



**Sagini & another (Suing as the Personal Representatives and Legal Administrators of the Estate of Josephat Nyamweya Nyakioga - Deceased) v Mariga (Civil Appeal E024 of 2023) [2024] KEHC 6525 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6525 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E024 OF 2023  
WA OKWANY, J  
MAY 23, 2024**

**BETWEEN**

**SUSAN KWAMBOKA SAGINI ..... 1<sup>ST</sup> APPELLANT**

**SAMWEL MOKAYA NYAKIOGA ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE PERSONAL REPRESENTATIVES AND LEGAL  
ADMINISTRATORS OF THE ESTATE OF JOSEPHAT NYAMWEYA  
NYAKIOGA - DECEASED**

**AND**

**EDWIN MARIGA ..... RESPONDENT**

**JUDGMENT**

1. The Appellants herein were the Plaintiffs before the trial court where they sued the Respondent/ Defendant for damages under the *Law Reform Act*, Cap 26 and *Fatal Accidents Act*, Cap 32. Their case was that the deceased was, on or about 6<sup>th</sup> October 2016, a lawful pedestrian along the verge of Gesusu-Keumbu road when the Defendant, his driver and/or agent drove motor vehicle registration No. KCC 501L so carelessly, negligently and/or recklessly thereby allowing it to lose control, veer off the road and hit the deceased who, as a result, sustained fatal injuries.
2. The trial court heard the case and rendered its judgment on 17<sup>th</sup> May 2023 as follows: -
  - Liability at 50% against the Defendant.
  - Damages for Pain and Suffering – Kshs. 10,000/=
  - Loss of Expectation of Life – Kshs. 60,000/=
  - Loss of Dependency – Kshs. 134,726/=



Special Damages – Kshs. 120,000/=

Total – Kshs. 324,726/=

3. Dissatisfied with the trial court's decision, the Appellants instituted the present appeal vide Memorandum dated 8<sup>th</sup> June 2023 wherein they listed the following grounds of appeal: -
  1. That the learned Trial Magistrate erred in law and fact by awarding the Appellant a sum of Kshs. 10,000/= as an award for general damages for pain and suffering which award is so inordinately low as to represent an entirely erroneous estimate.
  2. That the learned Trial Magistrate erred in law and fact in awarding the Appellants Kshs. 60,000/= as General Damages for loss of expectation of life which award was inordinately low in the circumstances.
  3. That the learned Trial Magistrate erred in law and fact in awarding the Appellants a sum of Kshs. 134,726/= as General Damages for loss of dependency which award was inordinately low as to amount to an erroneous estimate.
  4. That the learned Trial Magistrate erred in law and fact by not properly analyzing and/or properly considering the materials/evidence on record while arriving at his decision/judgment on quantum.
  5. That the learned Trial Magistrate erred in law and fact by awarding damages for pain and suffering, Loss of Expectation of Life and Loss of Dependency/Lost Years that were manifestly and so inordinately low and not in tandem with or supported by the materials, evidence and or submissions on record.
  6. That the learned Trial Magistrate erred in law and fact by reaching a decision on quantum that was not supported by the pleadings, materials, evidence and or submissions on record.
  7. That the learned Trial Magistrate erred in law and fact in failing to accord due regard to the Appellant's submissions and authorities on quantum and applicable principles for assessment of damages.
  8. That the learned Trial Magistrate erred in law and fact in over relying on the submissions and authorities of the Respondent to the detriment of the Appellants herein.
  9. That the learned Trial Magistrate erred in law and fact in failing to apply proper legal principles regarding quantum and thus arriving at a wrong decision.
  10. That the learned Trial Magistrate's decision on quantum albeit a discretionary one was plainly wrong.
4. The Appellants seek orders to vary/set aside the judgment of the trial court and the entry of a fresh judgment on quantum. The Appellants also pray for costs of the Appeal.
5. The Appeal was canvassed by way of written submissions which I have considered.



6. The duty of a first appellate court was explained in the case of Williamson Diamond Ltd vs. Brown (1970) EA 1, as follows: -

“The appellate court, when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below but must reconsider the evidence and make its own evaluation and draw its own conclusions.

7. I find that the main issue for determination is whether the trial court applied the correct principles when assessing quantum of damages.

8. In Kivati vs. Coastal Bottlers Ltd, Civil Appeal No. 69 of 1984 the Court of Appeal discussed the circumstances under which an appellate court may disturb the award of damages by a trial court thus: -

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”

9. In the instant case, the Appellants’ main challenge on quantum was that the trial court made inordinately low awards under the various headings.

#### **Damages under Law Reform Act**

10. The Appellants submitted that the trial court’s award was inordinately low. They cited the decision in the case of Francis Odhiambo Nyunja & 2 Others vs. Josephine Malala Owinyi Suing as the Legal Administrator of the Estate of Kevin Osore Rapando -deceased- (2020) eKLR where an award of Kshs. 100,000/= was made for pain and suffering and the case of Beatrice Mukuli Kang’uta & Another vs. Silverstone Quarry Limited & Another (2016) eKLR where the court awarded Kshs. 200,000/=. Appellants proposed the sum of Kshs, 150,000/= for pain and suffering.

11. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 38 of 2015 [2016] eKLR, the deceased died immediately after the accident and the trial court awarded Kshs. 50,000/- for pain and suffering. In the said case, Majanja J. upheld the trial court’s award and held that: -

“On the first issue, I hold 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 entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs. 10,000/- to Kshs.100,000/- over the last 20 years hence I cannot say that that the sum of Kshs.50,000/- awarded under the head is unreasonable.”

12. Similarly, in Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased) [2021] eKLR, it was held that: -

“...what determines the award under that head is how long the deceased took before he either passed away or lost consciousness. In the instant case, there was no cross-examination of the witnesses in order to bring out this evidence. A distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some time 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...”

13. In the present case, PW1, Susan Kwamboka Sagini, testified that the deceased did not die immediately but died the following day while undergoing treatment in hospital. PW3, Kennedy Miyogo, testified that the deceased was first rushed to Kiamokama dispensary before being transferred to Kisii Teaching and Referral Hospital where he succumbed to his injuries. DW1, Enock Ondari, confirmed that the deceased was taken to the hospital after the accident.
14. I find that the evidence on record reveals that the deceased did not die instantly following the accident and that he must have undergone considerable pain and suffering before his demise. Taking a cue from the above cited decision where the Estate of the deceased was awarded Kshs. 50,000/= where death occurred immediately following the accident, I find that the trial court erred in failing to consider the period that the deceased suffered before he succumbed to his injuries. In the circumstances, I find the award of Kshs. 10,000/= under this head was inordinately low and revise the same to Kshs. 100,000/=.
15. The Appellants also submitted that the award for loss of expectation of life was inordinately low. They cited the case of Lucy Wambui Kahoro v Elizabeth Njeri Obuong (2015) eKLR and Makano Makonye Monyanche v Hellen Nyangena Civil Appeal No. 113 of 2012 (2014) eKLR where the courts held that the conventional award of damages under this heading was Kshs. 100,000/= across the board.
16. In this case, the trial court awarded the Estate of the deceased Kshs. 60,000/= under loss of expectation of life. In the case of Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR the court observed that:-

“...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.”
17. I find that the trial court did not establish a basis for awarding Kshs. 60,000/= and evidently erred in this respect because the award was inordinately low. I therefore also revise the same to the conventional figure of Kshs. 100,000/=

#### **Damages under *Fatal Accidents Act***

18. The evidence on Record, in particular, the Death Certificate (P.Exh3) shows that the deceased died at the age of 38 years. PW1 testified that he was a farmer and the sole breadwinner in the family. I however note that no material was presented to prove his earnings. The trial court however employed the multiplicand method and used a multiplicand of Kshs. 6,736/= and a multiplier of 10 years to arrive at the award under this heading. It also calculated the same using a third of the deceased’s earnings.
19. In view of the fact that no evidence not presented to prove the deceased’s earnings from his alleged farming activities, I will adopt the global sum approach under this heading. I guidance in the decision in Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another wherein it was held thus:-

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on



the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”

20. With the above cited decision in mind, I find that the trial court should have considered a global sum approach in assessing damages for loss of dependency as opposed to using the multiplier method which did not seem to have a basis. The trial magistrate opined that the deceased spent 1/3 of his earnings on his family yet PW1 testified that the deceased was married with a family who depended on him for school fees, food and rent. It is evident that the trial court proceeded on a wrong principle and misapprehended the facts of the case in adopting a dependency ratio of 1/3 which is the ratio applicable where the deceased was unmarried as was held 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 where the court held that:

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.

21. In the circumstances of this case, I find that the global sum approach in determining loss of dependency. I find guidance in the following authorities: -

- i. In *Moses Maina Waweru v Esther Wanjiru Githae* (suing as the personal representative of the estate of the late David Githae Kiririo Taiti [2022] eKLR, the court awarded Kshs. 800,000/= for loss of dependency where the deceased died at the age of 68 years and left one dependent.
- ii. *Nyakundi J. in Amazon Energy Limited v Josephine Martha Musyoka & another* [2019] eKLR, reduced the trial court’s global sum award of Kshs 2,500,000/= for loss of dependency to Kshs 1,200,000/= for a 56-year-old deceased whose only child was in college.
- iii. In *China Civil Engineering & another v Mwanyoha Kazungu Mweni & another* [2019] eKLR, the High Court on appeal upheld a global sum award of Kshs 700,000/= for loss of dependency where the deceased was aged 79 years old.

22. Comparing the ages of the deceased, in the above cited cases, to the age of the deceased in this case, I find that an award of the global sum of Kshs. 2,000,000/= will be fair compensation for the Estate of the deceased considering that he died at the prime of his life and left behind three young children and a widow.

23. In conclusion, I find that the instant appeal is merited and I allow it. Consequently, I set aside the trial court’s assessment of quantum and, in its place, enter judgment in favour of the Appellants for the sum of Kshs, 1,160,000/= made up as follows: –

Liability remains at 50:50%

- i. Damages for Pain and Suffering – Kshs. 100,000/=
- ii. Damages for Loss of Expectation of Life – Kshs. 100,000/=
- iii. Damages for Loss of Dependency – Kshs. 2,000,000/=
- iv. Special Damages – Kshs. 120,000/=

GRAND TOTAL = Kshs. 2,320,000/=

Less 50% contribution =Kshs. 1,160,000



Net total = 1,160,000

24. Each party shall bear his/her own costs.

25. Orders accordingly.

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

**W. A. OKWANY**

**JUDGE**

