



Nzuki v Maithya & another (Suing as the Legal Representatives of the Estate of Joseph Wambua - Deceased) (Civil Appeal E024 of 2022) [2024] KEHC 2752 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E024 OF 2022**

**RK LIMO, J
MARCH 11, 2024**

BETWEEN

MARGARET KIVALA NZUKI APPELLANT

AND

FRANCIS MWANIKI MAITHYA 1ST RESPONDENT

DORCAS KAVUTHA MWANIKI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH
WAMBUA - DECEASED**

*(Appeal against the Judgement of Hon. M. Kimani Resident Magistrate in Kitui
Chief Magistrates Court Civil Case No. 252 of 2018 delivered on 17th December 2021)*

JUDGMENT

1. This is an appeal against the Judgement of Hon. M. Kimani Resident Magistrate in Kitui Chief Magistrates Court Civil Case No. 252 of 2018 delivered on 17th December 2021.
2. In that case the Respondent's had sued the appellant seeking Special damages, general damages under the *Fatal Accidents* and *Law Reforms Act*, costs of the suit plus interest. The Respondents pleaded that on 6th February 2017, the deceased was pedal cycling along Ilooi-Ithokwe road when he was knocked down by motor vehicle registration number KBZ 521V at Syongila area occasioning the deceased fatal injuries. It was pleaded that at the time of his death, the deceased was a student aged 17years, he enjoyed good health and he lived a happy and vigorous life. As a result of the death of the deceased, his estate suffered loss, damage and his dependents suffered a lot of emotional pain and damage as well as funeral expenses.
3. In response, the Appellant filed a defence dated 18th August 2020 where she denied the particulars of negligence levelled against her and claimed that the deceased was injured as a result of his own



negligence. The Appellant also denied ownership of motor vehicle registration no. KBX 542N as well as the applicability of the doctrine of *res ipsa loquitur* against it.

4. The summary of the evidence tendered in the trial court was as here below;
5. The Respondent's first witness was PC Nangalo (PW1) a Police officer based at Kitui Police Station. The officer only tendered police abstract (Pex 1) indicating that a fatal accident occurred that involved motor vehicle Registration No. KBZ 521V and the deceased who was a cyclist. The witness stated that he was not the investigating officer and could not tell who was to blame for the accident.
6. Francis Mwaniki Maithya (PW2) stated that he was the father of the deceased child whom he says aged 17 years old and that at the time he was heading to school using a bicycle. He stated that he was not at the scene of the accident but blamed the appellant for causing the accident. He testified that the deceased died 20 minutes after the accident. He stated that the burial costed him and family Kshs. 150,000/= and that the deceased was a bright student.
7. Peter Muime (PW3) stated that he was at the scene at the material time. He testified that he was walking from Unyaa to Ithokwa road when he saw the motor vehicle registration KBZ 521B speeding from the opposite direction. According to him the said motor vehicle veered off its lane and went to the lane used by the deceased cyclist which was to the opposite side from the approaching motor vehicle Registration No. KBZ 521B. He blamed the said motor vehicle for causing the accident because it hit the deceased due to speed. He stated that the car ran over the bicycle and they removed the bicycle from underneath the car after the accident.
8. The appellant on her part testified as DW1 and blamed the deceased cyclist for emerging from a feeder road at a junction without first checking if it was safe. She said that the deceased hit a water canal and was thrown into the road where he was hit by her car. She stated that she hit the emergency brakes and the car skidded for about 1 metre and stopped. She stated that when she came out of her car she found the deceased underneath her car lying between the front and rear tyres.
9. The trial court after trial found that the appellant was 100% liable to blame and awarded the respondents as follows;
 - a. Loss of expectation of life - Kshs. 100,000/=
 - b. Pain and suffering- Kshs. 20,000/=
 - c. Loss of dependency – Kshs. 1,000,000/=
 - d. Special damages – Kshs. 16,665/=Total Kshs. 1,136,665/=.
10. The Appellant was dissatisfied with the judgment on liability and quantum and filed this appeal vide a Memorandum of Appeal dated 5th May 2022 raising the following grounds;
 - i. That the learned trial magistrate erred in law and in fact the defendant 100% liable without due regard that the deceased substantially contributed to the accident.
 - ii. That the learned trial magistrate erred in law and in fact in awarding the respondents Kshs 1,136,655 on quantum without due regards of the submissions on record.
 - iii. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and authorities attached thereto while assessing liability and quantum.



