



**Kamunto & another v Mutuku & another (Suing as the legal representatives  
of the Estate of Faith Kamene Wambua (Deceased)) (Civil Appeal  
E179 of 2021) [2023] KEHC 23376 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23376 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E179 OF 2021  
A MSHILA, J  
OCTOBER 6, 2023**

**BETWEEN**

**CHARLES KAMUNTO ..... 1<sup>ST</sup> APPELLANT**

**ESTHER MUTHONI MUIRURU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ELIZABETH KILEE MUTUKU ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN WAMBUA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FAITH  
KAMENE WAMBUA (DECEASED)**

*(Being an appeal from the whole judgment of the Honourable Court  
delivered on 15th September, 2021 at the Chief Magistrates Court at  
Gatundu by Honourable H.M.Ng'ang'a (PM) in CMCC NO. 36 of 2017)*

**JUDGMENT**

**Background**

1. By a Plaintiff filed on 15/02/2019, the Respondents herein being the Legal Representatives of the estate of Faith Kamene Wambua (Deceased) sued the Appellants claiming compensation for the fatal injuries sustained by the deceased on 6<sup>th</sup> October, 2017 when the deceased was a lawful pedestrian beside the road along Eastern Bypass at Total Petrol Station when motor vehicle registration number KBA 043H Toyota Matatu was so negligently driven at a high speed without any due care by the 1<sup>st</sup> Appellant that while overlapping he caused the vehicle to lose control and knock down the deceased causing fatal injuries to the deceased and as a result the Respondents suffered loss and pain.



2. The Appellants filed their Defence denying the particulars of negligence and special damages. Further, they stated that if any accident occurred the same was caused by the negligence of the deceased.
3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate entered judgment on liability for the Respondents as against the Appellants jointly and severally at 100%. On quantum damages were awarded as follows:-
  - a. General damages for pain and suffering Kshs. 20,000/=
  - b. Global sum for loss of dependency & Loss of expectation of life Kshs. 800,000/=
  - c. Special damages Kshs. 22,550/=Total Kshs. 842,550/=
4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed nine grounds of appeal as follows:-
  - a. That the Learned Trial Magistrate proceeded on wrong principles when assessing the damages and liability to be awarded to the Respondent (to apply precedents and tenets of law applicable).
  - b. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
  - c. The Learned magistrate erred in assessing an award, hereunder, which was wholly erroneous estimate of the loss and damages suffered by Plaintiff;
    - a. Global sum for Loss of dependency and loss of expectation of life Kshs. 800,000/=
    - b) Pain & Suffering Kshs. 20,000/=
    - c) Special Damages Kshs. 22,550/=Net Award Kshs. 842,550/=
  - d. The Learned Magistrate erred in fact and in law by failing to take into consideration the evidence adduced by the Defendant on liability and erred in finding that the Appellant was 100% liable for the accident.
  - e. The Learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Loss of dependency and loss of expectation of life of Kshs. 800,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellant.
  - f. The Learned Magistrate erred in fact and in law by holding that the Plaintiffs were entitled to General Damages for Pain and Suffering of Kshs. 20,000/= an amount of which is excessive considering the circumstances and evidence tendered by the Appellant.



- g. That the Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and liability thereby arriving at a decision unsustainable in law.
- h. That the learned magistrate erred in law and fact in arriving at his said decision.
- i. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
- j. That the learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

5. The court directed the parties to canvass the appeal by way of written submissions.

### **Appellants' Submissions.**

6. The Appellants submit that the award of Kshs. 800,000/= under the head of loss of dependency was inordinately high for a six year old. Reliance was placed in the case of *Simon Kibet Langat & another v Miriam Wairimu Ngugi (Suing as the administrator of the estate of Daniel Mwiritu Ngugi* [2016] eKLR cited in the case of *Wycliffe Momanyi v Daniel Absalom Otwoma & another* [2022] eKLR. The Appellants opined that an award of Kshs. 400,000/= will be adequate. Reliance was placed on among other cases the case of *Wycliffe Momanyi v Daniel Absalom Otwoma & another* [2022] eKLR where an award of Kshs. 1,809,640/= was substituted with an award of Kshs. 600,000/=.

