



Ndungu (Suing as the legal administrator of the Estate of Peter Mugi Munai) v Climax Coaches Limited (Civil Appeal E062 of 2023) [2024] KEHC 10956 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E062 OF 2023
GL NZIOKA, J
SEPTEMBER 16, 2024**

BETWEEN

MICHAEL MUNAI NDUNGU (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF PETER MUGI MUNAI) APPELLANT

AND

CLIMAX COACHES LIMITED RESPONDENT

(Being an appeal from the decision of Hon. J. Ndengeri, Principal Magistrate delivered on 27th June 2023 vide Chief Magistrate's Civil Case No. E054 of 2021 at Naivasha)

JUDGMENT

1. By a plaint dated 28th July 2020, the plaintiff (herein “the appellant”) sued the defendant (herein “the respondent”) seeking for the following orders: -
 - a. General damages under the Fatal Accident Act (Cap 32 Laws of Kenya)
 - b. General damages under the Law Reform Act (Cap 26) Laws of Kenya
 - c. Special damages Kshs 42,480.
 - d. Costs of the suit and interest
2. The appellant’s claim arose out of a road accident that occurred on 27th September 2020, wherein the deceased Peter Mugi Munai was fatally injured. It is the appellant’s case that the accident was caused by the negligence of the servants, agents and/or authorized driver of the respondent while driving the respondent’s motor vehicle registration number KCU 575A.
3. That as a result of the said accident, the deceased who was riding a motor cycle registration number KMEB 046Z was hit and died. Further, as a result of the deceased’s demise, the appellant incurred a



sum of Kshs. 42,480 as funeral expenses and related costs, hence the claim herein together with the claim of general damages, costs and interest.

4. The appellant further avers that the deceased was survived by two dependents being the father and mother.
5. However, the respondent filed a statement of defence dated 12th April 2021 and denied liability for the accident and instead blamed the deceased for solely and/or substantially causing the accident. The defendant further avers in the alternative that, the accident was inevitable.
6. The case proceeded to full hearing wherein the trial court held the respondent 100% liable for the accident.
7. As regards quantum, the appellant was awarded damages as follows: -
 - a. Pain and suffering-----Kshs. 40,000
 - b. Loss of expectation-----Kshs. 200,000
 - c. Loss of dependency-----Kshs. 600,000
 - d. Special damages-----Kshs. 41,980
 - Total-----Kshs. 881,980
8. However, the appellant is aggrieved by the decision of the trial court on the following grounds: -
 - a. That the learned trial Magistrate erred in law and in fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case.
 - b. That the learned trial magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions on quantum payable and therefore awarding general damages which were too low compared to the injuries suffered by the appellant.
 - c. That the learned trial Magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.
9. As a result, the appellant seeks for the following orders: -
 - a. That the judgment/decree of the Honourable court dated 27th June, 2023 be reviewed and/or set aside and re-access damages payable to the appellant.
 - b. That the respondent bear costs of this appeal.
10. The appeal was disposed of vide filing of submissions. The appellant in submissions dated; 5th October, 2023 stated that the appeal was solely on the award of Kshs. 600,000 awarded for loss of dependency as it was too low.
11. The appellant cited the case of Shabani vs County Council of Nairobi (1985) KLR 516 where the Court of Appeal discussed the principles to consider before interfering with an award of damages and stated as follows: -

An appellate court will not disturb an award of damages unless it is so 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”



12. The appellant further submitted that, the trial court disregarded the respective parties' submissions seeking that the court adopt the minimum wage guidelines for municipalities for the year 2020 and 2018 respectively and instead adopted a global award.
13. That, the court should apply the minimum guidelines for a general labourer in a municipality as at the time of the accident and a dependency ratio of ½ and award the appellant Kshs. 3,780,000.
14. Further that the trial court, relied on the case of; Coast Bus (MSA) Ltd vs Fatimabhai Osman Suleiman & Another (suing as the legal representatives of the Estate of Aslam Jeferali Juma (2020) eKLR where the High Court applied a multiplier of 2/3 where the deceased was unmarried but was depended on by his parents
15. The appellant further submitted that even if the trial court decided to use a global award as outlined by the High Court in the case of Albert Odawa vs Gichumu Githenji (2007) eKLR, the sum of Kshs. 600,000 for a deceased aged 22 years old was on the lower side. The case of, Geoffrey Obiero & Another vs Kenya Power Lighting Co. Ltd & Another (2019) eKLR was cited where the High Court awarded Kshs. 1,200,000 for the deceased who was 25 years old.
16. The appellant argued that, the learned trial Magistrate did not give a reason or the factors the court considered in arriving at the award of Kshs. 600,000. Furthermore, the learned trial Magistrate failed to consider inflation and arrived at an award that was too low. The appellant urged the court to exercise its discretion and interfere with the trial court award of Kshs, 600,000 under the head of loss of dependency, set it aside and enhance it to Kshs. 3,780,000 or any other suitable assessment.
17. However, the respondent in submissions dated 13th June 2024 cited the case of; Ann Kanja Kithinji (suing as the legal representative of the Estate of Patrick Koome (Deceased) & 2 others vs Jacob Kirari & another[2018] eKLR where the High Court quoted the case of; Kemfro Africa limited t/a Meru Express Service Gathogo Kanini vs A.M.M Lubia & Another (1982-88) 1 KAR 777 which laid down the principles to be considered before interfering with an award of damages.
18. The afore principles being that the trial court acted on the wrong principles of law by taking into account an irrelevant factor or failed to take into account a relevant factor and in doing so arrived at an award so inordinately low or so inordinately high to be a wholly erroneous estimate of the damages.
19. The respondent further submitted that, the court should uphold the decision of the trial court under the head of loss of dependency and relied on the case of; Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) vs Kiarie Shoe Stores Limited [2015] eKLR where the Court of Appeal discussed the issue of double compensation and stated as follows: -

