



**Gitonga v Kaberia (Suing as the Administrator of the Estate of
Raymond Gitonga Kinanchui - Deceased) (Civil Appeal E113 of 2022)
[2023] KEHC 22464 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E113 OF 2022
TW CHERERE, J
SEPTEMBER 21, 2023**

BETWEEN

MARK GITONGA APPELLANT

AND

**DANIEL KIMATHI KABERIA (SUING AS THE ADMINISTRATOR
OF THE ESTATE OF RAYMOND GITONGA KINANCHUI -
DECEASED) RESPONDENT**

*(Being an appeal from the judgment and decree in Maua CMCC
No. E235 of 2021 by Hon. T. Gesora (CM) on 21st July, 2022)*

JUDGMENT

1. On 29th August, 2020 Raymond Gitonga Kinanchui (Deceased) was knocked down by Appellant's motor vehicle KCX 285Q (Accident motor vehicle) which was allegedly being driven negligently by the Appellant and/or his servant as a result of which Raymond Gitonga Kinanchui suffered fatal injuries. Consequently, Daniel Kimathi Kaberia filed suit for compensation in his capacity as uncle and administrator of deceased's estate.
2. On 12th May, 2022, a consent judgment on liability was entered at 80:20% in favour of the Respondent as against the Appellant.
3. At the conclusion of the trial, the learned trial magistrate by a judgment dated 21st July, 2022 entered judgment in favour of the Respondent at KES. 2,010,000/- after contribution plus costs and interest.

The Appeal

4. The Appellant dissatisfied with the lower court's decision filed this appeal mainly on the ground that the award was inordinately high and unsupported by the facts of the case.



5. The appeal was argued by way of written submissions which both parties dutifully filed.

Appellant's submissions

6. By submission filed on 22nd February, 2023, Appellant faulted the trial magistrate for applying the wrong principles firstly in awarding KES. 50,000/- for pain and suffering whereas deceased died on the date of the accident, secondly in awarding KES. 150,000/- for loss of expectation of life yet the sum of KES. 100,000/- had been awarded in the two authorities cited by the Respondent, thirdly in awarding a global sum of KES. 2,000,000/- for loss of dependence whereas there was no evidence that the Respondent who was an uncle of the deceased was deceased's dependent and finally on the ground that the receipts in support of special damages did not have revenue stamps and were therefore inadmissible.

Respondents' submissions

7. Respondent urged the court not to be quick to interfere with the discretion of the trial magistrate in awarding damages to the Respondent.

Analysis and Determination

8. I have considered the evidence at the trial and the submissions filed on behalf of the parties.
9. The principles on which a court can interfere with an award for damages was stated by Madan JA in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A 898* and restated by Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30* 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.”

10. In determining this appeal, I will endeavour to address the damages under each heading as follows:

Whether damages were awardable

11. Appellant conceded liability to the extent of 80% and the issue of when deceased died or whether damages are payable was not a triable issue before the trial court.

Special damages

12. It is trite that special damages must not only be pleaded but strictly proved (See *David Bagine v Martin Bundi [1997]* eKLR and any receipts for special damages must have stamp duty paid on it before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award any damages based on such a receipt. (See *Leonard Nyongesa v Derrick Ngula Rigba [2013]* eKLR).
13. As was rightly observed by the trial magistrate, each and every receipt tendered in support of special damages bears a revenue stamp and the sum of KES. 250,000/- awarded under this heading was therefore not only pleaded but proved.



Pain and suffering

14. At the hearing, Respondent prayed for KES. 100,000/- and Appellant on the other hand offered KES. 10,000/- and none of them cited any authority. Consequently, I find that the trial magistrate cannot be faulted for awarding KES. 50,000/- under this heading.

Loss of expectation of life

15. At the hearing, Respondent prayed for KES. 200,000/- and cited no authority. Appellant on the other hand offered KES. 100,000/- and cited *Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017]* eKLR where the court awarded Kshs. 100,000/- under this heading.
16. In awarding the sum of KES. 150,000/- under this heading, the trial court failed to justify why he departed from the generally accepted principle that the conventional award for loss of expectation of life is KES. 100,000/- (See *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019]* eKLR cited in *Francis Odbiamba Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020]* eKLR.
17. The general approach being that comparable damages should, as far as possible, be compensated by comparable awards. I find that this is a proper case for the court to interfere with the award under this heading and the same is substituted with KES. 100,000/-.

Loss of dependency

18. Section 4 (1) of the *Fatal Accidents Act* Cap 32 Laws of Kenya provides as follows: Action to be for benefit of family of deceased

" Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:..."

19. Under the foregoing section, deceased's uncle having failed to tender evidence that he was a dependent of the deceased would not qualify as such dependent. In the premises, the award for KES. 2,000,000/- for loss of dependency was unmerited.
20. In the final analysis, this appeal partially succeeds and it is hereby ordered:
1. The award of KES. 250,000/- for special damages is upheld
 2. The award for KES. 50,000/- for pain and suffering is upheld
 3. The award for KES. 150,000/- for loss of expectation of life is set aside and substituted with an award for KES. 100,000/-
 4. The award for KES. 2,000,000/- for loss of dependency is set aside in its entirety
 5. Each party shall bear its own costs of the appeal



DATED AT MERU THIS 21ST DAY OF SEPTEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Ms. Ateko for Kiruki & Kayika Advocates

For Respondent - Ms. Asuma for Mutembei & Kimathi Advocates

