



REPUBLIC OF KENYA



**Chege & another v Murithi & another (Civil Appeal E205 of 2021)
[2023] KEHC 2187 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E205 OF 2021**

JM CHIGITI, J

MARCH 1, 2023

BETWEEN

SUSAN WANJIRA CHEGE 1ST APPELLANT

**HARISON KAMAU KARIGU (SUING AS ADMINISTRATOR OF THE ESTATE
OF MORRIS MWANGI KAMAU) 2ND APPELLANT**

AND

ERICK MURIUNGI MURITHI 1ST RESPONDENT

MURITHI KIRINYA SOLOMON 2ND RESPONDENT

*(Being an appeal from the judgment and/or decree by Hon. V. Kachuoaho
SRM in Thika CMCC No. 660 of 2019 delivered on 20th July 2022)*

JUDGMENT

Brief Background

1. This is appeal arises from a suit that was filed by the Appellants in their capacity as administrators of the Estate of Morris Mwangi Kamau. The Appellants' sued the Respondents seeking special damages of Kshs 40,750/=, general damages under the Fatal Accidents Act and the Law Reform Act, costs and interest in the suit arising from the death of the deceased who died as a result of a road traffic accident along Kenyatta- Gatundu road near Marram, on 30th March 2019, wherein the driver of Motor Vehicle KAP 963Z negligently, carelessly managed and/or control the same causing it to knock the tuk tuk registration No. KTWB694B. The Appellants blamed the Respondent for the accident.
2. The Respondent filed their defence on 5th February 2020 denying the occurrence of the accident and or being the driver and/or beneficial owner of the Motor Vehicle KAP 936Z. The Respondent blamed the deceased for the accident and particularized the negligence of the deceased.



3. The trial court in its judgment apportioned liability at 50:50 against each party, quantum under pain and suffering Kshs. 10,000/=, under the head of loss of expectation of life Kshs. 100,000/= and loss of expectation of life Kshs. 1,000,000/= and special damages of Kshs. 40,750/=.
4. Aggrieved by the decision of the trial court the Appellant filed the instant appeal challenging the quantum, an urged this court to set aside the trial court's award on quantum and re-assess the award on quantum upwards.
5. The appeal was canvassed by way of written submissions.

Appellants' submissions

6. Counsel filed submission on 2nd September 2022 wherein he submitted that prior to his untimely demise, the deceased was employed in Ruiru and that in the circumstances the trial court ought to have adopted the minimum wage as per Section 8 of *Regulation of wages (General) amendment Order 2018* and adopt the figure of Kshs. 21,175.15/=.
7. Counsel submits that the trial court misdirected itself by holding that there was no evidence of deceased's source of income and in disregarding the use of the *Regulation of Wages General Amendment order 2018*. The case of *Jacob Ayiga Maruja & anor v Simeon Obaya* (2005) eKLR

“.... we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”
8. Counsel urged the court to disturb the trial courts award on quantum under the head loss of dependency and adopt Kshs. 21,175.51/ as the deceased minimum wage.

Respondent's submissions

9. Counsel filed submissions on 3rd October 2022, and submitted that the award of damages is a discretion vested on the courts. According to the Respondent, the Appellants failed to adduce evidence on the salary of the deceased and that the occupation of the deceased is not provided for under the minimum wage as a result of which the Respondent submits that the trial court did not error in adopting a global sum in the calculation for loss of dependency.
10. To support its case, the Appellant cited the case of: *Seremo korir & Anor v SS (suing as the legal representative of the estate of MS, deceased)* (2019) eKLR where the Court held that there is no justification or evidence to support the learned trial magistrate's choice of multiplicand and multiplier and thus ought to have adopted the global award system and thus used his discretion to enter an award under the loss of dependency.
11. On the issue of loss of expectation of life, the Respondent contends the law prohibits the estate of the deceased from benefiting twice under the *Law Reform Act* and the *Fatal Accident Act*.
12. Counsel urged the court to uphold the decision of the trial court and dismiss the appeal with costs to the Respondents.



