



REPUBLIC OF KENYA



Fixed Investment & another v Odunga & another (Suing as the Estate of Peter Otinyi Papa (Deceased) (Civil Appeal E097 of 2022) [2024] KEHC 3044 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E097 OF 2022**

REA OUGO, J

MARCH 6, 2024

BETWEEN

FIXED INVESTMENT 1ST APPELLANT

RAYMOND OLANDO 2ND APPELLANT

AND

CELESTINE NEKESA ODUNGA & ALEX LANGAT OTIENO (SUING AS LTHE ESTATE OF PETER OTINYI PAPA (DECEASED)) RESPONDENT

(Being an appeal from the judgment of Hon. Phoebe Kulecho delivered on 30th September 2022 in Webuye SPMCC No. 113 of 2020)

JUDGMENT

1. The respondent filed their claim before the subordinate seeking the following reliefs: general damages, special damages and costs. It was alleged that on 19/4/2020 the deceased was lawfully riding motorcycle registration number KMEE 771U along Eldoret Webuye Road when the appellant and or his agent was negligently driving trailer registration number KCE 321J/ZF 2022 and caused it to knock the deceased and as a result he sustained fatal injuries, It was alleged that the deceased was a boda operator earning Kshs 1,000/- per day and had a wife and 5 children. The appellants filed their statement of defence and denied the claim.
2. The parties settled the issue of liability at 80:20% in favour of the respondent. After evaluating the evidence before her, the trial magistrate entered judgment in favour of the respondent as follows:
Pain and suffering Kshs 50,000
Loss of expectation of life Kshs 100,000/-
Lost years Kshs 2,500,000/-



Special damages Kshs 110,550/-

Grand Total Kshs 2,760,550

Less 70% contribution Kshs 552,110

Net total Kshs 2,208,440/-

3. The appellants dissatisfied with the finding of the subordinate court have filed their memorandum of appeal dated 6/10/2020 raising the following grounds:
 1. That the learned trial magistrate erred in law and fact in making an award of damages under loss of dependency/lost years at Kshs 2,500,000/- which was manifestly excessive in the circumstance.
 2. That the learned trial magistrate erred in law and fact by failing to take into account the vicissitudes and vagaries of life in respect to a 48-year-old man; and therefore, made an award of Kshs 2,500,000/- for loss of dependency/lost years which amount was manifestly excessive.
 3. That the learned trial magistrate erred in law and fact by making an award under the Law and Reform Act for lost years instead of making an appropriate award for loss of dependency under the *Fatal Accidents Act*.
 4. That the learned trial magistrate erred in law and fact to properly consider and analyse the defendant's submissions and hence arrived at a wrong determination on the aspect of damages awardable to the respondents thereby awarding excessive damages in the circumstances.
 5. That the learned trial magistrate erred in law and fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgment.
 6. That the judgment of the learned trial magistrate is in the circumstances unjust.
4. The appellants therefore sought to set aside the judgment and decree of the subordinate court and that the award of Kshs 2,500,000/- awarded for loss of dependency/lost years be re-assessed and reduced downwards.
5. The appeal was canvassed by way of submissions and the appellants filed their submissions dated 11/7/2023 in support of the appeal while the respondents filed their submissions dated 10/7/2023 opposing the appeal.
6. The appellant in submissions argues that the award on pain and suffering at Kshs 50,000/- was manifestly high. It was pointed out that the trial magistrate failed to consider the evidence on record, i.e., the post-mortem report, police abstract, and the testimony of the respondent thus the award of Kshs 50,000/- on that head was excessive. They submit that an award of Kshs 10,000/- to Kshs 20,000/- would be reasonable. They cited the case of *Rai Cement Limited v Stephen and Another* (suing as the legal administrator of the estate of Zablou Khaemba Wanyama (deceased) 2022 eKLR.
7. They also submitted that the award of Kshs 2,500,000/- under the head loss of dependency was manifestly excessive. That the learned trial magistrate adopted a global award approach for lost years yet a multiplier approach was more suitable. The appellants opposed the trial magistrate's reasoning because although the deceased was alleged to be a boda boda rider, there was no proof of his earnings or proof that he was a boda boda rider. The trial court therefore ought to have adopted a minimum wage as boda boda operators fall under the category of general labourers as they are semi-skilled. They relied on the decision in *Multiple Hauliers (EA) Limited & Another v William Abiero Ogeda* (suing as the representative of Christine Arglera Obiero (deceased) & 2 others (2016) eKLR where the court



held that since there was no evidence adduced that the deceased was mechanic and earnings as such, he was treated as a casual labourer. The deceased was 48 years old with only 12 years to retirement. However, owing to the vagaries and vicissitudes of life and the nature of his work which is prone to risks they submit that the court should adopt 5-6 years as the multiplier. The appellants further submitted that although it was alleged that the deceased was a family man and a letter from the chief was produced there was no marriage certificate presented. Therefore, there was no proof of dependency. The appellants submit that a dependency ratio of 1/3 would have been most appropriate – see *Chania Shuttle v Mary Mumbi* (2017) eKLR. The award of loss of dependency would then be (Kshs. 7,240.95 years x 12 x 1/3) = Kshs 289,638/-.

