



**Manzurali v Mtambuki & another (Civil Appeal 130 of 2022)
[2024] KEHC 16947 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 130 OF 2022
F WANGARI, J
OCTOBER 11, 2024**

BETWEEN

QASIM INAYAT MANZURALI APPELLANT

AND

FRANCISCA KASUMUNI MTAMBUKI 1ST RESPONDENT

**NZAU MATIVO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF
MOHAMED OMAR MAKELELE) 2ND RESPONDENT**

*(Being an appeal from the Judgement of Hon. G. Kiage delivered
on 17th day of August, 2022 in MC NO. 1497 of 2018, Mombasa)*

JUDGMENT

1. This Appeal arises from a Judgement and delivered on 17th August, 2022 by Hon. G. Kiage, Senior Resident Magistrate in Mombasa Civil Suit No. 1497 of 2018.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
 - a. That Learned Resident Magistrate erred in awarding to the Plaintiff the sum of Kshs. 2,400,000/= for loss of dependency when there was no or no plausible and/or credible evidence tendered before him in respect of the deceased's earnings in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the Plaintiff;
 - b. That the Learned Resident Magistrate erred in not holding that in the absence of any documentary and credible evidence in respect of the actual earnings of the deceased there was no evidence before the Honourable Court to assess damages for loss of dependency under the *Fatal Accidents Act*;



- c. That the Learned Resident Magistrate erred in awarding to the Respondents damages for loss of dependency when it was clear that the Plaintiffs had failed to plead in the plaint what the deceased was doing for a living prior to his death and had failed to adduce any evidence in respect of the deceased's earnings;
 - d. That the learned Resident Magistrate on the facts erred in law and in fact in adopting a multiplier of 30 years whilst assessing damages for loss of dependency considering all the circumstances of the case and the vicissitudes and uncertainties of life;
 - e. That the Learned Resident Magistrate erred in failing to hold that Francisca Kasumuni Mutambuki the deceased's wife aged 40 years named in paragraph 6 of the plaint dated 12th June, 2018 would also have cared for their 2 children in the absence of the deceased and further failing to hold that by reason of this, their dependency on the deceased would be reduced;
 - f. That the Learned Resident Magistrate erred in making awards under the various heads by failing to take into account that the general damages awarded to the Plaintiffs would be invested to earn interest. If the Learned Resident Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the Plaintiffs under each head;
 - g. That the Learned Resident Magistrate erred in law in failing: -
 - i. To appreciate the significance of the various facts that emerged from the evidence of the Plaintiffs' witnesses;
 - ii. To consider or properly consider all the evidence before him and/or;
 - iii. To make any proper findings on the aspect of quantum of damages on the evidence before him.
 - h. That the Learned Resident Magistrate erred in failing to consider or properly consider the written submissions filed by Counsel for the Defendant/Appellant
3. He thus prayed that that the appeal be allowed with costs and that the Learned Resident Magistrate judgement dated 17th August, 2022 be set aside or varied as to this Honourable Court appears proper and an appropriate order for costs be made in respect of the appeal and in respect of the proceedings in the court below.
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 8th September, 2023 while those of the Respondents are dated 13th September, 2023. I am grateful to both parties for the industry they put in by filing well researched submissions and cited various decided cases of this court and other superior courts. 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 and the authorities cited 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. From the grounds of appeal as well as the parties' submissions, the appeal is only on quantum.
- 6. 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 allowance to the fact that it neither saw nor heard the witnesses' testimonies.

7. 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.”

8. 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.
9. In their plaint dated 12th June, 2018 and filed on 24th July, 2028, the Respondents sought for a raft of reliefs among them general damages under the *Fatal Accidents Act* (Cap 32) and *Law Reform Act* (Cap 26), Laws of Kenya, special damages for Kshs. 85,000/=, costs of the suit, interests on the three heads and any other remedy that the court may deem fit to grant. Considering that liability is not an issue, I need not to rehash the witnesses' testimony.
10. As the appeal is 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.
11. 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...”

12. Under the head of pain and suffering, the Trial Magistrate awarded a sum of Kshs. 50,000/=. This court will, hence, be guided by *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...”

13. It is not in dispute that the deceased died instantly after the accident. Therefore, there was no prolonged suffering. As guided by the Hyder Nthenya case (supra), nominal damages ought to be awarded. I thus find the award of Kshs. 50,000/= to be on a higher side and I proceed to set aside the same and instead award Kshs. 20,000/= under this head.
14. On loss of expectation of life, the Trial Court made an award of Kshs. 100,000/=. The award of Kshs. 100,000/= is conventional and I see no reason to disturb it. The award under this head stands.
15. On loss of dependency, the Trial Court used the multiplier approach and thus awarded a sum of Kshs. 2,400,000/= having adopted a sum of Kshs. 10,000/= as the minimum wage. 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.”
16. The deceased was 26 years and the court proceeded to use a multiplier of 30 years. 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.
17. 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.
18. In adopting a sum of Kshs. 10,000/= as the minimum wage, the Trial Court was duly guided by the fact that there was no evidence of income and I find that the Trial Court exercised its discretion correctly. However, in adopting a multiplier of 30 years, I find that the same was on a higher side as this did not factor the vicissitudes of life.
19. It is always everyone’s expectation that they would work to the age of 60 years. This means the deceased would have had 34 years of working. However, this is the ideal situation. 20 years would have been the ideal multiplier and I thus set aside the multiplier of 30 years and substitute it with a multiplier of 20 years.
20. On the ratio of 2/3 it is not in dispute that the deceased was married. The Appellant argued that the widow (1st Respondent) being 40 years could have equally taken care of the children. I find that argument speculative and without a legal basis. Whether one could have taken care of the children or not is not within this court’s consideration. The estate must be compensated. I therefore uphold the ratio of 2/3 as adopted by the Trial Court.



21. Having found as above, I proceed to set aside the award of Kshs. 2,400,000 under the head of loss of dependency and substitute it with an award of Kshs. 1,600,000/= which is arrived at as follows: -

$$10,000 \times 20 \times 12 \times \frac{2}{3} = \text{Kshs. } 1,600,000/=$$

22. I find the award on special damages to be well founded and I thus see no reason to disturb it.

23. 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 bear own costs.

24. 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. 50,000/= under the head of pain and suffering is set aside and substituted with an award of Kshs. 20,000/=;

ii. The award of Kshs. 2,400,000= under the head of loss of dependency is set aside and substituted with an award of Kshs. 1,600,000/=.

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. Achoka Advocate h/b for Mr. Adede Advocate for the Appellant;

Mr. Nyabena Advocate for the Respondents;

Ms. Salwa, Court Assistant

