



**Wafula (Suing as the Administrator and Personal Representative of the Estate of James Wafula Seme - Deceased)) & another v Amunga (Civil Appeal 52 of 2018) [2023] KEHC 2152 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 52 OF 2018  
DK KEMEL, J  
MARCH 22, 2023**

**BETWEEN**

**JOSEPHINE NAMWENYA WAFULA (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES WAFULA SEME - DCSD) ..... 1<sup>ST</sup> APPELLANT**

**PAULO SEME KITUYI (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES WAFULA SEME - DCSD) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LORNA AMUNGA ..... RESPONDENT**

*(Being an appeal against the Judgment delivered by Hon. Kingori-Chief Magistrate in Bungoma CMCC No. 507 of 2014 dated 24th July 2018)*

**JUDGMENT**

1. The suit in the trial Court arose out of what is said to be an accident involving the deceased who was a pedestrian along Kimilili-Chwele road on 17<sup>th</sup> December 2013 and that the Respondent's motor vehicle registration number KBM 578A Toyota Matatu at Mt. Crest area when the deceased was hit by the Respondent's said motor vehicle that was negligently driven by the Respondent's agent/servant. The Appellants pleaded negligence and sought special damages of Kshs. 160, 320/= and general damages in respect of the accident.
2. The Respondent in her defence dated 26<sup>th</sup> February 2015, denied ownership of the suit vehicle, denied the occurrence of the accident in the manner described by the Appellants, denied negligence on her part as well as the particulars of loss and injuries. The Respondent pleaded that the accident was as a result of the sole and/or contributory negligence of the Appellants as particularized in paragraph 6



- of the defence. The appellant pleaded “*volenti non-fit injuria*”. She further pleaded that the accident was unforeseeable; an act of God and was beyond her control and that it still occurred in spite of all reasonable avoidance action taken by her.
3. When the matter came up for hearing, consent on liability was recorded at 70% to 30% in favour of the Appellants. The matter proceeded on quantum. In its judgement on quantum, the trial Court made the award as follows: pain and suffering= Kshs20,000/-; loss of expectation of life=Kshs. 100,000/-; loss of dependency=(2,000×2/3×20) Kshs 320,000/-; and special damages=Kshs. 108, 120/- less 30% contribution. Net award=Kshs. 368, 984/-
  4. Aggrieved by the judgment, the Appellants filed a memorandum of appeal on the 20<sup>th</sup> August 2018. The appeal is on the trial Court’s finding on quantum. The grounds of appeal are that: -
    - i. The learned trial magistrate erred in law and in fact in awarding a sum of Kshs. 2,000/= per month as earnings for loss of dependency for the deceased working as a tout (conductor).
    - ii. The learned trial magistrate erred in law and in fact in applying wrong assessment of earning for the loss of dependency for the deceased.
    - iii. The learned trial magistrate after analyzing the evidence before him arrived at a wrong decision on earning in respect of the deceased.
    - iv. The learned trial magistrate failed to consider the submission and authorities submitted by the Appellants on the issue of earning of the deceased person.
  5. The Appellants prayed that this Court allow this appeal; set aside the lower Court’s judgement; proceed to assess the earning in respect of the deceased person and the costs of the appeal be awarded to Appellants.
  6. This being the first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123. The parties filed written submissions but did not find it necessary to orally highlight.
  7. When the matter proceeded to hearing evidence on quantum, the 2<sup>nd</sup> Appellant herein, Paul Seme Kituyi, testified as PW1. It was his evidence that the deceased was his son and the 1<sup>st</sup> Appellant is his wife. He recalled on 17<sup>th</sup> December 2013, at around 5.00pm he was called and informed that his son had been involved in an accident near Mt. Crest on Kitale-Bungoma road. He proceeded to the scene of incident and found his body on the road dead. The body of the deceased was later transferred to Kimilili District Hospital Mortuary where he later obtained a burial permit. He produced in Court the burial permit as P. exhibit 1. He hired transport for the body at Kshs. 10, 320/= and produced a receipt to that effect in Court as P. exhibit 2a. He proceeded to pay Kshs. 4, 800/- at the Hospital and produced a receipt to that effect marked as P. exhibit 2b before the Court.
  8. According to him, a postmortem report was conducted on the deceased’s body and the same cost Kshs. 10,000/=and he produced the requisite receipt in Court as P. exhibit 2c. Also, he bought a cow for Kshs. 40,000/=to feed the mourners and produced a receipt to that effect marked as P. exhibit 2d.
  9. He told the Court that he procured food items at Kshs. 27,000/= and produced a receipt to that effect marked as P. exhibit 2e. He obtained a death certificate for the deceased and produced the same in Court as P. exhibit 3; a police abstract on the accident which was marked as PMFI1; a limited grant



for filing the suit, which he produced in Court as P. exhibit 5a and which he paid Kshs. 15,000/= as Advocates fees, and produced the receipt in Court as P. exhibit 5b.