- iv That the learned trial magistrate's award was an erroneous estimate of the damages due in the particular case and was manifestly excessive.
11. In her written submissions dated 28/9/23 done through counsel, the appellant faults the trial court for its finding on liability. The appellant submits that the accident was caused by the sole negligence of the deceased and that she should not have been held 100% liable.
12. On quantum, the Appellant submits that the award of Kshs 1,000,000/- for loss of dependency was inordinately high and proposes an award of Kshs 400,000/-. The appellant has placed reliance on the case of *Dismus Omolo Odongo & Anor v Interior Inspirations Ltd & 2 Others* (2017) eKLR where it is submitted that the deceased was aged 17 years old at the time of the accident and was awarded Kshs 500,000/- under this head. She submits that damages under the pain and suffering should have been Kshs 10,000/- and not Kshs 20,000/- as there was no evidence that he deceased was admitted at Kitui County Referral Hospital after the accident. On damages for loss of expectation of life, the Appellant submits that the award of Kshs 100,000/- was excessive and proposes an award of Kshs 60,000/-.
13. The Respondents on their part support the trial court's finding on liability and submits that they availed an eye witness (PW3) who gave an account of how the accident occurred and denied the allegation that the deceased hit a culvert. It is submitted that PW3 testified that there were no water tunnels or culverts at the scene of the accident. The respondents refer to documents produced by the appellant which contained pictures of the scene and submit that there was no photograph of a culvert around the scene. It is further submitted that the appellant's admission that the vehicle skidded for some meters after she applied breaks indicates that the car was speeding.
14. On quantum specifically on the award of damages the respondents submits that Kshs 20,000/- awarded for pain and suffering was appropriate considering the circumstances of the accident. They submit that the Kshs 100,000/- awarded for loss of expectation of life was appropriate considering the age of the deceased. on the award for loss of dependency, they submit that the global sum of Kshs 1,000,000/- awarded was appropriate, reasonable commensurate.
- They have cited the cases of *Francis Odhiambo Nyunja & 2 Others v Josephine Malala Owinyi (suing as the legal administrators of the estate of KOR (deceased))* (2020) eKLR where the deceased was 17 years old at the time of the accident and the court awarded a global sum of Kshs 1,500,000/-. *Twokay Chemicals Limited v Patrick Makau Mutisya & Anor* (2019) eKLR where the court upheld a global sum of Kshs 1,500,000/- awarded under this head. The deceased was 16 years old at the time of her death.
15. This court has considered this appeal and the response made. This is a first appeal and the role of this court is to review the evidence adduced at the hearing, reconsider the same, re-evaluate the same and draw own conclusions.
16. The issues arising from this appeal are basically two namely;
- Whether the trial court was correct in its finding on liability
 - Whether the assessment on quantum was right.

Liability

- 17 The Respondents being the plaintiff at the trial court bore the burden of proof and the standard applicable was on a balance of probabilities.



Burden of Proof.

18 The legal burden of proof as provided for under Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

19. The evidential burden of proof is captured under Sections 109 and 112 of the [Evidence Act](#) as follows;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him”.

20. Similarly, in the case of [Nadwa v Kenya Kazi Ltd](#) (1988) eKLR, the Court of Appeal observed:

“In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant’s evidence provides some answer adequate to displace that interference”.

