



AO Bayusuf & Sons Limited v Ayoti & another (Suing as the Administratrixes of the Estate of Moruri Kerongo Geoffrey) (Civil Appeal E156 of 2023) [2024] KEHC 16966 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 16966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E156 OF 2023
F WANGARI, J
MAY 23, 2024**

BETWEEN

AO BAYUSUF & SONS LIMITED APPELLANT

AND

JACKSON MURURI AYOTI 1ST RESPONDENT

ELVIN NYANCHAMA ABUYA 2ND RESPONDENT

**SUING AS THE ADMINISTRATRIXES OF THE ESTATE OF MORURI
KERONGO GEOFFREY**

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. R.N Akee– RM dated 22/6/2023 arising from Mombasa CMCC No. 1033 of 2019. The Appeal is on quantum only.
2. The Memorandum of Appeal dated 12th July 2023 raises grounds challenging the award by the trial court on:-
 - a. The global sum of Kshs. 3,000,000/= for loss of dependency
 - b. Kshs. 100,0000/= for pain and suffering
 - c. Kshs. 100,000/- for loss of expectation of life
 - d. Kshs. 240,000/- for special damages.
3. The Plaintiff dated 29th June 2021 claimed damages for an accident involving Motor Vehicle Registration No. KDB 271H ZG 4430 which occurred on 10th April 2021 while the Deceased was riding on his motorcycle registration number KMFC 496R Tv The Respondents blamed the driver of the accident motor vehicle for the accident for carelessly ramming into the deceased's motorcycle.



4. The Respondents particularized negligence on the part of the Appellants and pleaded special damages of Kshs. 240,000/- and General Damages.
5. The Appellant entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint.
6. The Trial Court heard the parties and proceeded to render judgement on 22nd June 2023. In the Judgement, the Court found 40% liability against the 1st and 2nd Respondents. The court also awarded Damages as follows:
 - i. Pain and suffering Kshs. 100,000/=
 - ii. Loss of Expectation of Life Kshs. 100,000/=
 - iii. Loss of Dependency Kshs. 3,00,000/=
 - iv. Special Damages Kshs. 240,000/=

Less 40% liability
7. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.
8. The court will apply the Respondents testimony largely on quantum as this is what is in contest in the appeal.
9. PW1, was Elvin Nyanchama Abuya, the widow and Jackson Moruri Ayoti, PW2, was father of the deceased. The case of PW1 was materially that the deceased used to earn Kshs. 183,133/- per month based on which he supported them. That he was 39 years old at the time of his demise.
10. The Appellant called one Daniel Nduti Kilonzo who was the driver of the accident motor vehicle.
11. I have perused the testimony and evidence produced and related what would assist this court to determine the issues raised on the quantum of the damages awarded by the trial court.

Submissions.

12. The Appellant filed submissions dated 18th January 2024. It was submitted that it was in error for the trial court to find the way it did on the quantum of damages.
13. It was submitted that Kshs. 20,000/- was sufficient for pain and suffering. They relied on James Karanja v Joyce Njoki Maina & Another [2020] eKLR.
14. On loss of expectation of life, they relied on Benedeta Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR to submit that the deceased died immediately and Kshs. 50,000/- would be adequate compensation.
15. On the loss of dependency, it was submitted that a multiplier approach and multiplier of 10 years and dependency ration of 2/3 would be adequate and not the global sum.
16. It was not submitted the manner in which the trial court erred in the assessment of special damages.
17. On quantum, the Respondent submitted that the court did not err in the assessment of the damages. It was submitted that the global sum approach was the most ideal in this case and the Appellant had not shown why the court should have applied the multiplicand approach on dependency. They cited Frankline Kimanthi Bariu & Another v Philip Akungu Mitu Mborothi [2020] eKLR.



18. It was also submitted that the court was right in its finding on loss of expectation of life and the pain and suffering.
19. On special damages, they submitted they submitted that the award of Kshs. 240,000/- was pleaded and proved and correctly awarded by the trial court. This court was urged to dismiss the Appeal.

