



Daima Connections Limited v Kamanda & another (Suing as the Personal Representatives of the Estate of Fred Mokuu - Deceased) (Civil Appeal E018 of 2023) [2024] KEHC 6524 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E018 OF 2023
WA OKWANY, J
MAY 23, 2024**

BETWEEN

DAIMA CONNECTIONS LIMITED APPELLANT

AND

JOSEPHINE MORAA KAMANDA 1ST RESPONDENT

DAMARIS KWAMBOKA NYAMBAGORA ALIAS EDNA KWAMBOKA 2ND RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF FRED MOKUA - DECEASED

(Being an Appeal from the Judgment and Decree in the Chief Magistrate's Court at Nyamira in CMCC No. 212 of 2018 delivered by Hon. W. Chepseba, Chief Magistrate on 2nd May 2023)

JUDGMENT

1. The Respondents herein were the Plaintiffs before the trial court where they sued the Appellant/Defendant for compensation under the *Law Reform Act* and the *Fatal Accidents Act*. The Plaintiffs' (Respondents) case was that on or about the 12th day of November 2017, their son, Fred Mokuu (deceased), was riding motorcycle Registration No. KMEE 619Q along Nyamira-Kisumu road at Miruka Trading Centre area when motor vehicle Registration No. KBP 484E which was negligently, carelessly and/or recklessly driven, controlled and/or managed by the Defendant and/or his driver, servant and/or agent lost control, veered off the road, and knocked the said motorcycle thereby causing an accident in which the deceased suffered fatal injuries.
2. The Respondents' case was that the deceased was 25 years old at the time of his death, was in good health and was earning a total of Kshs. 30,000/= from his motorcycle and farming businesses. The deceased was survived by a wife and a 1 month old baby.



3. The Defendant/Appellant) denied the averments made in the Plaintiff and attributed the accident to the deceased's negligence.
4. The matter proceeded for hearing after which the trial court delivered a judgment for the Respondents as follows:-

Liability at 100% in favour of the Plaintiff

Pain and Suffering – Kshs. 30,000/=

Loss of Expectation of Life – Kshs/. 100,000/=

Loss of Dependency – Kshs. 500,000/=

Special damages – Kshs. 95,950/=

Total – Kshs. 725,950/=

Costs of the Suit and Interests.

5. Aggrieved by the said judgment, the Appellant filed the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal: -
 1. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant without considering the circumstances of the case.
 2. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability whereas the Police Abstract produced as Plaintiff's Exhibit indicated that the matter was still pending under investigation.
 3. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant whereas DW1 and DW2 gave evidence that the rider was to blame.
 4. That the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.
6. The Appellant seeks orders for the setting aside of the judgment and costs of the Appeal.
7. The Appeal was canvassed by way of written submissions which I have considered.
8. The duty of a first appellate court was stated in the oft cited case *Selle v Associated Motor Boat Company* (1968) EA 123 where Sir. Clement stated thus: -

“ This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard 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 had 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.”

9. The Appeal is on the twin issues of liability and quantum.

Liability

10. It was not disputed that a fatal accident occurred as recorded on the Police Abstract (P.Exh1) and the Death Certificate which records the date of death as 13th November 2017 (P.Exh4). PW3 testified that



he was driving uphill on the left side of the road when the motorcycle overtook him and collided with the oncoming bus. DW1, Joash Obari Nyandege, testified that he saw the motorcycle rider riding in a zig-zag manner and talking on his mobile while looking at a different direction. According to DW1, the deceased was not able to see the bus approaching.

11. My analysis of the above evidence is that the accident occurred as a result of negligence of both parties. I therefore find that the trial court erred in finding that the motor vehicle encroached on the lane of the motorcycle because the Plaintiff's own witness stated that the motorcycle overtook him. This means that the motorcycle rider went to the the right lane in order to overtake PW3 thereby colliding with the bus head-on. According to DW1, the deceased was knocked in the middle of the number plate. I find that the bus driver DW1 owed a duty of care to the other road users and should have either stopped, slowed down or swerved in order to avoid colliding with the motorcycle.
12. I find that the trial court erred in awarding 100% liability against the Defendant/Appellant. In the circumstances of the case, I find both parties equally liable for the accident. I therefore find that liability should be apportioned at 50%:50%.

