



REPUBLIC OF KENYA



M'noti & another (Suing as Legal Representatives of the Estate of Charles Kithinji Ringera-Deceased) v Gitonga & another (Civil Appeal E143 of 2022) [2024] KEHC 3180 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E143 OF 2022
EM MURIITHI, J
APRIL 4, 2024**

BETWEEN

LUCYLINE KIENDE M'INOTI & ANOTHER (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES KITHINJI RINGERA-DECEASED) APPELLANT

AND

PATRICK MBAABU GITONGA 1ST RESPONDENT

BENFORD GICHUNGE 2ND RESPONDENT

(An appeal from the Judgment and Decree of Hon. L. W. Maina (R.M) in Meru CMCC No.E505 of 2021 delivered on 28/9/2021)

JUDGMENT

1. By an amended plaint dated 20/6/2022, the Appellants sued the Respondents seeking general damages under the [Law Reform Act](#) and [Fatal Accidents Act](#), special damages of Ksh. 160,000/= and costs of the suit plus interest. The gist of the claim was that on 6/3/2020 at Kaarene area along Githongo-Meru road, the Respondents so negligently, carelessly and recklessly drove, controlled and/or managed Motor Vehicle Registration No. KCK 728 W Toyota Pick-up that is veered off the road to the pedestrian path and hit the deceased occasioning him fatal injuries. The deceased was prior to his death aged 51 years, enjoying a good health, leading a happy industrious and vibrant life, and as a result of his abrupt and premature death, his estate has suffered loss and damage.
2. The Respondents denied the claim by their statement of defence dated 20/7/2022 and prayed for the Appellants' suit to be dismissed.
3. The parties recorded a consent on liability at the ratio of 80:20 in favour of the Appellants against the Respondents and upon full hearing on quantum, the trial court awarded Ksh. 10,000 for pain



and suffering, Ksh. 100,000 for loss of expectation of life, Ksh. 374,460 for lost dependency, special damages of Ksh. 22,000 less 20% contribution = Ksh. 405,168.

The Appeal

4. On appeal, the Appellants filed their memorandum of appeal on 14/10/2022 raising 5 grounds as follows:
 1. The Learned Trial Magistrate erred in law and fact in failing to consider the evidence on special damages as pleaded and arrived at an erroneous award.
 2. The Learned Trial Magistrate erred in law and fact in awarding the appellant damages which were inordinately low and disregarding the set out principles in calculating damages.
 3. The Learned Trial Magistrate erred in law and fact in failing to consider that the evidence that the multiplicand appropriate for calculating damages was 20 years as the deceased was a business man.
 4. The Learned Trial Magistrate erred in law and fact in failing to evaluate the evidence in its totality and failing to take into consideration submission and the relevant authorities by the appellant thereby arriving at wrong conclusion.
 5. The entire decision was erroneous and the award was inordinately low by the circumstances.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).
6. On 29/8/2022, the parties recorded a consent in the following terms:
 1. Judgment on liability be entered in favour of the plaintiff in a ratio of 80:20.
 2. Plaintiff's witness statement dated 14th March 2022 be adopted as their exam in chief.
 3. The plaintiff's list of documents dated 17th December 2021 be adopted without calling the witnesses further List dated 5th February, 2022 be also adopted supplementary list dated 26th April 2022 be adopted without calling witness (1-14).
 4. Parties file submissions."

Submissions

7. The Appellants urge that at the time of death, the deceased was 51 years and worked as a business man earning Ksh. 30,000 per month. They propose a sum of Ksh.200,000 for loss of expectation of life, and Ksh. 150,000 for pain and suffering, and cite *Loise Mwangi & Anor v Joseph Wambua Kamau* (2006) eKLR and *Milicent Kimuri & Benson Wanjohi Njogu* (Suing as the Administrators of the estate of Ephantus Murimi Wanjohi-Deceased) v *Mbisi Linah Catherine & Anor* (2015) eKLR. They fault the trial court for applying the multiplicand of Ksh.6,241 yet there was no evidence tendered to show that the deceased was a general labourer, and cite *Isaack Kimani Kanyingi & another* (Suing as the legal representative of the Estate of *Loise Gathoni Mugo* (Deceased) v *Hellena Wanjiru Rukanga* (2020) eKLR and *Jacob Ayiga Maruja & Anor v Simeon Obayo* (2005) eKLR. They urge that a multiplier of 20 years and a dependency ratio of $\frac{1}{2}$ would suffice, and cite *Moses Akumba & another v Hellen Karisa*



Thoya (2017) eKLR. They urge that the special damages of Ksh.160,000 were satisfactorily proved, and cite Benjamin Muela Kimono v Daniel Kipkirong Tarus & another (2015) eKLR and Premier Dairy Limited v Amarjit Singh Sagoo & another (2013) eKLR. They urge that they proved their case on a balance of probabilities, and pray for the appeal to be allowed with costs. They also relied on Edward Muriga v Nathaniel D. Schulter (1997) eKLR, Motex Knitwear Limited v Gopitex Knitwear Mills Limited (2007) eKLR, Karuru Munyororo v Joseph Ndumia Murage & Another Nyeri HCCC No. 95/1988 and Beatrice Wangui Thairu v Hon. Ezekiel Bargetuny & Another Nairobi HCCC No. 1638/1988 (UR) in support of their submissions.

