



Daycan Trading Limited & another v Cheptebkeny & another (Suing as the legal administrators of the Estate of David Biwot Katam - Deceased) (Civil Appeal E027 of 2020) [2023] KEHC 22255 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E027 OF 2020
AC MRIMA, J
SEPTEMBER 19, 2023**

BETWEEN

DAYCAN TRADING LIMITED 1ST APPELLANT

DAVID CHERUIYOT KILEI 2ND APPELLANT

AND

ANN CHEPTEBKENY 1ST RESPONDENT

JANET CHEPKOECH BIWOT 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF DAVID
BIWOT KATAM - DECEASED**

(Being an appeal arising out of the judgment and decree of Hon. V. Karanja (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 206 of 2019 delivered on 11th January, 2021)

JUDGMENT

Background:

1. The appeal subject of this judgment is only against the quantum of damages. It arose from the judgment and decree in Kitale Chief Magistrate's Court Civil Case No. 206 of 2019 Ann Cheptebkeny & Janet Chepkoech Biwot (suing as the legal administrators of the Estate of David Biwot Katam (Deceased) vs. Daycan Trading Limited and David Cheruiyot Kilei (hereinafter referred to as 'the suit') which was delivered on 11th January, 2021.
2. Liability was agreed at 25%: 75% in favour of the Respondents in this appeal, who were the Plaintiffs in the suit.



3. The suit was heard before the liability was apportioned. Ann Cheptebkeny testified and produced various exhibits which were admitted by the consent of the parties. At the close of the Plaintiffs case, the Defendants did not call any witness, but instead the consent on liability was recorded.
4. Parties were directed to file and exchange written submissions. Only the Plaintiffs complied.
5. The trial Court in its judgment rendered itself as follows: -
 - a. Liability is apportioned at the ratio of 25%:75% in favor of the Plaintiffs;
 - b. Pain and suffering at Kshs. 50,000/=;
 - c. Loss of expectation of life at Kshs. 100,000/=;
 - d. Loss of Dependency at Kshs. 800,000/=;
 - e. Special damages awarded at Kshs. 65,000/=;
 - c. The Plaintiff has the cost of the suit and interest at court rates.

The Appeal:

6. Being dissatisfied with the above decision, the Appellants herein preferred an appeal vide a Memorandum of Appeal filed on 19th October, 2020.
7. The Appellants mainly contended that the trial Court erred in adopting wrong principles and failing to consider the evidence adduced. As a result, they opined that the trial Court arrived at a grossly excessive award in general damages.
8. They prayed that this Court sets aside the award on general damages and to re-assess the general damages downwards. It also sought for the costs of the appeal.
9. Parties canvassed the appeal by way of written submissions.
10. The Appellants majorly expounded the grounds of appeal in their submissions. Several decisions were referred to in support.
11. The Respondents opposed the appeal. They urged this Court to uphold the trial Court's findings and relied on several decisions to buttress the argument.
12. They prayed for the dismissal of the appeal.

Analysis:

13. As the appeal is on quantum of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)



14. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

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 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.

15. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.

16. This Court has carefully read and understood the gist of the appeal, the pleadings, the proceedings, the impugned judgment, the submissions and the judicial authorities referred to by the parties.

17. The two issues which arise for determination in this appeal are as follows: -

- i. Whether awards under the [Law Reform Act](#) and the [Fatal Accidents Act](#) amount to double compensation.
- ii. Whether the trial Court rightly handled the issue of Pain and suffering, Loss of expectation of life, Dependency ratio and the Multiplicand.

18. The Court will deal with the issues in seriatim.

- a. Whether awards under the [Law Reform Act](#) and the [Fatal Accidents Act](#) amount to double compensation:

19. From the reading of the Petitioners' Counsel written submissions, it is easily gathered that the Counsel was well aware of the prevailing legal position on this issue. Counsel, rightly so, referred to the Court of Appeal decision in *Hellen Waruguru Waweru (Suing as legal representative of the Estate of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited* (2015) eKLR.

20. However, Counsel only captured part of paragraph 20 of the decision which stated as follows: -

20. 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 dependants under the [Fatal Accidents Act](#) are the same, and consequently the claim for lost years and dependency will go to the same persons.

21. A simple reading of paragraphs 19 to 23 inclusive of the above decision reveals the most current legal position on the issue.

22. The said paragraphs are hereunder reproduced verbatim: -

19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the



same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.

20. 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 dependants 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 issues of duplication does not arise.

21. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another =vs= Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -

6. 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; it appears the legislation intended that it should be considered.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants 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.

8. The words 'to be taken account' and 'to 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."

22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Kshs. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr.



Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.

23. The consequence of our intervention in the various awards boils down to the following final assessment of damages: -

Pain and suffering 10,000/=

Loss of life expectation 100,000/=

Loss of life dependency (19,373 x 122 x 1 x 2/3) 154,984/=

Farming (20,000 x 12 x 5 x 2/3) 800,000/=

Total 1,064,984/=

Less 30% contribution 319,495/=

Balance 745,489/=

In our view, the low amounts awarded under the LRS sufficiently take into account the further award under the FAA. We also note from the list of dependants that some of them would not directly benefit from the estate.

