



**Mulu & 2 others v Njue (Suing as the Legal Representatives of the Estate of Angel Carmelyn Njagi - Deceased) (Civil Appeal E204 of 2021) [2023] KEHC 18778 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18778 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E204 OF 2021**

**A MSHILA, J  
JUNE 16, 2023**

**BETWEEN**

**DANIEL WAMBUA MULU ..... 1<sup>ST</sup> APPELLANT  
SHADRACK MUUSYA MAKAU ..... 2<sup>ND</sup> APPELLANT  
NIPPON IMPORTS LIMITED ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ESTHER MURUGI NJUE (SUING AS THE LEGAL REPRESENTATIVES OF  
THE ESTATE OF ANGEL CARMELYN NJAGI - DECEASED) ..... RESPONDENT**

*(Being an appeal from the original judgment delivered by Honourable  
A. M. Maina (CM) on 13th October, 2021 in THIKA NO. 830 of 2019)*

**JUDGMENT**

**Background**

1. By a Complaint filed on December 16, 2019, the Respondent herein being the legal representatives to the estate of Angel Carmelyn Njagi (Deceased) sued the Appellants claiming compensation for injuries sustained by the deceased on or about August 12, 2019 when the deceased was a lawful pedestrian at Kivulini area along Garissa-Thika Road when motor vehicle registration number KCT 772U Toyota Hiace was so negligently driven at a high speed that it lost control, veered off the road and knocked down the deceased causing her to sustain fatal injuries.
2. The Appellants filed their Defence denying any liability for the accident. In particular, the Appellants averred that the accident was caused solely and/or substantially contributed to by the negligence of the deceased.



3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate entered judgment on liability for the Plaintiffs against the 3 Defendants at 100%. On quantum, the Honourable Trial Magistrate entered judgment as follows:

Under the Law Reform Act

- a. Pain and suffering.....Kshs 20,000/=
- b. Loss of expectation of life.....Kshs 100,000/=

Under the Fatal Accidents Act

- a. Lost years.....Kshs 1,000,000/=
- b. Special damages.....Kshs 6,075/=

Total Kshs 1,126,075/=

4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed eight grounds of appeal as follows:

- a. The Learned Magistrate erred in law and misdirected himself when he failed to consider the Appellants submission on both points of law and facts.
- b. That the Learned 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.
- c. That the Learned Magistrate erred in assessing an award, hereunder, which was wholly erroneous estimate of the loss and damages suffered by Plaintiff;
  - a) Lost years Kshs 1,000,000/=
  - b) Loss of expectation of life Kshs 100,000/=
  - c) Pain & Suffering Kshs 20,000/=
  - d) Special Damages Kshs 6,075/=Net Award Kshs 1,126,075/=
- d. The Learned Magistrate erred in fact and in law by failing to take into consideration the evidence adduced by the Defendant on liability and finding that the Appellant was 100% liable for the accident.
- e. The Learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Lost years of Kshs 1,000,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellants.
- f. The Learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Loss of Expectation of Life of Kshs 100,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellants.
- g. The Learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Pain and Suffering of Kshs 20,000/=



an amount of which is excessive considering the circumstances and evidence tendered by the Appellants.

- h. The Learned Magistrate erred in fact and in Law in failing to consider the Appellants' Submissions in their entirety.

5. The court directed the parties to canvass the appeal by way of written submissions.

### **Respondent's Submissions.**

6. In her advocate's written submissions, the Respondent submitted that the trial court properly found the Appellants 100% liable for the accident as PW2 testified that she witnessed the accident occur when the suit motor vehicle was being driven at a high speed causing it to veer off the road thereby knocking down the children who were standing off the road on the pedestrian walk near the kiosks. Reliance was placed on the case of *John Wainaina Kagwevs Hussein Dairy Ltd* (2013) eKLR. Further, the Respondent submitted that the Appellants have not demonstrated how the award of Kshs 1,000,000/= for lost years is excessive. The trial court was said to have exercised its discretion in a judicious manner. The award of Kshs 100,000/= for loss of expectation of life was contended to be on the lower end in line with the prevailing awards under this head hence the court was urged not to disturb the said award as it was fair. Similarly the award of Kshs 20,000/= awarded for pain and suffering was said to be fair as the deceased died when she arrived at the hospital therefore, she must have suffered a lot of pain before her demise. Lastly, the Respondent submitted that the trial court considered the Appellants' submissions in deciding that the amount of Kshs 300,000/= for lost years was not within the limits of comparable cases. The court was urged not to disturb the award by the trial court.

