



South Nyanza Sugar Company Ltd v Dimba & another (Suing as the personal representative of the Estate of Kevin Ochieng Dimba - Deceased) (Civil Appeal 97 of 2019) [2023] KEHC 2028 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 2028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 97 OF 2019**

TA ODERA, J

FEBRUARY 15, 2023

BETWEEN

**JANE ATIENO DIMBA & HOSTINE OTIENO DIMBA
(SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
KEVIN OCHIENG DIMBA-DECEASED) PLAINTIFFS**

AND

SOUTH NYANZA SUGAR COMPANY LTD.....DEFENDANT

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD APPELLANT

AND

HOSTINE OTIENO DIMBA 1ST RESPONDENT

JANE ATIENO DIMBA 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF KEVIN
OCHIENG DIMBA - DECEASED**

(Being an appeal from the Judgment and Decree of HON. G. ONSARIGO, Senior Resident Magistrate, Rongo, delivered on 6th August 2019 in Rongo SRMCC NO. 465 OF 2018)



JUDGMENT

Background

1. The appeal before court is against the award of general and special damages to the respondents by the trial court to the tune of Kshs 2,070,000/=, liability having been agreed between both parties at 70%:30% in favour of the respondents.
2. Brief facts of the case were that on or about the April 26, 2018 while the deceased was lawfully riding motorcycle registration No KMEB 804E along the Awendo- Oyani road at Mariwa the appellant's motor vehicle registration No KAY 504V violently collided with him occasioning him fatal injuries.
3. *Vide* a judgment delivered on August 6, 2019 the learned magistrate entered judgment in the following terms; General damages under the *Fatal Accidents Act*. Pain and suffering Kshs 50,000/= Loss of dependency Kshs 2,800,000/= Special damages Kshs 20,000/= Funeral expenses Kshs 100,000/= Damages under the *Law Reform Act*. Loss of expectation of life Kshs 100,000/= Total Kshs 3,070,000/= Less Kshs 100,000/= (loss of expectation of life) Kshs 2,970,000/= Less 30% contributory negligence Kshs 2,079,000/= Costs and interests to the plaintiff.
4. Being aggrieved by the judgment the appellant has now proffered this appeal vide the memorandum of appeal dated September 6, 2019 on the following grounds;
 - i. That the honourable learned magistrate erred in law and in fact in awarding quantum of Kshs 3,070,000/=
 - ii. That the quantum is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - iii. That the honorable learned magistrate misdirected himself by failing to consider the submissions by the appellant while arriving at the judgment.
5. They appellant then sought the following orders from the court;
 - a. That the appeal be allowed.
 - b. That this honourable court be pleased to assess downwards the quantum of general damages awarded under the said headings to the respondent.
 - c. That the respondent does pay the costs of this appeal.
 - d. That such further relief may be granted as may appear just to the honourable court.
6. On the April 25, 2022 directions were taken to the effect that the appeal be canvassed by way of written submissions. The appellant filed its submissions on August 23, 2019 while the respondents filed their submissions on September 12, 2022.

Appellants Submissions

7. In their submissions dated August 22, 2022 the appellants abandoned prayer 3 of the memorandum of appeal and only identified the following issues for determination.
 - i. Whether damages of Kshs 50,000/= for pain and suffering were excessive?



