



Salim & another v Yusuf & another (Suing as the Personal and Legal Representatives of Yusuf Omar Chepkwony - Deceased) (Civil Appeal E037 of 2021) [2024] KEHC 5610 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E037 OF 2021
RL KORIR, J
APRIL 11, 2024**

BETWEEN

AHMED SALIM 1ST APPELLANT

GLACIER LIMITED 2ND APPELLANT

AND

FLORENCE WANGUI YUSUF 1ST RESPONDENT

CHARLES KIPKIRUI 2ND RESPONDENT

**SUING AS THE PERSONAL AND LEGAL REPRESENTATIVES OF YUSUF
OMAR CHEPKWONY - DECEASED**

*(Being an Appeal from the Judgment of the Principal Magistrate, Muleka
E. at the Magistrate's Court at Sotik, Civil Suit Number 9 of 2020)*

JUDGMENT

1. The Respondents (then Plaintiffs) as the Legal Representatives of the deceased Yusuf Omar Chepkwony, sued the Appellants (then Defendants) for General and Special Damages that arose when the deceased was allegedly involved in a fatal road traffic accident on 24th October 2019 along Chepilat-Sotik road.
2. The trial court conducted a hearing where the Respondents and the Appellants produced two witnesses each.
3. In its Judgment delivered on 28th September 2021, the trial court awarded Kshs 2,602,582/= as General and Special Damages to the Respondents (then Plaintiffs).



4. Being aggrieved with the Judgment of the trial court, the Appellants filed their Memorandum of Appeal dated 22nd October 2021 appealing against the quantum of damages. They relied on the following grounds:-
 - I. That the learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him specifically and consequently coming to a wrong conclusion.
 - II. That the learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellants.
 - III. That the learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondents (if any) and failed to apply precedents and tenets of law applicable.
 - IV. That the learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.
 - V. That the learned trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR.

The Plaintiffs'/Respondents' case.

6. Through their Complaint dated 10th February 2020, the Respondents stated that the deceased Yusuf Omar Chepkwony was involved in a road traffic accident on 24th October 2019. That he was hit by Motor Vehicle Registration Number KCA 271P/ZF 1474 while aboard Motor Cycle Registration Number KMDV 881F. It was their case that the Appellants were the registered or beneficial owners of the said motor vehicle.
7. It was the Respondents' case that the Appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of the Complaint. That as a result of the accident, Yusuf Omar Chepkwony suffered fatal injuries.
8. The Respondents prayed for Special and General Damages against the Appellant under the *Fatal Accidents Act* and the *Law Reform Act*.

The Appellants'/Defendants' Case.

9. Through their Statement of Defence dated 4th August 2020, the Appellants denied the occurrence of the accident on 24th October 2019 and further denied being the registered owners of Motor Vehicle Registration Number KCA 271P/ZF 1474. The Appellants also challenged the locus standi of the Respondents to bring the suit before the trial court.



10. It was the Appellant's case that if the accident occurred then it was caused by the negligence and carelessness of the deceased. The particulars of negligence were contained in paragraph 16 of the Defence.
11. On 24th May 2023, I directed that this Appeal be canvassed by way of written submissions.

The Appellants' Submissions.

12. The Appellant submitted that they were only challenging the quantum awarded by the trial court. They submitted that the award of Kshs 150,000/= under the loss of expectation was excessive. They proposed the conventional award of Kshs 100,000/=.
13. In respect of loss of dependency, they submitted that no evidence was presented before the trial court to prove that the deceased was an electrician. They further submitted that the trial court should have adopted a multiplicand of Kshs 6,736.30/= being the minimum monthly income as per the Regulation of Wages (Agricultural Industry) (Amendment) Order 2018. They relied on *Nyamira Tea Farmers Sacco vs Wilfred Nyambati Keraita (suing as the personal representative of Mary Nyaboke Keraita - Deceased)* (2011) eKLR.
14. On the issue of multiplier, the Appellants proposed a multiplier of 10 years. That the trial court's adoption of 20 years for a 47 year old person was excessive. On the issue of funeral expenses, the Appellants submitted that the Respondents did not prove that they had spent Kshs 100,000/=. That the same was erroneous.
15. It was the Appellants' submission that the trial court acted beyond the ambit of principles for determining damages as it failed to consider the previously decided cases. That the court award damages that were incommensurate with cited cases. It was their further submission that the damages awarded were excessive and that there were sound grounds for this court to interfere with the trial court's award.
16. The Appellants prayed that their Appeal be allowed and the court award general damages to the tune of Kshs 538,904/=.

