



REPUBLIC OF KENYA



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H Young & Company (EA) Ltd & another v Kago & another (Civil Appeal E369 of 2023) [2024] KEHC 9822 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E369 OF 2023
BM MUSYOKI, J
JULY 24, 2024
(FORMERLY KIAMBU HCCA NUMBER E415 OF 2023)**

BETWEEN

H YOUNG & COMPANY (EA) LTD 1ST APPELLANT

JACKSON KARURI MAGONDU 2ND APPELLANT

AND

STEPHEN MUNGAI KAGO. & MERCY WANGUI KAGO RESPONDENT

(Being an appeal from judgement and decree of Honourable C.A. Okello, PM dated 19-10-2023 in Ruiru Senior Principal Magistrate's Court civil case number E493 of 2022)

JUDGMENT

1. This appeal arises from judgement and decree of the honorable Christine Asuna Okello PM sitting in Ruiru Senior Principal Magistrate's court civil case number E493 of 2022 dated 19-10-2023 in which she awarded the respondents the following damages;
 - a. Pain and suffering Kshs 20,0000.00
 - b. Loss of expectation of life Kshs 100,000.00
 - c. Loss of dependency Kshs 2,160,000.00
 - d. Special damages Kshs 86,715.00
2. The parties had entered into a consent on liability at 80:20 leaving the honourable magistrate to assess damages. This appeal is consequently on the award of damages only.
3. The claim before the court was for damages following an accident which occurred on 5-12-2021 involving the appellant's motor vehicle registration number KCR 092G and one John Njoroge Kago



(hereinafter referred to as ‘the deceased’) in which the deceased sustained fatal injuries. The deceased was a 2nd year student of Arts at Kenyatta University.

4. In the appeal, the appellant has challenged the award of all the categories of damages. The respondents also filed a cross appeal where they faulted the magistrate for applying a dependency ratio on arriving at damages payable under the Law Reform Act and that she applied wrong principles in arriving at damages payable under the Law Reform Act. In essence the respondents have no issues with damages awarded under the Fatal Accidents Act.
5. I have read the submissions of the parties and authorities cited alongside the judgment of the lower court. This is a first appeal and I have duty to re-evaluate and re-examine evidence produced before the trial court and come to my own conclusion.
6. The 1st respondent told the court that the deceased died on the spot and produced a set of 10 documents in support of their case. The 1st respondent who was the deceased’s brother stated that the deceased did not have children and that their parents were not alive. The respondents admitted that they did not produce receipts of Kshs 50,000.00 being funeral expences and Kshs 165.00 for postage fees.
7. Having read the submissions and the court’s judgment, I have come to a conclusion that there is no sufficient ground for me to disturb the awards for pain and suffering and loss of amenities and loss of expectation of life. Damages are at the discretion of the court and an appellate court should not interfere with the trial court’s discretion unless it is shown that the court applied the wrong principles in arriving at the awards or the award is too low or too high as to amount to an erroneous estimate as compared to similar cases. None of the parties has been able to show me a good ground to justify my interference with the lower court’s discretion in these awards.
8. The honourable magistrate awarded damages for loss of dependency by using a multiplicand based on monthly income of Kshs 15,000.00 and a multiplier of 36 years. The parties and the magistrate in the judgment acknowledged that there was no proof of earnings. It is also a common ground that the deceased did not leave behind any dependants as he had no wife, children or parents. It is settled matter of law that siblings do not fall under category of dependants. I therefore find that the magistrate used or applied the wrong principle of law by awarding damages for loss of dependency.
9. So what damages are available to the estate of the deceased in the circumstances of this case? Judicial pronouncements have established that a person would ordinarily use 1/3 of his earnings for himself and the rest on his dependants. Where it is proved that the deceased used to earn identifiable income and that he did not have dependants, it is a principal of law that the courts should award lost years to his estate. The lost years are damages awardable under the Law Reform Act. The court must however not award both loss of dependency and lost years in the same matter. This was so held in Dilip Asal v Herma Muge & Another (2001) eKLR by the Court of Appeal when it set aside an award of lost years because there was a duplicate award on loss of dependency. I quote the relevant part thus;

