



**Ng'ang'a v GOO & another (Suing as the legal representative of the Estate EOO)  
(Civil Appeal 17 of 2018) [2023] KEHC 20058 (KLR) (Civ) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20058 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 17 OF 2018**

**CW MEOLI, J**

**JULY 6, 2023**

**BETWEEN**

**SAMUEL NG'ANG'A ..... APPELLANT**

**AND**

**SAO ..... 1<sup>ST</sup> RESPONDENT**

**GOO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE EOO**

*(Being an appeal from the judgment of P. Muboli (Mr.) (SRM) delivered  
on 20th December 2017 in Nairobi Milimani CMCC No. 2560 of 2016)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on December 20, 2017 in Nairobi Milimani CMCC No 2560 of 2016 (hereafter the lower court suit). The suit was filed on April 27, 2016 by GOO and SAO, the plaintiffs in the lower court suit (hereinafter the respondents) in their capacity as the legal representatives of the estate of the EOO (hereafter the deceased), against Samuel Ng'ang'a, the defendant in the lower court suit (hereafter the appellant). The respondents' claim was for damages under the Law Reform Act, Fatal Accidents Act and special damages, and arose from an accident that occurred on October 5, 2013.
2. It was averred that at all material times the appellant was the driver of motor vehicle registration No KAX 669D (hereafter suit motor vehicle). It was further averred that the deceased was lawfully standing along Kangundo Road at Chokaa Area when the appellant through his authorized driver, servant and or agent drove or controlled the suit motor vehicle so carelessly and negligently that he knocked down the deceased who sustained fatal injuries.



3. The appellant filed a statement of defence on August 31, 2016 denying the key averments in the plaint and liability. On his part he averred strictly without prejudice to the denials in the statement of defence that any such occurrence of accident as the respondents might prove, was caused solely and or substantially contributed to by the negligence of the deceased.
4. The suit proceeded to a hearing during which both parties adduced evidence. In its judgment, the trial court found the appellant wholly liable for causing the accident and awarded to the respondents damages as hereunder: -
  - Pain and suffering – Kshs 50,000.00/-
  - Loss of expectation of life - Kshs 100,000.00/-
  - Loss of dependency - Kshs 1,200,000.00/-
  - Special damages – Kshs 92,000.00/-
  - Total Kshs 1,442,000.00/-
5. Aggrieved with the outcome, the appellant preferred this appeal challenging the judgment solely on the issue quantum of damages based on the following grounds:-
  - “ 1. The learned trial magistrate erred in law and misdirected himself when he failed to consider the appellant’s submissions on both points of law and facts.
  2. That the learned trial magistrate’s judgment was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned miscarriage of justice.
  3. That the learned magistrate failed to make a finding on the submissions by the defence in his judgment and in particular not to make any award under the Law Reform Act.
  4. That the learned magistrate erred in law and in fact in awarding Kshs. 50,000/- for pain and suffering and Kshs 100,000/- for loss of expectation of life when the same was not pleaded.
  5. The learned magistrate erred in law in adopting the wrong principles in awarding loss of dependency under the Fatal Accident Act.
  6. That the learned trial magistrate erred in law and in fact by computing an award for loss of dependency which was manifestly excessive in the circumstance.
  7. That the learned magistrate erred in law and in fact by failing to weigh all the evidence placed before him in assessing damages.
  8. That the learned magistrate erred in law in applying wrong principles when assessing general damages under the Law Reform Act and Fatal Accident Act and the decision therein being exorbitantly excessive in the circumstance.
  9. That the estate has earned twice under the Law Reform Act and Fatal Accident Act.” (sic)
6. The appeal was canvassed by way of written submissions which on the appellant’s part were riveted on quantum of damages. Reiterating the principles undergirding the assessment of damages, counsel



anchored his submissions on the decision in *Kemfro Africa Limited t/a Meru Express Services [1976] & another v Lubia & another* [1987] KLR 30. He urged the court to disturb the trial court's award on damages because the court improperly exercised its discretion by considering irrelevant factors thereby arriving at an inordinately high and excessive award on damages.