21. The admitted facts in this matter are that the deceased was fatally injured by motor vehicle registration number KBZ 521B which was being driven by appellant at the material time. What is in dispute is who was to blame for the accident. Two eye witness accounts were tendered before the court on how the accident occurred. PW3 stated that he was walking from Unyaa to Ithokwa Road when he saw the suit motor vehicle which was speeding, that it veered off the road, left its lane and hit the deceased. He stated that the deceased was found underneath the suit motor vehicle together with his bicycle. He also denied the presence of water tunnels at the accident scene and that the area was flat.

22. The appellant’s testimony appears inconsistent to some extent. She stated that upon arriving at the junction she slowed down and confirmed that the road was clear before she proceeded and that she did not see the deceased. She proceeded that the deceased came from the left and onto the road and he was hit and thrown into road by a ditch. In one instance she denied that her vehicle skidded on the road and stated that she hit the brakes and stopped. On the other hand, she admitted that she was shocked to see the deceased and hitting the brakes hard, the motor vehicle skidded and when she stopped she say the deceased in between the tyres underneath the vehicle. Her earlier testimony that he was by the road side in a ditch as well as her vehicle skidding changed. She had also stated that the deceased hit a child and was thrown into the road but later changed and stated that he hit a culvert and got tosses into the road. She also stated that there was a culvert at the scene when PW3 indicated that there was none.

23. The evidence tendered by the police officer (PW1) was not helpful because he failed to tender any sketch map or the details of the outcome of the investigations carried out which would have at least assisted the trial court with background information as to how the accident occurred and who was to blame. In my view what the trial court was left with was the word of an eye witness (PW3) against the



word of the appellant who was also another eye witness. The trial court tried to evaluate the evidence of the two and this was her observation in the judgment;

“I do actually believe that the defendant saw the deceased at the junction as she admits but since she was speeding, skidded but not quickly enough to avoid him so hit and dragged him underneath her car as told. I find that the plaintiff proved their case on a balance of probabilities and enter judgment for the plaintiff as against the defendant and award liability at 100%”

24. This court on re-evaluation of the evidence finds that though appellant was partly to blame the deceased cyclist could not also avoid some blame. In respect to the appellant, I note from the appellant’s own admission that she had used the road severally before and was aware that there was a junction at the scene where the accident occurred.

It was therefore incumbent upon her to slow down accordingly but sliding for a metre in itself shows that the motor vehicle was driven at moderately high speed. In *Masembe v Sugar Corporation & Another* (2002) Eklr EN 434 the court held as follows;

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.”

The appellant was therefore required to be on the look out when approaching the junction.

25. In respect to the deceased cyclist, it was also incumbent upon him to ensure that it was safe to enter the main road but appears to have failed to do so. Perhaps given his age he could have failed to appreciate the potential danger he faced. Had he been a little more careful, he could have avoided the accident. On a balance of probabilities given the scanty evidence tendered by both sides, this court finds that both the appellant and the deceased cyclist were equally to blame. In the premises, this court hereby sets aside the finding by trial court on liability by binding that the appellant was 50% to blame while the deceased cyclist shouldered the other 50% liability of the blame.

Quantum

- 26 The Court of Appeal in *Francis K. Righa v Mary Njeri* (Suing as the Legal Representative of the Estate of James Kariuki Nganga (2021) referenced the case of *Butler v Butler* [1984] KLR 225 provides a guideline the assessment and reassessment of damages. The court observed;

“...assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge’s findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision...”



27. The general method of approach in assessment of damages is that comparable injuries /claiming should as far as possible be compensated by comparable awards. The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions”

28. On the head of loss of expectation of life, the appellant proposed Kshs. 60,000/- while respondents maintained that the award Kshs. 100,000/- was appropriate. With regards to damages for pain and suffering, the trial court awarded Kshs 20,000/- while the appellant is proposing an award of Kshs 10,000/- on the ground that there was no evidence tendered that the deceased was admitted at Kitui County Referral Hospital. The court in the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR observed that:-

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/- while pain and suffering the awards range from Kshs.10,000/- with higher damages being awarded if the pain and suffering was prolonged before death.”

