



**Car General Kenya Limited v Nene & another (Suing as the Administrator
of the Estate of Agnes Wavinya Joana - Deceased) (Civil Appeal
60 of 2022) [2023] KEHC 3260 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 60 OF 2022
MW MUIGAI, J
APRIL 17, 2023**

BETWEEN

CAR GENERAL KENYA LIMITED APPELLANT

AND

JEMIMA MUNYIVA YOHANA 1ST RESPONDENT

VINCENT YOHANA NENE 2ND RESPONDENT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF AGNES WAVINYA
JOANA - DECEASED**

*(Being an Appeal from the Judgment of the Hon Stephen Jalango
(PM) Delivered on 21.04.2022 in Mavoko Cmcc No 143 Of 2020)*

JUDGMENT

Trial Court Record

1. Vide a plaint filed on February 21, 2020, the plaintiff contends that the cause of action arose on October 26, 2019 where the deceased was a pillion on a motorcycle registration number KMDS 265 L (hereinafter referred to as “the motorcycle”) along Nairobi- Mombasa road when the defendant’s driver, servant and or agent while in the course of employment driving motor vehicle registration number KBQ 625S (hereinafter referred to as “the motor vehicle”) drove recklessly, carelessly and negligently thus ramming into the motorcycle from behind hence causing fatal injuries to the deceased.
2. The suit was filed by the father and the sisters and the dependents of the deceased were listed as;
 - a. Diana Mbithe daughter 17years
 - b. Beatrice Mbithe mother



- c. Nene Yohana brother
3. It was averred that at the time of death the deceased was 32 years, unmarried with one child and worked as a business lady and owned a club known as Pilipili Club in Athi River with a monthly income of Kshs 130,000 per month, she enjoyed good health and lived a happy life. The plaintiff prayed for general damages under *Fatal Accident Act* and *Law Reform Act*, special damages of Kshs 66,575, costs and interest of the suit.
 4. The defendant filed a statement of defence on September 22, 2020 denied each and every allegation in the plaint and in the alternative averred that if the accident occurred, it was wholly and/or substantially contributed to by the deceased and the rider of the motorcycle. The defendant indicated that it would rely on the doctrine of *volenti non fit injuria* and asked that the suit be dismissed with costs.
 5. At the hearing, the plaintiff called 2 witnesses. PW1 was Vincent Yohana Mark who adopted his statement and further stated that Agnes Wavinya was his daughter, she died on October 26, 2019. He was not present when the accident occurred. The deceased died at the age of 32 years. The deceased was taken to Shalom Mortuary, she was not married and had a daughter aged 17 years old that he was taking care of. The deceased had a bar in Athi River but he did not have a document to prove that she operated the bar. The deceased used to give him Kshs 15,000 each month to take care of his needs and that of her child. He used to depend on the deceased. He prayed for compensation.
 6. He produced a demand letter, death certificate, post mortem, limited grant, letter form area chief, receipt for filing this matter, receipt paid to mortuary, legal fees receipt and post mortem receipt, official search
 7. Upon cross examination he further stated that the deceased's daughter is called Diana is aged 17 years, he did not have the birth certificate. He was aware that all businesses had licenses, he did not have any document. He did not avail any document to prove that the deceased used to earn Kshs 130,000. He did not know if she died on the spot, he found the body at Shalom Hospital.
 8. PW2, CPL Zephania Andany, the investigation officer, produced the police abstract and stated that it was in respect to deceased Agnes Wavinya Johana who was involved in a road traffic accident on October 26, 2019 at Sabaki along Nairobi- Mombasa Road while on board motor cycle KMDF 265 Skygo and motor vehicle KBQ 625F Toyota Probox, both were headed in the same direction. Upon reaching the location of the accident, the vehicle knocked the motorcycle rear, the cyclist lost control, veered off the road and due to the impact, and the deceased succumbed to the injury on the spot. He visited the scene and took the deceased's body to Shalom Mortuary and later towed the vehicle to the police station.
 9. Upon cross examination, he stated that the matter was pending under investigation, the drawing indicated that the vehicle hit motorcycle from behind. He blamed the driver of KBQ for occurrence of the accident.
 10. The defendant did not call any witness.