The Respondents Submissions.

17. The Respondents submitted that this court could only interfere with the trial court's assessment of damages if it was satisfied that the trial court took into account an irrelevant factor or left out a relevant factor so as to make the award too high or too low.
18. On the issue of multiplicand, the Respondents submitted that the deceased's wife testified that the deceased was an electrician. That the trial court was convinced by her testimony and used the monthly income of Kshs 21,418 being the monthly income of a Grade 11 artisan as per the Regulation of Wages (Amendment) Order 2018. They further submitted that there was no evidence to show that the deceased was working in the Agricultural Sector as submitted by the Appellants. They relied on *Richard Matheka Musyoka & another vs Susan Aoko & another (suing as the administrators ad litem of Joseph Onyango Owiti (Deceased))* (2016) eKLR.
19. On the issue of multiplier, the Respondents submitted that the deceased died aged 47 years and he was not in formal employment that would limit his retirement age. That the multiplier of 20 years adopted by the trial court was reasonable.
20. On the loss of expectation of life, the Respondents submitted that courts had in the recent past awarded between Kshs 100,000/= to Kshs 200,000/=. They relied on Vincent Kipkorir Tanui (suing as the



Administrator and/or personal representative of the *estate of Samwel Kiprotich Tanui - deceased* vs *Mogogosiek Tea Factory Co. Ltd & another* (2018) eKLR.

21. It was the Respondents' submission that funeral expenses were inevitable and it would be unfair to deny a party the same merely on the grounds that there were no receipts produced. It was the Respondents' further submission that the Appeal lacked merit and ought to be dismissed with costs to them.
22. I have gone through and carefully considered the Record of Appeal dated 6th February 2023, the Appellants' Written Submissions dated 2nd June 2023 and the Respondents' Written Submissions dated 9th June 2023. The only issue for my determination was whether the damages awarded were inordinately high.
23. Before I commence my analysis of the evidence, it is salient to note that the trial court's apportioning of liability was not contested in this Appeal and so the same remains at 70:30 in favour of the Respondents.
24. With regard to the award on damages, the trial court awarded the Respondents Kshs 2,602,582/= as general and special damages.
25. The principles upon which an appellate court may alter an award by the trial court have been long settled. In the case of *Johnson Evan Gicheru vs Andrew Morton & another* (2005) eKLR, the Court of Appeal stated that:-

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.
26. It is also a principle of law that awards must be reasonable and comparable to awards in similar cases. The Court in *Odinga Jactone Ouma v Moureen Achieng Odera* (2016) eKLR held:-

“.....In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* CA Civil Appeal No. 26 of 2013 [2014] eKLR thus:
The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
27. In regard to the pain and suffering, the trial court awarded Kshs 10,000/=. The trial court stated that the basis of the award was that the deceased instantly which limited her suffering. Both parties did not submit under this head.
28. I have analysed the evidence and it is clear to me that the deceased was involved in a road traffic accident with Motor Vehicle Registration Number KCA 271P/ZF 1474 as it was negotiating spikes along Chepilat-Sotik road. The deceased who was aboard Motor Cycle Registration Number KMDV 881F collided with the bumper of Motor Vehicle Registration Number KCA 271P/ZF 1474 and died on the spot. This was from the evidence of Calvin Auko (DW1) who was the driver of Motor Vehicle Registration Number KCA 271P/ZF 1474 and No. 106229 PC Timothy Koech Kimutai (PW1). They all stated that the deceased died on the spot.



