



**Gathenya & another v Waithaka (Civil Appeal 14 of 2021)
[2023] KEHC 1592 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 14 OF 2021
J WAKIAGA, J
MARCH 8, 2023**

BETWEEN

LUCY WANJIKU GATHENYA 1ST APPELLANT

WILFRED MBUIA WAIRIMU 2ND APPELLANT

AND

FRANCIS NJAU WAITHAKA RESPONDENT

*(An appeal from the judgement and decree of Hon. E. M Nyagah SPM in
Muranga CMCC NO 230 of 2016 delivered on 20th day of April 2021)*

JUDGMENT

1. The appellants were sued by the respondent by a plaint dated July 22, 2016 in respect of a road traffic accident involving motor vehicle registration numbers KBR 692 N and KCB 640 S and it was pleaded that the deceased whose estate the Respondents represent was a lawful passenger in motor vehicle registration number KRB 692N which was driven in a negligent manner thereby ramming onto motor vehicle registration number KCB 640 S as a result of which the estate suffered loss and damages.
2. By a statement of defence dated March 16, 2017, the appellant denied being the registered owner the subject motor vehicle, the occurrence of the accident, negligence attributed to the same and the subsequent loss and damages.
3. The parties entered into a consent judgment on liability at 80%:20% in favour of the respondent with the matter to fixed for formal proof in respect of quantum which was agreed by consent to be by way of written submissions.
4. By a judgement thereon dated April 20, 2021 and the subject matter of this appeal, the court assessed general damages as follows;



- a) Under law reform - Kshs 100000
 - b) Loss of expectation of life - Kshs 100000
 - c) Loss of dependency - Kshs 2,000,000
 - d) Special damages - Kshs 135,330
5. The award was subject to 20% contribution
6. Being aggrieved by the said award, the appellant filed this appeal and raised the following grounds of appeal:
- a) The learned magistrate misdirected himself and erred in law by considering facts outside the documentary evidence adduced hence awarding damages for loss of dependency which was totally unsupported by evidence and arrived at an award which was excessive
 - b) The learned magistrate awarded global figure for loss of dependency, yet the occupation of the deceased was known.
 - c) The learned magistrate relied on written submissions which was not evidence.
 - d) The court did not take into account the award under *Fatal Accidents Act* while awarding under the *Law Reform Act* while the beneficiary was the same.
 - e) The court considered extraneous matters and went outside the ambit of the proceedings and evidence tendered hence arrived at an erroneous decision on quantum.

Submissions

7. Directions were issued on the determination of the appeal by way of written submissions and on behalf of the appellant it was submitted that the deceased monthly earning being a business woman were unascertainable as no evidence was led in court to prove the same as required under section 107, 108 and 109 of the *Evidence Act* and having failed to do a lump sum award of Kshs 400,000 would have been appropriate, in support of which the following cases were tendered:
- a) *Multiple Haulers (EA) Ltd v Christine Arglera Abiero* [2016] eKLR
 - b) *Mary Khayesi Awalo & another v Mwilu Malungo & another* [1999] eKLR where the court stated that it is better to adopt the principle of the lump sum award instead of estimating an income in the absence of books of account
 - c) *Albert Odawa v Gichimu Gichenji* [2007] eKLR where the court awarded Kshs 400,000 in the absence of evidence of the actual earning by the deceased.
8. It was submitted that should the court not consider a global sum approach, then the court should apply for multiplier the minimum wage regulation in respect to unskilled labourer as was stated in the case of *Philip Musyoka Mutua v Veronica Mbulu Mutiso* [2013] eKLR to the effect that in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like wage of an unskilled employee and since the deceased was aged 50 years, the court was urged to apply a multipliers of ten years in support of which the cases of *Susan Warimu Muthee & 2 others v Samuel Nganga Mbugua* [2017] eKLR and *Makorio Makonye Monyancha v Hellen Nyangena* [2014] eKLR were tendered.



