



REPUBLIC OF KENYA



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Ntiritu & another v Raiboni & another (Suing as the legal representatives of the Estate of Wilson Gikundi M’Mbijwiwe (Deceased)) (Civil Appeal E066 of 2021) [2023] KEHC 18068 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E066 OF 2021
EM MURIITHI, J
MAY 18, 2023**

BETWEEN

PATRICK MUTUMA NTIRITU 1ST APPELLANT

KENNEDY MWENDA KINYUA 2ND APPELLANT

AND

SOLOMON KIMAITA RAIBONI 1ST RESPONDENT

DOREEN NKIROTE 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF WILSON
GIKUNDI M’MBIJIWE (DECEASED)**

*(An appeal from the Judgment and Decree of Hon. E. Tsimonjero
(R.M) in Meru CMCC No.238 of 2019 delivered on 5/5/2021)*

JUDGMENT

1. By an amended plaint dated 20/1/2021, the Respondents sued the Appellants seeking general damages under both the Law Reform Act and Fatal Accidents Act, special damages of Ksh. 169,880/=, costs of the suit and interest.
2. The Respondents pleaded that on or about 3/12/2018 at about 19.05 hours, the deceased was a lawful pedestrian along Nanyuki-Meru Road when the 2nd Appellants’ so carelessly, recklessly and/or negligently drove motor vehicle registration number KCH 645 N Isuzu Lorry that it veered off the road thus occasioning the deceased fatal injuries. They pleaded that the deceased was 41 years old at the time of his death and he used to support his family. As a result of his sudden untimely death, his estate has suffered loss and damage under both Law Reform Act and Fatal Accidents Act.



3. The Appellants denied the claim by their statement of defence dated on 4/12/2019 and prayed for the Respondents' suit to be dismissed. Upon full hearing, the trial court found the Appellants to be 100% liable for the accident, and awarded the Respondents general damages of Ksh.20,000 for pain and suffering, Ksh.100,000 for loss of expectation of life, Ksh. 2,000,000 for loss of dependency and special damages of Ksh.89,500 totaling to Ksh. 2,209,500 plus costs and interest.

The Appeal

4. On appeal, the Appellants filed their Memorandum of Appeal on 31/5/2021 listing 3 grounds as follows:
 1. The learned trial magistrate erred in law and fact by awarding inordinately high amount for pain and suffering without considering that the deceased died on the same day.
 2. The learned trial magistrate erred in law and fact by assessing damages to the Respondents at the sum of Ksh. 2,000,000/= for loss of dependency, which assessment is inordinately high considering the weight of evidence put forward by the Respondents.
 3. The learned trial magistrate erred in law and fact in ignoring the material evidence of the defence and the Appellants' written submissions on the issue of quantum.

Duty of the court

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

The Evidence

6. PW1 Doreen Nkirote adopted her statement dated 12/2/2021 as her evidence in chief together with the list of documents dated 26/7/2019. She further testified that, "I pray that the deceased be compensated as prayed for in the plaint."
7. On cross examination, she stated that, "The deceased is Wilson Gikundi. He was my brother in law. We were not living together. I did not witness the accident. We used Ksh. 80,230 as funeral expenses. We gave the receipts to the advocate. That was our budge. We do not have the receipts in court. I did not go to the scene. The deceased used to in scrap metal. He was also a farmer rearing pigs and children. He used to earn about Kshs. 800 per day from his scrap metal business. I have no evidence. He also used to get Kshs. 15,000/= per month from the sale of chicken. I have no evidence. He used to harvest potatoes twice a year. I have no evidence. The farming was done at our home. It is the deceased who used to support his family. I was informed of the accident by the eye witness one Peter. We were at the mortuary together with my sister. The deceased on the same day of the accident. I do not know if anybody was charged for the accident. I have never attended any other court to testify. Am not aware if the investigations have been completed. A pedestrian should walk on the left side. I do not know on which side the deceased was walking. The deceased was aged 42 years as per the death certificate. The deceased's children were being chased away from school. I have not produced evidence of the school fees. I have also not produced the prove that the deceased used to support the family."
8. On re-examination, she stated that, "My sister used to tell me that the deceased used to support them. The 1st born of the deceased is now 20 years. He was a student at Githongo Polytechnic at the time of the deceased's death. He finished. I have not taken the certificate. The 2nd born was 10 years. I now take



