



**Mbae (Suing as the Legal Representative of the Estate of Koome Mbae - Deceased) v
Mugambi (Sued as the Legal Representative of the Estate of Duncan Mwega Micheni -
Deceased) (Civil Appeal E019 of 2022) [2024] KEHC 3376 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E019 OF 2022**

LW GITARI, J

APRIL 4, 2024

BETWEEN

**MARTIN DOPORRES MBAE (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KOOME MBAE - DECEASED) APPELLANT**

AND

**MICHENI MUGAMBI (SUED AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF DUNCAN MWEGA MICHENI - DECEASED) RESPONDENT**

JUDGMENT

1. This appeal arises from the judgment and decree delivered on 18th July, 2022 in Chuka CMCC No. E025 of 2021 Benjamin Micheni Mugambi (Suing as the legal representative of the estate of Duncan Mwega Micheni (Deceased) v. Martin Doporres Mbae (Sued as the Legal Representative of the Estate Koome Mbae (Deceased)).
2. The Respondent herein was the Plaintiff in the lower court and she had instituted the proceedings against the Appellant herein seeking general damages under the Fatal Accident Act and the [Law Reform Act](#), special damages of Kshs. 45,350/= and costs of the suit and interests thereof.
3. The Respondent alleged that the late Duncan Mwega Micheni (deceased) was riding his motor cycle registration number KMCQ 016N Tiger Make along Meru-Chuka Highway at Wiru area when the driver, servant, and/or employee of motor vehicle registration number KCX 733A Nissan S. Wagon drove, managed, and/or controlled the said motor vehicle so negligently, carelessly and/or recklessly that he caused or permitted the same to violently hit motor cycle registration number KMCQ 016N Tiger make thereby causing an accident and as a consequence of which the late Duncan Mwega Micheni succumbed to the serious injuries he sustained in the said accident. The Respondent averred that the Appellant ought to be held liable for negligence.



4. The particulars of negligence on the part of the Appellant were pleaded in paragraph 4 of the Plaint dated 8th February, 2021 and amended on 2nd August, 2021 whereas the particulars of loss and damage suffered were itemized in paragraph 7 of the Plaint.
5. In response to the Respondent's claim, the Appellant averred that that the Appellant lacked the requisite locus standi to institute these proceeding and further, that the Appellant lacked the requisite locus standi to be sued on behalf of the estate of the late Kevin Koome Mbae. The Appellant denied, among other things, the ownership of the motor vehicle registration number KCX 733A on the material day, the occurrence of the subject accident in the manner alleged by the Respondent, and the particulars of loss and damage alleged.
6. In the impugned judgment, the learned trial magistrate entered judgment for the Respondent herein against the Appellant as follows:
 - a. Liability – 100%;
 - b. General damages under Fatal Accident Act as follows:-
 - i. Loss of dependency - Kshs. 3,369,120/=;
 - ii. Pain and suffering – Kshs. 50,000/=
 - iii. Loss of expectation of life – Kshs. 100,000/=Total Kshs. 3,519,120
 - c. Interest on the general damages at the court's rate from date of the judgment;
 - d. Kshs. 45,350/= as special damages with interest from the date of filing the suit;
 - e. Costs of the suit with interest at the court's rate from the date of the judgment.
7. Aggrieved by the said decision, the Appellant proffered this appeal in the grounds THAT:
 - a. In computing damages for loss of dependency, the learned trial magistrate erred in law and fact by failing to apply the appropriate Statutory Minimum Wage in the absence of documentary evidence of Duncan Mweiga Micheni's earnings as he was obligated under Section 2 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya, thereby making an inordinately high award of damages for loss of dependency.
 - b. The learned trial magistrate misdirected himself grossly and erred in making an inordinately high award of damages for loss of expectation of life.
 - c. The learned trial magistrate erred in law and fact by considering irrelevant factors in applying a multiplier of 30 years in computing damages for loss of dependency.
 - d. The learned trial magistrate erred in law and fact in awarding the Respondent damages under the Fatal Accident Act and the *Law Reform Act* thus amounting to double compensation.
 - e. The learned trial magistrate showed extreme prejudice by totally ignoring the evidence on record and the Applicant's counsel's submissions and thereby arrived at an erroneous decision.
8. The Appellant thus prayed for this appeal to be allowed with costs and for the awards of Kshs. 3,369,120/= in general damages, the award of Kshs. 50,000/= for pain and suffering, and the award of Kshs. 100,000/= for loss of expectation of life made by the trial court be set aside and be substituted with an award of Kshs. 689,615/= for loss of dependency, an award of Kshs. 20,000/= for pain and



