



Mogusu & another (Suing as the Legal Representatives of the Estate of Peter Isoe Oyugi - Deceased) v Nganga & another (Civil Appeal 19 of 2019) [2024] KEHC 2656 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL 19 OF 2019
AK NDUNG’U, J
MARCH 12, 2024**

BETWEEN

**CALLEN KERUBO MOGUSU 1ST APPELLANT
JOYCE MOKERIA MANYANGE 2ND APPELLANT
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER ISOE
OYUGI - DECEASED**

AND

**SAMUEL WAWERU NGANGA 1ST RESPONDENT
JOSPHAT TAMU 2ND RESPONDENT**

*(Appeal from judgment passed on 03/12/2019 in Nanyuki
CM Civil Case No 55 of 2018 – Njeri Thuku, PM)*

JUDGMENT

1. The Appellants were dissatisfied with the quantum of damages awarded in the judgement of the lower court passed on 03/12/2019. The matter had proceeded by way of formal proof hearing after an interlocutory judgment was entered against the Respondents apportioning liability at 100% against the defendants.
2. The trial court awarded the Appellants Kshs.600,000/- for loss of dependency with interest from the date of judgment and Kshs.1,375/- as special damages with interest from the date of filing the suit. The trial court declined to award damages for pain and suffering and for loss of expectation of life.
3. Being dissatisfied with the trial court assessment of damages, the Appellant filed the memorandum of appeal dated 17/12/2019 and raised the following grounds of appeal;



- i. The learned magistrate erred in awarding Kshs.1,375/- as special damages yet the Appellant pleaded and proved special damages amounting to Kshs.122,875/-.
 - ii. The learned magistrate erred for failing to award damages for pain and suffering.
 - iii. The learned magistrate erred for failing to award damages for loss of expectation of life.
 - iv. The learned magistrate failed to use the multiplier approach but used the lump sum principle in awarding damages for loss of dependency.
 - v. The learned magistrate failed to give any principle or precedent relied upon in awarding the lump sum amount which was inordinately low for fatal injuries.
 - vi. The learned magistrate failed to consider the authorities submitted by the Appellant on quantum.
4. The Respondents did not participate in this appeal. The Appellant's counsel in his written submissions argued that the trial court only awarded special damages of Kshs.1,375/- which was fees for filing for limited grant ignoring the Appellant's plaint and especially paragraphs 8 & 9. That the deceased was subjected to a lot of pain and suffering for he died on his way to Nanyuki Teaching and Referral Hospital and was later transported to Kisii for burial which facts the trial court failed to consider. That the lower court made an award of Kshs.600,000/- but did not make an award on loss of expectation of life and failed to give adequate reasons thereon.
 5. Further, the court adopted the lump sum approach but failed to give reasons on how it arrived at the definite figure. That the lower court failed to appreciate the evidence and relevant matters before it thus calling for interference of this court. That the Respondents have been accorded numerous opportunities to advance their case but have failed to and therefore, they will not suffer any prejudice.
 6. The Appellants' position is that the assessment of damages by the trial court was not justified. From the submissions the issue for determination is on the award of damages on pain and suffering and loss of expectation of life which the trial court failed to award, loss of dependency and special damages.
 7. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of *Butt v. Khan Civil Appeal No. 40 of 1997* thus: -

“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 arrive at a figure which was either inordinately high or low.”
 8. It is therefore settled that this court will only interfere with the trial's court award of damages if the Appellants demonstrate that the same was inordinately low or the trial court proceeded on wrong principles.
 9. Under pain and suffering and loss of expectation of life, the trial court did not award any amount on this head. No reasons were advanced by the trial court for failing to award but merely stated that;

‘... I make no award on pain and suffering or loss of expectation of life.’



10. Emukule J in *Benedeta Wanjiku Kimani vs Changwon Chekoi & Another* [2013] eKLR, held:

“In common law jurisprudence of which Kenya is part, the courts have enrolled the 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 continual sum which has increased over the years from Ksh.10,000/= to Ksh.100,000/= currently the basis of the increased has basically been based upon the increase of life expectancy from 15 years to run 60 years currently, that life itself was until cut short by the accident ...something to the estate?”...It is of course correct both awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased's estate. These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the *Fatal Accidents Act* and the *Law Reform Act*.

11. In *William Kinyanjui & another (Suing as the Legal Representatives of the Estate of Jane Florence Njeri Kinyanjui (Deceased) v Benard M. Wanjala & another* [2015] eKLR the court faulted the trial court for failing to make an award under loss of expectation of life by stating thus;

Given the foregoing, there is no doubt and I so find that the learned trial magistrate was clearly wrong in declining to make any award for loss of expectation of life. The deceased's Estate which was represented by the appellants was entitled to damages for loss of expectation of life, her life having been abruptly cut short at the young age of 26 years by the road traffic accident. I find that a conventional sum of Kshs. 100,000 would be fair compensation under this head.

12. It is therefore my view that the trial court erred for failing to make an award under the loss of expectation of life and pain and suffering.

13. On the amount to be awarded under this head, the court in *Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased)* [2015] eKLR, stated that:

“....the generally accepted principle is that very nominal damages will be awarded on these head claims of the death followed immediately after the accident. Higher damages will be awarded of the pain and suffering was prolonged before the death in this case, the antentional figure for loss of expectation of life is Ksh.100,000/=.

