



**Kanyi & another v GWS (Suing as a legal representative of the Estate of MNW - Deceased)
(Civil Appeal 200 of 2019) [2023] KEHC 18837 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 200 OF 2019**

**PM MULWA, J
JUNE 15, 2023**

BETWEEN

RICHARD KANYI 1ST APPELLANT

JOSEPH WAWERU MUNGAI 2ND APPELLANT

AND

**GWS (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF MNW -
DECEASED) RESPONDENT**

*(Being an appeal from the judgment of Hon. S. Atambo (SPM)
delivered on 25th November 2019 in Kiambu CMCC no. 115 of 2019)*

JUDGMENT

1. The appeal before this court is against the award of damages by the trial court in the sum of Kshs. 100,000/= for pain and suffering, Kshs. 200,000/= for loss of expectation of life, Kshs. 1,200,000/= for lost year less 20% contribution, special damages of Kshs 15,000/= costs and interest. Liability had been consented at 80: 20 in favour of the Respondent. The judgment was delivered on 25th November 2019. Aggrieved by the judgment the Appellant filed the Memorandum of Appeal dated 13th December 2019.
2. The appeal is mainly on the quantum. The grounds of the appeal are that: -
 - a. The Learned Magistrate erred in law and in fact in awarding a quantum of damages at 1,515,000/= with cost and interest.
 - b. The quantum is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard to the circumstances of this case before the subordinate court and the weight of precedents in similar circumstances.



- c. The Honourable Learned Magistrate misdirected himself by failing to consider the submissions by the appellant while arriving at the judgment
It was proposed to ask the court to;
 - i. Allow the appeal
 - ii. Assess the quantum of damages awarded downwards
 - iii. Costs of the appeal to be borne by the respondent
 - iv. Any further orders or reliefs.
3. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions. This being a first appeal this court is required to re-evaluate the evidence tendered in the trial court and come up with its own conclusion, bearing in mind that it did not have a chance to listen and see the witnesses who testified. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows: - “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
4. The parties filed written submissions.

Background

5. The Respondent through the legal representative filed the suit dated 28th February 2018 against the appellants seeking damages under the Fatal Accident Act, *Law Reform Act*, special damages of Kshs. 15,000/=, costs and interest of the suit, for the injuries sustained in a road traffic accident on 7th September 2017 along Nairobi - Limuru Road Avenue when the 3rd Defendant being the driver of Motor Vehicle KAR 918Y controlled and or managed the motor vehicle so negligently, recklessly and/ or carelessly that he caused the vehicle to lose control, veer off the road and violently hit the deceased causing severe bodily injuries to which he succumbed. The 1st and 2nd Defendant were blamed to be vicariously liable for the acts of the 3rd Defendant. The suit against the 2nd Defendant was withdrawn with no orders as to costs.
6. According to the plaint the deceased was a 10-year-old who suffered internal injuries, and the driver of KAR 918Y was liable for the said accident.
7. By a defence filed on 8th May 2018, the 1st and 3rd Defendant denied the occurrence of the accident and the particulars of the negligence levelled against the 3rd Defendant, the Defendant attributed the negligence of the accident to the Plaintiff.
8. A consent judgment was entered on 22nd July 2019, in terms of liability in the ratio of 20:80 in favour of the respondent against the appellants. The suit was heard through written submissions and all parties filed written submissions which the trial court considered.

Trial Court judgment

9. In awarding damages under the Fatal Accident Act, the trial court adopted a global figure approach since the child was of tender age and awarded Kshs. 1,200,000/= and Kshs 100,000/= for pain and suffering as the deceased died while undergoing treatment at Kihara Hospital. For loss of expectation of life an award of Kshs. 200,000/= was made as the deceased was 10 years of age.



