



**AM (Suing as the legal representative Of The Estate of NKM (Deceased) v Kinoro Tea Factory Co Ltd (Civil Appeal E101 of 2021) [2023] KEHC 20209 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E101 OF 2021  
EM MURIITHI, J  
JULY 13, 2023**

**BETWEEN**

**AM (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NKM  
(DECEASED) ..... APPELLANT**

**AND**

**KINORO TEA FACTORY CO LTD ..... RESPONDENT**

*(An appeal from the Judgment of Hon. E. M Ayuka (S.R.M)  
in Nkubu PMCC No.24 of 2020 delivered on 28/1/2021)*

**JUDGMENT**

1. By a plaint dated 22/6/2020, the Appellant sued the Respondent seeking general damages under the *Law Reform Act* and the Fatal Accidents plus interest, special damages as pleaded plus interest together with costs and interest. The Appellant pleaded that on or about 8/2/2020, the deceased was lawfully walking as a pedestrian on the pedestrian pavement along Kionyo Chogoria Road when the Respondent's authorized driver, agent, servant and or employee so negligently drove, managed and/or controlled motor vehicle registration No KCQ289 H that it lost control, veered off its rightful lane and hit the deceased thereby occasioning her fatal injuries. The deceased was aged 17 years and waiting to join university to pursue her dream of being a doctor after completing her secondary school education. She was a healthy, brilliant student who was full of life and the parents expected her to help them once she was done with school. As a result of her death, her estate has suffered loss and damage.
2. The Respondent denied the claim by its statement of defence dated 2/7/2020 and prayed for the Appellant's suit to be dismissed.
3. Upon full hearing, the trial court awarded general damages for pain and suffering of Kshs 10,000, Kshs 100,000 for loss of expectation of life, Kshs 700,000 for loss of dependency and special damages of Kshs 69,550 = Kshs 879,550 together with costs and interest.



## The Appeal

4. On appeal, the Appellant filed his Memorandum of Appeal on 4/8/2021 listing 6 grounds as follows:
  1. The learned Senior Resident Magistrate erred in law and fact and/or misapprehended the law in arriving at an erroneous decision which is against the evidence on record.
  2. The learned Senior Resident Magistrate misdirected herself into using wrong principles of the law in arriving at an erroneous decision when there was clear evidence tendered by the Appellant.
  3. The trial magistrate's assessment of damages was wrong, too low and not properly or sufficiently considered.
  4. The trial magistrate erred in law and fact in not finding that the retirement age in Kenya is 60 years and the deceased had 43 years to work.
  5. The learned trial magistrate erred in law and fact in disregarding and failing to consider the Appellant's submissions and useful authorities and principles of law that could have helped him arrive at a well reasoned decision.
  6. The learned Resident Magistrate erred in law and fact in failing to apply and follow the principle of a ratio decidendi and stare decisis thus ignoring the established principles of law.

## 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 Cpl Albert Mwiti of Nkubu police station traffic department, testified that, "I have an O/B following an accident fatal on 8/2/2020 along Kionyo Mutunguru Road at Mutunguru Market at about 1250 Hours involving Motor Vehicle KCD 289 H Isuzu FSR driven by female driver Faith Kathusi. The motor vehicle knocked a pedestrian NK. The motor vehicle was headed towards Chogoria. At Mutunguru market the motor vehicle lost control and moved to the extreme right side of the road facing Chogoria. The motor vehicle then knocked the deceased pedestrian. She was severely injured. She was rushed to Chogoria Hospital where she was pronounced dead on arrival. I have the police abstract dated 19/2/2020 in respect of the accident. It was issued at Nkubu Police station. Clause 7 indicates that investigations were still underway. I wish to produce the abstract. Police abstract dated 19/2/2020 – PEXb. 1. Ob is also recorded as per the records at the police station. It indicates the motor vehicle lost control and moved to the extreme right side of the road where it knocked the deceased."
7. On cross examination, he stated that, "I am not the one who prepared the police abstract. I am the one who made the entry on the O/B. The information was given to me by my colleague who was at the scene – PC Mwiti. I was not at the scene by the time the police abstract was issued, investigations were still pending. Accident was on 8/2/2020. Abstract was issued on 19/2/2020. O/B was entered on the date of the accident 8/2/2020. Whenever there is an accident, an entry is made in the O/B. There is an



investigating officer in the matter. I do not know when investigations closed. I am not able to tell the point of impact because I did not visit the scene. As at the time the investigation officer was relaying the investigations which I put on the O/B he was at the scene. I do not know the final outcome of the investigations.”

