



REPUBLIC OF KENYA



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**Hasse v Muriuki (Legal Representative of the Estate of David Murimi Muregi - Deceased)
(Civil Appeal E074 of 2021) [2024] KEHC 4934 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E074 OF 2021
DKN MAGARE, J
MAY 8, 2024**

BETWEEN

JUMA WOLASA HASSE APPELLANT

AND

**EPHRAM MUREGI MURIUKI (LEGAL REPRESENTATIVE OF THE ESTATE
OF DAVID MURIMI MUREGI - DECEASED) DEFENDANT**

JUDGMENT

1. This is an Appeal from the judgment and decree of the Hon. K.M. Njalab – SRM given on 27/10/2021 in Karatina PMCCC 75 for 2020. The Appellant was the defendant in the matter.
2. The court below entered judgment as follows: -
 - a. Liability 90:00
 - b. Pain and suffer 10,0000 loss of expectation of life 1,821,120
 - c. Special damages 66,578
3. The appellant was aggrieved and filed 9 paragraph memorandum of Appeal. The same is prolixious, unseemly and repetitive. A good memorandum of Appeal should be concise and not argumentative.

Duty of the first Appellate court

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



5. In the case of Mbogo and Another vs. 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.”
6. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law lords held by as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
7. 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.
8. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
9. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
10. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.
11. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree ofis to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”



12. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.
13. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie Vs. 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.
14. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”
15. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.
16. So my duty as the appellate court is threefold regarding quantum of damages: -
 - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
 - b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
 - c. The award is simply not justified from evidence.
17. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
18. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite



apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

19. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

20. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

Issues

21. There are only two issues raised in the memorandum of appeal.
- a. Liability
 - b. Quantum

Pleadings

22. The respondent filed suit claiming for damages on behalf of the estate of the and dependant of the late David Murimi Muregi.
23. The same arose out of an accident on 14/3/2020 along Sagana – Karatina road involving Motor vehicle registration KCK 809Z Mitsubishi Fuso Lorry. The Appellant was said to be a pedestrian. He is stated that the deceased left his parents and brothers. Special damages were claimed as follows: -
- a. Advocates fees on ad litem Ksh. 20,000/=
 - b. Fees on hearse Ksh. 15,000/=
 - c. Post mortem Ksh. 10,000/=
 - d. Court fees on Ad litem Ksh. 1075/=
 - e. Fees on clothe(s) Ksh. 20,000/=
 - f. Copy of records Ksh. 550/=
- Total Ksh. 66,575/=
24. The deceased was said to be 34 years, in good health, a coffee farmer as a result of his death they lost dependency.
25. The defendant filed defence on 7/4/2021 denied ownership and if it was an owner then it blamed the deceased for the accident.



Evidence

26. The Respondent stated that the deceased went up to class 7. He earned 50,000/= from coffee and animals. He gave the Respondent even 80,000 a month. That is 30,000/= more than he was earning. PW2, a lorry driver (another lorry, though unknown testified that he saw the Appellant's driver veer off the road and knocked the Deceased. The police testified on the accident. He testified on the accident. He stated that he knocked the deceased who was crossing. It was not indicated that he was drunk.
27. The Driver testified, though the court indicated that he was PW4. (It should be DW1. He stated that he was driving at 40- 50 Kph. The deceased appeared he hooted and stepped on the brakes. He blamed the deceased. He stated, on cross- examination that he was going uphill. The place is slat. The deceased was too close and drunk. He did not indicate that, he hooted in his statement. He stated that he saw the deceased when he was too close.

Analysis

28. The Appellant took capital on the fact that the deceased may have been crossing the road. Crossing the road is not of useful evidence of negligence. The eye witness account was not discounted. Even if I believe that the deceased was crossing the road, a distance of 50 m away, is enough to cross even where the vehicle is crossing at 80KPH. Failing to stop when a danger was 50km away means 2 things: -
 - a. First the brakes failed or
 - b. the vehicle was extremely high speed.
29. A vehicle at 80Kph can comfortably stop within 20meters. Had the court resolved this she will have found the Appellant 100% liability. There was no evidence of contributory negligence.
30. Nevertheless, this court cannot disturb the finding on liability in favour of the Respondent, since there is no cross Appeal. Consequently, appeal on liability if dismissed.
31. On Quantum the Appellant appealed on various grounds these are: -
 - a. Specials
 - b. 2/3 Dependency ratio
 - c. Multiplicand of 10,840
 - d. Multiplier of 21 years.
 - e. Funeral expenses.
32. On funeral expenses, a sum of 20,000/= was for Ad litem and 1,000/= for filing ad litem 20,000 for post mortem and 20,000/= for the coffin. A sum of Ksh.. 550 was for the search. There were not all funeral expenses. The decision in the case of Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR posits as doth: -

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned



judge took what was a practical and pragmatic approach. Although a sum of Ksh. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Ksh. 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages. “

33. Expenses for coffin and clothe are expected for a decent send off. Amounts outside the funeral expenses must be strictly pleaded and proved. The rest of the claims fell under Special damages. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”

34. A sum of Ksh. 1075/= was proved. A sum of 20,000/=, a receipt was issued on 16/6/2020 for ad litem. This is what gave title to the plaintiff to sue. The same cannot be claimed special damages. It is between the advocate and the party getting letters of Administration. It is not an expense incidental to the accident.
35. The amount of Ksh.1075 was paid as court fees. I set aside the award for fees for ad litem and retain amount of 1075/= paid. The amount for the hearse coffin and post mortem, are allowable. The receipts produced appear bogus. However, reasonable funeral expenses must have been incurred. A sum of Ksh. 35,000/= and Ksh 10,000/= for post mortem. Funeral expenses are reasonable. Special of 1025 and 550 for special were proved. I therefore set aside the award of Ksh. 66,575 and substitute the same with 46,575/=.
36. The parties need to properly plead their cases without the necessity of getting dubious receipts. This can be seen in the wisdom of the Court of Appeal in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR, where they held as follows: -

“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...”