- care of her since both parents died. It is the deceased who had custody of the documents to prove his income. I do not know why I have never been called to testify in any other court.”
9. PW2 Peter Kimathi Kanga, adopted his statement recorded on 27/6/2019 as his evidence in chief.
 10. On cross examination, he stated that, “I have my Id (Identity confirmed). The accident occurred on 3/12/2018 at around 7.00 p.m. I was headed to town at a place called crescent. Nanyuki-Naru Moro. I was on the left hand side of the road off the road. I was following the deceased from behind. A pedestrian should walk on the left hand side. I know that I have to walk facing the direction I am going. There is no pedestrian lane you only need to walk off the road. The deceased was not crossing the road. The weather was good. There was no rain. It was not dark. He was about 50 meters from me. The deceased was wearing a T-shirt (whitish). The deceased was completely off the road/tarmac about 5 meters. There were also animals grazing besides the road. The lorry was overtaking. I did not know the registration number of the motor vehicle that was being overtaken. I cannot tell if the deceased had seen the lorry. There was a very short distance between the lorry and the deceased. There is no way the deceased could have escaped the accident. There is a hillslope that he could not climb over. The deceased did nothing to avoid the accident. According to me the motor vehicle was in high speed because the deceased died on the spot together with the cattle that were knocked. There was careless driving. The deceased was not in the tarmac. It was at a corner. I did not record a statement with the police. It is me who explained to the police what happened. I also accompanied them to the mortuary. I have never testified before any other court. I do not know if anybody was blamed.”
 11. On re-examination, he stated that, “The distance between the deceased to the tarmac is about 5 meters. The deceased was not on the road. The motor vehicle was in high speed because of the impact. The deceased was dragged from the side to the road. The cattle died. It is in a corner. A motor vehicle overtaking another should be at higher speed than the one being overtaken. The motor vehicle was in high speed. The scene is at a corner. The motor vehicle hit the deceased and the cattle. It did not roll/ overturn. I blame the driver. It was at a corner and one should not overtake at a corner. The speed was too high.”

Submissions

12. The Appellants urge that since the deceased died on the spot, the trial court ought to have treated the death as instantaneous and awarded Ksh. 10,000 for pain and suffering, and cite *Ali Issa v China Road & Bridge Corporation* (2011) eKLR, *Teresia Sebastian Massawe (Suing as the Legal Administratrix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic (Kenya Office & another))* (2018) eKLR and *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. They fault the trial court for taking into account an irrelevant factor or failing to appreciate the relevant evidence thereby awarding a global sum of Ksh. 2,000,000 which was excessive, and cite *Moses Maina Waweru v Esther Wanjiru Githae (Suing as the Personal Representative of the Estate of the late David Githae Kiririo Taiti)* (2022) eKLR and *Gilbert Kimatare Nairi & another (suing as personal representatives of the Estate of Lemayian Richrd Kimatare (Deceased) v Civiscope Limited)* (2021) eKLR. They urge the court to take into account the sum of Ksh. 1,000,000 already paid to the Respondents in reviewing the award for loss of dependency from Ksh. 2,000,000 to Ksh. 750,000.
13. The Respondents submit that the Appellants have not established that the trial court applied any wrong principle or that the award was extremely high as to make it an erroneous estimate of the damage, and cite *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR. They urge the court to find the amount of Ksh. 20,000 to be reasonable as the deceased suffered immense pain and suffering before his death, and cite *Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir (Suing as admin*



of the estate of Bernard Soita Nyongesa (deceased) (2022) eKLR. They urge that the global award of Ksh. 2,000,000 for loss of dependency was reasonable noting that the deceased was a healthy man of 42 years, who was survived by his wife and 2 children who all depended on him, and cite *Stanley Muiru Njuguna & another v SK (2019) eKLR* and *Jacob Ayiga Maruja & another v Simeon Obayo* (2005) eKLR. They pray for the appeal to be dismissed and the trial court's award to be upheld.

