



Wanja & another v Munuve & 2 others (Suing as the Personal Representative of the Estate of the Late Cornelius Ngove munuve) (Civil Appeal E157 of 2021) [2023] KEELC 18435 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E157 OF 2021**

**FR OLEL, J
JUNE 21, 2023**

BETWEEN

HILLARY KARARI WANJA 1ST APPELLANT

BONIFACE MUTUA KIILU 2ND APPELLANT

AND

CATHERINE MUTONO MUNUVE AND 2 OTHERS (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE CORNELIUS NGOVE MUNUVE) RESPONDENT

(Being an appeal from the judgment of Hon Evans H.Keago (Mr) Chief Magistrate delivered on 18th September 2021 in the Chief Magistrate Court at Machakos in Civil suit No. 573 of 2019)

JUDGMENT

1. This appeal arises from the judgment/decree of Honourable E.H Keago Chief Magistrate delivered on 15th September 2021 in Machakos Chief Magistrate court case no.573 of 2019, where he awarded the Respondent's a total of Ksh.6,475,900/= as damages arising from the fatal injuries suffered by the deceased one Cornelius Ngava Munuve from a road accident which occurred on 23.06. 2018 near Machakos Girls High school along Machakos- Kitui Road.

Background

2. The Respondent's had filed a plaint dated 8th September 2019, as the legal representatives of the deceased, against the appellant's claiming damages in tort. In the plaint, they averred that on the 23.06.2018, the deceased was a lawful passenger on motor vehicle (tuk-tuk) registration no. KTWA 806X, where at around Machakos girls High School, motor vehicle KBX 085E, Toyota Fielder which was being driven from the opposite direction by the defendant's their servant, driver, employee and/



- or agent did negligently and/or carelessly ram into the said tuk tuk , which was on its rightful lane. As a result of the said accident, the deceased suffered fatal injuries and his estate suffered loss and damage.
3. The appellant's on their part did file a statement of defense where they denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellant's further denied all the particulars of negligence, carelessness and recklessness attributed to them and/or their servant, employee or agents and stated in the alternative that if indeed an accident occurred, it was substantially contributed too by the deceased negligence which were particularized in the said defense filed. The appellant's also denied that the deceased estate suffered any loss and prayed for the suit to be dismissed.
 4. PW1 Catherine Mutono Munuve testified and adopted her witness statement as part of her evidence in chief. She also produced document listed on her list of documents as exhibits which she relied on. She stated that the deceased was her son aged 39 years. He died as a result of injuries sustained in a road traffic accident. The deceased was working at Machakos Golf Club and was earning Ksh.30,000/= monthly and would assist her by paying for her upkeep as well as upkeep of his children and his other siblings. After the accident, she was issued with police abstract which revealed the owner of the suit motor vehicle. The owner was charged with the offence of causing death by dangerous driving. He was found guilty and fined. She prayed for compensation for the death of her son, as he was healthy before he passed on and she could no longer get support, she used to get from him.
 5. PW1 closed her case without being cross examined as the appellant's counsel was not present though served. The appellant's advocate, later applied to have the Respondent's case to be re-opened and the Respondent and her witness be recalled for cross examination. The said application was allowed by consent on 13/5/2021. In cross examination PW1 confirmed that the deceased was her son and she was called and informed of the accident on 25/8/2018. She had listed the deceased children and his siblings as beneficiaries of the estate as they were being taken care of by the deceased. With regard to proof of salary earned at the gold club, PW1 admitted that she produced as score card from Machakos Gold Club. It did not show the appellant name nor did it show how much he was earning before his demise.
 6. Finally, the witness stated that the accident occurred at 11pm and the deceased died in hospital the following day at night. In Re-examination, she stated that she got the score card from the deceased house. The deceased was also taking care of the children of Elizabeth Mutheu, his deceased sister and also took up responsibilities of providing for his other sibling.
 7. PW2 PC Daniel Chache from Machakos Police station –traffic records testified that a fatal accident occurred on 23/6/2018 and it was reported vide OB no.5/24/6/2018. The accident involved motor vehicle KTW 806x (tuk tuk) and motor vehicle KBX 085E Toyota fielder. The accident happened along Machakos- Kitui road near Machakos Girls and as a result one Cornelius Ngove Munuve sustained fatal injuries. The police did their investigations and charged the driver of the suit motor vehicle one Boniface Munuve Kiilu. He was found guilty and fined Ksh.40,000/= in traffic case no.572/2018. He produced the police abstract into evidence.
 8. In cross examination, the witness stated that he was not the investigating officer. The investigating officer was PC Lilian who had been transferred. He was also not aware if any appeal had been filed to challenge the conviction made in traffic case no.572/2018. He also relied on information obtained from the police abstract and first information report as reported. The police abstract was also a reflection of the OB abstract. The driver of the suit motor vehicle was to blame for the accident.
 9. The appellant did not call any witness and opted to close their case. Upon considering the submissions filed, the trial court did enter judgment for the Respondent's as against the appellant's in the following terms;



