



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sua & another v Kithuka & another (Civil Appeal 01 of 2019)  
[2023] KEHC 620 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL 01 OF 2019  
GMA DULU, J  
FEBRUARY 2, 2023**

**BETWEEN**

**GRACE MWONGELI SUA ..... 1<sup>ST</sup> APPELLANT**

**HARRISON KIOKO SUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RICHARD MBITHI KITHUKA ..... 1<sup>ST</sup> RESPONDENT**

**MUSYOKI MULUMBI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the original judgment of Hon. Mayamba  
Mrs. C. Muchoki (SRM) in Tawa Senior Resident Magistrate's  
Court Civil Case No. 182 of 2016 delivered on 3rd December, 2018)*

**JUDGMENT**

1. In a judgment delivered on December 3, 2018, the learned magistrate found in favour of the plaintiffs, now the appellants, and concluded as follows –
  1. Liability 90:10
  2. Special damages Kshs 20,770/=
  3. Loss of Life Expectancy Kshs 100,000/=
  4. Loss of Dependency Kshs 2,000,000/=
  5. Pain suffered Kshs 15,000/=Total Kshs 2,135,770/=



2. Aggrieved by the trial court's finding on liability and quantum of damages awarded, the appellants have come to this court on appeal through counsel M/s Kilonzo & Company on the following grounds –
  1. The learned magistrate erred in law and facts in the apportionment of liability in the ratio 90:10.
  2. The learned magistrate erred in fact and in law in the assessment of general damages.
  3. The learned magistrate erred in fact and in law in awarding general damages of Kshs 50,000/= for pain and suffering.
  4. The learned magistrate erred in law and fact in awarding Kshs 100,000/= general damages for loss of life expectation.
  5. The learned magistrate erred in law and fact in awarding Kshs 15,000/= for pain and suffering.
  6. The learned magistrate erred in law and fact in assessing general damages.
  7. The learned magistrate erred in assessing special damages.
  8. The learned magistrate erred in fact and law in not awarding special damages for obtaining Letters of Administration of the estate of the late Joseph Mutie Sua.
  9. The learned magistrate erred in fact and in law in awarding Kshs 2,000,000/= for loss of dependency.
  10. The learned magistrate erred in adopting a multiplier of kshs 10,000/= on the basic minimum pay.
  11. The learned magistrate erred in fact and in law in adopting a multiplier of 25 years in assessing loss of dependency.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kilonzo & company for the appellants; I note that the respondents' counsel M/s Kieti D Ndolo has not filed written submissions, though I am informed that he was served with requisite notice.
4. This is an appeal on liability as well as on the quantum of damages awarded. It is a first appeal, and as a first appellate court, I have a duty to re-examine the evidence on record and come to my own conclusions and inferences, as first appeal is in the nature of a retrial. See *Selle v Associated boat Company Ltd* [1968] EA
5. With regard to assessment of damages, I am reminded of the legal principle which has been applied consistently by the courts on appeal, including the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 88] KAR 5, and the case of *Kenfro Africa Ltd v Meru Express Service & Anor v AM Lubia & Anor* [1982 – 88] I KAR 727, in which the Court of Appeal restated the principle that assessment of damages is an exercise of discretion by a trial court and an appellate court will only interfere where the trial court in assessing damages erred in principle and either took into account an irrelevant factor or left out of account a relevant factor, or that the award was either too high or too low as to amount to an erroneous estimate of the damages.



6. In the present case, the respondents did not either enter appearance or file defence. Thus interlocutory judgment was entered and the matter proceeded to formal proof hearing.
7. In the formal proof hearing, the appellant called one witness Pw1 Grace Mwongela Sua the mother of the deceased. She relied on documents filed. According to her, the deceased was knocked down and killed by motor vehicle No KBN 724V. She produced a letter to show that the deceased used to pay school fees for his sister at Masii Central School. This witness was one of the administrators of the estate of the deceased.
8. Pw2 was Harrison Kioko Sua a brother of the deceased, the other administrator who relied on his witness statement.
9. After all the evidence of the appellants' two witnesses was taken and closed, Mr Mulyungi appeared in court for the respondents, and filed written submissions but did not call any evidence.
10. When considering liability, the magistrate merely stated in the judgment that the witnesses who testified for the appellants were not eye witnesses, and found liability to be 90:10 for the plaintiffs against the defendant, but without giving any reasons for so finding.
11. In my view, with the evidence on record, and without any cross examination or evidence tendered from the respondents, the magistrate was wrong in finding that the deceased was contributory negligent, as there is nothing on record to suggest that he was careless or contributed to the occurrence of the accident. Thus in my view liability should have been at 100%.
12. With regard to quantum of damages, the magistrate awarded special damages of Kshs 20,770/= and stated that this was in accordance to the receipts relied upon. Counsel for the appellants now argues on appeal that the trial court should have awarded additional special damages of Kshs 13,090/= for obtaining letters of administration.
13. I note that the appellants pleaded under paragraph 13 of the plaint, that obtaining letters of administration cost them Kshs 13,090/=. In the evidence, Pw1 referred to the letters of administration and also receipts amounting to Kshs 17,770/=. The trial magistrate awarded 20,770/= as special damages.
14. In my view, the fact that the letters of administration were referred to in pleadings and evidence, did not mean that the appellants were either represented by counsel or paid advocates fees for same. I note also that the appellants' counsel in written submissions asked for special damages of Kshs 29,700/= and now seems to be eager to enhance that figure. Counsel has not tendered any evidence, even a demand for fees, to support this expenditure. In my view, the magistrate was not in error in determining special damages. I will uphold the trial court's award on special damages.
15. I now turn to the award for general damages for pain and suffering. The trial magistrate awarded Kshs 15,000/=. There is no evidence that the deceased survived the impact. From the evidence on record, in my view the award of Kshs 15,000/= was not based on wrong principle as the evidence on record, shows that he died instantly. I do not agree with the proposal for damages of Kshs 100,000/= for pain and suffering.
16. I now turn to the award of general damages for loss of life expectancy. The trial court awarded Kshs 100,000/= under this head. In my view, for a 28 years old healthy person the figure was inordinately low, taking into account comparable awards, I will award Kshs 150,000/= under this head.
17. With regard to loss of dependency, the appellant's counsel submits that the court should go by minimum wage of Kshs 18,895.25 applicable to an Artisan Grade III. I don't agree with that proposal



as there is no evidence on record that the deceased was such artisan. I will go by the figure of Kshs 10,000/= used by the trial magistrate.

18. With regard to the multiplier, the magistrate applied 25 years, which would translate the deceased's productive life to end at 53 years of age. In my view, with the current general retirement age being 60 years, and the deceased being healthy, I am convinced that a multiplier of 32 would be ideal.
19. Consequently, and for the above reasons, I allow the appeal in part and order as follows –
  - i. I set aside the award of the trial court and assess liability and damages as follows –
    - a) Liability 100% against the respondents.
    - b) General damages for pain and suffering – Kshs 15,000/=
    - c) General damages for loss of life expectancy Kshs 150,000/=
    - d) Special damages Kshs 20,770/=
    - e) Loss of dependency  $32 \times 12 \times 10,000 \times 2/3 = 2,560,000$   
Total Kshs 2,745,770/=
  - ii. The appellants are awarded costs and interests against the respondent jointly and severally.

**DELIVERED, SIGNED & DATED THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023, VIRTUALLY IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**