7. Specifically concerning the award on loss of dependency, counsel cited several decisions including *Catholic Diocese of Kisumu v Sophia Achieng Tete* civil appeal No 284 of 2001 [2004] 2 KLR 55, *Rosemary Onyango & another v Mohamed Jenjewa Ndoyo & another* [2019] eKLR and *Oshivji Kuvenji & another v James Mohamed Ongeng* [2012] eKLR in urging the court to allow the appeal by disturbing the trial court's award and substituting therefor an award in the sum of Kshs 600,000/-. In conclusion, counsel asserting that costs follow the event cited the provisions of section 27 (1) of the *Civil Procedure Act*, in seeking costs of the appeal.
8. The respondent naturally defended the trial court's decision. Counsel for the respondent contemporaneously addressed the appellant's grounds of appeal. He too echoed the principles that guide an appellate court on a first appeal as set out in *Mbogo v Shab & another* (1968) EA 93. However, despite the appeal being confined to quantum, counsel went ahead to submit on the issue of liability.
9. Concerning damages, counsel contended that the appellant has not pointed out the irrelevant factors that the trial court considered and or the relevant factors the court failed to take into account in arriving at the challenged award. He cited the case of *Mugambi & Silas v Isaiah Gitiru* civil appeal No 130 of 2002 in that regard. His view was that the trial court's award was not so excessive as to warrant interference by this court. In support of the submission, counsel cited several cases including *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of NK (DCD))* [2016] eKLR, *Twiga Chemicals Limited v Patrick Makau Mutisya & another* [2019] eKLR and *Zack Abusa Magoma v Julius Asiago & Jane Kerubo* [2020] eKLR. The court was thus urged to dismiss the appeal with costs.
10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This being a first appeal, the duty of this court is as spelt out by the Court of Appeal for East Africa in *Selle v Associated Motor Boat Company Ltd* [1968] EA 123:-

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982



– 1988] 1 KAR 278. This appeal turns on the question whether appropriate damages were awarded under the *Fatal Accidents Act*.

12. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* [1987] KLR 30. It was held in that case that:-

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.”

13. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 KAR 5 that:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge 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 also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* [1979] EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu civil appeal No 284 of 2001; [2004] eKLR.

14. Pertinent to the determination of issue herein are the pleadings, which form the basis of the parties’ respective cases before the trial court. The respondents at paragraph 3 of the plaint pleaded as follows:-

“....Particulars pursuant to statute

- a) GOO father adult
- b) SAO mother adult

The nature of the claim in respect of which damages are sought is as follows:-

At the time of his death the deceased was aged 6 years old and enjoyed good health and lived a happy vigorous life. The deceased died the same day while under treatment. By his death, the deceased lost normal expectation of a happy and successful life and his estate has suffered loss and damage.

Before his death the deceased was a minor. Consequently, as a result of his death the deceased’s family have miserably lost the expected financial, material and or economic support or otherwise from the deceased as in commonly rendered by such members of the Kenyan Society of the status of the deceased.” (sic)

15. In its judgment, the trial court after restating and examining the respective parties’ evidence stated as follows: -

“....Parties filed written submissions of which I have looked at.....

Loss of dependency

The plaintiff has submitted and asked the court to consider the minimum wage in 2013, a multiplier of 50 years which would have worked out to Kshs 6,574,400/=. The defendant asked the court award a global figure to recognize the loss to the deceased’s estate. They submit that his prospects were not known and fully depended on the parents. They



suggested Kshs 200,000/=. In *Kenya Breweries Limited v Saro* [1991] eKLR the Court of Appeal in Mombasa rendered itself ...when faced with compensation for a minor deceased...

The import of the above decision is that the court should be able to award compensation to the family of a deceased child...

Similarly in present case the minor was 6 years old he attended [Particulars Withheld] Academy, he was an average student as per exhibits no. 6, the parents must have had expectation that he would have finished school and entered the job market and assist them in old age, the zeal would be seen by the mother who had taken them from school. Considering the rate of inflation, the value of the shilling and all other relevant economic factors I am convinced that an award of Kshs 1,200,000/= is adequate compensation.” (sic)