- i. Pain and suffering Ksh.100,000/-
 - ii. Loss of expectation Ksh.100,000/-
 - iii. Loss of dependency(30,000x2/3x12x26) Ksh.6,240,000/-
 - iv. Special damages Ksh. 36,900/-
- Total Ksh.6,476,900/=
- Plus, cost and interests
10. The appellants being wholly dissatisfied by the said judgement did file their memorandum of appeal dated 29th September, 2021 and raised the following grounds of appeal;
- a. That the learned magistrate erred in law and in fact in dismissing the appellant's suit as against the Respondent and holding that the totality of Respondent's evidence proved liability against the appellant.
 - b. That he trial magistrate erred in fact and in law in awarding the Respondent Ksh.6,240,000/- for loss of dependency when no proof was provided to support the claim in the deceased earning and which award was too excessive in the circumstances.
 - c. That the court erred by using the multiplier approach in awarding damages to the estate of the deceased under the Fatal Accident Act instead of applying the global aware approach.
 - d. That the learned trial magistrate erred in law and in fact in awarding the Respondent a sum of Ksh.100,00/- for pain and suffering when there was clear evidence before him that the deceased died immediately after the accident.
 - e. That the learned magistrate erred in awarding the Respondent's estate a sum of Ksh.6,476,900/- as total damages an amount which was excessive thus it amounts to an erroneous estimate of loss or damages suffered by the estate of the deceased.
 - f. That the trial magistrate erred in law and in fact by failing to accord sue regard to the appellant's submissions and authorities of quantum or applicable principles for assessment of damages.
11. The appellant prayed that the judgment appealed against be set aside and /or be varied based on the court re-determined issue on liability and assess damages payable in the circumstance.

Appellant's submissions

12. The appellant's filed their submissions on 23/9/2022.They submitted that the death was instant, immediately after the accident and therefore the court erred in awarding the estate a sum of Ksh.100,000/=. The appellant submitted that the same should be reduced to Ksh.10,000/= to Ksh.20,000/=. They relied on *Mercy Muriuki and another versus Samuel Mwangi Ndueti and another (suing a legal administrator of the estate of the late Robert Mwangi)* (2019)eKLR and *Kimunya Abednego alias Abednego Munyao versus Zipporah S. Musyoka and another* 2019eKLR.
13. On loss of dependency the appellant's submitted that there was not satisfactory proof of monthly income and court should be wary of subscribing to a figure so as to come up with a probable sum to be used as multiplicand. In such circumstances it was advisable to apply the global sum approach or minimum wage as the appropriate mode of assessing the loss of dependency. Reliance was placed on *Frankline Kimathi Baariu and another versus Phillip Akungu Mitu Mborothi (suing as the administrator and personal Representative of Antony Mwiti Gakungu – deceased)*eKLR 2020.