Analysis

20. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. (See the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123).
21. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
22. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
23. The issue in this case is whether the trial court awarded general damages that were inordinately high as to occasion injustice to the Appellant.
24. On the quantum of damages, the Court of Appeal, pronounced itself succinctly on the principles for disturbing the award of damages in *Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages”.
25. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure.
26. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”



27. The principle on the award of damages is settled. In *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case.
28. The considerations include but not limited to; -
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
29. There is no dispute that the Deceased was 39 years at the time of his demise. PW1 testified that the deceased worked as a Motor Vehicle Assembler with Associated Vehicle Assemblies Limited at a salary of Kshs. 183,133/- per month.
30. However, the pay slip produced via the Plaintiff's supplementary list of documents dated 6th September 2021 and filed on 8th September 2021 showed that the Deceased's basic salary was Kshs. 46,341/- per month.
31. Whereas the Appellant contended that there was no evidence produced in court to show that the Deceased earned income, I note that the Appellant's record of Appeal contained the Respondents' Supplementary Bundle of Documents dated 6th September 2021 and filed on 8th September 2021 showed that the Deceased's basic salary was Kshs. 46,341/- per month and which is among the documents produced in evidence. In my view, it was thus not factually correct that the Respondent did not prove income.
32. To interfere with the finding of the trial court on quantum, I find no basis to interfere with the global award of Kshs. 3,000,000/- as awarded by the trial court as the discretion did not subvert relevant considerations.
33. In *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:
- “In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.
34. I also note that if the court were to apply the multiplicand approach as submitted by the Appellant, most certainly, the damages awarded under loss of dependency would have been higher than the awarded amount of Kshs. 3,000,000/- as follows: $46,341 \times 15 \times 2 / 3 \times 12 =$ Kshs. 8,341,380/-.



35. This takes into account a multiplicand of 15 as the time the Deceased would have reasonably worked considering the vicissitudes of life. However, as the Respondent did not appeal against the Application of the global sum, I find no basis to interfere with the finding of the trial court.
36. I therefore find and hold that the appeal against the loss of dependency is not merited.
37. On the damages for loss of expectation of life and pain and suffering, the Appellant submitted for an award of Kshs. 50,000/- and Kshs. 20,000/- respectively. The court awarded Kshs. 100,000/- for each.
38. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua v SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -
- “The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis mine).
39. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.
40. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this case, the deceased passed away on the same day of the accident. There is no evidence that he was taken to any hospital prior to his death.
41. The question therefore is whether the award of Kshs 100,000 for pain and suffering was high considering that the deceased died on the spot. I have looked at the case law submitted by both parties. I have also had a look at other cases as highlighted below.
42. On the award for pain and suffering, in Nairobi HCCC No. 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v Elijah Oketch Adellah [2015] eKLR, the Court awarded Kshs 50,000/= on 6th February 2015 for pain and suffering where the deceased died shortly after the accident.
43. In Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & another v Hellen Karisa Thoya [2017] eKLR the court upheld an award Kshs 50,000/= on 4th October, 2017 and observed that although there was sudden death, it is clear that the deceased must have suffered a lot of pain.
44. Based on the above case law, I am persuaded that the award of Kshs. 100,000/= for the deceased was slightly higher. It is in dispute that the Deceased died on the spot. I will interfere this award by the trial court and substitute it with Kshs. 50,000/-.



45. However, I do not find basis to disturb the award of Kshs. 100,000/= for loss of expectation of life. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was 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 for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

46. On special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 where it was stated that the Special Damages which is a specific pecuniary loss must be specifically pleaded.

47. There was also an appeal on the award of Kshs. 240,000/- in special damages. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved.

48. I have perused the record filed in court and I find the Appellant indeed pleaded and proved Kshs. 240,000/= for special damages which the court correctly awarded.

Determination

49. In the upshot, I make the following Orders:

- i. The Appeal against the award on special damages, loss of expectation of life and loss of dependency is dismissed.
- ii. The Judgment of the Lower Court on damages for pain and suffering is set aside and substituted with Kshs. 50,000/.
- iii. As the Appeal is partially successful, each party shall bear their own costs in the Appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 23RD DAY OF MAY, 2024.

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F. WANGARI

JUDGE

In the presence of: -

Adede Advocate h/b for Gor Advocate for the Appellant

Wairagu Advocate h/b for Ngure Advocate for the Respondent

Barile, Court Assistant