37. A multiplier of 21 years was given. The same is proper for a 34 years old deceased. -On the multiplicand the court used a multiplicand of Ksh. 10,840. This was the minimum wage for the period the deceased died. The amount is usually higher. However, I accept 10,840 as proper and within range. In that



respect I am guided by the decision of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal pronounced itself as follows:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled

38. The aspect is the dependency ratio. The court used 2/3. The deceased was single. Dependency is a question of fact. No court can accept the lies given that the deceased was giving over 80,000/= to the father. True he must have given some money to the father and mother.

39. He ought to have spent some himself. The Deceased was a bachelor. He spent most of his money on himself. An award of 2/3 is therefore excessive for an unmarried 34 year old. A possibility even if less than 1/3 is real. I agree with Justice E.C. Mwita where in the case of *Dismas Muhami Wainarua v Sopon Kasirimo Maranta* (suing as administrator and or personal representative of the estate of Partinini Supon (Deceased) [2021] eKLR, he stated as hereunder: -

“ 43. Dependency is a fact that should be proved by evidence. The respondent stated that the deceased used to give them Ksh. 10,000 while he stated in his statement that the deceased spent two-thirds of his income to support them. Obviously, the respondent did not understand what was meant by two-thirds of the deceased’s income. That notwithstanding, the ages of his siblings were not given to show that they depended on the deceased in any way. There was need to prove through evidence, that the deceased’s brothers and sister were his dependants which the respondent did not do.

44. The deceased left behind parents. He must have supported them in some way. In that regard the ratio could not have been 2/3. The respondent’s counsel agreed that the dependency ratio of 2/3 was on the higher side and suggested a ratio of ½. Although the deceased was not married, it would be difficult to assume without evidence that he gave ½ of his income towards his parents’ support. The ratio of 1/3 would be appropriate.

40. The deceased herein left only parents and brothers. It is not clear how he was helping the brother. A dependency ratio of 1/3 is the most appropriate in the circumstances.

41. It must be recalled that when dealing with damages generally, the court is constrained in the nature of decisions that must be made. Where discretion is exercised, I cannot set it aside on grounds that had I been sitting, I would have reached a different result. In the case *Joseph Wachira Maina & Another –vs- Mohammed Hassan*(2006) eKLR, the court considered the principle that should guide the Appellate Court in considering trial Court’s assessment of damages as follows-

“The principles to be considered by this court when deciding on the issues raised on this appeal was laid down in the case of *Ali –vs- Nyambu T/a Sisera Stores*[1990] KLR 534 at



page 538 quoted with approval the principles laid down by the Privy Council in Nance –vs- British Columbia Electric Railways Co. Ltd[1951]AC 601 at page 613 where it held that:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a Judge or jury, the appellate court is not 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 the law (as by taking into account 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 damages (Flint –Vs- Lovell [1935] IKB 354) approved by the House of Lords in Davis –Vs- Powell Duffryn Associated Collieries Ltd. [1941]AC 601.”

42. In the circumstances, I set aside the dependency ratio of 2/3 as excessive I substitute the said with an award of 1/3 dependency ratio. This works as follows: $21 \times 12 \times 1/3 \times 10,840 = \text{Ksh. } 915,560/=$.
43. In the circumstances I allow the Appeal partly. The success is not minor. I shall award the Appellant costs of 65,000/= for the Appeal.

Determination

44. The upshot of the foregoing is that I make the following orders: -
 - a. The Appeal of liability is dismissed.
 - b. The award for pain and suffering are retained.
 - c. The award for loss of dependency and or loss of special damages are set aside and substituted with a sum of Ksh. 915,560/= and Ksh. 46,575 respectively. This works as follows: -
 - a. Pain and suffering Ksh. 10,000/=
 - b. Loss of expectation of life Ksh. 100,000/=.
 - c. Loss of dependency Ksh. 915,560.
 - d. Subtotal Ksh. 1,025, 560.
 - e. Less 10 % liability Ksh. 102,556/=.
 - f. Total Ksh. 923,004/-
add special Damages Ksh. 46,575.
 - g. Special are not subject to contribution and shall attract interest from 2-11-2020, the date of filing.
 - d. General damages to attract interest from 27/10/2021, the date of judgment from the lower court.
 - e. The appellant will have cost of Ksh 65,000/=.
 - f. The lower court file be returned to Karatina Law Courts forthwith.



- g. The Deputy Registrar to serve this Judgment upon the Hon. K.M, Njalale.
- h. File is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 8TH DAY OF MAY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Kariuki for the Respondent

Mr. Burugu for the Appellant

Court Assistant- Norah