Appellant's submissions

10. Counsel for the appellant filed submissions on 1st November 2022. It was submitted the award of the trial court on the head of general damages under the [Law Reform Act](#) and the Fatal Accident Act is excessive and should be set aside and substituted by a lower amount. According to the appellant, the deceased died immediately after the accident and thus the award of Kshs. 100,000 is excessive and urged the court to reduce the award to Kshs. 50,000/=. He cited the case of Joseph Gatone Karanja vs John Okumu Soita & Esther Chepkorir (suing as admin of the estate of Benard Soita Nyongesa -deceased) [2022] eKLR) where the court awards Kshs. 50,000/= for damages for pain and suffering where the deceased died moments after the accident.
11. Under the head loss of expectation of life, counsel submits that courts have adopted a lump sum global approach of Kshs. 100,000/= and there is no justification for deviation from the amount. He cited the case of Savannah Hardware vs EOO (suing as a representative of SO deceased) (2019) eKLR where the court awarded damages of Kshs. 100,000 for loss of life where the deceased was aged 10 years.
12. On the head for lost years the appellant submits the deceased was only 10 years with no dependants. The trial court award of Kshs. 1,000,000/= (read 1,200,000) was excessive considering similar authorities. He relied on the case of Chabhadiya Enterprise Limited & Anor Vs Gladys Mutenyo Bitali (suing as the administrator and personal representative of the estate of Linet Simiyu now deceased) (2018) eKLR where the court stated thus: - "I take the view that the multiplier method where it involves minors is merely speculative. In this appeal, the minor died at the age of 12 years. The court cannot know what the minor would have turned out to be in life"

The court adopted a lump sum award of Kshs. 700,000/= for a 12-year-old deceased.
13. The appellant urged the court to award a global sum of Kshs. 600, 000/=as a lump sum award. In conclusion, the appellant urged the court to set aside the award under pain and suffering, loss of life expectancy and lost years as proposed.

Respondent's submissions

14. By the submissions filed on 13th January 2023 the respondent submits the appeal as raising the issue of assessment of damages. According to the respondent special damages of Kshs. 15,000/=:, as awarded by the trial court, was properly pleaded and proved and urged the court to uphold the award of special damages.
15. Further counsel submits the award of general damages of kshs. 100,000/= for pain and suffering, kshs. 200,000/= for loss of expectation of life, and Kshs. 1,200,000/= for lost year was sound and proper in the circumstances of the case. That the deceased died at the age of 10 years and she did not die immediately after the accident as she died in Kihara Hospital where she was receiving treatment after a referral from Ndenderu Hospital. Counsel urged the court to uphold the decision of the trial court on the award of Kshs. 100,000/= for pain and suffering.
16. Under the head loss of expectation of life counsel submits the award of kshs. 200,000/= is proper and urged the court to be persuaded by Alexander Okinda Anangwe vs Reuben Muriuki Kahuha & Others (2015) eKLR where the deceased died as a result of the negligence of the defendant hospital after a complication arose after the delivery of a child. The court awarded her a sum of kshs. 200,000 for loss of expectation of life in 2015.
17. Under the head of lost years, counsel submits the trial court is at liberty to either adopt a global sum approach or multiplier approach. It was submitted that the trial court acted within the law by adopting



a global sum approach in awarding kshs. 1,200,000/= as the deceased was of the tender age of 10 years. Counsel submits that even if the court was to adopt a multiplier approach the same may be computed as Kshs 10,000 multiplicand being the minimum wage multiplied by 30 years which the deceased would have worked and a ratio of 1/3 (10, 000).

18. Counsel urged the court to find the trial court did not use irrelevant factors in the assessment of the quantum of damages to warrant the court interfering with the trial court's discretion.
19. In conclusion counsel pleaded with the court to award funeral expenses of Kshs. 30,000/= as a fair estimate as the estate purchased a coffin, and met transportation costs. The court was urged to uphold the award of the trial court and further to award the costs of the appeal to the respondent.

