



Intex Construction Company Limited & another v Ireri (Suing as the legal representatives of the Estate of Kennedy Ireri - Deceased) (Civil Appeal E053 of 2022) [2023] KEHC 20541 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E053 OF 2022
LM NJUGUNA, J
JULY 19, 2023**

BETWEEN

INTEX CONSTRUCTION COMPANY LIMITED 1ST APPELLANT

DAVID IRUNGU GICHUHI 2ND APPELLANT

AND

MARGRET WANJIKU IRERI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KENNEDY IRERI - DECEASED) RESPONDENT

(An appeal from the judgment and decree delivered on the 27th Day of September 2022 (Hon D. Endoo, MCIarb. Resident Magistrate)

JUDGMENT

1. The Appellants herein filed a Memorandum of appeal dated 17th September 2022 on the grounds appearing on its face seeking the following orders:
 - a. That the appeal be allowed and the judgment on quantum be set aside;
 - b. That this honorable court do proceed and enter its own judgment on quantum;
 - c. That the honorable court do proceed and set aside the awards for general damages for pain and suffering, loss of expectation of life and special damages and/or reduce the same; and
 - d. That the costs and interests of the trial court and this appeal be awarded to the appellants.
2. The particulars of the case are that on or about the 19th January 2018, along Embu-Ishara Road, the 2nd appellant who was a servant of the 1st Appellant herein carelessly and/or recklessly drove motor vehicle registration number KBP 807K Mitsubishi Pajero, causing the same to lose control and knock down the deceased, and thus causing the deceased sustain injuries that led to his death. It is from the above



events that the respondent herein sought special and general damages as pleaded in the plaint. Parties entered into a consent on liability at 20:80% in favour of the respondent after which, the court reached a decision to award damages to the respondent herein as summarized in the impugned judgment dated 22nd September 2022 which detailed as follows:

- a. Liability at the ration of 20:80 in favour of the respondent;
 - b. Special damages Ksh 126, 395/=;
 - c. Pain and suffering Ksh 50,000/=;
 - d. Loss of expectation Ksh 100,000/=;
 - e. General loss of dependency Ksh 2,000,000/=;
 - f. Cost to the respondent herein;
 - g. Interest at courts rate to accrue from the date of this judgment till payment in full; and
 - h. Stay of execution for 30 days.
3. The court directed that this appeal be disposed of by way of written submissions and both parties complied.
 4. The appellants submitted that the damages as awarded were excessive and unsupported and prayed that the same be reassessed and reduced by this appellate court. They reminded the court of its appellate powers as enshrined in section 78 of the *Civil Procedure Act* (Cap. 21). In doing so, they cited the cases of *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, *Kenya Ports Authority v Kustom (Kenya) Limited* [2009] 2 EA 212 and *Bashir Ahmed Butt v Uwais Ahmed Khan* [1981] KLR 349.
 5. It is the appellants' case that the amounts claimed and awarded as special damages cannot be substantiated as the proof provided is contained in inconsistent and illegible documents produced at the trial court. In support of their case and the argument for proportionality of the award, they cited sections 107, 108 and 109 of the *Evidence Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159(2)(a) of the *Constitution* of Kenya 2010. In challenging the claim and subsequent award of general damages for pain and suffering and loss of expectation of life, they relied on the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & another* [2017] eKLR.
 6. In the appellants' argument to challenge the general damages for loss of dependency, they submitted that the trial court failed in its application of the multiplier method and more so in failing to factor in the element of double compensation as discussed in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased)) v Kiarie shoe Stores Limited* [2015] eKLR.
 7. The respondent in her submissions, urged the court to uphold the decision of the trial court as the trial Magistrate kept in mind points of fact, law and evidence in mind while arriving at the decision. She supported the decision of the court in using the global sum approach in computing loss of dependency and in support she cited the case of *Mwanza v Ngalali Mutua Kenya Bus Ltd* which was cited in *Albert Odawa v Gichimu Githenji* in Nakuru HCCA No. 15 of 2003 [2007] eKLR. It was also her case that the appellants have failed in making their case to the appellate court and that the decision of the trial court ought to be upheld.
 8. After carefully considering the evidence adduced before the trial court by both parties, the grounds of appeal and submissions, it is this court's finding that the issue for determination is whether or not the award of damages by the trial court are erroneous and ought to be reviewed.