- ii. Whether damages Kshs 2,800,000/= of loss of dependency were excessive?
 - iii. Whether the learned magistrate erred in awarding funeral expenses of Kshs 100,000/=?
8. On the first issue the appellant submitted that the award of Kshs 50,000/= was manifestly high because no evidence was led to show that the deceased suffered before death. They faulted the learned magistrate for awarding Kshs 50,000/= despite finding that the deceased died on the spot. It was their contention that the magistrate erred in awarding the amount simply because Kshs 10,000/= was awarded under the same head 3 years earlier in the case of *Sukari industries ltd v Clyde Machimbo Juma* [2016]eKLR.
 9. They urged this court to award the nominal damages of Kshs 10,000/= for pain and suffering based on the authority of *Tabitha Mulwa Mwangi (Suing as Personal and legal representative of the estate of Simon Wambugu Mathu (deceased) v henry Musembi & 2 others* [2021] eKLR.
 10. On the second issue the appellant submitted that the damages awarded were excessive in the circumstances. It was their contention that although the trial court was right in applying a multiplicand of Kshs 10,000/= per month it erred in applying a multiplier of 35 years and a dependency ratio of 2/3.
 11. With respect to the multiplier the appellant submitted that a multiplier of 21 years was adequate in the circumstances. It was their contention that the vagaries and vicissitudes of life worked against the 35 years adopted by the trial court on the grounds that: There was no evidence showing whether the deceased was working for someone or was self-employed. It was inconceivable that a boda boda rider would have a life expectancy of more than five decades given the hazardous nature of their work. There was no evidence on the length of expected dependency by the mother given that she was 56 years old at the time the deceased died. The multiplier must take into account that courts usually award damages for pain and suffering and loss of expectation of life. On this point they relied on the Court of Appeal case of *Kenfro Africa ltd t/a Meru Express services & another v Lubia & another* as excerpted in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015]eKLR.
 12. In buttressing the 21-year multiplier the appellant relied on among others the cases of:
 - i. *Alex Koech & another v Nelson M Mulama (suing as the legal representative of the estate of Kevin Kinyanjui, deceased)* [2018]eKLR where the court applied a multiplier of 15 years for the deceased who was aged 22 years.
 - ii. *Joash Gitange v Rebecca Kemunto Gikenya & Miriam Orare (suing as legal representative of Frankline Nyamora Orare (deceased)* [2019] eKLR where a multiplier of 25 years was applied for a 27-year-old with a wife and two children.
 13. On the dependency ratio they submitted that a dependency ratio of 1/3 would suffice as opposed to 2/3 adopted by the trial court. It was their contention that the deceased was only survived by his mother. They relied on the authorities of *Florence Awuor Owuoth v Paul Jackton Ombayo* [2020] eKLR, *Julita Akinyi Ouma v Hillpark Investment Company Ltd & another* [2022]eKLR and *Benard Philip Mutiso v Tabitha Mutiso* [2022]eKLR. Where the judges adopted a dependency ratio of 1/3 in instances where the dead were survived by their mothers.
 14. On the issue of reasonable funeral expenses, the appellant faulted the trial magistrate for awarding Kshs 100,000/=. They submitted that the respondents had testified to only expending Kshs 50,000/=. They further contended that it was not uncommon for the larger community to chip in and contribute since funerals in Kenya are known to be a communal affair. They submitted that an award of 50,000/= would suffice in this case.



Respondents' Submissions

15. *Vide* their submissions dated August 31, 2022 the respondents were of the opinion that Kshs 50,000/= for pain and suffering was sufficient. Based on the case of *Sukari Industries Ltd v Clyde Machimbo Juma* (2016)eKLR relied upon by the appellant.
16. On the multiplier it was the respondents' contention that 35 years was fair due to the fact that the deceased was in the informal sector hence he wasn't susceptible to retirement. They relied on the case of *Alice O Alukwe v Akamba Public Services Ltd & 3 others*. Where a multiplier of 30 years was applied for someone who was 24 years.
17. With regard to the dependency ratio they agreed with the appellant that 2/3 was on the higher side but proposed that a ratio of 1/2 would suffice, they relied on the case of *Alice O Alukwe v Akamba Public Road Services Ltd & 3 others*.
18. In respect of funeral expenses, they called on the court not to interfere with the award Kshs 100,000/=. They placed reliance on the case of *Jacob Ayiga Maruja & another v Simeon Obayo* (2005)eKLR where an amount of 60,000/= was awarded back in 2006.
19. They implored on the court to find in the following terms.
 - i. Pain and suffering - Kshs 50,000/=
 - ii. Loss of expectation of life - Kshs 100,000/=
 - iii. Loss of dependency - Kshs 2,100,000/=
 - iv. Funeral expenses - Kshs 100,000/=
 - v. Special damages - Kshs 20,000/=Total - Kshs 2,370,000/=
Less 30% contribution - Kshs 711,000/=
Net award - Kshs 1,659,000/=
20. Each party to bear its own costs.

Issues For Determination

21. From extensive analysis of the record of appeal and the submissions on record the issues that crystallize for determination are:
 - i. Duty of the first appellate court.
 - ii. Whether damages of Kshs 50,000/= for pain and suffering were excessive in the circumstances?
 - iii. Whether damages Kshs 2,800,000/= of loss of dependency were excessive?
 - iv. Whether the funeral expenses of Kshs 100,000/= was unjustified.

Duty Of The First Appellate Court.

22. It is well settled that the duty of the court in these circumstances is to re-evaluate and reconsider the evidence and come to its own conclusions, taking into consideration that they didn't have the advantage of hearing or seeing the victims first-hand. See the case of *Selle and another v Associated Motor Boat Co Ltd & others* [1968] EA 123. Similarly, as general rule the court will rarely interfere with



the trial court's finding on quantum unless the award was so high or inordinately low; or was founded on the wrong principles. (see the case of *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309.)

Whether damages of Kshs 50,000/= For pain and suffering were excessive in the circumstances?

