



Kubai (Suing as the Legal Representative of the Estate of Caroline Kayuyu Kubai - Deceased) v Ng'ang'a (Civil Appeal E004 of 2023) [2023] KEHC 22425 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E004 OF 2023
GMA DULU, J
SEPTEMBER 21, 2023**

BETWEEN

BENARD KUBAI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CAROLINE KAYUYU KUBAI - DECEASED) APPELLANT

AND

IRENE NJERI NG'ANG'A RESPONDENT

(From the judgment delivered by Hon. A. M. Obura (Mrs.) CM at Voi Law Court on 24th March 2022 in Civil Case No. E105 of 2021)

JUDGMENT

1. In a judgment delivered on March 24, 2022 the Chief Magistrate's court at Voi entered judgment for the plaintiff (now appellant), and concluded as follows:-

“In view of the foregoing, I hereby enter judgment for the plaintiff's as against the defendant as follows:-

Pain and suffering Kshs 40,000.00

Loss of expectation of life Kshs 100,000.00

Loss of dependency Kshs 897,877.80

Loss of consortium Nil

Special damages Kshs 458,660.00

Sub total Kshs 1,496,537.80

Less 15% contribution Kshs 224,480.67



Total Kshs 1,272,057.13

The plaintiff is also awarded costs of the suit and interest thereon at court rates.”

2. Dissatisfied with the above decision of the trial court, the appellant who was the plaintiff in the trial court has come to this court on appeal through Counsel Ngunjiri Michael & Company Advocates on the following grounds:
 1. The learned Magistrate erred in law and fact in awarding Kshs 40,000/= under the head of pain and suffering when it was not in doubt that the deceased died after some time and after enduring immense pain, hence arriving at a wrongful decision.
 2. The learned Magistrate erred in law and fact in adopting a dependency ratio of 1/3 while the deceased person had a child who she was single handedly providing for and parents hence arriving at a wrongful decision.
 3. The learned trial Magistrate erred in law and in facts when she took into account extraneous issues for example that the deceased could have gotten married and that would have reduced her earnings hence adopting a dependency ratio of 1/3, hence arriving a wrongful decision.
 4. The learned Magistrate erred in law and in fact when she disregarded a letter from New Life Church of Kenya proving the deceased person’s earnings yet the same was not challenged by the respondent or the maker of that document summoned to court, hence arriving at a wrongful decision.
 5. The learned Magistrate erred in law and fact when she applied a minimum wage for a general labourer in Meru whereas the earnings of the deceased had been established by the appellant and the same was not challenged, hence arriving at a wrongful decision.
 6. The learned Magistrate erred in law and facts when she arrived a conclusion that the deceased could have worked up to the age of 50 years, while the retirement age in Kenya is 60 years, hence arriving a wrongful decision in regards to the multiplier.
 7. The learned Magistrate erred in law and in fact when she failed to appreciate that even children of deceased persons are entitled to damages for loss of consortium, hence arriving at a wrong decision.
 8. The learned Magistrate erred in law and fact in that she failed to take enough consideration of the submissions tendered by the appellant.
 9. The judgment of the learned trial Magistrate was against the weight of the evidence.
 10. The learned trial Magistrate ruling was bad in law.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Ngunjiri Michael & Company Advocates for the appellant, as well as the submissions filed by Chamwada & Company Advocates for the respondent. Both counsel relied on decided court cases.
4. This being a first appeal, I am required to evaluate the evidence, reappraise and re-assess it in totality and make my own conclusions see *Selle Versus Associated Boat Company Ltd* (1968) EA 123, and *Peters Versus Sunday Post Ltd*.
5. At the trial, the appellant who was the plaintiff called one witness PW1 Benard Kubai. He adopted his witness statement as evidence in chief and relied on several documents. It was his evidence that