Quantum

13. In *Municipal Council of Nakuru & another v. David Mburu Gathiaya* [1993] eKLR the court cited, with approval, the case of *Butt v. Khan* [1982-88] KAR 1, and held as follows on the circumstances under which an appellate court may interfere with the trial court's assessment of damages: -

“An appellate court will not disturb an award for damages unless it is 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”.

(see also the East Africa Court of Appeal's decision in *Henry Hidayat Kanga v Manyema Manyuka* (1961) EA 705 at 713).

14. It was the Respondent's case that the deceased earned Kshs. 20,000/= monthly from his motorcycle business and Kshs. 10,000/= monthly as a peasant farmer. She however did not tender any documentary evidence of this income. She also testified that the deceased was survived by his widow and a baby boy. I am satisfied that the deceased's Estate is entitled to damages under the *Law Reform Act* and *Fatal Accidents Act*.

i. Damages Under the Law Reform Act

15. In *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, the Court stated as follows: -

“As regards damages awarded under the *Law Reform Act*, the principle is that 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.... 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 awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”



16. I have perused the Post-Mortem Report (P.Exh2) which indicates that the deceased died on 12th November 2017 at about 7.00 p.m. The trial court awarded Kshs. 30,000/= for pain and suffering. I find that this award was on the higher side and revise it to Kshs. 10,000/=.
17. On loss of expectation of life, I note that the deceased died at age 25 and was said to be in good health. In *Alexander Okinda Anagwe v Reuben Muriuki Kabuha, City Hopper Ltd, Michael A Graig & Reuben Kamade Mburu* [2015] eKLR the court awarded Kshs. 100,000/= for loss of expectation of life for a 25-year-old deceased person. The trial court made a similar award. I find no reason to interfere with the said award.

ii. Damages under Fatal Accidents Act – Loss of dependency

18. It is trite that, where it is not possible to ascertain the earnings of a deceased person so as to determine the multiplicand as in the present case, courts are at liberty to adopt a global sum approach in making an award for loss of dependency. In this case, the trial court awarded Kshs. 5,000/= as the deceased's monthly income and estimated that he would retire at age 50. It is my view that while the trial court has the discretion of deciding whether to use the multiplicand method, the same was not suitable in the present circumstances. A global sum approach would have been the best route for the trial court to take. I find guidance in the decision in *Gammel v. Wilson* (1981) 1 ALL ER 578 where it was held: -

“The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Pickett, will have no difficulty. But in all cases, it is a matter of evidence and a reasonable estimate based on it. (see page 593).”

19. I have considered the cases of *MNM & another v. Solomon Karanja Githinji* [2015] eKLR, where the court awarded a lump sum of Kshs. 3,000,000/= for loss of dependency for a 46-year-old deceased who was survived by a spouse and four children and *Amazon Energy Limited v. Josephine Martha Musyoka & another* [2019] eKLR, where Justice Nyakundi reduced the trial court's global award of Kshs. 2,500,000/= for loss of dependency to Kshs 1,200,000/= for a 56-year-old deceased survived by one child. Similarly, in *Kwamboka Grace v. Mary Kimuma* [2017] eKLR an award of Kshs. 720,000/= made for the estate of a 5-year-old deceased was reduced, on appeal, to Kshs. 300,000/=



20. From the above precedents, I find that a global sum award of Kshs. 1,500,000/= will be suitable compensation for loss of dependency.
21. Since Special Damages were not contested, I uphold the award as pleaded and proved by the Respondent in the sum of Kshs.95,550/= and not 95,950/= as recorded by the trial court in its judgment.
22. In the end, I find that the instant appeal is merited and I therefore allow it and set aside the trial court's decision which I hereby substitute with this court's judgment as follows: -

Liability – 50:50%

- a. Damages for Pain and Suffering – Kshs. 10,000/=
- b. Damages for Loss of Expectation of Life – Kshs. 100,000/=
- c. Damages for Loss of Dependency – Kshs. 1,500,000/=
- d. Special Damages – Kshs. 95,550/=
- e. Gross Total = Kshs. 1,705,550/=
- f. Less 50% contribution = Kshs. 852,775/=
- g. Net Total Kshs. 852,775/=

23. I make no orders as to costs.

24. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF MAY 2024.

W. A. OKWANY

JUDGE

