



**Chesang v Tendegwa & another (Suing as the Legal Representatives
of the Estate of Ali Swaleh Tendegwa) (Civil Appeal E062 of 2023)
[2024] KEHC 16911 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E062 OF 2023
F WANGARI, J
OCTOBER 24, 2024**

BETWEEN

NICHOLAS KIPTALAM CHESANG APPELLANT

AND

ALI TENDEGWA 1ST RESPONDENT

HALIMA HASSAN CHIGAMBA ALIAS HALIMA SAWA

NGETI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ALI SWALEH
TENDEGWA**

*(Appeal from the Judgment and Decree of Hon. Kiongo Kageyo, Resident
Magistrate dated 03/03/2023 arising from Kwale CMCC No. 148 of 2021)*

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Kiongo Kageyo, Resident Magistrate dated 03/03/2023 arising from Kwale CMCC No. 148 of 2021. Though one of the grounds in the Memorandum of Appeal was that there was a miscarriage of justice in reaching liability at 100%, the Appellant prayed for judgement of the lower court on quantum be set aside and the same be reassessed to a lower award.
2. The Plaintiff by the Respondent herein dated 24/09/2021 claimed General Damages for an accident involving Motor Vehicle Registration No. KBD 642Q which occurred on 17/10/2020 while the deceased was riding on his motor vehicle (Tuktuk) registration number KTWB 775T. The Appellants herein blamed the driver of the accident motor vehicle for the accident for carelessly ramming into the deceased's motor vehicle.



3. After the hearing of the matter, the Court found 100% liability against the Appellant. The court also awarded Damages as follows:
 - a. The global sum of Kshs. 2,500,000/= for loss of dependency
 - b. Kshs. 180,0000/= for pain and suffering
 - c. Kshs. 180,000/- for loss of expectation of life
 - d. Kshs. 15,500/- for special damages.
4. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal. On liability, I note that in the proceedings, the Appellant did not call any witness in support of the defence case. I also note that the Appellant's driver pleaded guilty to the traffic offence charges of Causing death by dangerous driving and he was fined Kshs. 20,000. In the absence of any evidence to the contrary in respect to liability, judgment on liability remains undisturbed.
5. Court directed that the appeal was to be disposed of by way of written submissions. Parties were directed to file their written submissions and only the Respondent complied with the directive.
6. It was also submitted that the court was right in its finding on loss of expectation of life and the pain and suffering. The Respondent prayed to have the appeal dismissed with costs.

Analysis

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 issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. (See the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123).
8. 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.”
9. 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.
10. The issue in this case is whether the trial court awarded general damages that were inordinately high as to occasion injustice to the Appellant. On the quantum of damages, the Court of Appeal, pronounced itself succinctly on the principles for disturbing the award of damages in *Kemfro Africa Ltd Vs Meru Express Service 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”.

11. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure.
12. On quantum, the Respondent submitted that the court did not err in the assessment of the damages. It was submitted that the global sum was fair and reasonable as there was no proof of his specific earnings. The Respondent relied on the case of Moses Mairua Muchiri v Cyrus Maina Macharia (suing as the Personal Representative of the estate Mercy Nzula Maina (deceased)).
13. The deceased being aged 34 years at the time of death left behind a wife and children who were minors, the youngest child being 1 1/2 years. I also note that if the court were to apply the minimum wage as the multiplicand, the damages awarded under loss of dependency would have been higher than the awarded amount of Kshs. 2,500,000.
14. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.
15. I find no basis to interfere with the finding of the trial court on loss of dependency. I therefore find and hold that the appeal against the award is not merited.
16. On the damages for loss of expectation of life and pain and suffering, the court awarded Kshs. 180,000/- for each. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21, the Hon. Odunga J (as he then was) observed: -

“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes 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.” (emphasis mine).
17. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, 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.
18. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this case, the deceased passed away 7 days after



the accident. I am persuaded by the case cited herein below in awarding damages for pain and suffering and loss of expectation of life at Kshs. 100,000 each.

19. In *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

“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 award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

Determination

20. In the upshot, I make the following Orders:

- i. The Appeal against the award in loss of dependency is hereby dismissed.
- ii. The Judgment of the Lower Court on damages for pain and suffering is set aside and substituted with Kshs. 100,000.
- iii. The Judgment of the Lower Court on loss of expectation of life is set aside and substituted with Kshs. 100,000.
- iv. As the Appeal is partially successful, each party shall bear their own costs in the Appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of: -

N/A by the Appellant

N/A by the Respondent

Brian, Court Assistant

NB: File released to the registry. Parties be notified