Analysis and determination

20. Having considered the appeal and the evidence of the trial court as well as the submission on record, the only issue for determination is whether the trial court erred in the assessment of damages.
21. In dealing with an appeal on the quantum of damages the appellate court is cautioned against interfering with the discretion remedy of the trial court based on the fact that it would award a different figure if it had tried the case. In *Savvana Saw Mills Ltd vs Gorge Mwale Mudomo* (2005) eKLR the court stated as follows: - "It is trite law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance."
22. This court is of the considered view that assessment of damages is a discretionary remedy of the trial court and the appellate court will only interfere with the same if the trial court applied wrong principles of the law and the award is excessively high or too low.

Special damages

23. It is trite law that special damages must be pleaded and proved. In the plaint the respondent pleaded special damages of kshs 15,000 and attached receipts in support of the same and the trial court awarded special damages of Kshs. 15,000/= having found they were specifically pleaded.
24. In the instant appeal the appellant has urged this court to award a sum of kshs. 30,000/- as funeral expenses, this amount was not pleaded in the plaint and has been raised at the appeal stage through the written submissions. This court is sitting as an appeal court and will not entertain new evidence. I am guided by the holding in *General Motor East Africa Limited vs Eunice Alila Ndeswa & Anor* NRB HCCA no. 527 of 2013 (2015) eKLR where it was appreciated that "parties do not provide new evidence in submissions and therefore one cannot adduce evidence by way of submission to challenge evidence or documents which in this case did not form part of the pleadings"
25. This court will not interfere with the award of special damages.

Pain and suffering

26. The Respondent tabled evidence before the court that the deceased sustained fatal injuries but did not die immediately, she was rushed to Ndenderu Hospital where she received first aid and later taken to Kihara Hospital where she died when receiving treatment. I do note the deceased did not die immediately as alleged by the appellant and thus the award of Kshs 10,000/= as proposed by the appellant is too low. This court finds the deceased experienced some pain thus it is my considered view that the award of kshs. 100,000/= is adequate compensation under this head.



Loss of expectation of life

27. The appellant submits the award of Kshs, 100,000/= as an award under this head would be adequate compensation. According to the appellant, the courts have adopted a general approach of awarding Kshs. 100,000/= and therefore the award of kshs. 200, 000/= is without any justification by the trial court. On the other hand, the respondent submits the award of kshs 200,000/= is adequate compensation.
28. The deceased was aged 10 years old at the time of death. She was attending school her parents had high expectations of her, that she would complete school and start earning, these dreams were shattered by her untimely death and as such it was proper to award damages under this head.
29. I am not persuaded the trial court erred in awarding damages of Kshs 200,000/= under this head.

Lost years

30. The appellant submits the award of Kshs. 1,200,000/= for lost years is excessive. The appellant argues the trial magistrate erred in adopting a global sum award and instead should have used a multiplier. The respondent is in support of the trial magistrate award based on the global sum award.
31. In the case of Moses Mairua Muchiri vs Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) (2016) Eklr, the court held that "... it is not possible to ascertain the multiplicand accurately as appears to have been the case here, the courts should not be overly obsessed with mathematical calculations to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of the case."
32. I am not convinced that the trial court erred in adopting a global sum award. I hold so, as using a multiplier would be engaging the trial court in mathematical speculations of how long the deceased would have lived and survived after completing school, and what the deceased would have turned to become in life. The proper approach in this case was to use a global sum approach as the deceased was aged 10 years at the time of her death.
33. The authorities cited by the appellant in support of their proposal for Kshs. 600,000 were determined in 2018. Considering factors of inflation and lapse of time I find the award of Kshs. 1,200,000/= by the trial court as adequate compensation.
34. Final Orders:

The appeal herein is lacking in merit and the same is dismissed with costs to the respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 15TH DAY OF JUNE 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua – court assistant

Mr. Muriuki h/b for Mr. Opondo - for the Appellant



Ms. Kinyanjui - for the Respondent