9. On the award of special damages, I have perused the record of the trial court and the evidence produced and do find that funeral expenses were pleaded by the plaintiff and legible expenditure receipts were indeed submitted. In my review, the total amount that can be accounted for by examining the payment receipts is Kshs. 126,395/= being the total sum for funeral expenses and filing of the succession proceedings. Therefore, I find that special damages are rightly awarded. On this, I am guided by the case of *Maritim & another v Anjere* [1990-1994] EA 312 at 316 it was held:-

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

10. On the award of general damages for pain and suffering, it goes without saying, that the deceased died on the spot and did not undergo prolonged pain and suffering. I am guided by the decision in the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi)* [2019] eKLR where the court observed that:

“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 pain and suffering the award range from Kshs 10,000/= with higher damages being awarded if the pain and suffering was prolonged before death”

Similarly, in the case of *Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* [2021] eKLR Hon. Odunga J observed that:-

“The appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the respondents ought to have been awarded a lesser sum. In my view what determines the award under that heading is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.”

In the circumstances, I find that Kshs. 50,000/= for pain and suffering is on the higher end as the deceased died on the spot, and did not suffer much pain. I therefore accordingly set aside the award of Ksh 50,000/= and award Ksh. 20,000/= for general damages of pain and suffering.

11. On the award of loss of expectation of life, the same is to be applied modestly because its intention is not to attain pecuniary gain for the life lost. In the case of *Benham v Gambling*, (1941) AC 157 it was held that only moderate awards should be awarded for loss of expectation of life for the following reasons:-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period



of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

Consequently, I find that the award of Kshs. 100,000/= is modest to cover its purpose.

12. On the issue of general damages for loss of dependency, I have noted that the deceased had an income which was pleaded in the trial court. However, I am quick to also state that this does not mean that his income was unascertainable just because he was a casual labourer. In fact, this court is left to speculate on the amount that the deceased made in a month and so I recognize that the 29 year-old man worked for a combined monthly income of Kshs. 15,000/= The kind of work he engaged in was casual labour and therefore it may not be possible to formally prove it. My position on this is guided by the Court of Appeal decision in the case of *Jacob Ayiga Maruja & another v Simeon Obayo (Suing as the administrator of the Estate of Thomas Ndaya Obayo* [2005] eKLR where it was held:

“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

13. It is my view that with these parameters set in place, nothing stops this court from applying the multiplier method in computing loss of dependency. In the case of *Leonard O. Ekisa & another v Major K. Birgen* [2005] eKLR it was held:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”

14. There is no doubt that the deceased had dependants who were his mother, sister and his 4 year-old son. I therefore find that a dependency ratio of $\frac{2}{3}$ is just and is to be applied. Additionally, given the fact that the deceased was only 29 years old when he died, it is prudent to say that he would have worked gainfully until the retirement age of 60 years. With this in mind, I find that the computation of the award by the trial court was within the parameters set out under the law of dependency.

15. In the end, I find that the appeal partially succeeds on the issue of pain and suffering only.

16. For the avoidance of doubt, this court orders as follows:

- a. Liability at the ratio of 20:80 in favour of the respondent;
- b. Special damages Kshs. 126,395/=;
General damages
- c. Pain and suffering Kshs. 20,000/=;



- d. Loss of expectation of life Kshs. 100,000/=;
- e. General damages for loss of dependency Kshs. 2,000,000/=;
- Subtotal
- Less 20% contribution (Kshs. 449,279/=)
- Grand Total Kshs.1,797,116/=
- f. Each party to bear its own costs of the appeal.
- g. Costs of the trial court to the respondents;
- h. Interest of general damages from the date of the judgment of the trial court. Special damages to attract interest from the date of filing of the plaint.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....1st Appellant

.....2nd Appellant

.....Respondent