29. The appellant did not advance reasons for interference with the award under the damages for loss of expectation of life and in my opinion, the trial court did not err in awarding the conventional figure of Kshs 100,000/-. With regards to the award of Kshs 20,000/- for pain and suffering, the appellant submitted that there was no evidence that the deceased was admitted in hospital. It is however not in dispute that he did not succumb to the injuries on the spot and the trial court did not err in enhancing the award to Kshs 20,000/-

30. On the award of Kshs 1,000,000/-for loss of dependency, the appellant submits that an award of Kshs 400,000/- is appropriate under this head. Loss of Dependency is a claim that arises from the *Fatal Accidents Act*. Section 4 (1) of the *Fatal Accident Act* which provides:

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought”

31. Evidence before the trial court was that the deceased was a student aged 17 years old at the time of his death. Under this head, the trial court held as follows;

“The future of the deceased was yet to be unfold and so it would be difficult to ascertain his earnings and to do so would be mere speculations. In this case to award a conventional award would be most appropriate”.

32. The adoption of a global figure is an accepted method of assessment of damages which has been adopted by various courts. Mabeya J in *Michael Rimiri M'ingetha & another v Zipporah Mukomua*



M'ituri [2020] eKLR stated as follows on dealing with situations where proof of income is not presented to the court;

“25. All that documentary evidence does is to give the Court an estimation of the actual income a person derives from his economic activities. Where there is no such documentary evidence, the Court should then resort to the principle of lump sum”.

33. In Albert Odawa v Gichimu Githenji [2007] eKLR, Koome J (as she then was) quoted Ringera J in Mwanzia v Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another where he stated that;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors 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.

However, in resorting to the lump sum principle, a trial Court should be guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages”.

34. The factors to be considered in determining an award for loss of dependency for a deceased person leaving behind dependent's, is the number of dependent's, the age of the dependent's and the level of dependency. The age at which the deceased died is also a relevant factor in my view. In this case, the deceased was 17 years old and was survived by parents and siblings.

35. In the cases cited by the appellant of Dismus Omolo Odongo & Anor v Interior Inspirations Ltd & 2 Others (2017) eKLR where the deceased was aged 17 years old at the time of the accident the court awarded Kshs 500,000/- under this head but stated that it awarded the same because the deceased was not in school which is not the case in this matter.

36. The cases cited by the appellant of Francis Odhiambo Nyunja & 2 Others v Josephine Malala Owinyi (suing as the legal administrators of the estate of KOR (deceased)) (2020) eKLR where the deceased was 17 years old at the time of the accident and the court awarded a global sum of Kshs 1,500,000/- and Twokay Chemicals Limited v Patrick Makau Mutisya & Anor (2019) eKLR where the court upheld a global sum of Kshs 1,500,000/- awarded under this head. The deceased was 16 years old at the time of her death are more appropriate in this case as both victims were students.

37. Similarly, in the cases of Charles Makanzie Wambua v Nthoki Munyao & Prudence Munyao (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased)) [2020] eKLR, the court upheld a global award of Kshs 1,320,000.00 for loss of dependency for a minor aged 17 years old while 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 the court awarded a global award of Kshs. 1,500,000.00 for loss of dependency for a minor aged seventeen (17) years.

38. This court finds that the global award given by the trial court of Kshs. 1 million cannot be termed as excessive. I find no reason to interfere with it.

39. On costs though the trial court was silent on the same, costs and interests normally follow the event as provided by Sections 26 and 27 of the Civil Procedure Act.



In the premises this court partly allows this appeal only on liability. The appellant is held 50% liable while the deceased cyclist shoulders the other 50%. The total award on quantum of Kshs. 1,136,665/- is upheld. So, the appellant will pay 50% of the same. The Respondents will have costs and interest of the awarded sum in the lower court from date of delivery of the judgment. The appellant will have half costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF MARCH, 2024

HON. JUSTICE R. K. LIMO

JUDGE