9. On the expectation of life, it was submitted that an award of the sum of Kshs 50,000 would be adequate as was awarded in the case of *Joseph Kabiga Gathii & another v World Vision Kenya & 2 others* [2014] eKLR in respect of a 67-year-old deceased teacher.
10. On pain and suffering it was submitted that the deceased died instantly and therefore an award of Kshs 10,000 would be reasonable.
11. On the duplication of award, it was submitted that the court should deduct from the amount found due, the award for loss of expectation of life and pain and suffering as was stated in *Rosa Adisa Odari v Wilberforce Egesa Magoba* [2009] e KLR.
12. On special damages it was submitted that only the pleaded and proven sum should be awarded of Kshs 95,589.
13. On behalf of the respondent it was submitted that the deceased was aged 50 years and a business woman with an estimated monthly income of Kshs 30,000. It was submitted that an award of damages was at the discretion of the trial court which an appellate court ought to respect as was stated in *Hellen Waruguru Waweru v Karie Shore Stores Ltd* [2015] eKLR. It was submitted that a claimant under the Fatal Accident Act should not be denied damages for pain and suffering and loss of expectation of life as these are awarded under the *Law Reform act* and therefore the issue of duplication does not arise. The above position, it was submitted was supported by the Court of Appeal decision in *Kmfro Africa Ltd & another v Lubia & another np 2* [1985] eKLR and therefore the trial court cannot be faulted.
14. It was submitted that the trial court global sum award was supported by the decision in *Bendeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR where an award of Kshs 2,000,000 for pain and suffering was awarded. It was contended that the deceased was aged 50 years in good health and therefore an award of Kshs 100,000 under the heading of loss of expectation of life was justified based on the case of *Beatrice Agola Opondo v Swale Salim Said* [2003] eKLR. The court was therefore urged to dismiss the appeal.
15. This being a first appeal, the court is required to re-evaluate re-assess and re-analysis the evidence tendered before the trial court and to come to its own determination thereon as provided for under section 78 of the *Civil Procedure Code* and was stated by the court in the case of *Abok James Odera t/a A.J Odera & Co Advocates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR where the court held that the being a first appeal, the primary role is to re-evaluate, re-asses and to determine whether the conclusion reached by the learned trial judge are to stand or not and to give reasons either way.
16. In this matter consent judgement was entered on liability and the cause proceeded by way of written submission and in arriving at the determination appealed against the court held that it had considered the submissions made by the parties and was clear that the assessment of damages is not an exact science and the court in doing the best it can take into account the nature and extent of the injuries in relation to awards made by the court in similar cases. It ensures that the body politics is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries. The court can therefore not be faulted in not having taken into account the submissions by the parties.

Determination

17. The only issue for determination on this appeal is whether the award arrived at by the trial court was excessive so as to be interfered with by this court. As rightly submitted by the respondent, the award of damages is at the discretion of the trial court, which can only be interfered with if the award was



too low or too high so as to be unreasonable as was stated in *Hellen Waruguru Waweru v Kiarie Shore Stores Limited* (supra)

18. Was the use of global lump sum award in error? Having rightly held that the assessment of award of damages is not an exact science, I find no fault in the use of the global sum when the court was faced with the situation where the income of the deceased was uncertain and in this I find support in the case of *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR where the court assessed damages at the sum of Kshs 1,353,540 in respect of a fifty (50) year old deceased.
19. The use of global award was further applied in the case of *Moses Mairura Muchirui v Cyrus Maina Macharia* [2016] eKLR submitted by the respondent and having taken into account the case of *Ainu Shamsi hauliers Ltd v Moses Sakwa & another* [2021] eKLR where the court using the same principle affirmed assessed damages at Kshs 2,128,184, I find and hold that the award herein was not excessive to enable the court interfere with the same and find no merit on this ground of appeal.
20. On the issue of the deduction of the award, my understanding of the law is that the court ought to take the award into account as was state in *Kamfro Africa Ltd & another v Lubia & another (No 2)* [1978] KLR 30 where the court stated that the word to take into account and to deduct were two different things and that the court only need to show that in reaching the figure awarded under the *Fatal Accident Act* , the trial court bore in mind or considered what he had awarded under the *Law Reform Act* for non-pecuniary loss.
21. It follows that the court was not in error and therefore this ground of appeal must fail and having so found, the appal herein lacks merit which I hereby dismiss and affirm the judgment of the lower court with cost to the respondent.

Desposition

22. The appeal herein lacks merit and is dismissed with cost to the respondent.

DATED SIGNED AND DELIVERED AT MURANGA THIS 8TH DAY OF MARCH 2023

J. WAKIAGA

JUDGE

In the presence of

Bore Advocate for the Appellant

Wakwaya Advocate for the Respondent.