8. In the alternative if the court found that the learned trial magistrate did not err in adopting a global award, they urged the court to find the award manifestly excessive and the same be re-assessed downwards with an award between Kshs 200,000/- to Kshs 300,000/- (see *John Wamae & 2 others v Jane Kituku Nziva & Another* 2017 eKLR).
9. The respondents in opposing the appeal submitted that the respondent's claim was brought under the *Law Reform Act* and the Fatal Accident's Act, however in the wisdom of the trial court and in a bid to avoid double compensation were awarded damages for loss of dependency. In making the award the trial court adopted the global sum approach as there was no clear basis for computing loss of dependency. They argue that the trial magistrate had the discretion to decide which method to adopt in the assessment of damages in *Mwangangi & another v FKM* (suing as legal representative of the estate of the late AMK) (Civil Appeal E11 of 2021) [2021] (KLR) (22 November 2021) where the two approaches were intensively compared and analyzed.
10. They further submitted that the award of Kshs 2,500,000/- was not excessive considering that the deceased was the sole breadwinner survived by a widow and 5 children. The trial magistrate correctly observed that the deceased died while in line of duty as a boda boda operator. They cited the case of *Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another* (2019) where the court awarded Kshs 1,200,000/- in the instance of a 25-year-old deceased young man. In *Makueni Law Courts Ltd & another v Felistus Kanini Ndunda* (suing as the Administrator and Personal Representative of the estate of Eric Mutuku) (2020) eKLR where a 13-year-old deceased's estate was awarded Kshs 1,800,000/- for the loss of dependency. The case of *Makuto v Saenyi & another* (suing as the legal representative of the estate of Victor Juma Saenyi) (Civil Appeal E014 of 2022) [2023] KEH 425 (KLR) (January 2023) (Judgment) the court upheld an award of Kshs 1,300,000/- as adequate to the estate of a 20-year-old.
11. It was submitted that the trial court exercised its discretion judiciously and cautiously in making its award and therefore the appeal is unmerited and we pray that the same be dismissed with cost.

Analysis And Determination

12. I have carefully considered the rival submissions by parties and the evidence on record before the subordinate court. The only issue is whether the damages awarded by the trial court were excessive. I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”



13. The trial court made a global award of Kshs. 2,500,000/- as damages for loss of dependency. The magistrate reasoned that the court couldn't discern the deceased's wage. Pw1 testified that the deceased was a boda boda rider who made Kshs 1,000/- daily. There was no evidence to support the claim that the deceased made the said amount. However, what is clear is the occupation of the deceased. There is evidence indicating that he lost his life while in his line of duty, and his death certificate specifies his profession as a driver. In *Daycan Trading Limited & another v Cheptebkeny & another* (Suing as the legal administrators of the Estate of David Biwot Katam - Deceased) (Civil Appeal E027 of 2020) [2023] KEHC 22255 (KLR) (19 September 2023) (Judgment) the court found that the deceased therein was a boda boda rider and applied the Regulation of Wages (General) (Amendment) Order. The court observed that:
- “The deceased would have ideally been in the category of driver's for cars and light vans since boda-bodas vehicles are public service vehicles. In that category, the monthly wage was Kshs. 16,907/90.”
14. According to the Regulation of Wages (General) (Amendment) Order, 2018 the minimum wage for drivers in the category of cars and light vans is Kshs. 13,975.30/-.
15. Although the appellants argued that there was insufficient evidence to establish the deceased had dependents, on the contrary, I find that there was evidence indicating the deceased was survived by a wife and children. The court in *Rahab Wanjiru Nderitu v Daniel Muteti & 4 others* [2016] eKLR held that;
- “The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth of certificates or any other documents to confirm the same...”
16. The deceased's wife Celestine Odunga Nekesa (Pw1) produced the letter from the Chief which identified Pw1 as the deceased's wife. She further produced 5 Certificates of Birth each identifying the deceased as the father of the children and Pw1 as the mother. In my view, the fact that the deceased had dependents was sufficiently proven. There is no dispute that the deceased was 48 years old as the same is captured in his death certificate.
17. The court in *Caroline Leah Awino (also as Aduogo Caroline) v Francis Kipsang Ngetich* (Suing as personal administrators ad litem and/or personal representative of the Estate of Mary Jepkurgat (Deceased) [2019] eKLR the court adopted a multiplier of 12 years for the deceased who was selling vegetables. In this case, the deceased was a driver. I have considered that his occupation had some level of risks attached to it and a multiplier of 8 years would be appropriate in the circumstance. Given that the deceased had dependents, a 2/3 multiplier is most appropriate. Therefore, I award Kshs 894,419.20 made up as follows, $(13,975.30 \times 8 \times 12 \times 2/3)$ for loss of dependency.
18. 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 in the range of Kshs 10,000/- to Kshs 20,000/-. The fact that the deceased died on the spot was not an 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.”

19. I therefore find no reason to interfere with the trial court’s award under the head pain and suffering. The award of loss of expectation of life and special damages were not in issue in this appeal as the appellants made no submissions on the same.
20. In the end, the appeal is partially successful to the extent of loss of dependency. The respondent will have judgment as follows:
 - a. Pain and suffering Kshs 50,000.00
 - b. Loss of expectation of life Kshs 100,000.00
 - c. Loss of Dependency Kshs 894,419.20
 - d. Special damages Kshs 110,550.00Total Kshs 1,154,969.20/-
Less 20% liability Kshs 230,993.84/-
Net Total Kshs 923,975.36/-
21. The appeal has been partially successful, the appellant is awarded 50% of the cost of the appeal. Orders accordingly.

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

R.E. OUGO

JUDGE

In the presence of:

Miss Were- For the Appellants

Miss Mureithi - For the Respondents

Wilister - C/A