23. In making a determination on the above matter the court usually considers the suffering the deceased underwent before death. Generally, the more time it takes for the deceased to die after the accident the more the amount that will be awarded under this head.
24. The appellant has proposed Kshs 10,000/= while the respondents proposed 50,000/=.
25. From the post mortem report produced as PEXH 1 it is evident that the deceased died on the spot. In awarding Kshs 50,000/= under this head the magistrate averred that he was guided by the fact that Kshs 10,000/= was awarded 3 years ago in the case of *Sukari industries ltd v Clyde Machimbo Juma* [2016]eKLR.
26. As was held in the *Butt case* (supra) this court is enjoined to re-evaluate the finding of the trial magistrate and decipher whether the same was founded on the wrong principles.
27. In the circumstances of this case, there is no evidence showing that the deceased suffered before death, there is therefore no justification for the award of 50,000/= for pain and suffering. The fact that 50,000/= was being awarded three years is not the correct principle to apply. I place reliance on the Court of Appeal case of *Francis K Rigba v Mary Njeri (Suing as the Legal Representative of the Estate of James Kariuki Nganga* [2021] eKLR where an award of Kshs 40,000/= was upheld for the deceased who died four days after the accident.
28. An award of 10,000/= would be reasonable in the circumstances of this case.

Whether damages Kshs 2,800,000/= of loss of dependency were excessive?

29. Under this head the court shall deal with the issues of the multiplier and the dependency ratio since they were the main points of contention.

Multiplier

30. The appellant proposed a multiplier of 21 years while the respondents proposed 35 years as was held by the trial court. In reaching the 35 years the trial court relied on the Court of Appeal case of *Jacob Ayiga Maruja & another v Simon Obayo* civil appeal No 157 of 2002 in which it was held that there was no law or any requirement that stipulated that a self-employed carpenter must retire at 55 years. He then went ahead to hold that in the absence of any debilitating health conditions a multiplier of 35 years would suffice, after due consideration of the vicissitudes of life.
31. In interfering with this award this court must subject it to its own lens in order to ascertain whether the trial court applied the wrong principles. I do not agree with the submission by the appellant that the life expectation of boda boda riders is low as no human being can claim to predict when man will leave this earth as God is the competent authority in matters of life and death of human beings. I would rather use the term "high risk" than "low life expectation" Considering vagaries of life, the informal and high risk nature of the work of the deceased, the h this court is therefore of the opinion that a multiplier of 25 years would be reasonable on the strength of the totality of the circumstances.



Dependency Ratio

32. Under this head the appellant proposed 1/3 while the respondents proposed ½, the trial court on its part awarded 2/3.
33. In this case it is not disputed that the deceased had only one dependant, his mother. The issue of dependency ratio depends on the peculiar facts of each case. In the case of *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, it was the opinion of the Court of Appeal that:

“There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss...“dependancy” or “dependency” is the relation of a person to that by which he is supported...The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation...But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person...In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half.”

34. In the present circumstances and it is conceivable that the deceased was providing for her mother in some way or form. Taking this into consideration and coupled with the fact that his mother was 56 years and was likely to have a higher degree of dependency then a dependency ratio of ½ would suffice.

Whether the funeral expenses of Kshs 100,000/= was unjustified?

35. Under this head the appellant proposed Kshs 50,000/= while the respondents were of the opinion that the Kshs 100,000/= awarded by the trial court was fair in the circumstances.
36. In as much as there is no evidence of the expenses incurred for the burial it is not inconceivable that the respondents expended some money in catering for the funeral. In the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005]eKLR the court of appeal awarded Kshs 60,000/= after due consideration of the fact that funeral expenses were not proved.
37. From the foregoing it is easy to see why the trial magistrate would settle at Kshs 100,000/=. In fact, most would argue that this amount is manifestly low if the rate of inflation is anything to go by.
38. In the present case therefore, this court is not convinced that the trial magistrate relied on the wrong principles in reaching this award.

Disposition

39. In view of the foregoing, judgment on appeal is only varied in the following terms.
- i. Pain and suffering Kshs 10,000/=
 - ii. Dependency ratio ½
 - iii. Multiplier 25 years



40. The above variations bring the award down to Kshs 1,560,000/=.

Add funeral expenses - Ksh 100,000/=

Less 30% contribution= - Ksh 1,162,000/=

Less Kshs 100,000/= awarded for loss of expectation of life so as to avoid double compensation as was held in the court of appeal case of *Eliphas Mutegi Njeri & another v Stanley M'mwari M'atiri* civil appeal No 237 of 2004, when it stated that:

“As regards the failure of the superior court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards...Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-.”

41. In the upshot, the award succeeds and I proceed to award Kshs 1,062,000/=

42. Each party to bear their own costs of the appeal.

T. ODERA - JUDGE

15.02/2023

DELIVERED IN VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Mr Odera For Appellant.

Miss Kusa For Respondents.

Court Assistant; Nyaoke

T. ODERA - JUDGE

15.02.2023