23. Having said as much, and with the guidance of the Court of Appeal in the Hellen Waruguru Waweru case (supra), this Court now finds and hold that awards under the *Law Reform Act* and the *Fatal Accidents Act* do not amount to double compensation. The rationale is that from the reading of Section 2(5) of the *Law Reform Act*, it is the case that the beneficiaries under the *Law Reform Act* are not necessarily the same as those under the *Fatal Accidents Act*.
24. A Court is only supposed 'to take into account' the award made under the *Law Reform Act* when assessing damages under the *Fatal Accidents Act*. To this Court, the trial Court having addressed itself to the awards in both legislations is a clear indicator that the Court was well aware of the guiding legal principle and accordingly applied its legal mind thereto.
- b. Whether the trial Court rightly handled the issue of Pain and suffering, Loss of expectation of life, Dependency ratio and the Multiplicand.
25. This Court has carefully considered the awards.
26. On the issue of the award on pain and suffering before death, the record has it that the deceased died a day after the accident. The Appellants did not elicit to ascertain whether the deceased was unconscious during the period between the accident and the death or otherwise. If the deceased had been unconscious all along, then he would not have suffered any pain and suffering. An award in such circumstances would be low, if at all any.
27. However, since the record is silent on the state of the deceased from the time of the accident until his death, the presumption is that the deceased suffered pain from until his death.
28. In this case, the deceased died a day later. He must have suffered pain. The award of Kshs. 50,000/= is, hence, reasonable.
29. This Court, likewise, wishes not to disturb the award on loss of expectation of life. There is no doubt a vibrant life was lost. The deceased was aged 44 years.



30. In the English case of *Flint vs. Lovell* [1935] 1 K.B 354, the Court of Appeal held that ‘... in an action for damages for personal injuries, the damages awarded might, in appropriate cases, include a sum for the shortening of enjoyment of life or the lost prospect of an enjoyable, vigorous and happy old age...’
31. Therefore, even in ordinary personal injuries claims, a party may claim for an award of loss of expectation of life in appropriate instances.
32. In this case, the award of Kshs. 100,000/= is reasonable.
33. The Court will now consider the issues of the dependency ratio and the multiplicand together.
34. The manner in which damages for lost years or loss of dependency ought to be arrived at has, by now, been a well-trodden path. Briefly put, where there is evidence of income on the part of the deceased or such income can be appropriately ascertained say for instance through the duly gazetted minimum wages or any other manner as to enable the Court appropriately determine the multiplicand, then a Court is enjoined to undertake the mathematical process of calculating the lost years by inter alia using the multiplicand, the earnings, among other parameters.
35. In instances where it is not possible to ascertain the deceased’s income, say for instance where the deceased was not in any formal employment, business or such-like engagements, a Court is called upon to adopt a globe sum.
36. In *Franklin Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu (Deceased))* [2020] eKLR the Court held as follows:

.... In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach as the appropriate mode of assessing the loss of dependency...

37. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs Gichumu Githenji Nakuru High Court HCCA No. 15 of 2003* [2007] eKLR, the Court made the following observation: -

.... The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

38. Similarly, in *Moses Mairua Muchiri vs. Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (Deceased))* [2016] eKLR, the Court held as follows: -

... It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, Courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case....



39. In the present case, PW1 testified that the deceased was a boda-boda rider earning a sum of Kshs. 12,000/= monthly. No proof of income was adduced. In the judgment, the trial Court settled for Kshs. 10,000/= as the multiplicand, 10 years as the multiplier and two-thirds as the dependency ratio.
40. The trial Court did not, however, give the basis of the multiplicand of Kshs. 10,000/= monthly. The Appellants contended that since there was no proof of earnings, then the trial Court ought to have been guided by the Minimum Wages (Amendment) Order, 2018 which would have placed the earnings at Kshs. 7,240/95.
41. The deceased met his death on 24th April, 2019 at the Kitale County Referral Hospital. By then the applicable Order was the Regulation of Wages (General) (Amendment) Order, 2018 which came into operation on 1st May, 2018. According to the Order, the amount of Kshs. 7,240/95 referred to the category of general laborers. But, the deceased was a trained and qualified rider. As such, the Appellants' categorization of the deceased as a general laborer was inappropriate. The deceased would have ideally been in the category of driver's for cars and light vans since boda-bodas vehicles are public service vehicles. In that category, the monthly wage was Kshs. 16,907/90.
42. From the above applicable Regulation of Wages (General) (Amendment) Order, 2018, it appears that the trial Court settled for a lower multiplicand.
43. Be that as it may, the dependency ratio of two-thirds was reasonable given the age of the deceased and the number of his family members who were proved on a preponderance of probability.
44. The resultant award from the above multiplier, multiplicand and dependency ratio would then have been Kshs. 1,352,632/=. The trial Court awarded the Respondents a gross sum of Kshs. 800,000/=. Since there is no cross-appeal by the Respondents, this Court opts not to disturb the award of Kshs. 800,000/= made on the loss of dependency.
45. As the awards on special damages were not impugned, then this Court's finding on this appeal is that it should be dismissed with costs. In fact, the Appellants should consider themselves very lucky as the Respondents did not lodge any appeal against the judgment of the trial Court.
46. Consequently, the appeal is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

N/A for Mr. Wanyonyi, Counsel for the Appellants.

Mr. Kweyu, Counsel for the Respondents.

Regina/Chemutai – Court Assistants.