- he was a farmer at Meru and that his daughter died same day in the evening, of an accident which occurred in the morning. That his daughter was healthy but her life was cut short, and that he had high expectations as a parent.
6. In cross-examination, he stated that his daughter was employed at New Life Church and had a 1 ½ years old daughter. That she earned Kshs 40,000/= a month but that he did not produce a birth certificate for the child. He stated that he incurred expenses following the accident and death of his daughter.
 7. In re-examination, he stated that the employer of his daughter gave him a letter which confirms employment and her earnings.
 8. In his part, the respondent did not tender any evidence, and parties counsel agreed to file written submissions.
 9. Having perused and considered the pleadings, evidence on record, the judgment and the Memorandum of Appeal and submissions filed on appeal, I find that the issue of liability does not arise in this appeal, as liability was recorded by consent as 85%:15%. Thus the appeal is only on the quantum of damages, awarded by the trial court.
 10. This being an appeal on quantum of damages, I am guided by the principle stated in the case of *Kenfo Africa Ltd Versus Lubia & Another* (1987) KLR 30 wherein it was held that an appellate court will not interfere with the exercise of the trial court's discretion to award damages, unless it is shown that the trial court applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred.
 11. The first complaint of the appellant is the award of Kshs 40,000/= for pain and suffering. From the evidence on record, only PW1 testified to the time of injury and the time of death. He stated that the deceased was involved in a traffic accident and injured in the morning, and died in the evening same day. No details were given by him on whether the deceased was conscious up to the evening or unconscious.
 12. If the deceased was conscious, then she must have undergone severe pain. If she was unconscious there would be no pain or suffering.
 13. I note that PW1 was not at the place of accident near Voi town, but was the father of the deceased who must have received information on what had happened. Since his evidence on the time of accident and the time of death the same day was not controverted, in my view he had established on the balance of probabilities that the deceased died hours after the accident the same day. It is also very likely that she suffered some pain.
 14. I thus find that the award of Kshs 40,000/= as general damages for pain and suffering was inordinately low. In my view an award of Kshs 100,000/= for pain and suffering would be a reasonable figure, based on the evidence on record.
 15. With regard to the award for loss of dependency, in my view from the evidence on record, the finding of the trial court on the earnings of the deceased was reasonable. Other than the analysis of the trial court, the letter relied upon by the appellant from New Life Church, was not an employment letter, but a letter that was written after the event. Thus even if there was no contra evidence on record, in my view that letter could not be relied upon to establish an employment relationship on the balance of probabilities. Thus the application of the minimum wage by the trial court was justified.
 16. With regard to dependency, though there is no birth certificate or notification of birth relied upon, the chief's letter relied upon confirmed that the deceased had a 1 ½ years child named Darwin Muchemi. I find no reason to doubt the letter, as Chief's are the first point of notification of births and deaths in the rural areas of Kenya.



17. On the basis of the above finding that the deceased left behind a child of 1 ½ years, in my view the dependency ratio of 1/3 is inordinately low. A dependency ratio of 2/3 is a reasonable assessment with the evidence on record.
18. In my view, the multiplier of 31 years for a 19 years old girl, with the vagaries of life was reasonable.
19. The loss of dependency would thus be Kshs 7,240/95 x 12 months x 2/3 x 31 years = 1,795,756/=
20. With regard to the claim for loss of consortium, in my view such award is restricted to spouses and does not apply to children. Thus a child cannot be said to lose consortium due to the demise of a parent. In my view therefore, the trial Magistrate was correct in dismissing the claim for loss of consortium.
21. Consequently, I vary the quantum of damages awarded by the trial court and instead order as follows:-
Judgment is entered for the appellant (plaintiff) against the respondent (defendant) as follows:-
Pain and suffering Kshs 100,000/=
Loss of expectation of life Kshs 100,000/=
Loss of dependency Kshs 1,795,756/=
Loss of consortium Nil
Special damages Kshs 458,660/=
Sub total Kshs 2,454,416/=
Less 15% contribution Kshs 368,162/=
Total Kshs 2,086,254/=

I award costs of the appeal to the appellant. Interest will accrue till payment in full.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF SEPTEMBER 2023 VIRTUALLY IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Nusura/Alfred – court assistants

Mr. Chamwada for Appellant

