



**Baraka v Beja & another (Civil Appeal E341 of 2023)
[2024] KEHC 16903 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E341 OF 2023
F WANGARI, J
OCTOBER 11, 2024**

BETWEEN

ISSA BARAKA APPELLANT

AND

RIZIKI MWAKA BEJA 1ST RESPONDENT

**MBARAKA KARISA KAINGU (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF KAINGU KARISA KAKURO - DECEASED) 2ND RESPONDENT**

*(Being an appeal from the Judgement and Decree of Honourable Principal Magistrate
D.O. Mbeja delivered in Mombasa CMCC No. E965 of 2022 on 16th November, 2023)*

JUDGMENT

1. This Appeal arises from a Judgement delivered on 16th November, 2023 by Hon. D. Mbeja, Principal Magistrate in Mombasa Civil Suit No. E965 of 2022.
2. The Appellant filed this Appeal and preferred the following grounds in the Amended Memorandum of Appeal dated 26th January, 2024.
 - a. That Learned Trial Magistrate failed to properly evaluate and analyse the evidence and oftenly misapplied the evidence hence ended up making wrong findings of fact not supported by evidence;
 - b. That the Learned Trial Magistrate erred in law and in fact in holding that the Respondent had proved its case on negligence on a balance of probability;
 - c. That the Learned Trial Magistrate erred in law and in fact in assessing damages by taking into account irrelevant factors and failing to consider relevant factors hence ended up making an award for damages that was inordinately high;



- d. That the Learned Trial Magistrate exercised his discretion in assessment of damages arbitrary and capriciously hence arrived at a wrong assessment of damages; and
 - e. That loss of dependency was not proved as there was no legally recognized dependants pleaded.
3. He thus prayed that that the judgement be set aside and be replaced with an order dismissing the suit in the lower court with costs, that in any event, the damages be assessed downwards and or claim for damages be dismissed for want of proof and that the Appellant be awarded costs of the proceedings in the lower court and in this court.
 4. Directions were taken to have the appeal disposed off by way of written submissions. Both parties duly complied with the court's directions. The Appellant's submissions are dated 3rd May, 2024 while those of the Respondents are dated 7th March, 2024. I am grateful to both parties for the industry they put in by filing well researched submissions and citing various decided cases of this court and other superior courts which I have carefully given attention to. They go a long way in guiding the court in making its decision either way.

Analysis

5. This Court has carefully considered the Record of Appeal, the parties' rival submissions, the authorities cited as well as the law and the only issue that falls for this Court's determination is whether the Trial Court erred in entering judgement for the Respondents under the various heads. Corollary to this is the issue of costs.
6. From the grounds of appeal as well as the parties' submissions especially the Appellant, the appeal is only on quantum. I thus need not to rehash the witnesses' evidence other than considering the part that concerns quantum such as the issue of dependency.
7. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence and consider arguments by parties and apply the law thereto, and, make its own determination of the issue or issues in controversy. Except however, that it should give due allowance to the fact that it neither saw nor heard the witnesses' testimonies.
8. This was aptly stated by the Court of Appeal in the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123 as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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.”
9. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred in its findings.
10. In their plaint dated 17th June, 2022 and filed on 21st June, 2022, the Respondents sought for a raft of reliefs among them general damages under the *Fatal Accidents Act* and the *Law Reform Act*, general



damages for pain and suffering, special damages for Kshs. 160,504/=, costs of the suit, interests on general damages and costs from the date of filing of the suit till payment in full and interest on special damages at court rates from 10/3/2022.

11. At paragraph 5 of the plaint, it was pleaded that on or about 28/2/2022 at around 0930hrs, the deceased was a lawful pedestrian off the Mombasa – Malindi road at Kenol Junction area when the Defendant road, managed and/or controlled motorcycle registration number KMFG 775W Boxer so recklessly, carelessly and/or negligently that he caused the same to lose control, veer off the road and ram into the deceased causing a gruesome accident and the deceased fatal body injuries from which he thereon succumbed.
12. As earlier observed, the Appellant in his submissions abandoned his appeal on liability. As such, this court is bound by the Trial Court’s findings on the issue of liability.
13. As the appeal is only on quantum of damages, this court reiterates that assessment of damages is generally a difficult task. A court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate court must be slow to interfere with such an exercise of discretion.
14. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself or herself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there had been a miscarriage of justice. In *Ken Odondi & 2 Others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates* (2013) eKLR, the Court of Appeal stated: -

“...The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice...”
15. Under the head of pain and suffering, the Trial Magistrate awarded a sum of Kshs. 100,000/=. This court will, hence, be guided by the case of *Hyder Nthenya Musili & Another -vs- China Wu Yi Limited & Another* [2017] eKLR, where 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. It is not in dispute that the deceased died some two (2) weeks. Therefore, there was indeed prolonged suffering. As guided by the *Hyder Nthenya* case (supra), nominal damages ought to be awarded. I thus find the award of Kshs. 100,000/= to be well founded and I proceed to uphold the same.
17. On loss of expectation of life, the Trial Court made an award of Kshs. 100,000/=. The award of Kshs. 100,000/= in conventional and I see no reason to disturb it. The award under this head stands.



