



**Chuaga v Gravin (Suing as the Personal Legal Representatives of the Estate of Silas Waraba – Deceased) (Civil Appeal E102 of 2022) [2024] KEHC 3858 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E102 OF 2022**

**DK KEMEL, J  
APRIL 19, 2024**

**BETWEEN**

**KENNETH MUNENE CHUAGA ..... APPELLANT**

**AND**

**SANDUKU WARABA GRAVIN ..... RESPONDENT**

**SUING AS THE PERSONAL LEGAL REPRESENTATIVES OF THE ESTATE OF  
SILAS WARABA – DECEASED**

*(Being an Appeal from the Judgment/Decree of the Honourable C.A.S Mutai  
( SPM ) in Bungoma CMCC No.12 of 2019 delivered on the 6.8.2021)*

**JUDGMENT**

1. The Appellant herein arises from the Judgment and decree of Hon. C.A.S Mutai (SPM) in Bungoma SRMCC No. 12 of 2019 delivered on 6.8.20221 wherein he awarded general damages of Kshs 50, 000/(for pain and suffering), Kshs 60, 000/ (for loss of expectation of life), Kshs 3, 072, 000/ ( for lost years) and Kshs 106, 240/ (Special damages) which were to be subjected to 25% agreed contributory negligence. The Appellant was ordered to pay the costs of the suit. The cause of action arose as a result of fatal injuries that the deceased sustained during a road traffic accident which occurred on the 22<sup>nd</sup> June, 2018 along the Bungoma – Mumias road and particularly at the Sibembe area when the deceased who was then lawfully cycling along the said road was hit by the Appellant’s driver, servant and or agent then driving motor vehicle registration number KAP 604A.
2. Being aggrieved with the said judgement, the Appellant preferred this appeal which is premised on grounds that: -
  - i. That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.



- ii. That the learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant.
  - iii. That the learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
  - iv. The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the Respondent and failed to apply precedents and tenets of law applicable.
  - v. That the learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate *vis a vis* the Respondent's claim.
  - vi. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
3. By this appeal, the Appellant prays that this appeal be allowed with costs and that the Judgment of the learned trial magistrate be set aside with costs.
  4. The appeal proceeded by way of written submissions. Both parties filed and exchanged their respective submissions.
  5. Vide submissions dated 25<sup>th</sup> October, 2023 learned counsel for the Appellant maintained that the award of damages was inordinately high. Learned counsel submitted on all the heads of damages as awarded by the learned trial magistrate. Starting with the award on pain and suffering, counsel proposed a sum of Kshs 5,000/ as the deceased died while undergoing treatment. On loss of expectation of life, it was submitted that the said award was reasonable and sought for the same to be upheld. On loss of dependency, it was submitted that no documentary evidence was availed to prove the deceased's income of Kshs 30, 000/ per month and thus the court should have relied on the [Regulation of Wages \(General Amendment\) Order](#) 2018 which put the minimum wage at Kshs 7, 240.95 and which ought to be taken as the multiplicand. It was further submitted that there was no evidence of dependency from those listed as survivors of the deceased. It was submitted that no evidence was availed such as birth certificates and school fees receipts as evidence of maintenance by the deceased during his lifetime. Counsel opposed the application of 2/3 ratio of dependency as the children were all adults and hence a dependency ratio of 1/3 should be suitable and further that the multiplier should be 14 years and hence the amount under that head should be  $7240.95 \times 12 \times 14 \times 1/3 = \text{Kshs } 405, 493.20$ . It was also submitted that the award under the [Law Reform Act](#) should be deducted from the award under the [Fatal Accidents Act](#) so as to prevent double compensation and which issue the learned trial magistrate omitted to do so. As regards special damages, it was submitted that the same should be specifically pleaded and proved and that the sum of Kshs 92, 000/ pleaded and proved should be allowed while the extra sums not pleaded should be rejected. Learned counsel finally wrapped the proposed figures as follows:
    - a. Pain and suffering.....Kshs 5, 000.00
    - b. Loss of expectation of life...Kshs 60, 000.00
    - c. Loss of dependency..... Kshs 405, 493.20

Total.....Kshs 470, 493.20

Less.....Kshs 65,000.00

Total..... Kshs 470,493.00



Special damages...Kshs 92,000.00  
Total.....Kshs 562, 493.20  
Less 30%contribution.....Kshs 168, 747.96  
Total.....Kshs 393, 745.24

Finally, counsel prayed for the appeal to be allowed with costs.

