



**Electrical Link Eastafrica Ltd & another v Munyao & another (Suing as the Next of Kin to and on Behalf of the Estate of) David Munyao - Deceased) (Civil Appeal 471 of 2015) [2023] KEHC 18114 (KLR) (Civ) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18114 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 471 OF 2015**

**JN NJAGI, J**

**MAY 16, 2023**

**BETWEEN**

**ELECTRICAL LINK EASTAFRICA LTD ..... 1<sup>ST</sup> APPELLANT**

**JOEL KIOKO MATATA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSHUA MUE MUNYAO ..... 1<sup>ST</sup> RESPONDENT**

**MARY MUENI MUE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE NEXT OF KIN TO AND ON BEHALF OF THE ESTATE OF)  
DAVID MUNYAO - DECEASED**

*(Being an appeal from the judgment and decree of Hon.Maisy Chesang, Resident magistrate, in Nairobi CM's Court Civil Case No.4523 of 2012 delivered on 7/9/2015)*

**JUDGMENT**

1. The Respondents instituted suit against the Appellants in their capacity as Administrators of the estate of the deceased herein who was fatally knocked down by the Appellants' motor vehicle. They were seeking to recover damages under the Fatal Accidents Act and Law Reform Act. Parties entered consent on liability in the ratio of 50:50. They made submissions on quantum. The trial Magistrate then assessed damages and awarded the same as follows:

Pain and suffering Ksh.50,000/=

Loss of expectation of life Ksh.200,000/=

Loss of dependency Ksh.1,440,00/= (made as follows: -



$15,000 \times 12 \times 12 \times \frac{2}{3} = 1,440,000/=$ ).

2. The Appellants were dissatisfied with the assessment and filed the instant appeal. The grounds of appeal are that:
  1. The learned Magistrate erred in law and fact in awarding excessive damages in favour of the Plaintiff without any legal and or evidential justification and awarding damages under the Law Reform Act and Fatal Accidents Act concurrently without discounting.
  2. The learned Magistrate erred in law and fact in calculating loss of dependency using a multiplier of half ( $\frac{2}{3}$ ) without any justification in law or fact and failing to appreciate that the alleged dependants did not demonstrate their dependency or at all.
  3. The learned Magistrate erred in law and fact in condemning the Defendants on excessive quantum without any justification.
  4. The learned Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
  5. The learned Magistrate erred in law and fact in failing to appreciate as follows:
    6. That the Plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining any award of damages.
    7. The learned magistrate erred in law and fact in entering judgment in favour of the Plaintiff against the Defendants in spite of the Plaintiff's miserable failure to establish her case on quantum on a balance of probability.
3. The appeal was canvassed by way of written submissions.

#### **Appellant's Submissions -**

4. The advocates for the Appellants, Mose & Mose Advocates, submitted that the trial court erred in awarding Ksh.50,000/= for pain and suffering as the deceased died on the spot. That damages are not awardable where the deceased dies on the spot. In support of this proposition they relied on the case of James Mukolo Elisha & another v Thomas Martin Kibisu (2014) eKLR where it was so held. However, that in the event the court is inclined to make an award under this heading they urged the court to award Ksh.10,000/=. They cited the case of Joseph Muthuri v Nicholas Kinoti Kibera (2022) eKLR where Ksh.20,000/= was awarded for death occurring on the spot.
5. On loss of expectation of life the Appellant urged the court to award Ksh.100,000/= which is the conventional sum awarded by courts as stated in the case of Caleb Juma Nyabuto v Evance Otieno Magaka & another (2021) eKLR.
6. Under the Fatal Accidents Act, the Appellant submitted that the deceased died at the age of 48 years. That the trial court used a multiplier of 12 years. That in adopting such a multiplier the court failed to take into consideration the vicissitudes of life.
7. It was submitted that the Respondents did not produce a letter from the chief to prove that the deceased had children and a wife. Neither did they produce birth certificates to prove that he had children. That the trial court erred in using a dependency ratio of  $\frac{2}{3}$ .



