



**Gitonga v JM & MW (Suing as the legal representatives of the Estate of the Late DK
(Civil Appeal E070 of 2021) [2023] KEHC 19273 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E070 OF 2021
EM MURIITHI, J
JUNE 22, 2023**

BETWEEN

DAN MURIUKI GITONGA APPELLANT

AND

**JM & MW (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
THE LATE DK) RESPONDENT**

*(An appeal from the Judgment of Hon. E. M Ayuka (S.R.M)
in Nkubu PMCC No.100 of 2019 delivered on 25/3/2021)*

JUDGMENT

1. By a plaint dated October 30, 2019, the Respondent herein sued the Appellant herein seeking payment of special damages, general damages together with costs and interest. The Respondent pleaded that on or about 4/3/2019 at about 1700 hrs, the deceased was lawfully and carefully walking along Mitunguu - Nkubu Road at Gaceero area, when the Appellant's appointed driver/employee so negligently and carelessly drove motor vehicle registration No. KBS 926 E Toyota Probox that it veered off the road and knocked down the deceased thereby occasioning him fatal injuries. The deceased was a young boy, with a bright future and was doing well in school. The family lost a child who they really loved and had great hope for the future. As a result of the death of the deceased, his parents have suffered emotionally, socially and his estate has suffered loss and damage.
2. The Appellant denied the claim by his statement of defence filed on 2/3/2020 and prayed for the Respondent's suit to be dismissed.
3. Upon full hearing, the trial court awarded general damages for pain and suffering of Ksh. 10,000, Ksh. 100,000 for loss of expectation of life, Ksh. 800,000 for loss of dependency and special damages of Ksh. 140,400 = Ksh. 1,050, 400 together with costs and interest.



The Appeal

4. On appeal, the Appellant filed his Memorandum of Appeal on 9/6/2021 listing 10 grounds as follows:
 1. The learned trial magistrate erred in law and fact in duly disregarding the Appellant's evidence adduced in trial.
 2. The learned trial magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on both points of law and facts.
 3. The learned trial magistrate erred in law and misdirected himself as to the exact cause of the accident and the nature of the Respondent's injuries and therefore erred in law and in his assessment of damages.
 4. The learned trial magistrate erred in law and fact and misdirected himself in finding that the Respondent is entitled to general damages of Ksh. 1,050,400/= which amount is manifestly excessive for the injuries suffered.
 5. The learned magistrate erred in law and fact in unduly disregarding the judicial authorities cited by the Appellants which are related to the injuries and the evidence adduced in trial.
 6. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
 7. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent and further failed to apply the precedents and tenets of law applicable.
 8. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
 9. The learned magistrate erred in law and fact in arriving at his said decision.
 10. The learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

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 MW, one of the Respondents, adopted her statement dated 3/8/2020 as part her evidence in chief and produced the documents on the list of documents as P. Exb. 1 to 10. She testified that, "I stay at Mitinguu. I am a peasant farmer. The deceased was my son. He was involved in an accident. The motor vehicle belongs to the defendant."



7. On cross examination, she stated that, “I did not witness the accident. The defendant is the owner of the motor vehicle which caused the accident. I have filed documents to show that he is the owner of the accident motor vehicle. I have filed a police abstract. The child was alive. He was not accompanied by an adult. I am the mother of the deceased child. I have no documents but I have the death certificate.”
8. On re-examination, she stated that, “I filed a Misc. Succession application. I was issued with Ltd grant to file suit. The police abstract shows the owner of the Motor vehicle. I had a small child then.”
9. PW2 Sabina Karamuta, adopted her statement dated 3/8/2020 as her evidence in chief.
10. On cross examination, she stated that, “The motor vehicle was at a very high speed. I was walking alone the road. The motor vehicle came from ahead. It was moving in a zig zag manner. I did not read the speedmeter but I could see it was on high speed. The children were alone on the road.”