suffering, and an award of Kshs. 80,000/= for loss of expectation of life or such other lesser award that this Court may deem reasonable.

9. The appeal was opposed and the same was canvassed by way of written submissions.

The Submissions

10. It was the Appellant's submission that the learned magistrate in concluding that the deceased was a Securicor personnel and hence applying Kshs. 50,000/= as the multiplicand in determination of the damages to award under the head of loss of damages. It is the Applicant's submission that no evidence was tendered to show that the deceased was skilled in any specific vocation. According to the Appellant, the applicable income that should have been used ought to have been Kshs. 6,896.15/= per month which the minimum wage estimate of a general worker in the area that the deceased came from.
11. It was further the Appellant's submission that a multiplier of 25 years would have been reasonable in the circumstances. To buttress this, the Appellant relied on the case of Nakuru HCCA No. 142 of 2009, Comply Industries Limited & Another v. Mary Ngima Muthini where the court adopted a multiplier of 20 years for a deceased who was 21 years old.
12. Finally, the Appellant submitted that the learned magistrate misdirected himself in awarding a dependency ratio of 2/3 whereas the introductory letter of the chief indicated that the deceased only had one beneficiary, one BM, and that the testimony of PW2 that she was the spouse of the deceased was not substantiated by any evidence.
13. The Appellant thus urged this court to find that the Appellant's appeal is merited, set aside the award of damages for loss of expectation of life made by the lower court and substitute the same with an award of Kshs. 689,615/= (calculated as Kshs. 6,896.15 x 12 months x 25 years x 1/3) or such other lesser award that this Court may deem reasonable.
14. On behalf of the Respondent, it was submitted that the only issue raised by the Appellant is the award of quantum for general damages. That since the issue of liability was not presented for review in this Appeal, the same has been conceded by the Appellant.
15. Under the head of damages for pain and suffering, the Respondent submitted that the prayer for the same to be reviewed downwards from Kshs. 50,000/= to Kshs. 20,000/= was not supported by any factual or legal evidence and should therefore be upheld as unchallenged. Relying on 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 Respondent further submitted that the award of Kshs. 50,000/= should be upheld as the same is well within the prevailing range of awards for this category of damages.
16. On the award of general damages for the loss of expectation of life, it was the Respondent's submission that that the award of Kshs. 100,000/= should be upheld as the same the conventional award made by courts under this head. The Respondent relied on 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 to buttress this position.
17. On damages awarded under the head of loss of dependency, it was the Respondent's submission that the trial court did not err in accepting that the deceased was employed as a Securicor night watchman stating that the said profession is endorsed in the death certificate of the deceased which is government issued document representing prima facie evidence of the truth of its contents. That in the circumstances, the adoption of a monthly wage of Kshs. 14,038/= by the trial court should be upheld



as the same represents the prevailing minimum wage of a night watchman within a municipality for the 2020 when the deceased died.

