SRM) in Butere PMCC No. 50 of 2020 delivered on 13th October, 2022)*

**JUDGMENT**

**Background**

1. By way of a plaint dated 9<sup>th</sup> September, 2020, the respondent moved the trial court and prayed for special and general damages, costs and interests of the suit. His case was that on 6/8/2020 at around 1630hours the deceased was aboard Motor Cycle Registration Number KMEH 080H as a pillion passenger travelling along Sabatia-Buyangu road when the 2<sup>nd</sup> appellant negligently drove Motor Vehicle Registration Number KCE 110X that it knocked the motor cycle thereby occasioning serious injuries to the deceased. The injury and resultant damage were blamed on the defendant with the particulars thereof being given.
2. In a statement of defense dated 22<sup>nd</sup> October, 2020, the appellants denied the respondent's claim, including the occurrence of the accident including any damages suffered then averred, in the alternative, that if at all the accident occurred then it was occasioned by the sole or contributory negligence of the deceased and the rider of Motor Cycle Registration Number KMEH 080H. Particulars of such negligence was then laid out.



3. In a judgment of the trial court delivered on 13<sup>th</sup> October, 2022, the court held the appellant liable for the tort at 100% and awarded to the respondent general damages for lost years in the sum of Kshs. 868,914/-, general damages for loss of expectations of life in the sum of Kshs. 200,000/-, general damages for pain and suffering in the sum of Kshs. 50,000/-, special damages in the sum of Kshs. 5,400/-, interest on general damages at court rates from date of judgment and interest on special damages from the date of filing the suit.
4. The decision aggrieved the appellant who lodged a memorandum of appeal dated 28<sup>th</sup> October, 2022, faulting the trial court on assessment of damages only on grounds that:
  - a. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant on the issue of quantum.
  - b. That the learned trial magistrate erred in law and fact in using the wrong principles in the assessment of damages, thereby arriving at an erroneous decision.
  - c. That the learned trial magistrate erred in law and fact in adopting a multiplier of 15 years without taking into account vagrancies and vicissitudes of life and age of the deceased.
  - d. That the learned trial magistrate erred in law and fact in awarding Kshs. 50,000/- for pain and suffering which was excessive without taking into account that the deceased died on the spot.
  - e. That the learned trial magistrate erred in law and fact in awarding Kshs. 200,000/- for loss of expectation of life which was excessive in the circumstances.
5. For the above reasons, the appellant prays that the judgment of the trial court be set aside with costs and that the multiplier be reduced to between 5-6 years, general damages for pain and suffering be reduced to Kshs. 10,000/- and the general damages for loss of expectation of life be reduced to Kshs. 100,000/-.

### **Submissions**

6. Even though the court, in the presence of both counsel, directed that appeal be canvassed by way of written submission, gave timelines for compliance with a date to confirm such compliance, on the date to make such confirmation, only the appellant attended court and only their submissions were on record.
7. On the general damages awarded for pain and suffering, it is the submission of the appellant that an award of Kshs. 10,000/- is reasonable since the deceased died on the spot and in that regard they cite the case of James Gakinya Karienyne and Nancy Murugu Gakinya v Premium Kariuki Githinji Nairobi HCC No. 91 of 2014.
8. On the general damages awarded for loss of expectation of life, it is their submission that an award of Kshs. 100,000/- would have been reasonable and in that regard cite the case of Kenya Power & Lighting Company Limited v Charles Obegi Ogeta (suing as the legal representative of the estate of Esther Nyanchoka Obegi) (2016) eKLR where that sum was awarded.
9. On the multiplier for loss of dependency they submit that trial court erred in finding that the deceased was self-employed and would have worked past the statutory retirement age of 60 years. They argue that since the deceased was 54 years, 4 years would have been the appropriate and reasonable multiplier.

### **Issues, Analysis and Determination**

10. The court reminding itself of being a first appellate court has considered the grounds of appeal, the proceedings and judgment of the lower court and the submissions by the appellant with a view to



come to own conclusions. It has equally reminded itself that the appeal is limited to the discretionary duty of assessment of damages and the constraints on when an appellate court would interfere in that regard and discerns the only issues for determination to be whether the general damages assessed and awarded for pain and suffering were excessive, loss of expectation of life and loss of dependency based on a multiplier of 15 years were manifestly excessive. In isolating that single issue, the court comes from the learning that whether or not the submissions filed by parties is a matter that axiomatic for consideration by the court whether a party raises same or not.

