



**James & another v Waweru (The Legal Representative of James Waweru Wachayu)
(Civil Appeal E11 of 2020) [2023] KEHC 20321 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E11 OF 2020**

A MSHILA, J

JULY 14, 2023

BETWEEN

NDUNG’U MUHINDI JAMES 1ST APPELLANT

LEONARD WAWERU NGIGI 2ND APPELLANT

AND

**CECILIA WANJIKU WAWERU (THE LEGAL REPRESENTATIVE OF JAMES
WAWERU WACHAYU) RESPONDENT**

*(Being an appeal against the judgment of the Honourable court in Kikuyu Civil
Case No. 322 of 2017 delivered on 18/12/2019 by Hon. G. Onsarigo (SRM))*

JUDGMENT

BACKGROUND

1. By a Complaint dated 13/11/2017, the Respondent herein being the legal representative to the estate of James Waweru Wachayu (Deceased) sued the Appellants claiming compensation for the fatal injuries sustained by the deceased on or about the 22nd day of January, 2017, when the deceased was lawfully walking along Muhuri Road near Jada School when the 2nd Appellant so negligently drove motor vehicle registration number KCE 287A Honda Fit that he caused it to violently run into the deceased.
2. The 2nd Appellant filed his Defence denying any liability for the accident. In particular, he denied the particulars of negligence attributed to him.
3. The matter proceeded to a full hearing. The parties recorded a consent where liability was apportioned at 85:15. At the conclusion of the trial, the Honourable Trial Magistrate awarded damages as follows:-

Pain and suffering Kshs. 20,000.00

Loss of expectation of life Kshs. 100,000.00



Loss of dependency Kshs. 547,733.20

Special damages Kshs. 922,701.60

Total Kshs. 1,590,434.80

Less 15% Kshs. 238,565.22

Kshs. 1,351,869.58

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 three grounds of appeal as follows:-
 - a. That the trial court erred and misdirected itself in law, principle and facts when it made an order for special damages that was founded on a misapprehension of evidence so as to constitute an inordinately high and entirely erroneous estimate of the said damages in the circumstances.
 - b. The trial court erred in law, fact and principle in making an award for interest based on the date of filing of the case as opposed to the date of delivery of judgment thereby occasioning injustice to and prejudicing the appellants.
 - c. The trial court erred and misdirected itself in law when he abrogated his duty to adjudicate as per evidence produced and as per the law, principle and facts in assessing the quantum of general damages so as to reach an inordinately high and unjustified award.
5. The court directed the parties to canvass the appeal by way of written submissions. Hereunder are the parties respective submissions;

Appellants' Submissions.

6. The Appellants submit that the Respondent was unable to justify her claim for Kshs. 938,450/= in special damages. It was submitted that the Respondent ought to have presented flight receipts that were certified by the issuer. The Respondent also needed to prove that stamp duty was paid. Reliance was placed in the case of *Leonard Nyongesa vs Derrick Ngula Righa* (2013) eKLR. The court was urged to substitute special damages with an award of Kshs. 122,050/=.
7. The award of Kshs. 100,000/= awarded for pain and suffering was said to be excessive, erroneous and unreasonable as the deceased died on the spot. Reliance was placed on among other cases the case of *Harjeet Singh Pandal vs Hellen Aketch Okudho* (2018) eKLR. In regard to loss of expectation of life, the court was urged to review downwards the award of Kshs. 100,000/= to Kshs. 70,000/=. The deceased being 64 years was past the retirement age therefore the grant of 7 years post statutory retirement age was said to be overly generous. The Respondent was said to have failed to prove the deceased's earnings. The Appellants submitted that there was no justification for the award under loss of dependency. Further, under this head the ratio of 1/3rd was submitted to be applicable as the deceased's dependants were adults and relying on themselves. The court was faulted for awarding interest on both special and general damages from the date of filing suit and at a commercial rate. Reliance was placed on the case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited* (1970) EA 469.

