



**Muthondu v Muratha (Suing through the legal representative of the
Estate of the Late Erick Kimathi Gitari) & another (Civil Appeal
E021 of 2023) [2024] KEHC 13851 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E021 OF 2023
LW GITARI, J
OCTOBER 25, 2024**

BETWEEN

SAMWEL KIMANI MUTHONDU APPELLANT

AND

**GITARI MURATHA (SUING THROUGH THE LEGAL REPRESENTATIVE OF
THE ESTATE OF THE LATE ERICK KIMATHI GITARI) 1ST RESPONDENT**

**LILY MUTHONI MVUNGU (SUING THROUGH THE LEGAL
REPRESENTATIVE OF THE ESTATE OF THE LATE ERICK KIMATHI
GITARI) 2ND RESPONDENT**

JUDGMENT

1. The respondents filed a suit vide a plaint dated 23rd March, 2022 against the appellant seeking for kshs.150,550 special damages as pleaded, general damages for pain, suffering, loss of dependency and loss of expectation of life, cost of the suit, interest at court rate from the date of filing the suit and any other or further orders that the court may deem fit to grant.
2. The respondents pleaded that they are the holders of letters of administration ad litem in respect of the estate of Erick Kimathi Gitari(deceased).That at all material time relevant to the suit the Appellant was and is still the registered owner of motor vehicle registration number KCK 001H Mercedes Benz. That on 4th February 2022 along Chuka-Embu road in Tharaka Nithi County at Kirubia area the appellant being the driver of motor vehicle registration number KCK 001H drove the said motor vehicle so carelessly and negligently that he lost control of the motor vehicle, veered off the road and hit Erick Kimathi Gitari causing him to suffer fatal injuries.
3. The respondents enumerated particulars of the Appellant’s negligence as driving motor vehicle registration number KCK 001H Mercedes Benz too fast and carelessly in the circumstances, driving,



- managing and/or controlling motor vehicle registration number KCK 001H Mercedes Benz without due regard to other road users and in particular the deceased, failing to keep proper look out to motor vehicle registration number KCK 001H Mercedes Benz, driving motor vehicle registration number KCK 001H Mercedes Benz without due care and attention, failing to stop, swerve and to act in any other manner to avoid the accident and causing the accident.
4. The respondents states that they hold the Appellant liable for acts, omissions and commissions which caused the occurrence of the accident. That as a result of the occurrence of the accident the deceased estate suffered damages.
 5. The respondents enumerated particulars under the Law Reform Act and the Fatal Accidents Act as that at the time of his demise the deceased was of full good health and the deceased left behind his wife and children who had great hopes in him by virtue of his education and profession.
 6. The respondents pleaded that as a result of the said accident the deceased estate suffered further loss and damages which the appellant holds the appellant liable to compensate.
 7. The respondents enumerated particulars of loss and damages as kshs 550 purchase of copy records, kshs 10,000 cost of the demand notice, kshs.10,000 advocate's fees for seeking grant of a letter of administration ad litem, kshs 30,000 postmortem charges and kshs 100.000 funeral expenses hence totaling kshs 150,550.
 8. The respondents stated that the appellant is wholly to blame for the occurrence of the accident on 4th February 2022.
 9. The Appellant filed his defence dated 1st December 2022 wherein he denied the 1st and 2nd respondents claim. The Appellant states that he was not the registered owner of motor vehicle registration number KCK 001H at the material time and he puts the respondents to strict proof thereof.
 10. The Appellant pleaded that he denies without prejudice to the foregoing that any accident occurred on the 4th February 2022 involving motor vehicle registration number KCK 001H and puts the 1st and 2nd respondent to strict proof.
 11. The Appellant denied that the estate of the deceased suffered damages as a result of the alleged accident and in the alternative and without prejudice to the foregoing the appellant avers that the accident if any was caused and/or contributed to by the negligence on the part of the deceased and the defendant claims indemnity and/or contribution from the 1st and 2nd respondents.
 12. The Appellant enumerated particulars of the deceased negligence as failing to keep a safe and proper distance from the rightful path of motor vehicle KCK 001H, failing to keep a proper look out for himself and/or heed the rightful presence of the motor vehicle KCK 001H on the said road, carelessly and recklessly moving to the rightful path of motor vehicle KCK 001H, failing to act reasonably and move out of the path of motor vehicle KCK 001H so as to avoid the accident, hitting his motor cycle against Motor Vehicle Registration no KCK 001H, causing the accident, encroaching on the lane of motor vehicle KCK 001H, failing to give way to motor vehicle registration number KCH 001H and causing the accident.
 13. The Appellant pleaded that he denied the allegations that as a result of the occurrence of the accident the deceased estate suffered loss and damages that the 1st and 2nd respondents is liable to compensate.
 14. The Appellant states that he is a stranger to the allegations that he is wholly to blame for the occurrence of the accident and puts the 1st and 2nd respondents to strict proof.



15. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondents against the Appellant as follows:
 - i. Liability – 80:20
 - ii. General damages under Fatal Accident Act and *Law Reform Act* as follows
 - a. Loss of dependency – Kshs 2,175,925.6
 - b. Pain and suffering Kshs 50,000
 - c. Loss of expectation in life kshs 100,000Total – Kshs. 2,325,925.6/-
Less 20% liability 465,185.12
Net Total 1,860,740.48
 - iii. Interest on general damages (net total) at the court’s rate from the date of the judgement.
 - iv. Kshs.150,550 as special damages with interests at the court’s rate from the date of filing of the suit.
 - v. Costs of the suit with interests at the court’s rate from the date of the judgement.
16. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;
 1. The learned trial Magistrate erred in Law and fact by awarding the respondents a loss of dependency amounting to kshs 2,175,925.60/- which award was inordinately high using a high multiplicand without considering that the deceased was a casual laborer at the time of the accident.
 2. The learned trial magistrate erred in law and in fact in awarding the respondents pain and suffering amounting to kshs 50,000 which award was inordinately high considering the deceased died on the spot.
 3. That the learned trial magistrate erred in law and fact in failing to take into account relevant factors and the evidence on record in te assessment of damages under the fatal Accident Act.
 4. That the Honourable learned Magistrate misdirected himself by failing to consider the submissions by the Appellant while arriving at the judgement.
 5. That the learned trial magistrate erred in law and fact in adopting a multiplier of 19 years without considering relevant factors, in line with the law and the uncertainties of life.
 6. That the learned trial magistrate erred in law and fact in failing to deduct the Award under the *Law Reform Act* from the total award yet the respondents were both administrators and dependents of the deceased.
17. The appellant prayed that they intended to ask the court to reverse the Magistrate’s decision on quantum delivered on 14th August 2023 and determine the Appellant’s case against the respondents’ case finally and make orders as it deems fit and just grant.
18. The Appellant prayed for costs of the appeal.



19. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 27th May, 2024 through the firm of L.W Wang'ombe & Company Advocates while the respondents filed their submissions dated 11th June 2024 through the firm of Muthomi Gitari Advocates LLP.