### **Issues for determination**

7. Having read and considered the submissions filed by only the Respondent and the case law relied upon this court has identified the following being the issues for determination;-
  - a. Whether the trial magistrate considered the appellants submissions.
  - b. Whether the damages awarded were excessive.
8. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“... this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 allowance in this respect...”
9. During the hearing at the trial court, Esther Murugi Njue, (PW1) the deceased's mother testified that the deceased was aged 6 years and was in PP1. She produced the documents as in her list of documents. She also prayed for compensation as per her prayers in the Plaint. She blamed the driver of the accident motor vehicle.
10. Caroline Gakii Njagi (PW2) witnessed the accident. She recorded her statement which she adopted in court as her evidence. She blamed motor vehicle registration number KCT 772U for hitting the deceased when she was on the pedestrian lane.



11. No. 84389 PC Charles Mwadime (PW3) a police officer from Thika Police Station produced the police abstract in regard to the accident. He stated that the driver was charged for dangerous driving causing death as the pedestrian sustained fatal injuries

### Issues for determination

12. Upon re-evaluating the evidence on record this court is required to come up with an independent conclusion as to whether the Learned Trial Magistrate considered both parties written submissions and thus was correct in arriving at its decision on the issues of liability and quantum.

### Analysis

13. On liability, PW2 testified that she was with the deceased when she left her on the pedestrian path off the road and that the suit motor vehicle which was being driven at a high speed, lost control, veered off the road and knocked down the deceased causing her fatal injuries. The police officer also testified that the driver of the said motor vehicle was blamed for the accident and that he was even charged for causing death by dangerous driving.
14. On whether the trial court considered the Appellants submissions; After perusal of the impugned judgment there can be no doubt that the trial court considered the said submissions and made a determination on the matter before it. In any case the Appellants did not call any witnesses.
15. In the absence of any contradictory evidence this court is satisfied with the trial courts finding the Appellants were 100% to blame for the accident.
16. On quantum, the Appellants allege that the Learned Trial Magistrate awarded damages that were excessive considering the circumstances and the evidence tendered.
17. General damages awarded at the lower court can only be interfered with if it is:-

“So inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) 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.” (See *Butt –vs- Khan*, Nairobi Civil Appeal No. 40 of 1977).
18. A similar view was expressed in by the Court of Appeal in *Gitobu Imanyara & 2 Others V Attorney General* (2016) eKLR thus:-

[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.
19. The trial court considered the evidence before it and awarded Kshs 20,000/= for pain and suffering and Kshs 100,000/= for loss of expectation of life under the *Law Reform Act*. Under the *Fatal Accidents Act* the trial court further awarded Kshs 1,000,000/= for lost years
20. The Appellants’ case was that the awards by the trial court were excessive and asked this court to set them aside. On pain and suffering the appellants in their submissions at the trial court, urged the court



to award Kshs 10,000/= for pain and suffering and Kshs 20,000/= for loss of expectation. On lost years, they proposed Kshs 300,000/=.

21. The trial court exercised its discretion in this matter in adopting the global award method in assessing the award for lost years where it awarded a global figure of Kshs 1,000,000/=. Neither the Appellants nor the Respondent have demonstrated that the trial court the said awards given were either extremely low or excessively high to represent an entirely erroneous estimate and/or based on the wrong principles of law. See the case of *Daniel Mwangi Kimemi & 2 Others v G. M & Another* (2016) eKLR where an award of Kshs 1,000,000/= was made for a deceased person who was aged 6 years.
22. In the instant case, this court is of the considered view that the damages awarded by the trial are reasonable. In arriving at this conclusion, this court is alive to what Kneller JA, stated in *Kemfro Africa Limited T/a Meru Express Service Gathogo Kanini v Am Lubia And Olive Lubia* [1985] that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
23. In *Gicheru v Morton & another* [2005] 2 KLR 333, the Court of Appeal again stated that

“in order to justify reversing of the trial court’s amount of damages, it is necessary that the appellate court be convinced either that the trial court acted upon some wrong principle of law, or that the amount awarded is so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.”
24. The same court similarly observed in *Denshire Muteti Wambua V Kenya Power And Lighting Co Ltd* [2013] eKLR, that:-

“Monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.”
25. This Court has applied these principles to this appeal, and even after having also considered the fact that deceased was only 6 years old, and the case law relied upon, it does not find any goodreason to interfere with the trial court’s awards. Only in clear cases should an appellate court interfere with a trial court’s assessment of damages.
26. This Court is satisfied that the trial court considered the said submissions when making its determination in this matter and this appellate court should not impose its own view on what it would have awarded had it been the one trying the matter at first instance.

### **Findings & Determination**

27. For the forgoing reasons this court finds the appeal to be devoid of merit in its entirety; and the same is dismissed with costs to the Respondent.
28. Orders Accordingly.



DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 16<sup>TH</sup> DAY OF JUNE, 2023

A. MSHILA

JUDGE

In the presence of:

Court Assistant - Mourice

No appearance for the Appellant

Kangethe for the Respondent