Respondent's Submissions

8. The Respondent submitted that she produced the e-tickets for the deceased's children as proof of the award for special damages. Reliance was placed in the case of *Premier Dairy Ltd vs Amarjit Singh Sagoo & another* (2013) eKLR. It was submitted that an award of Kshs. 20,000/= was awarded for pain and suffering which award was said to be within range. For loss of expectation of life, the award



of Kshs. 100,000/= was submitted to be a conventional sum. Reliance was placed on among other cases the case of *Mercy Muriuki & another vs Samuel Mwangi Nduati & another (suing as the legal Administrator of the estate of the late Robert Mwangi)* (2019) eKLR. The Respondent submitted that in her supplementary list of documents she produced business licences as proof that the deceased was running a business. The court was urged to adopt a multiplicand of Kshs. 9,780.95 being the minimum monthly wage that was adopted by the trial court. Reliance was placed on among others the case of *Jacob Ayiga Maruja & another vs Simeon Obayo* CA167/200 (2005) eKLR. The court was urged to retain the multiplier of 7 years and the ratio of 2/3rd as proposed by the Appellants in the trial court. In conclusion, the court was urged not to disturb the award by the trial court as the same was not so high or low. In regard to interest, the Respondent submitted that the Appellants misapprehended the issue by indicating that the trial court awarded costs and interest at the time of filing. It was submitted that if the Appellants had an issue with the decree they would have approached the trial court for directions.

Trial Court's Evidence

9. Cecilia Wanjiku Waweru (PW1) adopted her witness statement. In cross examination, she stated that the deceased died on the spot. That he was aged 64 years and was businessman dealing in cereals. She produced the e-tickets for her children. She indicated that the driver of the accident motor vehicle was charged at Kibera Law Courts.

Issues For Determination

10. Having read and considered trial court record, the submissions by both parties and the case law relied upon, this court has framed the following issues for determination;
 - i. Whether the order made for special damages was erroneous and
 - ii. Whether the trial court erred in the assessment of quantum of general damages.
 - iii. The applicable date from when interest accrued.

Analysis

11. 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...”

12. By consent liability was apportioned at 85:15 in favour of the Respondent as against the Appellants.

Whether the order made for special damages was erroneous

13. On the issue of special damages, the Appellants contended that the Respondent did not prove her claim of Kshs. 938,450/=. In any case stamp duty had not been shown to have been paid for the flight receipts. The court was urged to award Kshs. 122,050/=. The Respondent argued that the flight charges incurred were for the children of the deceased who had to travel to attend the deceased's funeral



and e-tickets were produced to prove the same. The trial court proceeded to award special damages as prayed by the Respondent.

14. In *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, the Court of Appeal held as follows:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

15. From the evidence adduced this court is satisfied that the Respondent specifically pleaded for the award of special damages and subsequently strictly proved the same with the production of documentary evidence. The deceased’s children incurred expenses while travelling to attend the deceased’s burial as such ought to be compensated for the same. Therefore, this court finds no good reason to interfere with the award for special damages as awarded by the trial court.

16. This ground of appeal is found to have no merit and it is disallowed and the trial courts award is upheld.

Whether the trial court erred in the assessment of quantum of general damages.

17. On quantum, the Appellants allege that the Honourable Magistrate awarded damages that were inordinately high and unjustified considering the evidence produced.

18. 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.” (Refer to case of *Butt -vs- Khan*, Nairobi Civil Appeal No. 40 of 1977).

19. 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.”

20. 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. The Appellants contend that the court awarded Kshs. 100,000/= for pain and suffering. This is not correct as the record shows that the court awarded Kshs. 20,000/= for pain and suffering which this court is satisfied that it is reasonable as the deceased died on the spot. The court also finds the award of Kshs. 100,000/= for loss of expectation of life as being the conventional award that courts award in the circumstances.

21. Refer to the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR where 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.” (emphasis added).

