



Mombasa Maize Millers Kisumu Limited & another v Muchwenge & another (Suing as legal representatives of the Estate of Isabellah Nelma Wafula - Deceased) (Civil Appeal E075 of 2022) [2023] KEHC 19225 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E075 OF 2022**

DK KEMEL, J

JUNE 21, 2023

BETWEEN

MOMBASA MAIZE MILLERS KISUMU LIMITED 1ST APPELLANT

KITALE INDUSTRIES LIMITED 2ND APPELLANT

AND

MATHIAS WANJALA 1ST RESPONDENT

MARTIN MUCHWENGE 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ISABELLAH
NELMA WAFULA - DECEASED**

*(An appeal from the judgement and decree of Hon P.N Gesora
(CM) in Bungoma CMCC No. 548 of 2018 delivered on 26/7/2022)*

JUDGMENT

1. In the suit before the trial court, the respondents sued both appellants claiming damages arising out of a road traffic accident which claimed the deceased's life who was a pillion passenger. The respondents attributed the accident to the appellant's negligence. The claim was denied by the appellants.
2. In the trial at that court, Martin Wafula Muchwenge stated that the deceased was his first born child then aged 20 years old and a university student who left behind a child. He stated that he had high hopes in her for future support.

On cross-examination, he stated that he did not witness the accident but learnt that she had been hit by Kisumu Millers vehicle. He stated that the deceased was pursuing a course in business studies but did not have her transcripts and that she died while undergoing treatment.



3. PW-2 was Mathias Wanjala and his testimony was that the deceased was his niece and a student at Kibabii University and who left behind a two-year-old girl.
4. PW-3 Jentrix Sifuna testified that she witnessed the road traffic accident. She added that the truck driver was from Mumias direction and it overtook her before hitting the deceased and that the deceased's stomach organs were ruptured.
5. PW-4 was CPL Benard Kiboi whose testimony is that the deceased was a pillion passenger in a motorcycle which could not be identified. He stated that the vehicle involved was KBM 762 S/ZD 6821 whose owner is Mombasa Maize Millers. He produced into evidence a police abstract.
6. Subsequently, the defence case was closed without witnesses being called. The trial court vide a judgement dated 26/7/2022 awarded damages as follows;
 - Liability 100%
 - Pain and suffering..... Kshs 100,000/-
 - Loss of expectation of life..... Kshs 100,000/-
 - Loss of dependency..... Kshs 3,727,200/-
 - Special damages..... Kshs 80,550
 - Total Kshs 4,007,750/-
7. The appellant being aggrieved by the award, preferred the instant appeal anchored on the following grounds:
 - i. The learned trial magistrate erred in awarding Kshs 4,007, 750/- in damages which was not consistent with the injuries sustained, counsel submissions and legal precedent.
 - ii. The learned trial magistrate erred in making his findings on liability contrary to the weight of the evidence that was before the trial court.
 - iii. The learned trial magistrate erred in failing to consider judicial precedent and in failing to appreciate the doctrine of causation and blame worthiness hence arrived at a wrong decision on negligence and liability.
 - iv. The learned trial magistrate erred in finding the appellants 100% liable, a decision contrary to the evidence and the pleadings on record.
 - v. The learned trial magistrate erred in assessing damages under the *Law Reform Act* vis-à-vis loss of dependency and lost years under the *Fatal Accidents Act* by failing to apply the correct principles in determining the same hence arrived at an erroneous assessment of damages.
 - vi. The learned trial magistrate erred in assessment of damages for loss of dependency, loss of expectation of life and pain and suffering that were inordinately high representing an erroneous estimate.
 - vii. The learned trial magistrate erred in misapprehending the evidence and misapplied, misunderstood, an or overlooked the correct legal principles and judicial precedent and submissions by the appellants and or parties that made the award under the *Law Reform Act* and the *Fatal Accidents Act* that was inordinately high thus erroneous estimate.
 - viii. The learned trial magistrate erred by failing to appreciate that dependency in a matter of fact, its subsistence is pegged on the dependent's life.



- ix. The learned trial magistrate erred in failing to take into account the fact that the beneficiaries under the Law Reform Act and the Fatal Accidents Act were the same while assessing damages under both heads. .
 - x. The trial magistrate erred in failing to consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules and other provisions as required by law.
8. The appeal proceeded by way of written submissions. The appellants' submissions are dated 10th March, 2023 while those of the respondents are dated 15th March, 2023. The same have been duly considered.

Analysis and determination.

