



**Mbero v Kibiku (Sued on their Own Behalf and as Administrators
of the Estate of Simon Kibuku Kamau - Deceased) (Civil Appeal
E011 of 2022) [2023] KEHC 23459 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E011 OF 2022
LW GITARI, J
OCTOBER 12, 2023**

BETWEEN

EVARARD MUGAMBI MBERO APPELLANT

AND

**VIRGINIA NJERI KIBIKU (SUED ON THEIR OWN BEHALF AND AS
ADMINISTRATORS OF THE ESTATE OF SIMON KIBUKU KAMAU -
DECEASED) RESPONDENT**

*(An Appeal from the Judgment of Hon. Joyce M. Gandani Chief Magistrate
in Chuka CMCC NO. E148 OF 2021 delivered on 27th April, 2022)*

JUDGMENT

1. This is an appeal from the judgment delivered on 27th April, 2022 in Chuka CMCC No. E148 of 2021. The Appellant has raised the following grounds of appeal vide the Memorandum of Appeal dated 26th May, 2022:
 - a. That the trial magistrate misdirected herself as to the facts of the case thus arriving at an erroneous decision.
 - b. That the honourable magistrate erred in fact and in law by awarding inordinately high general damages to the Respondent.
 - c. That the honourable trial magistrate erred in fact and in law in failing to consider the Appellant's documents that were filed and produced in court.
 - d. That the honourable trial magistrate misdirected herself as to the facts of the case thus arriving at an erroneous decision.



- e. That the honourable trial magistrate erred in fact and in law in failing to consider the Appellant's submissions and authorities on quantum and hence arriving at an erroneous decision.
 - f. That the honourable trial magistrate erred in law and in fact by awarding damages that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
 - g. That the honourable trial magistrate's judgment as a whole is not supported by the evidence that was tendered in court by the parties.
2. The Appellant thus prayed for the appeal to be allowed by setting aside the impugned judgment and decree and a finding that the trial court lacked the jurisdiction to hear and determine this matter. Further, that the honourable court do proceed and set aside the award on general damages and reduce the same. Finally, that the costs of the subordinate court and this appeal be awarded to the Appellant.
 3. The appeal was canvassed by way of written submissions.

The Submissions

4. It is the Appellant's submission that the quantum of damages awarded to the Respondent is inordinately high. That there was no evidence adduced before the trial court to prove that the deceased was a businessman earning Kshs. 100,000/= per month. That considering the vicissitudes and uncertainties of life, and noting that the deceased was already quite advanced in his years, it would be fair and justice to accord a multiplier of 10 years to the deceased and a dependency ration of $\frac{1}{2}$.
5. Under the head of general damages for pain and suffering, it was the Appellant's submission that an award of a nominal sum of Kshs. 10,000/= would be reasonable while an award of Kshs. 100,000/= would suffice under the head of general damages for loss of expectation of life. The Appellant thus prayed for the substitution of the award by the trial court with the following award:
 - a. General damages for lost dependency of Kshs. 434,460/=; plus
 - b. General damages for pain and suffering of Kshs. 10,000/=; plus
 - c. General damages for loss of expectation of life of Kshs. 100,000/=, making a sub-total of Kshs. 544,460/;
 - d. Less double entitlement Kshs. 100,000/=
 - e. Less Respondents' 20% contribution to liability (Kshs. 88,892/=)
 - f. Grand Total of Kshs. 355,568/=
6. On the other hand, it was the Respondent's submission that the Appellant has not challenged the award of special damages and as such, the award should be isolated from interference in this appeal. That the trial court was correct to use a multiplicand of Kshs. 30,000/=, a multiplier of 18 years and a dependency ratio of $\frac{2}{3}$. The Respondent thus maintained that the instant appeal is not founded on any legal fault by the trial magistrate and thus as such, this court should uphold the trial magistrate's award of Kshs. 4,320,000/= in general damages for lost dependency under the *Fatal Accidents Act*, the award of Kshs. 100,000 for loss of expectation of life, Kshs. 100,000/= for pain and suffering as well as costs of the appeal and the lower court's case. Finally, it was the submission of the Respondent that the present appeal is unmerited and should be dismissed by upholding the entire judgment that was delivered on 27th April, 2022 in Chuka CMCC No. E148 of 2021.