10. It was his evidence that, the deceased was married with 4 children and a chief letter dated 13<sup>th</sup> April 2014 was produced in Court as P. exhibit 6. The deceased died at the age of 35 years and upon his demise he was a tout at Kimilili raking in Kshs. 20,000/=per month. He further told the Court that, the deceased sometimes supported him by giving him Kshs. 1, 000/=and his mother Kshs. 500/-. He could not ascertain how much he was giving his wife but he highlighted that the deceased was also a farmer on the side. He told the Court that a demand notice was issued to the Respondent and the same was produced in Court as P. exhibit 7.
11. On cross-examination, he told the Court that the deceased was getting Kshs. 2,000/= per month and that he was not there when the accident occurred and that he did not have the birth certificate of the deceased.
12. On re-examination, he told the Court that the deceased married under customary law thus no marriage certificate and their union bore 4 children as duly named in the Chief's letter. He told the Court that he was not aware of how much the deceased made from farming but his son would give him Kshs. 1,000/= or Ksh. 800/=.
13. PW2 was No. 77515 PC David Muchai Muriithi of Kimilili Police Station. He told the Court that he was before the Court to produce the police abstract form from Kimilili Traffic Station Base which was produced in Court as P. exhibit 4. On cross-examination, he told the Court that he was not the investigating officer and that the driver of the motor vehicle at the time of the accident was one Mohamed Alani. On re-examination, he told the Court that the deceased was indicated to be a pedestrian on the police abstract form.
14. Judgment on quantum was entered as follows: pain and suffering= Kshs20,000/-; loss of expectation of life=Kshs. 100,000/-; loss of dependency=(2,000×2/3×20) Kshs 320,000/-; and special damages=Kshs. 108, 120/- less 30% contribution. Net award=Kshs. 368, 984/-.
15. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions. I wish to note that at the time of my preparing this appeal on the Appellants had filed their submission.
16. Counsel for the Appellants submitted that in all the availed 4 grounds of appeal, the Appellant was appealing against the award of Kshs. 2,000/=per month as the earnings on the deceased under the loss of dependency. It was submitted that if the deceased worked as a tout the principle of minimum wage in this case would have sufficed. The cause of action arose on 17<sup>th</sup> December 2013 and the requisite minimum wage applicable is the Regulation of Wages (General) Amendment Order 2013 where the minimum wage for a general labourer in other municipalities (Kimilili in this instant appeal) is Kshs. 9, 024.15/=. Counsel relied on the case of Francis Karani vs Simeon Obayo & Another Kisumu HCA No. 167 of 2022.
17. I have duly dispensed with my duty as an appellate Court to reconsider all the evidence and testimonies on the record afresh. I have further considered the submissions by the parties' advocates and having done so, feel it appropriate to restate the legal principle on exercise of discretion by a superior Court over jurisdiction of a subordinate Court or inferior Tribunal. This principle is best summed up by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows: -

“I think it is well settled that this court will not interfered with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has



misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

18. On the issue of an appellate court interfering with a lower court’s assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

19. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below: -

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

20. The bone of contention is in regard to how the trial magistrate arrived at the earnings of Ksh. 2,000/- award under the loss of dependency but This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact.

21. Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a Figure which was either inordinately high or low”

22. In the case of *Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo* (2005) eKLR the Court stated as follows: -

“It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”

23. In regard to the issue of damages awarded under the *Law Reform Act*, the court in *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR observed that-

“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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in



an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

24. In the present appeal, none of the witnesses indicated whether the deceased died immediately after the accident or how long it took before he died. I am therefore guided by the death certificate which indicates that the deceased died at Kimilili. From the foregoing, it is evident that the deceased died on the spot after the accident happened. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, 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.”

25. In view of the above decisions and bearing in mind that this Court has been invited to exercise its discretion when considering the award made by the Trial Court, I find that the award made in the sum of Kshs. 20,000/= for pain and suffering was not excessive. I therefore uphold the said award.

26. Looking at the award made under loss of expectation of life, the Court in the case of *Rose v Ford* [1937] AC 826, held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate.