8. The Appellant submitted that there was no evidence that the deceased was a taxi driver as pleaded nor that he was earning Ksh.15,000/ per month. That it was all speculation that the deceased was a taxi driver. Consequently, it was submitted that the multiplier approach used by the trial court was in error and should be set aside. The court was urged to instead apply the global approach method of award. The Appellant relied on the case of James Muloko Elisha & another v Thomas Martin Kibisu (2014) eKLR where it was held that the trial Judge was justified in finding that the dependency of the family members was not proved as the Respondent did not adduce any documentary evidence to prove so. Also cited was the case of Gilbert Kimatare Nairi & another (suing as personal representatives of the estate of Lemayian Richard Kimatare (Deceased) v Civiscope Limited (2021) eKLR where Mwita J stated that there was no concrete evidence what the deceased's earnings were. That it was stated that he was a farmer earning Ksh.15,000/= per month which was not employment where minimum wage could be applied. The case of Michael Mwangi Kagwe & another (Suing as the administrators of the estate of Peter Maina Mwangi (Deceased) v Joel Munungi Arim, Nakuru HCCA No Eo45 of 2021 [2022] KEHC 3295 (KLR) where Matheka J. upheld a global award of Ksh.600,000/= since there was no evidence that the deceased was in employment earning a salary. The Appellant urged the court to interfere with the award and substitute it with its own finding.

### **Respondent's submissions –**

9. The advocates for the Respondents, L.M. Wambua & Co. Advocates, on the other hand submitted that the deceased died on the same day of the accident. That he suffered pain and the award of Ksh.50,000/= for pain and suffering was not inordinately high. They relied on the case of John Jembe v Seif Mbaruku t/a Takrim Bus & others (unreported), Mombasa HCCC No. 523 of 2001, where Ksh.20,000/= was said to have been made under this head.
10. The Respondents submitted that the award on loss of expectation of life was not based on wrong grounds or misapprehension of the evidence. That the award of expectation of life is usually based on the principle that the deceased has been deprived of life due to the wrongful act of a tortfeasor. That there was no evidence placed before the court by the Appellant that the deceased was ailing before the accident that would have shortened his life. They therefore supported the award and relied on Civil Appeal No. 35 of 2014 Eldoret, Coroline Leah Awino (Also as Aduogo Caroline v Francis Kipsang Ngetich (Suing as administrators ad litem and /or personal representative of the estate of Mary Jepkurgat (Deceased) where Ksh.150,000/= was awarded under this head to a deceased who was 48 years at the time of death.
11. On loss of dependency it was submitted that evidence was adduced that the deceased had a wife and children. That he was a driver with a tour company and was earning Ksh.15,000/= per month. That he was in good health and it is likely that he might have lived to the age of 60 years. That the court was not wrong in using a multiplier of 12 years.
12. It was submitted that the deceased's wife testified that she had six children with the deceased. That a dependency ratio of 2/3 was proper. The Respondents relied on the case of Agnes Bosibori Ogega v Tea Research Foundation & Joseph Mawia Mutisya (2006) eKLR where the court held that:

.....the plaintiff testified that she was married to the deceased and they were blessed with five children aged between 21 years and 12 years. Although the plaintiff did not produce any documentary evidence to support her contention that she was married to the deceased, her evidence was uncontroverted. I therefore hold that she has established on a balance of probabilities that she was married to the deceased.



13. It was consequently submitted that the court did not err in finding that the Plaintiff was the deceased's wife and that the deceased had dependants.
14. The Respondents also relied on the case of George Moga (Suing on his behalf and that of the estate of the late Joyce Adema in his capacity as the legal representative as well as on behalf of the named dependants of the said Deceased) v The National Women's Hospital & 3 others where the deceased was 41 years old and a multiplier of 25 years and a ratio of 2/3 were used. Consequently, it was submitted that the award of Ksh.1,440,000/= was not inordinately high and should not be disturbed.

#### **Analysis and Determination –**

15. The appeal is on quantum of damages. The grounds under which a court may interfere with an award of damages made by a lower court are well settled. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] Kneller J.A. stated that:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

16. In *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5, the Court of Appeal held 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 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 ....