Submissions

11. The Appellant submits that the court’s award on loss of dependency was inordinately high, as a global award of Ksh. 300,000 would have sufficed, and cites *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* (2013) eKLR and *Rosemary Onyango & another v Mobamed Jenjewa Ndoyo & another* (2019) eKLR. He submits that the sum of Ksh. 10,000 would suffice since the deceased died on the same day. He faults the trial court for failing to deduct the award under the *Law Reform Act* from the *Fatal and Accidents Act*, which amounted to double award, and cites *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* (2015) eKLR, *Seremo Korir & another v SS (Suing as the legal representative of the estate of MS, Deceased* (2019) eKLR, *Patrick Barasa v Serah Wambui Karumba (suing as the legal representative of the estate of late Albert Chebaya* (2019) eKLR and *Francis Wainana Kirungu (suing as personal representative of the estate of John Karanja Wainaina (Deceased) v Elijah Oketch Adellah* (2015) eKLR. He urges the court to allow the appeal with costs and substitute the trial court’s awards with the proposals made herein.
12. The Respondent faults the Appellant for failing to call any witness to support his defence, and cites *Edward Mariga (Suing through Stanley Mobisa Mariga) v Nathaniel David Schluter & another* (1997) eKLR, *Franciah Njeri Grace v Isaiah Ngararika Muindi & Anor* (2012) eKLR, *Esther Nduta Mwangi & Another v Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007* and *Gough v Thorne* (1966) WLR 1387. She urges that the awards on quantum made under the various heads were proper, and cites *S.M.K v Josephat Nkari Makaga* (2017) eKLR, *Daniel Mwangi Kimemi & 2 others v JGM & SMM (the personal representatives of the estate of N K (DCD) [2016]* eKLR and *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased) (2020) eKLR*. She submits the award under special damages was duly proved by receipts produced in court, and urges the court to dismiss the appeal with costs.

Analysis and Determination

13. Before delving into the merits of the appeal, the Appellant has introduced the issue of double compensation in his submissions. That issue was discussed by this court in KBT HCCA No. 1 of 2018, (Formerly Nakuru HCCA No. 147 of 2015) *David Kenei Julius Cheretei v Zipporah Chepkonga (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii - Deceased)*, as follows:

“7. It is therefore clarified by the Court of Appeal in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Limited (supra)*, which binding on this Court, that that there is



no requirement for the trial court to discount or reduce the damages in *Fatal accidents Act* with the awarded recovered under the *Law Reform Act*. The submission by the appellant that the trial court “the trial magistrate erred by failing to deduct the award [under the *Law reform Act* of Ksh.100,000 for loss of expectation of life and Ksh.50000/- for pain and suffering] and thus made a double award is therefore erroneous.”

14. After considering the grounds of appeal raised by the Appellant, the issues for determination are whether the awards made by the trial court under the various heads were inordinately high; and whether the Appellant’s evidence, submissions and authorities were considered.

Inordinately high damages

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. According to the Post mortem report, the deceased died on the same day while undergoing treatment at Mitunguu Hospital. This court finds that the sum of Ksh.10,000 for pain and suffering awarded by the trial court was therefore justified and warranted in the circumstances.

Loss of expectation of life

17. It is trite law that the conventional figure awardable under this head is Ksh.100,000, which is what the trial court awarded.

Loss of dependency

18. Dependency is a matter of fact and must be proved by evidence. PW1 recorded in her statement dated 3/8/2020 that, “Out of the subject accident I lost my son aforesaid who was in school water ocean academy and doing so well in school PP2 class. He had a very promising future who wanted to be a doctor when he grew up. He was only 5 years of age.”
19. That evidence was not challenged by the Appellant on cross examination, and therefore it remained uncontroverted.
20. In awarding a lump sum of Ksh. 800,000 for loss of dependency, the trial court properly took into account the age of the deceased, the uncertainties of life, the uncertain earning capacity and the period the dependency could have subsisted.
21. This court finds that the trial court’s award of Ksh.800,000 for loss of dependency was reasonable.



22. This court is satisfied that the award of Ksh. 140,400 was specifically pleaded and strictly proved by the receipts on record.

Consideration of the Appellant's evidence, submissions and authorities

23. The Appellant accuses the trial court of failing to consider his evidence yet he did not tender any or file any witness statements, and therefore his defence remained bare. The Appellant further accuses the trial court of ignoring his submissions and authorities. I respectfully agree with the court in Joshua Mung'athia v Evarick Muthuri Ntoiba & another (Suing as the Legal Representatives of the Estate of Fredrick Ntoiba Baraya (Deceased) [2021] eKLR, ((P.J.O Otieno J.)) on this issue:

“This grievance, in reality ought not be taken seriously when regard is taken of the court's mandate on a first appeal. It bears no premium that the submissions were not regarded when the appellate court is to carry out a re-evaluation in order that it comes to its own conclusions. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellant's submission. While I consider it important that parties' industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal.”

24. Besides, the fact that the trial court failed to agree with the submissions of the Appellant together with the authorities he cited does not mean that they were not considered.

Orders

25. Accordingly, for the reasons set out above, the appeal is unmeritorious and it is dismissed.

26. The Respondent shall have the costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF JUNE, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & Co Advocates for Appellant.

M/S Mutembei & Kimathi Advocates for the Respondent.