6. Learned counsel for the Respondent vide submissions dated 16.11.2023 submitted that parties had entered into a consent on liability at the ratio of 25% to 75% in favour of the Respondent but that the trial court used the ratio of 30% to 70% instead. Learned counsel urged the court to go by the ratios agreed by consent. He raised two issues for determination namely whether the trial court reached the right conclusion on the award of damages and secondly, who should bear the costs of the appeal?
7. As regards the 1<sup>st</sup> issue, learned counsel submitted that the learned trial magistrate duly considered the facts and circumstances of the case and arrived at the various awards which should be upheld. It was also submitted that the multiplicand of Kshs 12000/ should be upheld as the deceased was both a farmer and a businessman. Counsel sought reliance in the Court of Appeal case of *Jacob Ayiga Makokha & Another vs Simon Obayo* [2005] eKLR where it was held that documentary evidence of income need not be necessary regarding proof of income.
8. I have considered the record of appeal and the rival submissions and authorities cited. It is not in dispute that parties had entered into a consent on liability in the ratio of 25% to 75% as between the Respondent and Appellant. It is also not in dispute that the Appellant has appealed against all the heads of damage arrived at by the trial court. Hence, the issue for determination is whether the awards of damages by the trial court were proper.
9. The duty of an appellate court in civil proceedings is well known. In words of De Lestang v-P in the Court of Appeal for East Africa case of *Selle v. Associated. Motor Boat Co.* (1968) EA 123, 126:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally..” (*Abdul Hameed Saif v. Ali Mohamed Shalom* (1955), 22, EACA 270).”

It is indeed the duty of the first appellate court to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its independent findings and conclusion but bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

The record reveals that the parties entered into a consent on liability on the 26.11.2020 in the ratio of 25% to 75% in favour of the Respondent. It is only the Respondent who tendered evidence. Gravin Waraba (PW1) adopted his witness statement dated 18/12/2018 as his evidence in chief. He produced the certificate of death for the deceased and maintained that the deceased was aged 46 years old. He stated that the deceased was attended to at Life Care hospital at Bungoma and Bungoma County Referral hospital. He added that the deceased left behind two children namely Quinter Wanjala who is above 18 years and Sidney Wanjala who is below 18 years old. He produced several receipts of payments



all totaling Kshs 113, 190/. On cross-examination, he testified that the deceased died at the age of 46 years and had two children and that his wife had deserted him prior to the incident. He added that the deceased died after seven days while in hospital. He stated that the deceased was a milk vendor who earned Kshs 30, 000/ per month. He finally added that he fends for himself.

Both parties thereafter closed their respective cases.

10. As the appellant's appeal is mainly against the quantum of damages, regard must be had in the case of Butt Vs Khan [1981] KLR 198 where the court held as follows:

“It is trite law 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.”