18. Regarding the multiplier adopted, it was the submission of the Respondent that since the deceased died at the age of 30 years, a fact that remained undisputed, then the using of the multiplier of 30 years was reasonable as the expected life expectancy is 60 years. To buttress this position, the Respondent urged this Court to be guided by the holdings in *Mercy Wanjiru Muiruri (Suing as the administrators of the Estate of Loise Njeri Mbugua) v Robert Barasa & Another* [2015] eKLR and the case of *Easy Coach Bus Services & Another v. Henry Charles Tsuma & Another (Suing as the Administrators and Personal Representatives of the Estate of Josephine Weyanga Tsuma – Deceased)* [2019]eKLR.
19. Finally, regarding the dependency ratio, the Respondent placed reliance on the case of *Mary Wanjiru Maina (Suing as Administrator Ad Litem of the Estate of the late Jane Wanjiru Maina v. Lilian W. Macharia & Another* [2019] eKLR to submit that the application of 2/3 should be upheld as the court in the said case reasoned that people with smaller incomes tend to expend more of it on their dependents.
20. On ground no. 4 of the Appellant’s Memorandum of Appeal, the Respondent urged this Court to adopt the reasoning of the Court of Appeal in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Limited* [2015] eKLR and dismiss the allegation the award of damages of under the *Law Reform Act* and under the *Fatal Accidents Act* amounted to double compensation. The Respondent thus urged this court to dismiss the present appeal and uphold the entire judgment of the trial court.

Issues for Determination

21. I have considered the pleadings, and the submissions by the parties. The main issue that arises for determination by this Court is whether the trial court’s assessment of general damages was erroneous and/or excessive in the circumstances of this case.

Analysis

22. This is a first appeal. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. [See: *Court of Appeal for East Africa in Peters –vs- Sunday Post Limited* [1958] EA 424]. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. . First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
23. It is therefore the duty of this court as a first appellate court to re-evaluate the evidence and arrive at its own conclusions. In so doing the court must take into account that it had no opportunity to hear



and see witnesses, and therefore must make an allowance for that. (See: *Selle & Another Vs Associated Motor Boat Co. Ltd & Another* (1968 (E.A. 123)).

24. From the record, PW1 was Brenda Kinya, who was PW2 in the test suit, the same being Chuka CMCC No. E025 of 2021. She testified as the only witness in support of her claim against the Appellant. It was testimony that as a result of the subject accident, she suffered broken limbs (fractures of the femur and hand), and soft tissue injuries. That she was attended at Chogoria Hospital and later referred to Chuka General Hospital for 3 months. That she has metal implants in her leg and that she requires Kshs. 300,000/= for the implants to be removed. Further, that she used to attend physiotherapy after the accident at a cost of Kshs. 5,000/= and that she still limps which was not an issue before.
25. PW1 produced in evidence her list of documents in support of her claim including a demand notice, a medical report by Dr. Nkonge dated 17.06.2021, treatment notes, payment receipts, P3 form and motor vehicle record.
26. The Appellant, on the other hand, closed their case without calling any witnesses but produced in evidence, and by consent of the parties, a medical report dated 9th June, 2022.
27. The issue of liability in this case is not in question as the same was arrived at from the judgment of the aforementioned test suit.
28. On quantum of damages, it is a general rule that an appellate court should not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. This is the principle enunciated in *Rook v Rairrie* [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A 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.”
29. In the submissions made on behalf of the Respondent, the following award of damages were proposed:
 - a. Loss of dependency - Kshs. 3,600,000/= (Kshs. 15,000/= x 12 months x 30 years x 2/3);
 - b. Loss of expectation of life – Kshs. 100,000/=;
 - c. Pain and Suffering – Kshs. 100,000/=;
 - d. Special damages – Kshs. 45,350/=.
30. On the other hand, it was submitted on behalf of the Appellant that trial court ought to have assessed damages as follows:
 - a. Loss of dependency - Kshs. 689,615/= (Kshs. 6,896.15/= x 12 months x 25 years x 1/3);
 - b. Loss of expectation of life – Kshs. 80,000/=;
 - c. Pain and Suffering – Kshs. 20,000/=;
 - d. Special damages – Nil.
31. The factors that a court considers in determining the award to give in damages include the nature and extent of the injuries, the awards made for comparable injuries as well as inflation rates. A court must however bear in mind that no two cases are exactly the same. In the case of *Stanley Maore v.*



Geoffrey Mwenda Nyeri CA No. 147 of 2002 [2004] eKLR the Court of Appeal held as follows on the assessment of general damages;

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”