22. For loss of dependency, the trial court adopted a multiplier of 7 years, a ratio of $2/3^{\text{rd}}$ and a multiplicand of Kshs. 9,780.95 being the minimum monthly wage.
23. On multiplier; the Appellants contend that the Respondent failed to prove dependency. The trial court was also faulted for using a multiplier of 7 years as the deceased was aged 64 years as such he had surpassed the statutory retirement age of 60 years.
24. The trial court adopted a multiplier of 7 years as the deceased was said to be of good health. The Appellants had proposed 5 years. This court is not inclined to disturb the multiplier adopted by the trial court of 7 years as the deceased was running a cereals shop and he enjoyed good health as such would have continued with his business for several years were it not for the accident. Refer to the case of *Hardev Kaur Dhanoa v Multiple Hauliers (E.A) Ltd* (2013) eKLR where a multiplier of 6 years was adopted for a deceased who was 62 years old.
25. On the dependency ratio; The court adopted the ratio of $2/3^{\text{rd}}$ as proposed by both parties in the trial court. The ratio of $2/3^{\text{rd}}$ was faulted as the deceased’s dependants were said to be adults; The deceased was survived by his wife whom he was taking care of as he was the sole bread winner. This court is satisfied that the ratio of $2/3^{\text{rd}}$ is reasonable in the circumstances.
26. On the Multiplicand; the court adopted Kshs. 9,780.95 as the minimum monthly wage. The Respondent provided business licences that indicated that the deceased was working at a cereal shop. His actual income could not be ascertained as such the trial court did not err when it relied on the regulation of wages in applying the minimum wage.
27. Refer to the case of *Allan Owiti Awuor & another v Tabitha Micere Mathu (Suing As Personal Representative of The Estate Of Peter Math Ng’ang’a)* [2021] eKLR where Mwita J stated that:-

“It is true that it is not in every case that documentary evidence will be available to support earnings. It is also true, as decisions from courts show, that one can earn a living without necessarily having documents to prove that. However, it is trite law that in the absence of proof of income, the court should fall back to the regulations on wages and apply the minimum wage. In *Juma Kigambwi v Loise Kabenya* [2017] eKLR, the court held that where there is no proof of income, the court should apply minimum wage.”
28. Also refer to the case of *Francis Righa vs Mary Njeri (Suing as the Legal Representative of the estate of James Kariuki Nganga)* [2021] eKLR, the Court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages under Fatal Accident Act;

“...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of *Roger Dainty versus Mwinyi Omar Haji & Another* 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”



29. The trial court exercised its discretion in this matter. Neither the Appellants nor the Respondent have shown that the awards were either extremely low or high to represent an entirely erroneous estimate of the awards the Respondent was entitled to.
30. In the instant case, it is this court's considered view that the general damages awarded by the trial court are reasonable. In arriving at this conclusion, this court is alive to what Kneller J.A, stated in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. 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.’
31. Having applied these principles to this appeal as well as having also considered the fact that the deceased was 64 years old and working at a cereal shop where he was making this income so as to support his family as he was the sole bread winner, this court finds no good reason to interfere with the trial court's awards on quantum. The multiplier of 7 years is adopted by this court, the multiplicand of Kshs. 9,780.95 and the ratio of 2/3rd applied are reasonable in the circumstances.
32. In *Gicheru v Morton & another* [2005] 2 KLR 333, the Court of Appeal 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.”

The applicable date from when interest accrued.

33. Lastly, the Appellants contend that the trial court erred in awarding interest from the date of filing suit. The Respondent submitted that the court awarded Kshs. 1,351,869.58 plus costs and interest. Nowhere in the trial court's judgment did the trial magistrate indicate that interest was granted from the date of filing suit. For clarification, purposes interest shall accrue from the date of delivery of the judgment in the lower court.
34. In conclusion this court finds that there are no compelling reasons to warrant this court to interfere with the trial court's assessment of damages.

Findings and Determination

35. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds the appeal to be devoid of merit and it is hereby dismissed with costs to the Respondent.
 - ii. For clarity the date from which interest on the sum of Kshs. 1,351,869.58 plus costs shall accrue shall be from the date of delivery of the judgment in the lower court.

Orders Accordingly



DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 14TH DAY OF JULY, 2023.

A.MSHILA

JUDGE

In the presence of;

Wanza h/b for Miss Mwangangi – for the Appellant

Kihika – for Respondent