14. The appellants further submitted that the trial court erred in using the multiplier approach, while the facts of the case did not support use of such a method. It was not proved that the deceased was earning Ksh.30,00/= as alleged. Reliance as placed on *Albert Odawa vrs Gichimu Gitbinji* Nakuru HCCa no.15 of 2003 (2017)eKLR and *Eston Mwirigi Ndege and another versus Patrick Gitonga Mbaya* (2018)eKLR.
15. Using the global award approach, the appellant proposed that the deceased should be awarded ksh.800,000/= as a global award. In the alternative if the court was inclined to use the multiplier approach then the court should use a dependency ratio of 1/3 as paying school fees for one's sister's children was a gratuitous assistance. The appellants propose that the loss of dependency be calculated on the basis of (Ksh.10,000 x 1/3 x 12 x 18 = Ksh.720,000/-) Reliance was placed on *Catherine Kanyua Gatuura and Josephat Mwachhi Kiuru (appealing as legal representative of Peter Kiuuru Muchoma – deceased) versus Kenya Wildlife Services* (2020)eKLR and *James Gakinya Karienyne and another (suing as legal representative of the estate of David Kelvin Gakinya (deceased) versus Perminus Kariuki Gitbinji* (2015) eKLR.

Respondent's Submissions

16. The Respondent's filed their submissions on 12/7/2022 and submitted that the appellants did not call any witness to rebut and or controvert PW1 and PW2 evidence and that meant that the Respondent's evidence stood unchallenged. The Respondent's relied on *Autar Singh Bahra and another versus Rayu Govindji* HCC no.548 of 1998 and *Zumtel communication Ltd versus OM (Minor suing through the father next friend of MMI)* (2021) eKLR.
17. On whether the appellant had established proper grounds to the court's satisfaction that the magistrate acted on the wrong principle of law and therefore made an erroneous estimate of the damages suffered. On pain and suffering the respondent's submitted that the deceased died one day after the accident. The accident occurred on 23rd June 2018 and he died on 24th June 2018. PW1 in her evidence also confirmed the same. The award of ksh.100,000/= was thus appropriate and there was no basis of disturbing the same.
18. On loss of dependency, the respondent's submitted that the deceased was 36 years old and was working at Machakos Golf Club as a trainer of persons interested in learning how to play golf. Exhibit P-9 confirmed that the deceased was making Ksh.30,000/- monthly and was in good health prior to his death and would probably have worked up to the age of 70 years. On dependency the award was informed by the fact that, the deceased had three daughters and a son, he also supported his sisters' children who totally depended on him. The trial court thus did not error in using a multiple of 26 years, a dependency ratio of 2/3 with multiplicand of Ksh.30,000/- which the deceased was earning as at the time of his death. The Respondent's relied on the citation of *Mwita Nyamohanga & Anor. Vrs Mary Robi Moheria* (suing on behalf of the estate of Joseph Tagare Mwita (deceased) & another (2015)eKLR, *David Mbuba & Another versus Victoria Mwongeli Kimwelu and Another* (2018)eKLR and *Kitale Industries Ltd & Anor versus Zakayo Nyanda & Another* (2018)eKLR.
19. The Respondent's also submitted that the award of Ksh.6,476,900/= as total damages was not excessive and it represented what was adequate compensation for the deceased estate. The court was urged not to disturb the same merely because the appellant had indicated that the award was too high. The appellants had to show that the trial court acted on the wrong principle and/or misapprehended some evidence and thus arrived at the wrong award which was not the case herein. The award thus ought not to be disturbed and this appeal ought to be dismissed with costs.



