



Odhiambo v Gacheru & another (Both Suing on Behalf of the Estate of Blantina Nduku Kamali); Kamali (Respondent) (Civil Appeal 25 of 2022) [2023] KEHC 20453 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 25 OF 2022
SM GITHINJI, J
JULY 10, 2023**

BETWEEN

DANIEL AJUMA ODHIAMBO APPELLANT

AND

AGNES AMBUI GACHERU 1ST RESPONDENT

LOIS KAMBUA KAMALI 2ND RESPONDENT

BOTH SUING ON BEHALF OF THE ESTATE OF BLANTINA NDUKU KAMALI

AND

BLANTINA NDUKU KAMALI RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable L.N.Wasige – Principal Magistrate delivered in Kaloleni PMCC No.E053 of 2021 on 29th March, 2022)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mr Njengo Advocate for the Appellant

Mr Njoroge Mwangi Advocate for the Respondent

1. This appeal is against the award of damages by the trial court in the sum of Kshs. 1,500,000/= for loss of dependency. Consent on liability was recorded at 15 % against the Respondent and 85 % against the Appellant. The judgment was delivered on 29.3.2022. Aggrieved by the judgment, the Appellant filed a memorandum of appeal on 4.4.2022. The appeal is mainly on the Trial Court’s finding on quantum. The grounds of appeal are that:-



1. That the learned trial magistrate erred in fact and in law in her approach in assessment of general damages under the head of loss of dependency and therefore arrived at a sum that was inordinately high, excessive in the circumstances, unsustainable in law hence occasioning a miscarriage of justice.
 2. That the learned trial magistrate in assessing damages for loss of dependency and or lost years, applied the wrong principles of law by taking into account some irrelevant factors and leaving out of account some relevant factors hence arrived at an award that was erroneous.
 3. That the learned trial magistrate erred in fact and in law in awarding Kshs. 30, 000/- as special damages for obtaining limited grant of letters of administration yet the same was not an expense properly incurred thus not awardable in the matter on trial.
 4. That the learned trial magistrate erred in law in failing to apply the provisions of section 2 of the *Insurance Motor Vehicle Amendment Act*, 2013 in ascertaining the income of the deceased in failing to apply the minimum wage.
 5. The award for loss of dependency and lost years was arbitrarily made without due regard to judicial precedent, the parties' submissions and considering relevant factors hence inordinately high.
2. The Appellant proposed that the following orders be made; -
- a. That the quantum of costs judgment of honourable L.N. Wasige delivered in Kaloleni Principal Magistrate Civil Case No. E053 of 2021 on 29th March 2022 be set aside and be replaced with a reassessment of damages for loss of dependency and lost years downwards.
 - b. That the appellant be awarded costs of this appeal.
3. At the hearing of this appeal, directions were taken that both counsel file their respective submissions which I have carefully perused and considered. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified and should therefore make an allowance for that. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
 4. The background of the dispute between the parties herein is that vide a plaint dated 23.3.2021, the Respondent sued the Appellant for general and special damages for fatal injuries occasioned to the deceased on 2.2.2021 in a road accident. It was averred that the deceased was lawfully travelling aboard the Appellant's motor vehicle Registration No. KCP 535Z from Kibwezi to Mombasa along Nairobi-Mombasa Highway, when the Appellant's vehicle was negligently driven causing it to roll several times leading to the deceased's death. That at the time of her death, the deceased was aged 22 years and was a clothes seller within Kibwezi area, with an estimated monthly earning of Kshs. 24,000/-. She was also survived by two minors. The Respondent also pleaded special damages of Kshs. 128, 500/- being funeral expenses and costs for obtaining a limited grant.
 5. The Appellant entered appearance and filed a statement of defence dated 9.4.2021 denying the allegations. On 8.2.2022, parties recorded a consent on liability as aforementioned.

The Evidence

6. The matter was listed for hearing on 28.7.2021 when neither the Appellant nor his advocate appeared. The Respondent called two witnesses.