8. On re-examination, he stated that, “Once an O/B entry is made, it cannot be altered. I have relied on the O/B entry.”
9. PW2 AM, the Appellant herein adopted his witness statement dated 22/6/2020 as part of his evidence in chief. He went further to state that, “I stay at Kinoro. Am a driver. The deceased NK was my daughter. She was a school girl at [Particulars Withheld] Girls. She had completed form 4. She was 17 years old. The deceased died on the way to the hospital. Post mortem was conducted. I have the death certificate. P.EXv. 2 – S/N 0776502. I rely on the post Mortem report – dated 16/12/2020 P.EXb. 3. I obtained Ad Litem Grant – dated 8/6/2020 – P.EXb. 4. I have the area chief’s letter dated 11/5/2020 – PEXb. 5. The motor vehicle that caused the accident belongs to Kinoro tea factory- copy of records P.EXb. 6(a) report PEXb. 6(b). I have a demand letter by my advocate – its dated 16/3/2020 – PEXb. 7(a). Receipt of Kshs 5000 PEXb. 7(b). We incurred burial expenses. I have the receipts bundle of receipts for funeral expenses of Kshs 69,000 – PEXb. 8. I pray for compensation and special damages. The deceased was 17 years old. I suffered loss and damage. She had a bright future and could have assisted me in future. I am yet to collect the deceased’s certificate from school.”
10. On cross examination, he stated that, “The deceased had completed form 4 at [Particulars Withheld] Girls High School. I have nothing to show that the deceased was a student at the school. I have the papers at home. The deceased scored a C+ in K.C.S.E.”
11. The Respondent closed its case without calling any witness.

### **Submissions**

12. The Appellant restated the circumstances in which the appellate court will intervene in the decision of the lower court, and cited *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of Ben Siguda Okach (Deceased))* [2021] eKLR. He faulted the trial court for failing to award Kshs 5000 for the demand notice on the basis that the receipt lacked the requisite stamp, and relied on *Paul N. Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR. He further faulted the trial court for awarding Kshs 100,000 for loss of expectation of life instead of Kshs 150,000 which he had proposed. He strongly disagreed with the trial court’s use of a lump sum to award damages for loss of dependency instead of a multiplier approach, and cited *Albert Odawa v Githimu Gichenji* [2007] eKLR, *Mary Wanjiru Maina (Suing as Administrator Ad Litem of the Estate of the late Jane Wanjiru Maina v Lilian W. Macharia & another* [2019] eKLR, *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v NIA (minor suing through her next friend IAIS) & 3 others* [2018] eKLR and *Moses Akumba & Leonard Mwalimu Mweru v Hellen Karissa Thoya* [2017] eKLR. He prayed for the court to reassess the quantum of damages awardable to him as per his submissions.
13. The Respondent urged the court to uphold the award of Kshs 10,000 for pain and suffering and Kshs 100,000 for loss of expectation of life. It urged that the lump sum approach was the best suited since the deceased was a minor who was not engaged in any meaningful trade to earn any discernible income, and cited *Charles Ouma Otieno & another v Benard Odhiambo Ogecha (Suing as brother and legal representative and administrator of the estate of the late Oscar Onyango Ogecha (Deceased))* [2014] eKLR. In the alternative, it urged the court to adopt a multiplicand of Kshs 2,414, a multiplier of 10 years and a dependency ratio of  $\frac{1}{3}$ , and cited *Siyaram Enterprises & another v Samuel Nyachini (suing on behalf of the estate of Vincent Nyachini)* [2015] eKLR, *Simeon Kiplimo Murey & 3 Others v Kenya*



Bus Management Services Limited & 4 others [2014] eKLR, Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – deceased) [2015] eKLR. It urged the court to deduct the award of loss of expectation of life from the award of loss of dependency, as was held by the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR. It wholly supported the trial court’s award of only special damages which had been specifically pleaded and proved, as was held in David Bagine v Martin Bundi [1997] eKLR. It urged the court to reject interest in total and dismiss the appeal with costs.

### **Analysis and Determination**

14. Before delving into the merits of the appeal, the Respondent has introduced the issue of double compensation in its 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 Kshs100,000 for loss of expectation of life and Kshs50000/- for pain and suffering] and thus made a double award is therefore erroneous.”