“The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”
20. The respondent further relied on the case of; Seremo Korir & another vs SS (Suing as the legal representative of the Estate of MS, deceased) [2019] eKLR where the High Court stated that the suit having been brought for the benefit of the respondent and the deceased's mother under the Law Reform Act and the Fatal Accidents Act it would amount to double compensation if no deduction is made.



21. Further reliance was placed on the case of; *Dismas Muhami Wainarua v Sapon Kasirimo Maranta* (suing as administrator and or personal representative of the estate of Partinini Supon (Deceased) [2021] eKLR where the High Court stated that there cannot be awards under both the *Law Reform Act* and *Fatal Accidents Act* where the beneficiaries are the same and that the trial court should have deducted the award under the *Law Reform Act* from that under the *Fatal Accidents Act*.
22. The respondent urged the Court to uphold the trial court's award under the loss of dependency and dismiss the appeal with costs.
23. Having considered the appeal in light of the materials placed before the court, I note that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
24. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the 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 has 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
25. As regards quantum, the law is settled that the appellate court will not interfere with the decision of the trial court on the same unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another Vs Shah* (1968) EA and *Mkubwe -vs - Nyamuro* 1983 KLR 403.
26. It suffices to note that the trial court has the discretionary power to assess quantum. in that regard the Court of Appeal in *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* CA 142/2003 (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs Musila* [1984] KLR 257).”
27. The main bone of contention in this matter is the award of Kshs. 600,000 as loss of dependency. The argument by the appellant is that the trial court did not consider the submissions of the parties on the same.
28. Having considered the evidence and submissions of the parties I find that (PW1) Michael Munai Ndungu testified he is the father of the deceased. He produced his identity card No. 9555715 and a letter from the chief. That evidence was not contested.



29. Further the appellant submitted that since the deceased was supporting the father, a multiplicand of $\frac{1}{2}$ should be allowed. On the contrary the respondent's submitted that since the deceased had no dependants, his estate is entitled to $\frac{1}{3}$ of the amount due.
30. Furthermore, the appellant submitted that, the trial court should consider Kshs. 18,000 as the deceased's wages per month. The respondent proposed a figure of Kshs. 7,240.95 based on the Regulation of Wages (General)(Amended) Order 2018. Finally the appellant proposed multiplier of 35 years while the respondent proposed 20 years.
31. The question is; did the trial court consider the afore arguments? In making its decision the trial court stated as follows: -

“ 17. The court established that the multiplier application was not feasible in this case. Under this vote therefore, the court shall award a global figure of Kshs. 600,000/-.”

32. With utmost respect, the afore quote does not explain why the multiplier was not feasible. The trial court ought to have justified why the parties' arguments were disregarded and why a global figure was adopted.
33. In evaluating the evidence herein, I find that there was no proof of monthly income of the deceased therefore the figure of Kshs 7, 240.95 should have been adopted which I hereby do.
34. Further, as regards the multiplier, the deceased was 22 years old. If he was to work up to 60 years he would have had a further 38 years. However, due to natural and unnatural challenges in life, the 38 years are not tenable. I find the 35 years proposed by the appellant rather ambitious whereas the 20 years by the respondent is too low as it places the deceased in the prime years of life. I shall adopt 28 years as reasonable.
35. On the issue multiplicand or ratio, a third of income to a parent(s) is adequate.
36. The award herein shall be as follows:

$$\text{Kshs } 7,240.95 \times 28 \times 12 \times \frac{1}{3} = \text{Kshs } 810, 986.40$$

37. Consequently, the figure of Kshs 600, 000, awarded herein is set aside and substituted with the figure of Kshs 810, 986.40. the rest of the judgment is upheld. The sum awarded shall attract interest from the date of judgment in the trial court until payment in full.
38. Each party shall bear costs of the appeal.
39. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 16TH DAY OF SEPTEMBER, 2024

GRACE L. NZIOKA

JUDGE

In the presence of: -

Mr. Owour for the appellant

Mr. Kabita for the respondent

Doreen: Court Assistant