17. The trial court awarded Ksh.50,000/= for pain and suffering. The statements which were filed in court indicated that the deceased died on the spot. That however does not mean that the deceased did not experience pain however short it was. In the case of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR where the deceased had died on the spot, Majanja J. held 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 the sum of Kshs 50,000 awarded under this head is unreasonable...

18. The Appellant argued that the award of Ksh.50,000/= for pain and suffering was inordinately high. However, in the case of *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR, Mativo, J upheld an award of Ksh. 50,000/= where the deceased was said to have died on the spot. In *Mosonik & another v Cheruiyot* (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR), Sewe J. reduced an award of Ksh.150,000,/= to Ksh.50,000/= for instant death. In view of these authorities the trial court was within its discretion to award Ksh.50,000/= for pain and suffering.



19. The trial court awarded Ksh.200,000/= for loss of expectation of life. Courts have normally awarded conventional sums of Ksh.100,000/= under this head. However, awards over that figure have been made. In the case of Citi Hoppa Bus Limited & Another v Maria Clara Rota [2021] eKLR an award of Ksh. 200,000/= was made for loss of expectation of life where the deceased was aged 33 years old. In the Mosonik & another v Cheruiyot case (supra) an award of Ksh.200,000/= was upheld under this head. I therefore find no reason to interfere with the award.
20. On loss of dependency the deceased died at the age of 48 years. The trial court used a multiplier of 12 years. In my view the multiplier of 12 years was reasonable. It was not demonstrated that the trial court applied a wrong principle of law in arriving at that multiplier. The same is supported by case law. In Hussein Shariff Ali v Grace Karee Mutia (Suing as the legal representative of the Estate of John Mutua (Deceased)) [2021] eKLR the court upheld a multiplier of 15 years where the deceased died at the age of 48 years. Similarly, in Richard Nyamweya Oruru v Alice Kemunto Ombori & another [2020] eKLR, the court upheld a multiplier of 12 years where the deceased died at age of 48. I do not see any reason to interfere with the multiplier used by the trial court.
21. The Appellant submitted that it was not proved that the deceased had dependants as no documents such as the Chief's letter were produced. The 1<sup>st</sup> Respondent pleaded that she was a wife to the deceased. She took stand in court and testified that she was indeed wife to the deceased. She obtained an ad litem grant from the court to enable her file this suit. The evidence that the 1<sup>st</sup> Respondent was the deceased's wife was not controverted. In the premises, the 1<sup>st</sup> Respondent did prove that she was a wife and a dependant to the deceased.
22. The 1<sup>st</sup> Respondent testified in court that she had 6 children with the deceased. She said that all of them have identity cards which means that they are all adults. There was no evidence adduced that these adult children were dependent on the deceased. However, since the Respondents did prove that the deceased had a wife as a dependant, the dependency of a wife was sufficient to support a claim for loss of dependency under the *Fatal Accidents Act*. Thus, the dependency ratio of 2/3 used by the trial court was proper.
23. The deceased's wife pleaded that the deceased was a taxi driver earning Ksh.15,000/= per month. She stated the same thing in her evidence in court. She stated in cross-examination that the deceased used to drive tourists. The Respondents however did not produce any document to prove that the deceased was a taxi driver.
24. In the case of Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR the Court of Appeal held that documents are not the only thing that can prove the profession of a person. The court held: -

“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail.”



25. The evidence of the deceased's wife that the deceased was a taxi driver was not controverted even in cross-examination. The fact that the witness did not produce documents to prove that the deceased was a taxi driver should not defeat her case. According to the witness the deceased was earning Ksh.15,000/= in a month which calculates to Ksh.500/= per day. This amount is even less than what a labourer earns in a day in the open market. I find the earnings reasonable. The issue that the trial court should have awarded a global sum instead of using the multiplier method was not raised at the lower court. In my considered view the trial court was not at fault in using the multiplier method instead of the global/lumpsum method of approach in awarding damages. The earnings of Ksh.15,000 per month is thereby upheld.

26. In the final end, this court finds no merit in the appeal and the same is dismissed with costs to the Respondent.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF MAY 2023.**

**J. N. NJAGI**

**JUDGE**

In the presence of: -

..... for the Appellant

..... for the Respondent

Court Assistant – Amina

30 days Right of Appeal