16. During the trial, JAO testified as PW1 whereas GOO testified as PW2. It was PW2’s evidence that the Deceased was his son aged 6 years and a student at [Particulars Withheld] Academy as evinced by PExh.3, PExh.5 and PExh.6. Before the trial court the respondents relied on the decision in *David Ngunje Mwangi v Chairman of the Board of Governors of Njiri High School* [2001] eKLR in urging the court to apply a minimum wage of Kshs 10,954/- and multiplier of 50 years given the age of the deceased. The appellant on their part relied on the decision in *T.O.A v George Onyango Ogam & another* [2009] eKLR in urging the court to apply a global award of Kshs 200,000/-. This notwithstanding, both parties on this appeal have cited a raft of decisions that were not cited before trial court.
17. Thus, the trial court did not have the benefit of said decisions. This court entirely agrees with Ochieng J (as he then was) in his judgment in *Silas Tiren & another v Simon Ombati Omiambo* [2014] eKLR wherein the learned judge took exception to the introduction of new authorities at the appeal stage, stating *inter alia* that:

“None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal.”
18. That said, it would be apt to note that assessment of damages for lost dependency is not a precise science but an exercise based on settled principles and sensible estimates based on evidence. The Court of Appeal in *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1985] eKLR cited with approval the decision in *Gammel v Wilson* [1981] 1ALLER where it was held that:-

“ [ I]f sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation, it is the balance of probability which matters....”
19. The trial court in grappling with the foregoing issue opted to apply the global award approach in arriving at the decision it did, which award the appellant assails as inordinate high, all factors considered. The trial court was clearly alive to principles espoused by the Court of Appeal in *Kenya*



*Breweries Limited v Saro* [1991] eKLR concerning awards for loss of dependency in respect of a minor. In that case, the Court of Appeal stated that in claims brought in respect of deceased minors, the age of the child is a relevant factor. The court stated:-

“In the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in a case of a four year old who has not been to school and whose abilities are yet to be ascertained. That, we think, is a question of common sense rather than law ... Were the damages awarded excessive as claimed in ground two of the memorandum of appeal? It is now well established that this court can only interfere with a trial judge’s assessment of damages where it is shown that the judge has applied wrong principles or where damages awarded are so inordinately high or low that an application of wrong principles must be interfered.”

20. The court in the above case had proceeded to consider awards made under this head between 1982 and 1990 before concluding that an award of Kshs 100,000/- in 1990 could not be taken to be so inordinately high that the application of a wrong principle had to be inferred. The court concluded by stating that:

“While we would express the view that damages on this head must be kept relatively low, we do not think that the sum awarded was wrong, taking into account the depreciation in the value of money. We probably would have awarded slightly less had we been the trial judge but that is not a reason to warrant us interfering.”

21. The above appeal was dismissed in the year 1991. Back to the instant matter, the trial court considered the High Court decision in *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of NK (DCD))* [2016] eKLR in arriving at a global sum of Kshs 1,200,000/-. In the foregoing case, the deceased minor was a 9 year and attending school whereas in the instant appeal the minor was 6 years old and already enrolled in school. On this appeal, the appellant relied on a rather dated decision, *T.O.A* (supra) wherein the deceased was 11 years old and school going, in support of a global award of 600,000/- whereas before the trial court they proposed an award of Kshs 200,000/-.
22. This court having perused the authorities found that one related to much older child, in the case of *David Ngunje Mwangi v BOG Njiri High School* HCCC 2409 of 1998. The award herein was so inordinately high that the application of a wrong principle must be inferred. This court has reason therefore to interfere with the award, considering the authorities cited at the trial and on this appeal and the age of the deceased herein. Nevertheless, in view of inflation over the years, the award of Kshs 200,000/- urged by the appellant appears rather low. In the court’s view, a global award of Kshs 800,000/- suffices as damages for lost dependency in this case.
23. Finally, nothing turns on the appellant’s complaint of double compensation of the respondents under the *Law Reform Act* and the *Fatal Accident Act*, raised in the memorandum of appeal. The law is settled; awards may be made under both Acts but the court should take into account any sums awarded under the latter Act while awarding damages under the *Law Reform Act*. The Court of Appeal in *Hellen*



“This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependents under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered. The Law Reform Act (cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. The words “to be taken into account” and “to be deducted” are two different things. The words in section 4(2) of the Fatal Accidents Act are “taken into account”. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.

24. In the end, the appeal succeeds to the extent that the judgment of the lower court is hereby varied by the setting aside of the award for lost dependency, this court substituting therefor an award of Kshs 800,000/ (eight hundred thousand). All the other awards remain unchanged. The parties will bear their own costs on this appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6th DAY OF JULY 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Appellant: Mr. Njuguna h/b for Mr. Kabita

For the Respondent: Mr. Kamau

C/A: Carol