18. On loss of dependency, the Trial Court adopted the global/lump sum award and having considered the deceased's age, it proceeded to award a global sum award of Kshs. 2,000,000/=. Loss of Dependency is a claim that arises from the *Fatal Accidents Act*, Section 4 (1) of the Fatal Accident Act which provides: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.”
19. The deceased was 45 years and the court proceeded to award a global/ lump sum award of Kshs. 2,000,000/=. Though one of the grounds of appeal was that loss of dependency was not proved as there was no legally recognized dependants pleaded, I find this ground not founded. This is for the reason that PW2, Riziki Mwaka Beja testified as the deceased's wife. As such, dependency was well grounded.
20. Under this head, it is generally settled in law that global/lump sum damages are awarded in instances where the court is left with no choice since there is absolutely no proof of the deceased's monthly earnings, the Regulation of Wages (General) Amendment) Orders is not applicable and that the use of the multiplier approach would be tantamount to the Court engaging in speculation. I am thus in agreement with the Trial Court's adoption of global/ lump sum award approach. Though the deceased was said to have been a waiter, his earnings were unknown.
21. The factors to be considered in determining an award for loss of dependency for a deceased person leaving behind dependents is the number of dependents, the age of the dependents and the level of dependency. The age at which the deceased died is also a relevant factor in my view.
22. In awarding a sum of Kshs. 2,000,000/=:, the Trial Court observed that evidence tendered showed that he enjoyed robust health and that there was no evidence to suggest that the deceased was of ill health. His life was cut short by the subject accident. I find that the Trial Court was duly guided in terms of factors to be considered.
23. However, an award of Kshs. 2,000,000/= was on a higher side as it did not factor in the vicissitudes of life. It is always everyone's expectation that they would work to the age of 60 years. This means the deceased would have had 15 years of working. Though the Appellant proposed the multiplier approach, this court cannot impeach the Trial Court's approach.
24. I need not consider the ratio which would have applied noting the above sentiments. Having expressed myself as above, I find that an award of Kshs. 1,000,000/= would have been reasonable in the circumstances. In making awards in favour of the beneficiaries, courts are not supposed to enrich the beneficiaries but rather to compensate them for the loss suffered.
25. In *Chuaga v Gravin* (Suing as the Personal Legal Representatives of the Estate of Silas Waraba – Deceased) (Civil Appeal E102 of 2022) [2024] KEHC 3858 (KLR) (19 April 2024) (Judgment), an award of Kshs. 810,986.40/= for a deceased who died at the age of 46 years. Though the court in the said decision adopted a multiplier approach, I find it a useful guide. In the end, I set aside the award of Kshs. 2,000,000/= and in its place substitute it with an award of Kshs. 1,000,000/=:.
26. On special damages, it is trite that the same must be specifically pleaded and strictly proved. There is a receipt for Kshs. 49,970 from Beyondscope and another for Kshs. 23,500/= from Coast General Hospital. There is another receipt for Kshs. 10,000/= from Nyalı Bridge Hospital. I agree with the Appellant that an invoice is not a receipt unless the same is endorsed as “paid”. I allow the sum of Kshs.



26,500/= as reasonable funeral expenses as it was not disputed that the deceased was a Muslim. I thus set aside the award of Kshs. 160,504/= and substitute it with an award of Kshs. 109,970/=.

27. On costs, the same follows the event. Though the appeal partly succeeds, this court reserves its discretion as to the award of costs. I order that each party to bear own costs.

28. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Appeal succeeds only to the following extent: -
 - i. The award of Kshs. 2,000,000= under the head of loss of dependency is set aside and substituted with an award of Kshs. 1,000,000/=;
 - ii. The award of Kshs. 160,504/= under the head of special damages is set aside and substituted with an award of Kshs. 109,970/=; and
- b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Mr. Kioko Advocate h/b for Mr. Jengo Advocate for the Appellant;

Mr. Ganzala Advocate for the Respondents;

Ms. Salwa, Court Assistant