8. The Respondents restate the duty of the appellate court as elucidated in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR and Butt v Khan (1978) eKLR. They urge that the award on special damages of Ksh. 22,000 should be upheld, and cite David Bagine v Martin Bundi (1997) eKLR. They urge that the trial court did not proceed on a wrong principle or misapprehend the evidence, in awarding Ksh. 10,000 for pain and suffering, Ksh. 100,000 for loss of expectation of life and Ksh. 374,460, and cite Hyder Nthenya Musili & another v China Wu Yi Limited & another (2017) eKLR, Chunibhai J. Patel and Another v P.F Hayes and Others (1957) EA, Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja - Deceased) v Kiarie Shoe Stores Limited (2015) eKLR and Eliphaz Mutegi Njeri & another v Stanley M'mweri M'atiri (2010) eKLR.

Analysis and Determination

9. The issues for determination from the grounds of appeal are whether awards under the various heads were inordinately low and whether the Appellants' submissions and authorities cited thereon were considered.

General Damages for loss of dependency

10. This court has previously considered the principles for appellate interference with an award of damages by a trial court in Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020] eKLR as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”



Loss of Dependency

11. The 1st Appellant herein recorded in her statement dated 14/3/2022 which was adopted as evidence,

“That before the abrupt and premature demise, the deceased enjoyed a good life and was leaving a happy industrious and vibrant life and his life was abruptly brought to a sudden and premature end and as a result his estate suffered expense, loss and damage. The deceased was a bread winner of our family and also his elderly father one M’RINGERA M’MUKINDIA.”

12. It is not clear from that excerpt of the witness statement what the deceased did for a living, and the trial court, was properly guided in adopting the minimum wage of a general labourer of Ksh.6,241 as the multiplicand found that,

“The Plaintiff in this instance seek for a multiplicand of Kshs. 30,000/= alleging that the deceased was a shopkeeper selling cereals which multiplicand is has not been supported by the Plaintiff. According to the witness statement, it is unclear what job the Deceased did and details of the said shop have not been adduced. Therefore, the Court shall naturally revert to the minimum net wage to determine the multiplicand.”

13. The trial court settled on a multiplier of 10 years for a deceased who was aged 51 years at the time of his untimely death, after taking into account his good health and the vicissitudes of life. The Court considers that a multiplier of 15 is more suited for a person aged 15 and engaged in private business which he may conduct well beyond the age of 70 years.

14. The dependants disclosed by the 1st Appellant in her statement are herself and the deceased’s elderly father, and therefore the dependency ratio of $\frac{1}{2}$ adopted by the trial court was proper.

15. This court finds that the trial court’s adoption of the minimum wage of a general labourer as the multiplicand was justified accepting that the deceased earned some wages as a shopkeeper, in view of the paucity of evidence in support of the kind of business earning venture the deceased was engaged in, the amount of income earned therefrom and the percentage of it used to support his dependants.

16. On this calculation therefore the general damads for loss of dependency should be as follows:

$$\frac{1}{2} \times \text{Ksh.6,241} \times 15 \times 12 = 561,290.$$

The court shall, therefore, substitute an award of 561,290 for loss of dependency.

Loss of Expectation of Life

17. In the past trial court have not been faulted for awarding the conventional amount of Ksh.100,000 under this head. However, in view of the recent inflationary trend and loss of value of the Kenya Shilling, the Court will award the sum of Ksh.200,000/- for loss of expectation of life.



Pain and suffering

18. This court respectfully notes the holding of the court (D.S Majanja J) in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR 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.”

19. The 1st Appellant did not lead any evidence on how long the deceased suffered before he died, and that must be construed to mean that he died on the spot and thus the suffering was trifling. This court therefore finds that the award of Ksh.10,000 was fair.

Special Damages

20. The court notes that the Appellants adduced various receipts in support of their claim for special damages to wit *Loyal Funeral Services* receipt of Ksh. 18,000 for coffin and hearse services, *Nkubu Pizzeria* receipt of Ksh. 40,000 for funeral expenses, *Joshua Mwitwi Law Advocates* receipt of Ksh. 5,000 for demand letter fees and *Meru Teaching and Referral Hospital* receipts of Ksh.17,000 for mortuary charges, totalling to Ksh. 80,000. The award of special damages of Ksh. 22,000 awarded by the trial court was thus erroneous.

Consideration of the Appellant’s submissions and decisions

21. Submissions are a mere guide to the court as they are not pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court’s decision, as was aptly put by the Court (Patrick J.O Otieno J) in *Charles Mutuma M’kanake v Diocese of Meru Trustees Registered* [2021] eKLR thus:

“This court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision.”

Orders

22. Accordingly, for the reasons set out above, this court finds the appeal to have partially succeeded and allows it to the following extent:

1. The trial court award of Ksh.374,460 for lost dependency is set aside and substituted with an award of Ksh.561,290/=.
2. The award of Ksh.100,000 under the head for loss of expectation of life is set aside and substituted with an award the sum of Ksh.200,000/-.
3. The award of special damages of Ksh.22,000 is hereby set aside and substituted with an award of Ksh.80,000.
4. The rest of the awards and the liability ratio remain unaffected.
5. The Appellants shall have the costs of the appeal.

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

EDWARD M. MURIITHI



JUDGE

Appearances:

M/S Joshua Mwiti Law Advocates for the Appellants.

M/S Kiruki & Kayika Advocates for the Respondent.