Appellant's Submissions

20. The Appellant submitted briefly on the background of the matter. It is the Appellant's submission that the trial magistrate ought to have considered the evidence more so that came out during cross examination of the respondent on the matter of the nature of his son's work. That the magistrate in his judgement confirmed that the deceased was employed at a quarry.
21. The Appellant submitted that that was not in issue. That what the defence found to be in contention however was the learned magistrate automatically adopted the wage of a machine operator rather than that of a casual labourer and stated that is was uncontroverted as the defence did not call any witness.
22. It was submitted that the rules of evidence allow the defence to poke holes in the respondent's evidence during cross examination which line of questioning clearly highlighted the fact that the deceased was in fact a casual laborer whose duties bordered on physically chipping at stones in the quarry.
23. The Appellant submitted that the learned magistrate erred in adopting kshs 14,315.30. That the regulation of wages order 2018 does in fact have a provision for stone cutters and miners who operate outside the three major municipalities as kshs 8,366.35.
24. The Appellant submitted further that a global sum in light of unsupported proof of employment ought to have been adopted as was the court's observation in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & anor* and in *Albert Odawa v Gichimu Gichenji NKU HCCA No.15 of 2003 (2007)eKLR*.
25. The Appellant submitted that even if the court was right in opting to rely on the Regulation of Wages order 2018 and it should have applied the correct wage of kshs 8,366.35
26. The Appellant submitted further that the learned magistrate further misdirected themselves in adopting a multiplier of 19 years citing the fact that the work the deceased was engaged in did not have a retirement age.
27. The Appellant submitted that they proposed a multiplier of 11 and are guided by the case *Florence Ngina Nyalando Achacha & another v Daniel Munyua Njathii & Another(Eklr)* as quoted in *Kenya power & lighting Co Ltd v Maria KeruboKianga & Another(Suing as legal administrators of the estate of Peter Kianga Okoti (deceased)(2021)eKLR*.
28. It is the Appellant's submission that in the instant appeal the deceased was 41 years old at the time of his demise and the award on multiplier was too high and in any event the court ought to have adopted a global sum approach in assessing the award on loss of dependency.
29. The Appellant submitted on ground 2 on the award for pain and suffering at kshs 50,000. That the award was excessive granted that the deceased died instantly .That they had cited a case law for a lesser amount of kshs 10,000.
30. The Appellant prayed that the court reviews and set aside the judgement on quantum delivered by the magistrate's court and proceed to reassess the same and make any other orders and reliefs as it may deem fit in the circumstances of the instant case.



The Respondents' submissions

31. The respondents submitted on a detailed background of the matter and identified six issues for determination.
32. The respondents submitted that this is a first appeal, the court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter as provided in Section 78 of the *Civil Procedure Act*, Cap 21.
33. It is submitted that in carrying out that duty the court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same.
34. The respondents submitted that before they delve onto their submissions, it is worthy to note that the Appellant filed a Record of Appeal dated 20th February, 2024 and annexed the wrong annexures that form part of the Record of Appeal dated 20th February, 2024 and more specifically page no. 4 to page no. 24 that is the Plaintiff and its accompanying documents.
35. It is the respondents' submission that the Appellant annexed documents relating to a different case, different parties, different cause of action that arose in a different geographical location, and those documents which mainly form part of the Plaintiff are regarded as primary documents.
36. The Respondents' submitted that the Court ought to dismiss the appeal as the Record of Appeal filed herein is defective and whose omission and error not only offends the law but denies the Appellate Court the opportunity to appraise itself of the matters of fact and law.
37. It is the respondents' submission that the Appellant further went ahead to file a new Record of Appeal dated 20th February, 2024 that was filed on 3rd May 2024 that comprised the correct pleadings without leave of the Court and failed to have the defective Record of Appeal expunged from the Court record and they wished for the Court to take note of the same when it is making a determination of this Appeal.
38. The respondents submitted that the Appellant is not aggrieved by the apportionment of liability in the ratio of 80:20 in favour of the Respondents against the Appellant as consented to during the hearing and only contests on the award of damages as determined in the Judgement by the Lower Court.
39. The respondents relied in the case of Daniel Gatana Ndungu & another v Harrison Angore Katana [2020]eKLR and Kilda Osbourne v George Banned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 and Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] eKLR .
40. The respondents submitted that on the issue on the award loss for dependency, the Lower Court exercised its discretion by considering of the circumstances of the case and awarded the Respondents the sum of KShs. 2,175,925.60/= using a multiplier of 19 years respectively.
41. It is the respondents' submission that in support of the above-mentioned statement, the Respondents testified that the Deceased died at the age of 41 years and it was not in dispute that he was working as a quarry worker and despite there being no evidence of his monthly earnings, the Lower Court rightfully and properly was guided by the provisions of the Regulation of Wages (General) (Amendment) Order, 2018 to determine the minimum wage of the Deceased. The respondents relied on in the case of Rodgers Kinoti v Linus Bundi Murithi & another [2022] eKLR.
42. The respondents submitted that the Lower Court appreciated the testimony of the Respondents and the documents produced in Court that the Deceased was a young man of good health and in private



employment as a quarry worker and therefore the Deceased could have worked beyond the 60 year retirement age under the Government Labour Relations.