Trial Court Judgment

11. The trial court found that the plaintiff's evidence uncontroverted. In particular that the defendant was to blame for the accident. On liability, it was found that the defendant was 100% liable.
12. On quantum, reliance was placed on the case of *Kanini Jackson & another Kenya power & Lightning Company* - Msa HCCC No 338 of 2010 where the deceased died a few minutes after the accident. It was found that in this case the death certificate indicated that the deceased died the same day and



there was no evidence of hospitalization or death at a different time and awarded Kshs 30,000 under this head.

13. On loss of expectation of life, the court awarded Kshs 100,000/-.
14. On loss of dependency, the court adopted a multiplier of 28 years considering the retirement age in Kenya is 60 years, adopted the minimum wage at Kshs 13,572 considering that no evidence was availed that the plaintiff worked at a bar. Relying on the letter from the chief confirmed that the deceased was survived by a daughter and adopted a multiplicand of 2/3.
15. The court found that Kshs 66,575 was properly pleaded and proven.
16. In conclusion, the trial court gave an award as follows;
 - a. Liability 100%
 - b. Pain and suffering Kshs 30,000
 - c. Loss of expectation of life Kshs 100,000
 - d. Loss of dependency Kshs 3,040,128
 - e. Special damages Kshs 66,575Total Kshs 3,236,703

The Appeal

17. Dissatisfied by the judgment, the appellant filed a memorandum of appeal on May 16, 2022 and sought to have the judgment award on the dependency ration revised to commensurate levels as per the evidence on record and costs of the trial court and the appeal be awarded to the appellant. The appeal is founded on the following grounds, that;
 - a. The learned magistrate erred in law and misdirected himself in law, principle and facts when he misapprehended and misunderstood the applicable principles and the law in assessing loss of dependency thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances of the case.
 - b. The learned magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record, particularly by adopting a dependency ratio of 2/3 in his computation of loss of dependency.
 - c. The learned magistrate erred in law and fact in adopting a wrong estimate of the multiplicand arriving at a decision what was against the weight of evidence on record and weight of law as a result he arrived at and erroneous decision.
 - d. The learned magistrate erred in law and fact by taking into account irrelevant extraneous factors, hence he reached an erroneous verdict
18. The appeal was canvassed by way of written submissions.

Submissions

19. The appellant filed submissions on December 7, 2022 and submitted on quantum. Under pain and suffering, it was submitted that since the deceased died on the spot, an award of Kshs 10,000 to 15,000



would be sufficient. Reliance was placed to the cases of *Suleimani Muwanga v Walji Bhimji Jiwani & another* [1964] EA 171, *Charles Masoso Barasa & another v Chepkoech Rotich & another* [2014] e KLR, *Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi)* [2019] e KLR and *Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & another* [2019] e KLR.

20. On loss of expectation of life it was contended that the award should not be disturbed while making reference to the cases of *West Kenya Sugar Co Limited v Philip Sumba Julaya (suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019] e KLR and *Hyder Nthenya & another v China Wu yi Limited & another* [2017] where similar awards were given.
21. Under loss of dependency, the appellant submitted that there was no proof of the relationship between the deceased and the alleged daughter, as such the dependency ratio should be 1/3 and that a multiplier of 20 years is enough given the vicissitudes of life nowadays. He relied on the case of *James Gakinya Karienyie & another (suing as the legal representative of the estate of David Kelvin Gakinya (deceased)) v Perminus Kariuki Gitthinji* [2005] e KLR.
22. The respondent filed submissions on January 13, 2023 and contended that the trial court was right and justified to have arrived at the said quantum.
23. Under the heads of pain and suffering, loss of expectation of life and income the respondent seemed to have mixed up facts and made submissions on an incident that was not before this court.
24. On the multiplier, the respondent submitted that the deceased was in private business of a bar which does not require retirement age however the multiplier assumed that she would have retired at the normal age of 60 years for public servants which is not excessive.
25. On the dependency ratio, it was submitted that the absence of a birth certificate did not mean that the deceased did not have a daughter and the trial court having examined the deamenaor of PW1 who was quite old awarded a dependency ratio of 2/3. Reliance was placed on the case of *Gachoki Gathuri (suing as the legal representative of the estate of James Kinyua Gachoki (deceased)) v John Ndiga Njagi Timothy & 2 others* [2015] e KLR.
26. The respondent contended that the special damages were pleaded and proved.

