



**Mutinda (Deceased) v Maraga t/a Mwamasaburi Hydrotech Services & another (Civil Appeal E216 of 2022) [2023] KEHC 18009 (KLR) (Civ) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18009 (KLR)

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

**CIVIL**

**CIVIL APPEAL E216 OF 2022**

**JN MULWA, J**

**MAY 19, 2023**

**BETWEEN**

**PAUL MBEVI MUTINDA (DECEASED) ..... APPELLANT**

**AND**

**PETER KIOMORI MARAGA T/A MWAMASABURI HYDROTECH SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**MARK MUEMA MUIA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appeal arises from the judgment of the trial court delivered on the 24/03/2022 in Milimani CMCC N. E829/2021.

The cause of action was a traffic road accident whereupon the late Paul Mbevi Mutinda lost his life. Upon hearing the suit bought by the Administrator of the deceased estate against the owner of the accident vehicle, the court awarded the Estate damages as follows: -

- i. Loss of dependency - Kshs. 1,000,000/=
- ii. Loss of expectation of life - Kshs. 100,000/=
- iii. Pain and suffering - Kshs. 20,000/=
- iv. Special damages - Kshs. 23,900/=

2. The matter of liability was resolved by a consent of the parties at 80:20 in favour of the Estate/Appellant.

The Appellant (then Plaintiff) was dissatisfied with the awards of damages, stating that the award was manifestly low and urged for reassessment by this court.



3. Both parties filed written submissions to urge their respective positions.

I have considered the same as well as the cited decisions.

4. This is a first appellate court, which is mandated to re-evaluate the evidence tendered before the trial court, and reach its own conclusions. The court is also aware that while performing its duty, it should be slow to alter with the trial court's findings on questions of fact as it is the trial court that had the benefit to see and hear the parties and their witnesses testify.

However, in the process should the court find that the judgment is not based on the evidence before it, or on a misapprehension of the evidence before it, it should be ready to interfere with the findings as having been founded on wrong principles – *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* 2004) eKLR.

5. The Appeal is principally on the matter of damages awarded to the Appellant, the Appellant stating that the same are manifestly low and founded upon misapplication of the law and facts, and consideration of irrelevant matters and wrong exercise of the trial Magistrate's discretion.

6. I have perused and considered the reasons stated in the judgment of the trial court, and the entire evidence tendered before the said court.

The only issue for determination is whether the damages awarded under the various subheads is manifestly low so as to invite this court to interfere with upwards.

7. A brief background from the Appellants' plaint shows that the deceased, Paul Mbevi Mutinda was 28 years old when he met the untimely death; that he was a welder, working as a casual labourer at Kabarnet, Baringo County and earning approximately Kshs. 20,000/= per month.

The plaint dated 19/11/2021 further states the deceased's dependents as his four sisters and one brother (the Plaintiff) but their ages are not stated. It was not stated whether he was married or not, or whether he had any children.

8. From a perusal of the proceedings, it appears that the assessment of damages, was based on the parties' Advocate submissions as no indication that the plaintiff testified or at all; for the appellant dated 4/08/2021 and none for the Respondent.

There is too no record as to whether the Appellant's (plaintiffs) documents were admitted as evidence by consent, as none were produced by the plaintiff; who once again, no record of his evidence is on record.

9. Nonetheless, the trial magistrate in his judgment dated 24/03/2022 alluded to none of the documents but states to have considered the appellants' (plaintiffs) submissions on quantum of damages; without citing any relevant of any decisions in respect of the principles on assessment of damages, no the comparable decisions as to arrive at a well thought and reasoned decision on the damages on the sub-heads.

10. Notwithstanding the above, I shall look at the Appellants' documents and the submissions before the trial court, and before this court to guide the court in the determination of this appeal, as well as the submissions.

### **Special Damages**

11. The Appellant has no fault on the award of Kshs. 23,900/= and it is not a ground of appeal in the memorandum of appeal dated 7/04/2022. That which is not pleaded as a ground of appeal cannot be subject of interrogation by the appellate court.



The Respondents have no issue with the award of special damages as at paragraph 29 of their submissions, they acknowledge that the said sum of Kshs. 23,900/= was duly pleaded and strictly proved with visible receipts. This award is upheld.

#### **Damages under the Law Reform Act.**

12. This sub-head includes pain and suffering and loss of expectation of life.

The trial court awarded Kshs. 20,000/= and Kshs. 100,000/= respectfully.

#### **In The Respondent's View,**

13. The award under this head are fair and just.

The deceased died on the spot. The awards across board in comparable authorities attest to this. In the Hyder Nthenya Musili & Another v. China Wu Yi Limited & Another, (2017) eKLR the court awarded similar awards.

14. Surprisingly, the appellant in his submissions did not mention this sub head of damages. The court is therefore left with no option but to find and hold that the award by the trial court are fair and just, and is therefore upheld.