43. The respondents submitted that the 1st Respondent testified that the Deceased was employed by Geotech Developers Limited where he operated quarry machines; however, the Appellant failed to dispute the same in their evidence and only raised the issue in their submissions filed in the Lower Court.
44. The respondents further submitted that the 1st Respondent testified that the Deceased was married and had sired two children with the 2nd Respondent. That the same was evidenced in the Chief's Letter and the Birth Certificates of two minors aged 11 years and 8 years as at the time of filing of the suit that were produced in Court. That the same was not disputed by the Respondents at any one time during the pendency of the suit and neither did they produce any evidence to the contrary.
45. It was submitted that the Respondents submitted that the Lower Court was rightfully and properly exercised its discretion in using the two thirds rule when making its determination on the loss of dependency, and they implored the Court to be guided by the decision made in the case of Rodgers Kinoti(supra) and not interfere with the dependency ratio of two-thirds in calculating the award for loss of dependency.
46. The respondents submitted that on the award for pain and suffering, it was not disputed that the Deceased was pronounced dead at the scene and therefore the Court should be concerned with each unit of pain and suffering endured before it can overturn the trial court's award for KShs. 50,000/= . The respondents relied in the case of Acceler Global Logistics v Gladys Nasambu Waswa & another [2020]eKLR where an award of kshs. 50,000/= was awarded to the deceased who died on the spot. The respondent also relied in the decision made in the case of Hyder Nthenya Musili & another v China Wu yi Limited & another [2017]eKLR.
47. It was submitted that being guided by decided case authorities relied herein, the Respondent implored the Court not to interfere with the award of pain and suffering in the sum of KShs. 50,000/= and the award for Loss of Dependency in the sum of KShs. 2,175,925.60/= as rightfully and lawfully determined by the Lower Court.
48. The respondents submitted on the third issue of costs and relied on Section 27 of the *Civil Procedure Act* (Cap 21). The respondent also relied in the case of Thomas Nyaga Njuki v Alexander Ireri Karimi [2020]eKLR.
49. The respondents submitted that the Judge upheld the decision of the trial court having exercised its discretion judiciously in awarding half the costs in a case where the Appellant was partly successful in his claim. That in coming up with the said decision the Court was ably guided by a passage from Halsbury's Laws of England;

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”
50. The respondents submitted that they have successfully proved their case on a balance of probabilities, and being a successful litigant, they urge the court to be guided by the above and be persuaded to



uphold the final determination made by the Lower Court vide the Judgement delivered on 14th August, 2023 in its entirety.

51. It is the respondents' submission that the Court has jurisdiction to prevent an abuse of its process and it is therefore its duty to intervene and stop those proceedings which amount to an abuse of the Court's process by simply forestalling the Respondent from enjoying the fruits of his Judgement.
52. The respondent submitted that they urge the Court to strike out the Appeal with costs and make an order for release of the money held in the Joint Account to themselves for onward transmission to the Respondent.

Analysis & Determination

53. The Court of Appeal held in the case of Mark Oiruri Mose vs. R. (2013) eKLR that:-

“This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

54. Thus, this Court is required to review and analyze the entire Record and evidence presented before the lower courts in respect of the present appeal and draw its own conclusion, bearing in mind that the benefit of hearing firsthand evidence from the witnesses themselves is lacking.
55. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the following are pertinent issues for determination:
 - i. Whether the trial Magistrate erred in law and fact by awarding the respondent a loss of dependency amounting to kshs 2,175,925.60/- which award was inordinately high using a high multiplicand without considering that the deceased was casual laborer at the time of the accident.
 - ii. Whether the trial magistrate erred in awarding in law and fact pain and suffering amounting to kshs.50,000 which award was inordinately high considering the deceased died on the spot.