Analysis and Determination

14. The issues for determination are whether the awards of Ksh. 20,000 for pain and suffering and Ksh. 2,000,000 for loss of dependency were excessive and whether the trial court considered the Appellant's defence and submissions.
15. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the court of appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

“It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470)”

Pain and Suffering

16. There is no doubt that the deceased herein died on the spot. Does that then mean that he did not endure any pain at all? The court respectfully notes the case of *Sukari Industries Limited v Clyde Machimbo Juma (2016)* eKLR, cited by the Respondents, where the court (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 that the sum of Kshs 50,000 awarded under this head is unreasonable.”

17. This court finds that the sum of Ksh.20,000 awarded by the trial court for pain and suffering was reasonable, as the deceased, albeit succumbing to the injuries on the spot, underwent some form of pain.

Loss of dependency

18. When PW1 was cross examined, she stated that, “The deceased used to deal in scrap metal. He was also a farmer rearing pigs and children. He used to earn about Kshs. 800 per day from his scrap metal business. He also used to get Kshs. 15,000/= per month from the sale of chicken. I have no evidence. He used to harvest potatoes twice a year. The farming was done at our home. It is the deceased who used to



support his family... The deceased was aged 42 years as per the death certificate. The deceased's children were being chased away from school. I have not produced evidence of the school fees. I have also not produced the prove that the deceased used to support the family.” On re-examination, she stated that, “My sister used to tell me that the deceased used to support them. The 1st born of the deceased is now 20 years. He was a student at Githongo Polytechnic at the time of the deceased's death. He finished. I have not taken the certificate. The 2nd born was 10 years. I now take care of her since both parents died. It is the deceased who had custody of the documents to prove his income.”

19. Although it is factual that the deceased was engaged in the scrap metal business, farming as well as rearing of pigs and chicken, which obviously generated some form of income, there was no evidence to proof his exact earnings and the trial court properly opted to adopt a global approach as opposed to a multiplier approach. It is clear from the testimony of PW1 that the deceased was survived by a wife, who had since died and 2 children aged 20 years and 10 years. PW1 told the court that after the death of the wife to the deceased, she took in the smaller child of the deceased. This court finds that, like every married man, the deceased supported his wife and 2 children from his numerous income generating ventures.
20. It is therefore this court's finding that the trial court's award of a global sum of Ksh. 2,000,000 for loss of dependency was justified in the circumstances. In the end, this court is satisfied that the trial court applied the correct legal principles in arriving at the awards of Ksh.20,000 for pain and suffering and Ksh.2,000,000 for loss of dependency. There is, therefore, no occasion to interfere with the assessment of damages by the trial court on the test of *Butt v. Khan* (1981) KLR 349, 356, per Law, JA. 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.”

Consideration of the Appellants' defence and Submissions

21. The Appellants filed a statement of defence on 4/12/2019 vehemently denying the claim and blaming the deceased for the accident. The Appellants closed their case without calling any witness to support their defence or rebut the Respondents' evidence, and they cannot now be heard to fault the trial court for failing to consider that bare defence. Regarding the non-consideration of their submissions, the court finds that fault to be entirely unfounded as the trial court duly took into account both sets of submissions before reaching the decision it did.

ORDERS

22. Accordingly, for the reasons set out above, the court finds that the appeal has no merit and it is dismissed.
 23. The appellant shall pay costs of the appeal to the Respondent.
- Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:



M/S G. N. Mugo & Co. Advocates for Appellant.

M/S Thurania Atheru & Co. Advocates for the Respondents.