11. Being guided by the above authority, it is now my duty to analyze the various awards in contention. Starting with the award of pain and suffering, it is noted that the deceased did not die on the spot but had to undergo treatment before he breathed his last. Indeed, the deceased must have felt a lot of excruciating pain before he passed on. The main aim of such an award is to compensate the deceased's survivors and not the deceased himself. It is noted that the conventional awards under this head range from a sum of Kshs 10,000/ to about Kshs 20, 000/ for a deceased who has died on the spot. However, if the deceased takes a long period before he dies then a higher amount is awarded. In the present circumstances, the deceased took about seven days in hospital before he died. The higher the period the more the award. Consequently, I find the award of Kshs 60, 000/ for pain and suffering to be reasonable and I see no reason to disturb the same as the same is not inordinately high.
12. As regards the award of loss of expectation of life, it is noted that the trial court made an award of Kshs 60,000/. The conventional sums have always been in the region of Kshs 100, 000/. Hence, I find the said award to be reasonable in the circumstances. I will sustain the same.
13. As regards loss of dependency, it is trite law that the issue of dependency is a question of fact and thus the Respondent was under an obligation to prove the same. It was the evidence of the Respondent that the deceased earned Kshs 30, 000/per month yet did not produce a single receipt. Learned counsel for the Respondent has relied on the Court of Appeal decision in Jacob Ayiga Makokha & Another vs Simeon Obayo [2005] eKLR where it was held that it is not a must that documentary evidence must be availed as proof of income by persons who are illiterate. It is noted that the Respondent did not avail any document as proof of income. It is not appropriate to allow a party to plug figures from the blues and expect the court to accept it as the gospel truth. A party is duty bound to try and avail at least some modicum of documents so as to give even a hint that such a deceased used to earn some income. I am in agreement with the view of the counsel for the Appellant that the deceased be deemed to have been a casual labourer and thus fit in the category provided for by the Regulation of Wages (General Amendments Order) 2018. At the time of the deceased's death, these regulations were in place and the minimum wage for a labourer was Kshs 7240.95. I will adopt this sum as the multiplicand. On the issue of multiplier, it is noted that the trial court used a multiplier of 32 years. I find this was quite high bearing in mind that the deceased died at the age of 46 years old meaning that he would have worked up to 78 years. This is incredible yet vagaries of life must be considered. The retirement age for civil servants in this country is 60 years. That being the position, I must agree with the Appellant's counsel that the multiplier of 14 years is reasonable. Finally, as regards the dependency ratio, the trial court adopted a ratio of 2/3. The appellant's counsel has proposed a ratio of 1/3. Looking at the circumstances, I am inclined to agree with the trial court's assessment since the deceased had two children who depended on him after his wife deserted him. Hence, the award under this head will be worked out as 7240.95 x



$12 \times 14 \times \frac{2}{3} = 810,986.40$ . To that extent, I find the award by the trial court to be inordinately high and must thus be interfered with.

14. Finally, learned counsel for the Appellant has urged this court to deduct the amounts under the *Law Reform Act* so as to prevent double compensation to the Respondent. However, I am not persuaded by the suggestion in that the Court of Appeal has already clarified the same in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) vs Kiarie Shoe Stores Ltd* Nyeri CA No. 22 of 2014 [2015] eKLR where it held as follows:

“[20] This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough: duplication occurs when the beneficiaries of the deceased’s estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act* and hence the issue of duplication does not arise.”

Hence, I see no reason to make the deductions as suggested by counsel for the Appellant.

15. As regards special damages, it is trite that the same must be specifically be pleaded and proved. The Respondent had pleaded the sum of Kshs 92, 550/-. The receipts produced herein amounted to Kshs 113, 190/-. Hence, the amount to be awarded ought to be Kshs 92, 550 as pleaded and proved. The excess amounts must be abandoned as they were not pleaded in the first place.
16. In the result, the appeal partially succeeds. The judgment of the trial court is hereby set aside and substituted with a judgement being entered for the Respondent against the Appellant as follows:

- a. Liability as between the Respondent  
and Appellant respectively.....25% to 75%
- b. General damages
- i. Pain & Suffering..... Kshs 60,000.00
- ii. Loss of expectation of life.....Kshs 60,000.00
- iii. Lost years.....Kshs 810,986.40  
Total..... - Kshs 930, 986.40
- iv. Special damages.....Kshs 92, 550.00  
Kshs 1,023, 536.40  
Less 30% contribution.....Kshs 307, 060.92  
Grand Total - Kshs 716, 475.48

Each party to bear their costs of this appeal while the Appellant will pay the Respondent’s cost full costs in the lower court.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF APRIL 2024**

**D.KEMEI**



## **JUDGE**

In the presence of :

Fundi for Appellant

Shikhu for Mukisu for Respondent

Kizito Court Assistant