Analysis and determination

13. At the hearing in the trial court the Appellants called 2 witnesses. PW1 CPL Linet Makuti produced the police abstract dated 3rd April 2019 and testified that as per the Occurrence Book, the accident involved Tuk tuk KTWB 694B and Motor Vehicle KAP 963, when the Tuk tuk was making a U- turn and was hit by the Motor Vehicle severally. He told the trial court that he was not the investigating officer, he did not visit the scene of the accident and he could not point the place of the accident. PW1 told the court the investigating officer went on transfer.
14. PW2 Susan Wanjira Chege testified the deceased was her husband and he died as a result of the accident. She adopted her witness statement and list of documents. She told the court that the deceased died at the age of 34 years. She informed the court that the deceased was employed as the Tuk Tuk driver earning a monthly salary of kshs 40,000/=. PW 2 testified and told the court they spent Kshs. 39,000/=for the burial.
15. By the consent of the parties the evidence of the 2nd Appellant was admitted as his evidence in chief and the plaintiff closed its case.
16. DW1 Everick Muriungi Muriithi testified that there is no U- turn sign at the point of the road where the accident occurred. He indicated that the road was clear and that he was familiar with the road he was driving at a speed of 40-50 Km/hr. According to DW 1 the driver of the Tuk Tuk took a U- turn without indicating.
17. At the close of the hearing parties filed written submissions. The Appellants submitted that Kshs. 5,495,150/= would be adequate compensation on quantum.

Determination:

18. In the case of *Mbogo v Shah* (1968) EA 93 which would entitle this court to interfere as follows:

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless 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 misjustice”.
19. On the issue of whether the trial court erred in deducting the awards under the *Law Reform Act* from the *Fatal Accidents Act*.
20. The issue is well elaborated in the Court of Appeal in *Kemfro Africa Limited t/a Meru Express Services (1976) & Another v Lubia & Another (No. 2)* [1987] KLR 30 has guided that what the court is required to do is to take into account the award under *Law Reform Act* and not necessarily to deduct the same from the award under the *Fatal Accidents Act*, as follows:

“An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.

The *Law Reform Act* (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party is entitled to sue under the *Fatal Accidents Act* and under the *Law Reform Act* in respect of the same death.



The words "to be taken into account" and "to be deducted" are two different things. The words used in section 4(2) of the Fatal Accidents Act are "taken into account". The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

21. Guided by the above case, I find that the law is clear that awards under the Law Reform Act should be considered and not deducted from the Fatal Accident Act, in the circumstance. I find the trial magistrate erred in deducting the loss of expectation of life from the award on the Fatal Accident Act on loss of dependency. The award would not amount to double compensation.
22. In the upshot I find the appeal under this head succeeds, the awards under the head loss of expectation of life of Kshs. 100,000/= is affirmed.
23. Under the head pain and suffering the trial Court awarded kshs. 10,000/= on the basis that the deceased died on the same day of the accident. I find the award of Kshs. 10,000/= as proper compensation. I will not interfere with the trial court's award.

Loss of dependency:

24. The Appellants submits that the deceased died at the age of 34 years, earning a basic salary of Kshs. 40,000/= and urges the court to use the minimum wage as per the Regulation Amendment order 2018 and adopt Kshs. 21,175.15/= and find Kshs. 4,404,400/= as sufficient compensation.
25. The trial court adopted an estimate of Kshs. 1,000,000/= having found the income of the deceased could not be ascertained.
26. The deceased died aged 34 years and was employed as a Tuk Tuk driver. The age of retirement being 60 years, I factor in the many vicissitudes that afflict the daily lives of humans as may well shorten the working life of public service three wheel vehicles in adopting a multiplier of 18 years.
27. Without proof of earnings, I will adopt the minimum wage under the statutory minimum wage guidelines, the minimum wage for the year 2018, which is at Kshs. 21,175.15/= as the multiplicand. It was alleged that the deceased was survived by a wife and a child aged four months who would form part of the beneficiaries. I adopt a ratio of 2/3.
28. Thus the quantum under this head is calculated as $21,175.15 \times \frac{2}{3} \times 18 \times 12 = 3,049,221.6/=$. I review the award of the trial court on the head of loss of dependency and review it upwards to Kshs. 3,049,221.6/=.
29. The issue of special damages was not disputed. I will therefore not disturb the award of the trial court.

Orders

30. In the end I find the appeal partially succeeds as follows:
 - a. The award of kshs. 100,000/= as damages under the Law Reform Act is affirmed.
 - b. The Appellants are awarded Kshs. 3,049,221.6/=
 - c. The award of kshs 40,750/= as special damages is affirmed
 - d. The award of Kshs. 10,000/= for pain and suffering is affirmed.



- e. Special damages of Kshs. 40,750 /= are affirmed.
- f. The above is subject to the 50% liability as awarded by the trial court.
- g. The Appellants to have the costs of the appeal.

DATED AND DELIVERED AT KIAMBU THIS 1ST DAY OF MARCH, 2023.

J. CHIGITI (SC)

JUDGE