Analysis and Determination

20. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
21. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.
22. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316.
23. The appellant's in their memorandum of appeal had raised six (6) grounds of Appeal, which included challenging both the trial courts finding on liability and quantum. But on the submission's filed on 23rd September 2022, the appellants only challenged the quantum awarded. It is therefore deemed that the grounds of appeal relating to liability have been abandoned, and in my view correctly so as they did not present any evidence before the trial court to rebut the respondent's evidence.
24. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004] eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages 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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors or 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”.
25. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”



26. The appellants challenged the award Ksh 100,000/= given for pain and suffering and submitted that the appellant died instantly and should have been awarded Ksh 10,000/= to Ksh 20,000/=.
27. Under the head of pain and suffering, I am guided by the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, the Court stated as follows-
- “As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... 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 Kshs.100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
28. The uncontroverted evidence presented in court was that the accident occurred on 23.06.2018 at night and the deceased was rushed to Machakos level Five hospital, where he died the following day in the evening. The death certificate Exhibit P1 confirms the date of death. The deceased obviously suffered multiple trauma injuries and suffered excruciating pain before he succumbed to the same. The award of Ksh.100,000/= was fully justified.
29. On loss of dependency, the appellants submitted that there was no proof that the deceased earned Ksh.30,000/= monthly, and that dependency ought to be proved and demonstrated. The trial court was also wrong to use the multiplier method in assessing damages. what was suitable under the circumstance's herein was to use global sum approach or minimum wage approach. In the alternative if the court were to use the multiplier method of assessing damages, then the dependency ration needed to be reduced to 1/3 as paying school fees for the sisters' children was a gratuitous assistance. The said proposed ration was sufficient for the other deceased dependants. Further the appellants proposed a multiplier of 18 years. Calculating using the provided figures, the appellant proposed that the deceased be awarded $(10,000 \times \frac{1}{3} \times 12 \times 18 = 720,000/=)$.
30. The respondents on the other hand urged this court to uphold the award of loss of dependency on the bases that it was sufficiently proved that the deceased worked at Machakos golf club, and earned a net salary of Ksh.30,000/= which he used to support his family and siblings.
31. Having analysed the evidence presented, I do find that, while it was proved that the deceased worked at Machakos golf club as a trainer of golf enthusiast, the trial magistrate did commit an error in his finding that, deceased was earning Ksh.30,000/= monthly, when the same was not proved in evidence. As regards the dependency ratio, it was sufficiently proved that the appellant was taking care of his children, his mother and other siblings including the children of his deceased sister. Obviously, the dependency ration based on whatever the deceased was earning was high and the trial court cannot be faulted in using a ratio of 2/3.
32. Since there was no proof of earning/salary, the appellant urged the court to use the global award method or minimum wage method. They also proposed a multiplier of 18 years. The deceased as per the evidence adduced was said to be 36 years old, but the death certificate produced showed that he was 39 years old. A multiplier of 18 yeas as proposed is reasonable given the vestitudes of life. With regard to minimum wage, the regulations of wages (General)(Amendment) Order 2018, which came into force on 1st May 2018 (legal Notice No 2) under the *Labour institutions Act* did provide that for municipalities and town councils of Mavoko, Ruiru and Limuru , the minimum wage for General



labourers was placed at Ksh 12,522/=. Therefore, for loss of dependency the calculation should be (12,522 x 2/3 x 12 x 18= 1,803,168/=).

Disposition

33. Having exhaustively analysed all the issues raised in this appeal I find that the same is partially successful on the issue of quantum, but would have failed on the issue of liability. Judgement of Hon E.H KEAGO (CM) delivered in Machakos CMCC NO 573 OF 2019 with respect to loss of dependency is set aside and the award under loss of dependency is reduced to Ksh.1,803,168/=)
34. The sums award will thus be as follows
- Liability 100%
 - Loss of expectation of life Ksh 100,000/=
 - Pain and suffering Kshs 100,000/=
 - Loss of Dependency Kshs 1,803, 168/=
 - Special Damages Ksh 36,900/=
 - Total Kshs 2,040,068/=
35. The appellants are awarded half costs of this appeal which is assessed at Ksh.100,000/= all inclusive.
36. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

Judgment on the virtual platform, Teams this 21st day of June, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