15. 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 low; and whether the Appellant’s submissions and authorities were considered.

### **Inordinately Low Damages**

16. 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).”

### **Special Damages**

17. The trial court is faulted for failing to award Kshs 5,000 for the demand notice on the basis that the receipt did not bear a revenue stamp. That issue was conclusively dealt with in the case cited by the



Appellant of *Paul N. Njoroge v Abdul Sabuni Sabonyo* (2015) eKLR, where the Court of Appeal rendered as follows,

“21. The finding is often made by lower courts that documents which do not comply with the *Stamp Duty Act*, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR where it stated thus:

“Mr. Mbigi submitted that the guarantee document relied on by the respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the *Stamp Duty Act*. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is Diamond Trust Bank Kenya Ltd v Jaswinder Singh Enterprises CA No 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

“The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the *Stamp Duty Act* (cap 480). In view of my above finding, it suffices to state that sections 19 (3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of *Suderji Nanji Ltd v Bhaloo* [1958] EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in *Baghat Ram -vs- Raven Chond* (2) 1930 A.I.R Lah 854 that:

“before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty.

The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/respondent and he must be given the opportunity.”

We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the *Stamp Duty Act*. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.”

18. This court finds that the trial court fell into error when it failed to award the sum of Kshs5,000 for the demand notice purely on the want of a revenue stamp.



## **Pain and Suffering**

19. The Appellant testified that,

“The deceased died on the way to the hospital.”

It is indicated in the Post mortem report that the deceased died on the date of the accident on 8/2/2020. This court is satisfied that the sum of Kshs10,000 for pain and suffering awarded by the trial court was justified.

## **Loss of expectation of life**

20. It is trite law that the conventional figure awardable under this head is Kshs100,000, which is what the trial court awarded.

## **Loss of dependency**

21. Dependency is a matter of fact and must be proved by evidence. The Appellant recorded in his statement dated 22/6/2020 that, “The deceased was a student who had just completed her secondary school exams at [Particulars Withheld] Girls High School and she had performed exemplary as a bright student. She was awaiting to join University to pursue her career as a doctor. The cruel hand of death snatched a promising life from us as the parents and the bright future was cut short.” He however admitted on cross examination that he did not have any document to show that the deceased was either a student at [Particulars Withheld] Girls High School or that she had scored a C+ in her KCSE examinations.

22. In awarding a lump sum of Kshs 700,000 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.

23. Even with such uncertainties of life and the earning capacity as pointed out by the trial court, this court feels that the sum of Kshs 700,000 for loss of dependency for a 17 year old, who would soon become an adult and start gaining whether formally or informally, was inordinately low. In *China National Aero-Technology International Engineering Corporation v RL (Suing as the legal representatives of the estate of the late SL)* (2020) eKLR, the court (R.P.V. Wendoh J) declined to interfere with the trial court’s award of Kshs1,400,000 for loss of dependency of a deceased who was aged 13 years.

24. Similarly, this court in *Kala Abass v Baraqwo Guyo Halake (Suing as the administrator of the estate of Wario Guyo Halake (Deceased))* Meru HCCA No E178 of 2021 declined to interfere with the trial court’s award of Kshs1,500,000 for loss of dependency of a deceased who was aged 15 years.

25. The Court considers that an award of Kshs2,000,000/- for loss of dependency in this case is appropriate.

Consideration of the Appellant’s evidence, submissions and authorities

26. The Appellant accuses the trial court of failing to consider his submissions and authorities. Courts have countless held that submissions are merely a guide and a court is not bound to adopt them.

## **Orders**

27. Accordingly, for the reasons set out above, the Court finds that the appeal has merit and it is allowed in the following terms:



- a. The award of special damages of Kshs 69,550 is hereby set aside and substituted with an award of Kshs 74,550.
  - b. The global award of Kshs 700,000 for loss of dependency is hereby set aside and substituted with an award of Kshs 2,000,000.
  - c. The court does not interfere with the awards of Kshs10,000/- for pain and suffering and Kshs100,000/- for loss of expectation of life.
  - d. The total ward therefore is Kshs2,184,550/-.
28. The Appellant shall have costs of the appeal.  
Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

Mr. Kaimba Advocate for the Appellant/Applicant.

Ms. Oteko Advocate for Respondent.