Determination

27. I have considered the memorandum of appeal, the trial court record and the submissions of the parties. The appellant does not contest the liability, loss of expectation of life costs and interest awards, the only issues left for contention are the awards of pain and suffering and loss of dependency.
28. This being the first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified.
29. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (VP) stated that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make



due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".

30. The trial court awarded Kshs 30,000 which the appellant opines is high and that the trial court should have awarded between Kshs 10,000 and 15,000. 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."

31. The trial court in this case found that the deceased died on the spot. I agree with this finding. This is supported by the P3 form, the police abstract and the death certificate that all indicate that the deceased died on October 26, 2019. In the case of *Sukari Industries Limited v Clyde Machimbo Juma* Homa Bay HCCA No 68 of 2015 [2016] eKLR Majanja J captured the spirit of and the law on the issue and stated that:

"(5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

32. Considering that the deceased died on the spot, the trial court retained the award of pain and suffering at Kshs 30,000/-.

33. Under the head of loss of dependency, the trial court adopted a multiplier of 28 years considering the retirement age in Kenya is 60 years, adopted the minimum wage at Kshs 13,572 considering that no evidence was availed that the plaintiff worked at/or owned a bar. The court used a dependency ratio of 2/3, the appellant suggests a ratio of 1/3 and a multiplier of 20 years given the vicissitudes of life nowadays. The appellant further opines that there was no proof of existence of the daughter or a relationship between the deceased and the daughter.

34. The court in the case of *Moses Koome Mithika & another v Doreen Gatwiri & another (suing as the legal representative and administrator of the Estate of Phineas Murithi (deceased))* [2020] eKLR while addressing a similar issue stated as follows;

"Accordingly, lack of certificate of marriage or certificate of birth does not necessarily deprive a person the identity or right of a dependant."



35. In this case, the letter by the chief and the evidence of PW1 was not controverted and are sufficient proof that the deceased was the mother of DM and was also survived by the parents, Vincent Yohana Nene and Beatrice Mbithe Nene. They are therefore entitled to make a claim under loss of dependency and more specifically under section 4(1) of the Fatal Accidents Act which states that;

“Every action brought under the act shall be for the benefit of the wife, husband, parents and children of the deceased whose death was so caused.”

36. In Mary Khayesi Awalo & another v Mwilu Malungu & another Eld HCCC No 19 of 1997 [1999] eKLR Nambuye J, stated that: -

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

37. In John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR, the court held as follows:

“It is therefore not clear as to what the deceased did for a living. In my view, allocating the deceased an occupation on which to base the minimum wage would amount to speculation.... I am of the considered view that the award of the trial court should be set aside. A lump sum of Kshs 400,000/= as general damages will be sufficient in the circumstances of this case.”

38. In this case there was no proof of income placed before the court, I therefore find that a global award would have been more appropriate. In determining this award, this court is guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages as was stated in the case of Michael Rimiri M'ingetha & another v Zipporah Mukomua M'ituri [2020] eKLR

39. In MNM & another v Solomon Karanja Githinji [2015] eKLR, the court gave a global figure of Kshs 3,000,000/- where the deceased was 46 years old running a butchery in Nairobi.

40. The deceased herein was 32 years old, I find that a global award of Kshs 2,500,000 would be appropriate in the circumstances.

41. In the end the appeal partly succeeds and the trial court judgment is substituted as follows;

- a. Liability 100%
 - b. Pain and suffering Kshs 30,000/-
 - c. Loss of expectation of life Kshs 100,000/-
 - d. Loss of dependency Kshs 2,500,000/-
 - e. Special damages Kshs 66,575/-
- Total Kshs 2,196,575/-

42. It is so ordered.

**DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 17TH APRIL, 2023.
(PHYSICAL/VIRTUAL CONFERENCE)**



M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Mwangangi. -for The Appellant - Present Online

Mr. Mochama - For The Respondent Present Online

Patrick - Court Assistant

Ms Mwangangi: We Seek For Stay Of Execution For 30 Days.

COURT:The stay of execution granted.

M.W. MUIGAI

JUDGE