9. The duty of an appellate court is;
- reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.
- See Gitobu Imanyara & 2 others V Attorney General (2016) eKLR,
10. The instant appeal challenges the trial court's finding on both liability and quantum.
11. On liability, it was stated that the deceased was a pillion passenger at the time of the accident when the motor vehicle hit the motor cycle from the rear. The trial magistrate in arriving at the finding stated that the driver of the motor vehicle did not exercise care and rejected the appellants contention that liability be apportioned. He found that the appellants had made no justification for the same.
12. Similarly, on my part, I have taken note of the circumstances leading to the accident. The evidence of PW3, the eye witness was imperative in the matter. It is trite law that he who alleges bears the burden of proof as mandated by section 107 of the Evidence Act. It was incumbent upon the appellants to adduce evidence that would convince the court that the accident was contributed to by the deceased and or the rider.
13. In the instant case, the appellants adduced no evidence leaving the respondent's evidence factually uncontroverted. In the circumstances, I find the appellants' challenge on liability to be without merit and proceed to reject it. In any event, the fact that the appellants' vehicle hit the motorcyclist from behind is a clear indication that the appellant's driver was careless and did not consider the highway code of traffic by ensuring the safety of other road users. The appellants failed to avail evidence to the effect that their driver took any evasive maneuvers so as to avoid causing the accident. The deceased who was a pillion passenger had no control of affairs and cannot be said to have contributed to the accident. The eye witness (PW3) gave a vivid account of how the appellants vehicle rammed onto the motorcycle from behind thereby seriously injuring the deceased. Hence, the finding on liability by the trial magistrate was quite sound and should not be interfered with.
14. Turning to quantum, under the head of pain and suffering, the award is given to compensate the deceased's estate for the suffering the deceased suffered before finally succumbing. PW-3 stated that the deceased died in the hospital while undergoing treatment. Her testimony was that the deceased's stomach was ruptured and she kept crying for help.
15. In arriving at the award of Kshs 100,000/- the trial magistrate considered the appellants' proposal which was 10,000/- and the respondent's' which was Kshs 200,000/-. The appellants maintained this proposal even on appeal citing the authorities in Wangari Vs Nkaru (2004) eKLR.



16. It has been held time and again that the longer the period of suffering, the higher the award and vice versa. In this appeal, the deceased passed on while undergoing treatment at the hospital. The description by the eye witness was heart wrenching. The deceased must have undergone excruciating pain before breathing her last.
17. On this, I am guided by the decision in *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, where the court observed:
- “The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
18. Guided by the above, I find no reason to disturb the trial court’s award since it is clear the deceased spent some time before succumbing to the injuries.
19. On loss of expectation of life, the deceased was aged 24 years and a university student. In comparable awards, the court in *Paul IOuma v Sarah Akinyi and Monica Achieng Were (suing as the legal representative in the Estate of Paul Otieno Were (Deceased))* [2018] eKLR the court held as follows
- “ 13. On loss of expectation of life, the Trial Court awarded Kshs. 140,000/= which the Appellant urged is excessive and should be reduced to Kshs. 70,000/=. The Respondent did not agree. The Appellant has not urged why on award of Kshs. 140,000/= is excessive for loss of expectation of life for the deceased who died at the age of 26 years. The death certificate exhibit 5 produced as exhibit reveals the deceased died at the age of 29 years. I have considered the authorities relied upon and evidence on record and find an award of Kshs. 100,000/= for loss of expectation of life would be proper.”
20. In *Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR, the court awarded Kshs 100,000/- where the deceased was aged 28 years.
21. Having taken all the circumstances of the instant appeal weighed against the authorities stated, I find the award of Kshs 100,000/- sufficient in the circumstances.
22. On loss of dependency, the trial court adopted a multiplier of 30 years, 2/3 as the multiplicand and the monthly income of Kshs 15,530/=. On appeal, the appellants propose that a global sum of Kshs 1,000,000/- be awarded. The appellants submit that the trial court erred since there was no proof of income. It is however a fact the deceased is survived by a daughter who was then staying with the 2nd respondent.
23. Having considered the evidence, it is clear that the deceased was a student with no formal employment and therefore no proof of income. The question then that needs to be determined is whether in the circumstances, a proper approach would be the global approach or multiplier approach. The deceased was a full-time student pursuing a bachelor’s course leading to the award of a degree in education which the respondents submitted would earn Kshs 70,000/- per month and support her daughter then aged two years to the tune of a third of her income.



24. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs. Gichumu Gitbenji* Nku Hcca No.15 of 2003 [2007] eKLR, the court made the following observation;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

25. Similarly, in *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR where the court was dealing with a similar issue, it stated:

In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

26. In this case, there is no evidence of any income being made by the deceased. The basis for the multiplier and the multiplicand in this case had no basis at all. I thus find that the global approach would have been ideal in the circumstances.

27. Looking at comparable awards, I have considered the authority in *Maingi Celina v John Mitbika M'itabari suing as the administrator of the estate of Erastus Kirimi Mitbika (Deceased)* [2018] eKLR where the court awarded Kshs 2,000,000. In *Zachary Abusa Magoma* (supra), Ndung'u J awarded Kshs 1,500,000/- for a deceased who was set to write her final examinations in a bachelor of education course.

28. Guided by the above, I hereby find the award of Kshs 3,727,200/- to be excessive in the circumstances and further, the adoption of Kshs 15, 530/ as monthly income to be speculative and not supported by any evidence and that in any event, before she could start earning a salary, it cannot be said that the amount was available for maintaining here dependants. The same must be interfered with. I find the sum of Kshs 2000, 000/ as reasonable in the circumstances under the head of loss on dependency.

29. On special damages, I do not find any challenge that was mounted by the appellants. Hence, the same shall remain undisturbed.

30. In the result, it is my finding that the appeal partly succeeds to the extent that the award by the trial court is hereby set aside and substituted with the following:

Liability..... 100%

Pain and suffering..... Kshs 100,000/-

Loss of expectation of life.... Kshs 100,000/-

Loss of dependency..... Kshs 2,000,000/-

Special damages..... Kshs 80,550

Total Kshs 2,280,550/-



Each party to bear their costs of the appeal while the respondent shall have full costs in the lower court.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JUNE 2023

D.KEMEI,

JUDGE.

In the presence of :

No appearance for Kimaru Kiplagat for Appellants

Wamalwa R for Bw'Onchiri for Respondents

Kizito Court Assistant