32. In this case, the award of Kshs. 45,350/= as special damages was not contested and from the record, it is clear that the same was specifically pleaded and strictly proved as required by the law. There is therefore no reason for this Court to disturb this award of special damages.
33. On general damages for loss of dependency, it is not disputed that the deceased was 30 years old and had a son as a dependant. In view of the fact the life expectation is 60 years, I find that the learned magistrate did not err for finding that the deceased could have worked for another 30 (thirty) years or more. The trial magistrate further considered the evidence placed before it and in the circumstances of this case, a dependency ratio of 2/3 was proper. In my view, the trial court considered the correct legal principle before it used the said multiplier and dependency ratio.
34. The only issue then left for determination is the multiplicand that was applied by the trial court.
35. Section 26 of the *Births and Deaths Registration Act* (Cap 149 of the Laws of Kenya) provides that any entry date or fact on a death certificate shall be received as evidence without any proof of such entry.

This notwithstanding, a death certificate may only be relied on to prove what is legally supposed to prove. It is trite that a death certificate is an official statement signed by a doctor on the cause, date and place of a person's death. It is also a document issued by a Government Civil Registration Office that declares the date, location and cause of a person's death as entered in an official register of death. It follows that entries on a death certificate which shall be received as evidence must relate to such entries as cause of death, date of death and place of death.

I find that to rely on the death certificate to prove the occupation of the deceased is in my view not sufficient.

Section 2 of the Act gives the prescribed particulars which means any particulars as to death, name, age, sex, residence, occupation and nationality of the deceased and the date place, and cause of death. Section 107 of the *Evidence Act* (Cap 80 Laws of Kenya) places a burden of proof on the person who alleges. The respondent did not produce any evidence to prove that the deceased worked as Securicor other than the said death certificate. In the plaintiff's statement at paragraph 22 at page 8 of the record the plaintiff had stated that the deceased was a businessman and used to work as Securicor. I find that there was evidence tendered that the deceased used to work as Securicor and I should therefore not fault the trial magistrate for finding that the deceased was working as a Securicor. The learned trial magistrate applied the Regulation of Wages (General) (Amendment) Order 2018. He applied a multiplicand of Ksh.14,038.00. Though the learned trial magistrate relied on the Correct Regulation of Wages, the sum of Kshs. 14,038.00 was erroneous.

Under the Regulation, what was provided for was Night Watchman. 14,038/- applied in “All former Municipalities and Town Councils of Mavoko, Ruiru & Limuru” Chuka Does not fall under this category. It falls under all other areas. The applicable minimum wage for a night watchman is Ksh.7,240.95. These regulations were gazetted on 19/12/2018 and were therefore in force when the deceased died on 23/12/2020. The deceased had one beneficiary as per the letter by the Chief of Iruma Location. There was no proof that Breda Kinya was a dependant of the deceased. Under Section 4(1) of the *Fatal Accidents Act* an action under the Act is brought for the benefit of the wife, husband, parent



and child. The claim was brought for the benefit of the father. I agree with the appellant that the 1/3 should have been the correct ratio in the circumstances. This would work out as $7240.95 \times 12 \times 30 \times 1/3 = 868,914.00$.

36. Finally, on the general damages awarded under the heads of pain and suffering as well as the loss of expectation of life, I agree with the submissions of the counsel for the Respondent and the authorities cited that awards are the conventional awards made under those heads and are not excessive in any way. In light of the evidence adduced before it, the authorities cited by the parties, and the legal principles used in awarding general damages, it is thus my finding that the trial magistrate took into account the relevant principles in arriving at its decision on quantum on general damages.

Conclusion

37. From the foregoing analysis, I find that the appeal partly succeeds on the award of general damages for loss of dependency. I therefore enter Judgment as follows:-
1. Pain and suffering -Ksh.50,000/-
 2. Loss of expectation of life- Ksh.100,000/-
 3. Loss of dependency -Kshs.868,914.00
 4. Special damages- Ksh.45,350.00
 5. Costs and interests on special damages from date of filing suit and interests on general damages from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF APRIL 2024.

L.W. GITARI

JUDGE