27. In *Benham v Gambling* [1941] AC 157 it was held that-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

28. Due to different interpretations of the above decision as to whether an award of loss of expectation of life under the *Law Reform Act* and an award of loss of dependency under the *Fatal Accidents Act* amounts to double compensation, the Court of Appeal in *Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, held as follows-

“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependents under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise. The confusion appears to have arisen because of different



reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -

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 for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue 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 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." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

29. In light of the foregoing decisions, I am not persuaded that the Appellants should not be awarded damages under loss of expectation of life. I also see no rationale as to why damages for loss of expectation of life should be deducted from the award under loss of dependency. I therefore uphold the Trial Court's judgment under loss of expectation of life in the sum of Kshs. 100,000/=.
30. When making an award for loss of dependency, the trial magistrate stated that despite the fact that the deceased was a motor cycle rider, no financial records were produced to show how much he was earning hence the multiplier approach would not have been appropriate in the circumstances. The deceased's earnings could however not be ascertained. The Appellants suggested Kshs. 2,000/= as the wage for the motorcycle rider. Since no documentary evidence was produced as proof of the deceased's monthly income, the trial Court could have adopted either the multiplier approach with the Regulation of Wages (General) Amendment Order 2013 or global sum approach. He adopted the latter approach but used the wrong earnings as the same were not substantiated. I concur with the argument of the Appellants that the appropriate earnings would have been inspired by the Regulation of Wages (General) Amendment Order 2013 under the general skilled labourer (Kimilili municipality) which was not the case in the trial Court. I take judicial notice that the minimum wage in Kenya is based on the region and occupation of various categories of workers and in the case, the deceased hustling in Kimilili Municipality, the appropriate amount would be Kshs. 9,024.15/= as suggested by Appellants.



I do find the award of Kshs. 2,000/= as earnings, under the loss of dependency head, by the trial Court erroneous and proceed to interfere with the same.

31. Taking into account that the deceased was married with four children and the evidence produced before the trial Court to prove this fact was the letter of the Chief which was produced in Court as an exhibit, this Court takes judicial notice of the challenges that parents undergo to obtain crucial documents like birth certificates especially those in the rural areas. The letter of the area chief was used as proof of parentage. The trial Court did not err in relying on them. The ages of the children are as follows: -

- i. IW-9 years
- ii. LW-6 years
- iii. PW-4 years
- iv. LW 2-years

32. The deceased had four children aged below 18 years and thus they shall be considered as minors and the deceased's dependants as per the definition of a dependant under Section 4(1) of the *Fatal Accidents Act* Cap 32 Laws of Kenya. In my view, the learned trial magistrate took into account the fact that the deceased was married and there was a possibility that he was the sole bread winner of his young family and parents also have an expectation of being assisted by their children. I agree that 2/3rd dependency ration was appropriate in this scenario. Accordingly, I uphold the decision of the trial Court.

33. As regards the multiplier, the deceased was not in employment and therefore there is a possibility that he would have worked for more than 60 years but taking into consideration the uncertainties of life, in my view, the trial magistrate erred in applying 20 years as the multiplier. The deceased was 35 years old and a tout during his demise. He was not entitled to retirement age and in my view, the deceased may have worked for more than 25 years and therefore a multiplier of 25 years would be reasonable. The deceased died at the age of 35 years and taking cognizance of the vicissitudes of life, the appropriate years would have been 25 years. In the premises, the award for loss of dependency ought to have been as follows:

Kshs.  $9,024.15 \times 25 \times \frac{2}{3} \times 12 = 1,804,830$ .

34. On special damages, it is trite law that they should be specifically pleaded and strictly proved. The Appellants claimed a sum of Kshs. 160, 320/= but only Kshs. 67, 120/= was proved vide attached receipts. As regards to the other expenses, though alluded to in the plaint, there was no specific plea for what was spent. The same was not specifically pleaded and proved as required by law. I therefore find reason to interfere with the trial Court's award of Kshs. 107, 120/- as only Kshs. 67, 120/- was proved vide the availed receipts.

35. In the premises the total award should be as follows:

- (1) Pain and Suffering.....Kshs 20,000.00
- (2) Loss of Expectation of Life..... Kshs 100,000.00
- (3) Loss of Dependency.....Kshs 1, 804,830.00
- (4) Special damages.....Kshs 67,120.00
- Sub-total.....Kshs 1,991, 950.00
- (5) Less 30% contribution..... Kshs. 597,585.00



Net Damages.....Kshs.1,394,365.00

36. Accordingly, the appeal herein on quantum of damages succeeds. Each party shall bear own costs of this appeal while the costs of the lower Court case are awarded to the Appellants. Interest is also awarded to the Appellants at Court rates.

It is so Ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 22<sup>ND</sup> DAY OF MARCH, 2023.**

**D.K. KEMEI**

**JUDGE.**

**In the presence of:**

Wamalwa Simiyu for Onkangi for Appellants

No appearance Makokha Wattangah for Respondent

Kizito -Court Assistant