‘The learned judge awarded to the dependants of Bishop Muge Kshs 2,592,000/= for loss of dependency and this was obviously under the Fatal Accidents Act. Then the learned judge, proceeded to award to the estate of the late Bishop Kshs 525,600/= as damages for lost years, obviously under the Law Reform Act. This latter sum would obviously go to the same dependants who were beneficiaries of the state. Whether one designates it as failing to take into account the fact that Kshs 2,592,000/= had been awarded to the dependants or whether one designates it as failure to apply the correct principle by the learned judge, it is a matter which certainly entitles the Court to interfere with the award made by the learned judge. We accordingly interfere and set aside in its entirety the award of Kshs 525,600/= given by the



trial judge as damages for lost years, with the result that the total award of Kshs 3,217,7509/
= given by the learned judge is reduced by Kshs 525,600/= to Kshs 2,592,150/=.’

10. In the case before me, there was no proof of income or earnings. The formular for calculating lost years as applied by the magistrate was wrong. Even if we were to apply the minimum wage, there would still be a problem with how the magistrate arrived at the same. The deceased had not started working and it was not proper for the magistrate to apply the multiplier of 36 years. She could only assume that the deceased would have started working upon the expected time of completion of his studies. Even this one would have been too speculative and improper to apply. Again, the minimum wage of Kshs 15,000.00 she applied is not provided for in any law. She did not specify which Legal Notice she applied in getting the minimum wage of Kshs 15,000.00. Based on this, I find that the honourable magistrate applied wrong principles and I hereby proceed to set aside the award of Kshs 2,160,000.00 under the head of loss of dependency.
11. Having set aside the said award and considering my previous holding that the estate of the deceased is entitled to an award for lost years, I hold the opinion that the circumstances of this case dictates that I consider a global sum. The deceased was aged 24 years and had a future though the same was not easily ascertainable. There was no attempt to establish what he would have ended doing in life. Doing all that I can and considering the vicissitudes and vagaries of life, I am of the considered view that a global award of Kshs 1,500,000.00 is appropriate for this case. I therefore substitute the award of loss of dependency for a global award of Kshs 1,500,000.00 for lost years.
12. On special damages, receipts for Kshs 7,500.00 from Thika Level 5 Hospital, Kshs 3,000.00 from Nakuru War Memorial Hospital, Kshs 550.00 for search and Kshs 25,000.00 for obtaining letters of administration were produced. They total to Kshs 36,050.00. The appellant has contested Kshs 50,000.00 said to have been funeral expences and Kshs 165.00 for postage The respondent had not proved cost of postage and the sum of Kshs 165/= is disallowed. I note that the deceased hailed from Nakuru as per his identity card and that some money was paid to Nakuru War Memorial Hospital which means that he was buried in Nakuru all the way from Thika. Obviously, the estate spent money in interring the body and I find a sum of Kshs 50,000.00 reasonable. I find guidance in the holding of the Court of Appeal in the case of *Premier Diary Limited v Amarjit Singh Sagoo & Another* (2013) eKLR where the court held that;

‘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 burry or otherwise inter their dead relative should be compensated. In fact we take judicial notice that it would be worrying 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 customs of the particular community involved.’
13. Again, in *Rottger v Dusa & Another* KEHC 26630 (KLR), the Honourable Judge held that;

‘Flowing from the cited authorities, it is a matter of common notoriety that funeral expensed which include coffin, transport costs, food may not be receipted. To require such receipt would cause inordinate hardship upon a claimant’.
14. On the issue of costs, I consider that the appellants have partially succeeded in this appeal and I award half of costs of this appeal to them. In the end, the judgment of the lower court is set aside and substituted for a judgment for the respondents as follows;
 - a. Damages for pain and suffering Kshs 20,000.00



- b. Damages for loss of expectation of life Kshs 100,000.00
- c. Damages for lost years Kshs 1,500,000.00
- d. Special damages Kshs 85,000.00
- e. The above awards shall be subjected to 20% liability as agreed in the lower court.
- f. Costs of the suit in the lower court goes to the respondents.
- g. The appellants are awarded half costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