Whether the trial Magistrate erred in law and fact by awarding the respondent a loss of dependency amounting to kshs 2,175,925.60/- which award was inordinately high using a high multiplicand without considering that the deceased was casual laborer at the time of the accident.

56. The Appellant submitted that the trial magistrate ought to have considered the evidence more so that came out during cross examination of the respondent on the matter of the nature of his son's work. That the magistrate in his judgement confirmed that the deceased was employed at a quarry. The Appellant submitted further that the learned magistrate erred in adopting kshs 14,315.30. That the regulation of wages order 2018 does in fact have a provision for stone cutters and minors who operate outside the three major municipalities as kshs 8,366.35.
57. The Appellant submitted further that a global sum in light of unsupported proof of employment ought to have been adopted. To award a global sum in this regard the court in Albert Odawa vs.



Gichimu Gichenji [2007] eKLR), cited with approval the case of Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another, where Hon. Ringera, J took the view that:

“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.”

58. This reasoning was adopted in *Mary Khayesi Awalo & Another - Vs- Mwilu Malungu & Another* ELD HCCC NO. 19 of 1997 [1999] eKLR where Nambuye J., stated that: -

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.

59. I am not persuaded that the global approach is the most appropriate in this instance. A number of cases that I have looked at point to the fact that the choice of multiplier and multiplicand are at the discretion of court. The same must however be exercised judiciously and with reason. In *Cornelia Elaine Wamba vs Shreeji Enterprises Ltd. & Others* [2012] eKLR, the court stated,

“the choice of a multiplier or multiplicand is a matter of the Court’s discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was aged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and, lastly, possibility of death through natural causes and departure for greener pastures elsewhere.”

60. In the case of *Francis Righa vs Mary Njeri* (Suing as the Legal Representative of the estate of James Kariuki Nganga [2021] eKLR, the court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages under Fatal Accident Act;

“...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of *Roger Dainty versus Mwinyi Omar Haji & Another* 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”

61. Going by above decisions, the formula for assessment of dependency is the multiplicand that the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased as a result of premature death. The dependency ratio, is the fraction of the income that a person is expected to give to his dependents in his lifetime. If a person is married, it is expected that the person would spend 2/3 of his income to support his dependents but where the person unmarried it is accepted that 1/3 of his income utilized in support of his dependents.

62. On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual



regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income. This was the position adopted by court in *Petronila Muli v Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR.

63. At the hearing PW1 testified that he was Francis Gitari Murathi and he knew the deceased who was his son. PW1 stated that his son Erick Kimathi Gitari was involved in a road accident on 4th February, 2022 near OLA petrol station in Kirubia area. PW1 testified that that his son used to work in a quarry. That during the hearing the respondent's counsel attempted to produce the deceased pay slip for proof of earning but the same was objected and the issue ought to have been raised in the submissions.
64. I have perused the trial court judgement and it clearly indicates that the applicable minimum wages is regulated by the Regulation of Wages (General) Amendment order of 2018 which came into force on 1st May, 2018. However the learned magistrate erred by applying Kshs.14315.30 as that applies for specified areas of Nairobi Kisumu and Mombasa. The applicable wage for former municipalities like this one is Kshs.13,005.70. In view of this error, this court has a reason to interfere the Judgment.
65. I opine that there is no doubt that, that is the appropriate amount in the instant case. I note that PW1 testified that the deceased died at the age of 41 years which is exhibited by the death certificate at the time of death. The trial court noted that if the deceased had remained in good health it would have been expected that he could have worked for another nineteen (19) years or more. I agree with the trial court on the multiplier save that due to the nature of the job which is heavy he could have worked to 55 years however, I agree with the multiplier of 19 since it is discretionary and the reasons have aptly been stated.
66. To that end the award should be Kshs. 1,976866.4 worked out as $13005.70 \times 19 \times 2/3$. The learned trial magistrate exercised discretion to use a multiplier and based on the evidence before him and not global sum.