### **Respondents' Submissions**

7. The Respondents submitted that the trial court was well guided in coming up with a global sum of Kshs. 800,000/=. The trial court relied on the Court of Appeal case of *Hassan v Nathan Mwangi Kamau Transporters & 4 others* [2008] 1KLR (G&F) 90. Further, reliance was placed on among other cases the case of *SMK v Josphat Nkari Makaga* (2017) eKLR where the court awarded a global figure of Kshs. 800,000/= for a six (6) year old. The trial court was said to have relied on well set out principles to come up with the global figure which the court herein was urged to uphold as the same is not inordinately high. Reliance was placed in the case of *Gicheru v Morton and another* [2005] 2 KLR 333.

### **Trial Court's Evidence**

- 8. During the hearing of the case in the trial court Stephen Wambua (PW1) testified that he witnessed the accident that involved the child along the Eastern bypass. He stated that the vehicle that hit the deceased was leaving Kamakis to Kangundo bypass. That the deceased was on the left side of the road on the pavement having already crossed the road when the accident motor vehicle that was overlapping and driven at high speed knocked her. He produced the receipts of Kshs. 28,000/= for burial expenses.
- 9. NO. 64219219 SGT. Jane Matu from Traffic Ruiru stated that the accident was investigated by SGT. Janet who had since left the station. She confirmed that the accident occurred on 6/10/2017 along the Eastern bypass. She indicated that no one was blamed for the accident



## Issues for Determination

10. Having read and considered the submissions by both parties and the case law relied upon the main issue arising for determination is whether the award of Kshs. 700,000/= under the heading loss of dependency was inordinately high for a six (6) year old.

## Analysis

11. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

12. An appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. Refer to the case of *Bhutt v. Khan* [1981] KLR 349 cited in *Shabani v. City Council of Nairobi* [1985] KLR 516, 518-9 as follows:

“The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in *Butt v Khan*, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:

“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 the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

Refer also to *Kemfro Africa Ltd t/a Meru Express Service* [1976] & Another v. Lubia & Another [1987] KLR 30; [1982-88] 1 KAR 727.

13. The Appellants as per their submissions seem to have abandoned all the other grounds of appeal and only seem to raise issue with the global sum of Kshs. 800,000/= awarded under the head of loss of expectation of life and loss of dependency. They contend that the said award is inordinately high for a six (6) year old. They submitted that an award of Kshs. 400,000/= under the head of loss of dependency and Kshs. 100,000/= for loss of expectation of life would be sufficient.
14. The Respondents contend that the trial court relied on past decisions and well set out principles to come up with the global sum and took into account inflation.
15. The trial court found that the deceased was aged six (6) years and therefore not in gainful employment as such it would be difficult to estimate income and life expectancy. The court relied on the case of *Chen Wembo & 2 others v IKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased))* [2017] eKLR. In the end, the trial court awarded a global sum of Kshs. 800,000/= which would also cover damages under loss of expectation of life.
16. Having perused, the lower court record, and having also perused the authorities cited by both parties as well as the trial court, the deceased was a minor aged six years old. This court is satisfied with the global



sum approach the trial court adopted in assessment of damages for the deceased minor in finding that it would be the best approach as it would be risky to speculate what the minor would have turned out to be in life.

17. What is in contention is the award of Kshs. 800,000/=. Assuming Kshs. 100,000/= is the award for loss of expectation of life which is the conventional award awarded under this head, it then means that for loss of dependency, the trial court awarded Kshs. 700,000/=. In the circumstances, the award of that figure for loss of dependency is not inordinately high as to warrant this court to interfere with the same.
18. In failing to accept the call to interfere with the trial courts award of Kshs. 800,000/= for loss of dependency as being inordinately high, this court is guided by the case of *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased))* [2020] eKLR where the court awarded Kshs. 900,000/= for a child aged 7 years.
19. In the circumstances, this court is satisfied that the award of a global sum of Kshs. 800,000/= is reasonable compensation for loss of dependency a six (6) year old.

### **Findings and Determinations**

20. For the forgoing reasons this court makes the following findings and determinations;
  - i. The court finds the award of Kshs. 700,000/= under the heading loss of dependency was not inordinately high for a six (6) year old.
  - ii. The court finds that the appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**A. MSHILA**

**JUDGE**

**In the presence of;**

**Mourice – Court Assistant**

**Njuguna – for Appellant**

**N/A – for Respondent**