7. PC John Mbugua-PW1, a police officer attached to Rabai Police Station, testified that the accident occurred on 2.2.2021 at about 9am, and that it was self-involving. The driver of the motor vehicle was one Daniel Wambura Mwita. According to PW1, the motor vehicle was on high speed when the said driver lost control causing it to veer off the road and landed into a valley. The deceased herein died on the spot. The witness produced as PEXH 1 and 2 the police abstract and post mortem report respectively.
8. Agnes Wambui Gacheru-PW2, the deceased's mother, adopted her statement dated 23.3.2021 as evidence in chief. She also produced the documents in the list of documents as PEXH 3-9. The documents were a copy of the grant ad litem and receipt thereto, death certificate, chief's letter, two birth certificates of the deceased's children, receipts for funeral expenses and a copy of a demand letter.
9. At this juncture, the Respondent's case was closed. So was the Appellant's.
10. The trial court made a determination on quantum as follows;-
 - Under the *Law Reform Act*
 - a. Damages for pain and suffering– Kshs. 30,000/-
 - b. Damages for loss of expectation of life – Kshs. 120,000
 - Under the Fatal Accident Act
 - c. Damages for loss of dependency – Kshs. 1,500,000/-
 - d. Special damages – Kshs. 128, 500/-
11. The sum of this amount less 15 % liability being Kshs. 1,511,725/-.
12. Looking at the memorandum of appeal and submissions filed by the Appellant, it is clear to me that the main issue is the award on loss of dependency. It follows therefore that the issue for determination is whether the award of Kshs. 1,500,000 for loss of dependency is inordinately high.

Analysis and Determination

13. The Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR held that; -

“... it 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. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A 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.”



14. From my re-evaluation of the evidence, I find that on loss of dependency, the learned trial magistrate made reference to the relevant evidence on record. She observed that there was no proof of the deceased's earnings and proceeded to adopt the global approach as opposed to a multiplier approach. She relied on the case of *Ann Kanja Kitbinji v Jacob Kirari and another* [2018] eKLR, where the deceased, a farmer aged 36 had left behind a husband and children, and was awarded Kshs. 800,000 for loss of dependency.
15. According to the Appellant the trial magistrate misdirected herself by doubling that amount. He relied on the cases of *Sammy Kipruto Rop & another v Francis Cheruiyot Barbelio sued as the legal representative of Penina Jeptoo (Deceased)* [2016] eKLR; *Oyugi Judith and Another v Fredrick Odhiambo Ongong and 3 others* [2014] eKLR; and *John Migwi and another v Mashua Hassan Msuka and another* C.A No. 96 of 2019 Mombasa.
16. Upon considering the above cases cited by the Appellant, I note that the circumstances in those cases were a bit different to the present case. For instance, in the Sammy Kipruto case, the deceased was an average form four student aged 21 years. Her dependants were indicated to be her father who was also a retired teacher and mother. The court awarded Kshs. 600,000/- for loss of dependency. Similarly, in the second case, the Appellant relied on the award for a deceased person therein. That deceased was a 30 year old boda boda operator who left behind a wife and two children. He was awarded Kshs. 700,000/-. In the last case cited to me by the Appellant, the court of appeal simply reinstated the learned magistrate's award for reasons that the high court sitting on appeal failed to give reasons as to why it enhanced the award.
17. It should be noted that the cases cited by the Appellant are of awards given several years back. The effects of inflation need be weighed and for the reason I am not persuaded by the authorities cited by the appellant. The global approach adopted by the trial magistrate was proper. The trial magistrate gave her reasons for awarding loss of dependency at the impugned sum. The deceased died aged 22 years leaving behind three dependants, two of which were minor children aged 5 and 2 years then.
18. Bearing in mind that a court sitting on appeal on quantum cannot interfere with an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate and unless it is shown that the trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which is either inordinately high or low; I am not convinced in this case that the trial magistrate relied on wrong principles. An award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on the demeanor of witnesses observed by the trial Magistrate which advantage an appeal court lacks. See *Simon Tavera v Mercy Mutitu Njeru* [2014] eKLR.
19. Given the foregoing, I find that the appeal is unmerited. The same is dismissed with costs to the Respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 10TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the presence of; -

1. Mrs Julu for the Appellant



2. Mr Kazungu for the Respondent

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S.M. GITHINJI

JUDGE

10/7/2023