Similarly, since deceased died more or less immediately after the accident judging from the death certificate which states she died on 15th January 2011 same day the fatal accident causing death, occurred. The trial court's award on pain and suffering for Ksh.20,000/= was in order.”

14. In the instant case, the death certificate indicates that the deceased died on 04/09/2017 which was the date of the accident. It is not indicated whether he died instantly or at the hospital. The period of pain was from the facts available minimal.

15. Having regard to the following comparable cases where damages under pain and suffering were awarded, am persuaded that an award of Ksh 30,000 for pain and suffering would be appropriate in the circumstances of this case. (See *Oyugi Juma Joseph v Grace Omwanda Ogolla & another* [2020] eKLR and *Benard Kimeto v Emmy Chebet Koskei (Suing as Administratrix and/or Personal Representative of the Estate of Nixon Kiprotich Koskei (DCD)* [2021] eKLR)



16. For loss of expectation of life, the award under this sub head is normally conventional, and in the bracket of Kshs. 60,000/= to 200,000/=. In *Kenya Wildlife Services Vs. Geoffrey Gichuru Mwaura* (2018) e KLR, a sum of Shs. 150,000/= was granted.

In *Wembo & 2 others Vs. TKK* (2017) e KLR, a sum of Shs.100,000/= was awarded.

The court in *Easy Coach Bus Services Ltd & another Vs. Henry Charles Tsuma & another* (2019) e KLR, awarded a sum of Shs.80,000/=.

No reason was advanced by the trial court why damages under this head were not awarded. The estate of the deceased was entitled to damages for the life cut short and I have no hesitation in awarding damages for loss of expectation of life which I assess at Kshs. 100,000 being a conventional figure.

17. On loss of dependency, the Appellants' counsel faulted the trial court for adopting a global figure approach instead of the multiplicand approach. The trial court while adopting the global figure approach stated that there were no receipts that were produced to prove deceased's earnings, and therefore, the global sum approach was the best way to go about in making an award for loss of dependency. In doing so, the trial court was guided by numerous authorities which draw a line when the multiplier approach should be discarded. To that extent, my finding is that the trial court was spot on in so doing in view of the fact that the deceased's earnings could not be ascertained.
18. This finding is in consonance with our courts position on the matter. The Court of Appeal decision in *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, where it was stated that:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. ...”

19. In *Moses Mairua Muchiri v Cyrus Maina Macharia* (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court stated as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

20. In *Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwititi Gakungu deceased [2020] eKLR the court held that;

“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.” ...the global sum approach would be an estimate informed by the special circumstances of each case. “



21. The deceased's net income was not known as the sum the Appellants quoted in the plaint was speculative.
22. On whether Kshs.600,000/- was justifiable, it was stated that the deceased was 30 years old at the time of his death. He was survived by one wife and one son who was 5 years old and his father and mother. There is no evidence on record that the deceased suffered from any ill health before his demise.
23. I have considered the judgement by the trial court. The court as alluded to above correctly appreciated the circumstances upon which a court ought to depart from the multiplier approach in award of damages for loss of dependency and arrived at the right conclusion to adopt the global sum approach.
24. However, a perusal of the court's sentiments in awarding the Kshs. 600,000 reveals that the amount was awarded whimsically with no explanation why the figure was the appropriate one and without any guidance from precedent in similar circumstances. The result of this is, in my view, that the court arrived at damages which were inordinately low as to represent an erroneous estimate.
25. In *Ainu Shamshi Hauliers Limited v Moses Sakwa & Another* (Suing as the Administrators of the estate of Ben Siguda Okach (Deceased))(2021)eKLR a global sum of Kshs.2,000,000/- was awarded for the death of a 40 year old man who left behind a 29 year old wife and two young children aged 6 and 4 years. The said award was upheld on appeal as the court was of the opinion that the award was not inordinately high based on the young family the deceased left behind.
26. In *Kisii HCCA No. 39 of 2014; Marwanga Jeffern –Vs-Jeckton Ochieng' & Anor* an award of Kshs 1,600,000/= for loss of dependency was awarded for a deceased who died at the age of 30 and was survived by a widower and a 10year old son.
27. Following the awards in the above cases whose facts reflect situations like in our instant case where the deceased had a young family, and noting that the deceased herein had only one child, am of the considered view that a global sum of Kshs. 1000,000 for loss of dependency would be reasonable.
28. In regard to special damages the law is quite clear on this head. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, where the Learned Judges of Appeal held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
29. The only amount proved by evidence in accordance with the standards required in law was Kshs.550/- being for motor vehicle search and Kshs. 1,375/- being filing fees for limited grant. They were both proved by way of receipts. The amount claimed by the Appellants in the plaint was not proved to the required standard. The trial court did not for inexplicable reason award the amount of Kshs. 550 for motor vehicle search which was proved by way of a receipt. I award the same.
30. With the result that the Appeal herein largely succeeds. I set aside the award of damages by the trial court and enter judgement for the Appellants against the Respondents jointly and severally in the following terms;
 - a. Special damages at Kshs. 1,925
 - b. Pain and suffering Kshs. 30,000



c. Loss of expectation of life Kshs. 100,000

d. Loss of dependency Kshs 1000,000

Total Kshs. 1,131,925

e. Costs and Interest

DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH 2024

A.K. NDUNG’U

JUDGE

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