29. In the circumstances thereof, I am convinced that the deceased suffered some little pain when the impact occurred. I find the award of Kshs 10,000/= by the trial court for pain and suffering as reasonable and I thus uphold.
30. On the loss of expectation of life, the trial court awarded the Respondents Kshs 150,000/=. The Appellants submitted that the award of Kshs 150,000/= was inordinately high and he proposed the conventional sum of Kshs 100,000/=. The Respondents on the other hand submitted that courts have recently awarded between Kshs 100,000/= to Kshs 200,000/= under this head.
31. The courts have overtime adopted the figure of Kshs 100,000/= for loss of expectation of life. Due to the inflation rates, I do not find the trial court's award of Kshs 150,000/= under this head as unreasonable. I therefore uphold the award of Kshs 150,000/= for the loss of expectation of life.
32. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death 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, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

33. The trial court awarded the Respondents Kshs 3,426,880/= under this head. The trial court used a monthly wage of Kshs 21,418/=:, a multiplier of 20 years and a ratio of 2/3.
34. I have considered the evidence and it was stated by the deceased's wife Florence Wangui Yusuf (PW2) that the deceased was a business man who used to earn Kshs 30,000/= per month. The same was pleaded in the Plaintiff.
35. There was no proof of income from the exhibits that the Respondents produced in court. With respect to the trial court, I find that the safest way to make an award under this head where there is no ascertainable proof of income would be to go the global sum way. In *Frankline Kimathi Maariu & Another vs Philip Akungu Mitu Mborothi (suing as Administrator and Personal Representative of Antony Mwiti Gakungu deceased)* (2020) eKLR the court stated:-

“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 would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

36. Similarly in *Moses Mairua Muchiri vs Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* (2016) eKLR, Ngaah J. held 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.”

37. The Appellants proposed an award of Kshs 538,904/= under this head while the Respondents submitted that the trial court did not fall into error when it awarded Kshs 3,426,880/= as loss of dependency.
38. In determining an award under this head, I have considered the parties’ proposals under this head, the fact that the deceased died aged 47 years old and the fact that the deceased was survived by a widow (PW2) and four children, three of whom would be reasonably assumed were school going children. Having considered the above, it is my finding that an award of Kshs 2,000,000/= would be reasonable compensation under this head.
39. With regard to Special Damages, the Respondents stated that they had incurred the following:-
- i. Legal fees Kshs 30,000/=
 - ii. Motor Vehicle Search Kshs 550/=
 - iii. Demand Registration Kshs 100/=
 - iv. Funeral Expenses Kshs 100,000/=
40. I have gone through the receipts that were produced by the Respondents in the trial court. I have found the receipt for Legal Services from Khan & Associates marked as P.Exh 7 for Kshs 30,000/= and a Post Office Receipt marked as P.Exh 9 for Kshs 100/=. There was no receipt for the Motor Vehicle Search and as such that claim is dismissed.
41. The Respondents stated that they had incurred Kshs 100,000/= as funeral expenses. The Appellant opposed this award on account of the Respondent’s failure to produce receipts to prove the expenditure. The Respondents on the other hand submitted that funeral expenses were inevitable and it would be unfair to deny them the compensation on account of their failure to produce receipts.
42. Section 6 of the *Fatal Accidents Act* makes provision for funeral expenses as follows:-
- In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.
43. The Court of Appeal, in *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* (2016) eKLR, stated that:-
- “We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc....”
44. Guided by the above authority, it is my finding that the trial court’s award of Kshs 100,000/= for funeral expenses was reasonable and I uphold the same.



45. In total, it is my finding that the Special Damages awardable are Kshs 130,100/=
46. In light of the foregoing, the amount awarded to the Respondents is as follows:-
- i. Pain and Suffering Kshs 10,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 2,000,000
- Kshs 2,160,000
- Less 30% Contribution Kshs 648,000
- Kshs 1,512,000
- Add Special Damages Kshs 130,100
- Total Kshs 1,642,100
47. In the end, the Appeal dated 22nd October 2021 succeeds as the amount awarded to the Respondents is reduced from Kshs 2,602,582/= to Kshs 1,642,100/=.
48. Each party to bear their own costs in this Appeal while the costs in the suit remain as awarded by the trial court.
49. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 11TH DAY OF APRIL, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Otieno Njoga for the Appellant and in the absence of the Respondent. Siele(Court Assistant).