#### **Damages under the Fatal Accidents Act**

15. This claim constitutes three aspects, being the age of the deceased, the multiplicand, and the dependency ratio;

Under Section 8 of the Fatal Accidents Act, the Plaintiff/Claimant is required to deliver full particulars of the persons for whom damages claimed in every action under the Act. Indeed, the plaintiff did not fully comply with the above requirement. He failed to state the ages of the stated dependents including his own age.

16. On the deceased income, I have noted that no evidence of his alleged salary of Kshs. 20,000/= from his welding venture has been tendered. That I understand because being a casual labourer, a pays lip of a bank account may not have been available See Multiple Hauliers (EA)Ltd & Another vs. William Abiero Ogeda (suing as the representative of Christine Arglera Obiero (deceased) & 2 others [2016].

17. In the case of Jacob Ayiga Maruja & another vs. Simeon Obayo [2005] eKLR, the court (Musinga J, as he was then) rendered that there are many methods that may show a deceased's earnings in the absence of production of a pay slip of a bank account or other documents.

18. In this case, the Plaintiff produced no documents or at all other than stating that the deceased was a welder/casual worker.

In the circumstances, the Government Minimum Wages Guidelines for the period July, 2018 comes to the aid of the court.

I have taken the liberty to look at the minimum wages guidelines for the relevant period, being under Legal Notice No. 3 of 2018.

For a general labourer, under which the deceased falls, monthly earning are stated as Kshs. 12,523/= other than in Nairobi, Mombasa and Kisumu.

I shall therefore adopt the sum of Kshs. 12,500/= per month as the deceased's earnings, which is referred to as the multiplicand- the annual net income.



19. The multiplier is calculated on the expectation of working life of the deceased and the proportion of his net income which he would have made available for his dependents.

As ably analyzed in the case I have stated above that no evidence was tendered that the deceased had a family of his own.

20. Following therefore, this court will be wrong to hold that out of his earnings, the deceased would ordinarily spend 2/3 of the earnings to himself, and may be use the 1/3 to help his sisters and brothers stated as his only dependents.

21. The formula stated in the case *Beatrice Wangui Thairu vs. Hon. Ezekiel Bangetuny and Another* Nairobi Hccc. No. 1638 of 1988(UR) will be applied as the Learned Judge Ringera stated.

22. Stated simply, the loss of dependency would be: -

The net earnings of the deceased, multiply the same with a reasonable figure representing so many years purchase – called the multiplier; taking into account the expectation of life of the deceased, expectation of life of the dependants, and the chances of life of the deceased's dependants.

23. It is trite that the choice of a multiplier is a discretion of the court, that has to be exercised judiciously with reason-

The deceased died at the age of 28 years. There is no evidence that he was not in good health

Thus to ascertain he expected working lie of the deceased, certain relevant factors would be considered like the kind of work he was engaged in, and prospects of promotion- *Roger Dainty vs. Mwinyi Omar Haji & Another* (2004) eKLR

24. I have looked at comparable decisions.

The appellant proposes a multiplier of 32 years – that would bring the age to 60 years. For a healthy person, at the official retiring age of 60, a person would still be strong to engage in other income generating ventures; more so in informal businesses as was the case in this suit.

However, life is unpredictable, with its vulgarities and uncertainties.

25. For guidance, I have considered the following decisions;

In *Simon Karanja Mirungu (deceased) v. Zacharia Nyambura Karanja* [2017] eKLR, the deceased was 34 years, a multiplier of 24 was adopted.

In *Sidi Kazungu Gohu (legal representative of the Estate of George Yongo Katana) v. Fatuma Abdi Mohamed & Another* [2021] eKLR, the deceased was 34 years old when he met his death. A multiplier of 24 was adopted.

26. In *Broadway Bakery Ltd vs. Phyllis Wakonyu Waweru (suing as the personal representative of Samuel Wachira Mwangi* [2019] eKLR, the deceased was 30 years old, and the court adopted a multiplier of 15 years.

Further in *Festus Akolo & Another vs. Dickson Taabu Ogutu* [2016] eKLR, the court adopted a multiplier of 25 years for the deceased who died at 30 years.

27. By the above comparable decisions, upon taking into consideration vicissitudes of life, I am persuaded to adopt a multiplier of 30 years

This the loss of dependency would therefore be calculated as follows:



$12,000 \times 12 \times 30 \times 1/3 = 1,440,000$

28. The upshot is that the appeal succeeds partially and the trial courts award in damages for loss of dependency is set aside, and substituted one for Kshs. 1,440,000/=.

The trial awards in damages are therefore as follows: -

- i. Special damages - 23,900/=
  - ii. Pain and suffering - 20,000/=
  - iii. Loss of expectation of life - 100,000/=
  - iv. Loss of dependency - 1,440,000/=
- Total - 1,583,900/=
- Less 20% - 316,720/=
- 80% - 1,267,120/=
29. Special damages shall attract interest at court rates from the date of filing suit; while all the other awards under general damages shall attract interest from date of this judgment.
30. The Appeal having succeeded partially, each party shall bear own costs.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2023.**

**JANET MULWA**

**JUDGE**