11. The court proceeds from the learning that damages for pains and suffering and loss of expectation of life are awarded as of necessity in every suit where life was lost and the claimant has succeeded. The rationale for awarding damages for pain and suffering is to recompense for the physical and mental distress caused to the deceased for the period between the affliction of the injury and death and for the termination of the life.<sup>1</sup> both pre-trial and in the future as a result of the injury. The distress informing the sum due includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.
12. According to the post mortem report captured at page 30 of the record of appeal, the deceased died on the spot. The trial court awarded damages under this head in the sum of Kshs. 50,000/- which the appellant contends to be high and excessive merely because the deceased died on the spot. The appellant proposes the sum of Kshs. 10,000/- as the appropriate and reasonable sum.
13. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR the court in considering whether there ought to be a definite figure deemed conventional observed that for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.
14. The court thus finds that there is no definite and specific sum that a trial court is bound to award under the heading on account of instance death. Being an element of general damages, it is discretionary and that discretion ought to be interfered with very sparingly and not freely. When looked at against the principle of law that assessment of damages may only be interfered with where it is demonstrated that there was an error in principle or that the damages awarded are so high as to demonstrate an obvious error in assessment, the court find no justification to interfere. It finds that the trial court correctly exercised its discretion in awarding the respondent damages in the sum of Kshs 50,000/- for pain and suffering.
15. For loss of expectation of life, the trial court awarded the respondent damages of Kshs. 200,000/- which again the appellant contends to be too high and proposes that this court reduces same to a sum of Kshs. 100,000/- as being appropriate. The appellant's grievance still interrogates the question whether an award of damages being at the discretion of the court, and guided by comparative damages awarded in similar cases, is amenable to interference on the grounds advanced by the appellant. It being the position of the court that the trial court was never hamstrung to only award a specific sum, the court can only interfere if the threshold for interfering for a judicial discretion is made out.
16. The court has read the decision in *Citi Hoppa Bus Limited & Another v Maria Clara Rota* [2021] eKLR in which an award of Kshs 200,000/= was made for loss of expectation of life for a deceased was aged 33 years old and holds that no justification has been established to merit interference.

<sup>1</sup> Halsbury's Laws of England 4th Edition, Vol 12(1) page 348-883



17. On the choice of multiplier to be adopted in assessing damages under the Fatal Accident Act, it was the observation of the Court of Appeal in Francis K. Righa versus Mary Njeri (Suing as Legal Representative of the Estate of James Kariuki Nganga 2021 eKLR that courts ought to be guided by the expectation of the working life of the deceased. The court said; -

“...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of Roger Dainty versus Mwinyi Omar Haji & Another 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”

18. In the case at hand, PW1 who was the deceased’s wife, testified that the deceased was a pastor and that he was aged 54 year and was in good health at the time of death. In coming to its decision the court relied on the decision in Hussein Shariff Ali v Grace Kareya Mutua (Suing as the legal representative of the Estate of John Mutua (Deceased)) [2021] eKLR in which the court adopted a multiplier of 15 years for a pastor aged 48 years old.

19. On that finding the trial court is held to have been at fault. At fault because, to give a 54 year old lost years of 15 is to suppose that he would have worked till 70 years. that goes against the national retirement age as well as the known practice by mainstream churches which align retirement age to those of the state. The court takes retirement from remunerated employment to afford to the employed the benefit of resting in old age without the demand of being answerable to duty and that the choice of 15 years was erroneous. The court sets aside that choice and substitutes it with a period of 10 years.

20. Having done so and the multiplicand and dependency ratio not being in contention, the court reworks damages for loss of dependency as follows:-

$$7,240.95 \times 12 \times 10 \times 2/3 = 579,276$$

21. Flowing from the above discussion, the decision of the rial court awarding to the respondent an aggregate award of Kshs 1,124,314, is set aside and in its place substituted a sum of Kshs 829,276.

22. The appeal thus succeeds to the limited extent that the damages for loss of dependency is reduced by reduction of multiplier from 15 to 10 years. having succeeded the appellant is awarded the costs of this appeal while the respondent gets the costs at the trial.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Wesonga for the Appellants

No appearance for the Respondent

Court Assistant: Polycap Mukabwa