Whether the trial magistrate erred in awarding in law and fact pain and suffering amounting to kshs.50,000 which award was inordinately high considering the deceased died on the spot.

67. The Appellant submitted on ground 2 on the award for pain and suffering at kshs 50,000. That the award was excessive granted that the deceased died instantly. That they had cited a case law for a lesser amount of kshs 10,000.
68. In *West Kenya Sugar Co. Limited v Philip Sumba Julaya* (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR the court observed that-

“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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”
69. Similarly, 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.”

70. Furthermore, 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 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 some times 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.”

71. Similar emphasis was placed in Civil Case No. 56 of 2014 Beatrice Mukulu Kang’uta & Another vs Silverstone Quarry Limited & Another [2016] eKLR where Hon. P. Nyamweya observed: -

“As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason.”

72. 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. 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 latter case, the presumption is that the deceased experienced pain and suffering prior to his or her death unlike in the former.

73. The question before this court therefore is whether the award of Kshs 50,000 was high considering that the deceased died on the spot. I have looked at the case law submitted by both parties. I have also had a look at other cases as highlighted below.

74. In Josephine Kiragu vs Vyas Hauliers Ltd [2017] eKLR where the deceased had died instantly, Njoki Mwangi, J. held that an award of Ksh. 10,000/= for pain and suffering was on the lower side and increased it to Ksh. 30,000/=.

75. In the case of Sukari Industries Limited vs Clyde Machimbo Juma, Homa Bay HCCA NO. 68 of 2015 [2016] EKLK where the deceased had died immediately after the accident and the trial court had awarded Ksh. 50,000/= for pain and suffering, Majanja J. 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 nevertheless pain for which the deceased’s estate 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 this head is unreasonable.”

76. In the case of Simon Bogonko vs Alfred Mongare Mecha & Another (Suing as the Legal Representatives of the Estate of Akama Mong’are (Deceased) [2019] EKLK and Omanga Fish Limited V CKB & JM (Suing as the Legal Representatives of The Estate of JMM (Deceased) [2019] eKLR Maina J. reduced awards of Ksh. 100,000/= to Ksh 20,000/= for pain and suffering where the deceased persons in the cases had died on the spot.
77. In my view therefore, the award of Ksh. 50,000/= for pain and suffering is not manifestly excessive as there are High Court authorities to support it. In the circumstances, I see no reason to depart from the trial court’s award and the same is hereby upheld. In the circumstances, I see no reason to disturb the same and it therefore stands.
78. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned trial magistrates were well founded. I however find that I should correct the error on the minimum wage and find that the multiplicand which should have been applied is Ksh.13,005.70. This would come to $13,005.70 \times 12 \times 19 \times 2/3 = 1,976,866.4$, less 20% = 395,373.28. This gives the sum of Ksh.1,581,493.12 The learned trial magistrate’s award on general damages is set aside and substituted with an award of Ksh.1,581,493.12

The appeal succeeded to this extent. On the issue raised that the record of appeal was filed without leave of the court, I find that this was raised too late. The courts treats it as a technicality which is cured under Article 159 (2) (d) of *the Constitution* which provides that. “Justice shall be administered without undue regard to procedural technicalities.”

In the end I find that the appeal succeeds on the issue of general damages. The other grounds are dismissed. The appellant will get 1/3 of the costs and the respondent 2/3 of the costs of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF OCTOBER 2024.

L. W. GITARI

JUDGE

25/10/2024

Mr. Reren for Appellant

Mr. Muthomi Gitari for Respondent

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

25/10/2024