Issues for Determination

7. I have considered the pleadings, and the submissions by the parties. The main issue that arises for determination is whether the quantum awarded to the Respondent was inordinately high or low as to represent entirely on erroneous award in the circumstances of this case.

Analysis

8. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the Civil Procedure Act which espouses the role of a first appellate court which is to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’ This was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

“We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

[See also: Selle v Associated Motor Boat Co. Ltd [1968] EA] and Ainu Shamsbi Hauliers Ltd v Moses Sakira & Anothr (2021) eKLR

9. The Respondent commenced the suit by way of a Plaint in the trial court against the Respondent where he sought inter alia general and special damages together with costs of the suit, and interest on the same following a fatal road traffic accident that occurred on or about 27th March, 2021 along Meru-Chuka road and involving motor vehicle registration number KCY 403R Toyota Saloon and motorcycle registration number KMER 864 X Captain. The Appellant is the owner of the Toyota Saloon whereas the deceased was the rider of the aforementioned motorcycle. The respondent stated that the accident was solely caused by the negligence and or breach of duty of the appellant, particulars of which were set out on the face of the plaint.
 10. The suit was defended by the appellant who filed a statement of defence dated 1st September, 2021 denying the contents of the plaint therein. He appellant also averred that if any accident occurred, an allegation that was denied then the blame went to the respondent for being negligent and solely causing the accident.
 11. By consent, the parties agreed that liability to be shared between the parties in the ration of 80:20 in favour of the Respondent. The suit proceeded for a full hearing and at the conclusion of the trial the learned trial magistrate entered judgment for the respondent against the appellant as follows:
 - a. Loss of dependency – Kshs. 4,320,000/=
 - b. Loss of expectation of life – Kshs. 100,000/=
 - c. Pain and suffering – Kshs. 100,000/=
 - d. Specials – Kshs. 101, 500/=- Kshs. 4,621,500/=
- Less 20% Liability – Kshs. 924,300/=



Total - Kshs. 3,697,200/=

- e. Respondent to also get costs of suit plus interest
12. It was not in dispute that the deceased met his death following the accident which occurred on the material day. The Court of Appeal, in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, set out the parameters within which an appellate court will interfere with an award of general damages, when it stated:

“An appellate court will not disturb an award for general 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...”

13. Similar sentiments were expressed in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR] where it was held as follows:

“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.”

See also *Mukube v Nyamuro* (1983) KLR at 403, Court of Appeal where it was held-

“A Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching this conclusion.”

14. The foregoing decisions set out the law and the guiding principles, which this court is bound to apply in the determination of this appeal. Below is an analysis of the trial court’s awards under the different heads.

Pain and Suffering

15. It is trite law that award of general damages is a matter of court’s discretion. The general damages for pain and suffering are under the *Law Reform Act* Cap 26 Laws of Kenya. The learned trial magistrate assessed the damages which the deceased sustained following the road traffic accident. The learned trial magistrate did not consider whether the deceased died instantly or later as the damages under this head are assessed based on the amount of pain the deceased suffered before he succumbed to injuries. That is to say that if death was instant, though some amount of pain was suffered it was not prolonged. On the other hand, if death occurs later after some hours or days the deceased experienced prolonged pain and suffering and this attracts a much higher award. In this case the deceased died instantly. General damages for pain and suffering range between 10,000-30,000/-. The appellant cited the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited and Another* (2017) eKLR where Justice Nyamwea (as she then was) where she stated that award damages for pain and suffering ranges from 10,000/- to 100,000/- with higher damages being awarded if the pain and suffering was prolonged.

In this case, the deceased died instantly. The award of Ksh.100,000/- is inordinately high.



I have reason to interfere with the award. I find that where deceased died instantly an award of Ksh.10,000/- would suffice.

The award on loss of expectation of life is reasonable and I will therefore not interfere with it. It remains Ksh.100,000/- as awarded by the learned trial magistrate. I also note that the appellant has not challenged the amount awarded under this head.

Loss of dependency

16. The trial court awarded the Respondent Kshs. 4,320,000/= under this head. The Appellant is proposing an award of 434,460/= under the same head. Both parties filed submissions in favour of using the multiplier method of assessing loss of dependant. The only issue in dispute is on the factors adopted by the trial court in quantifying the award. The principles applicable in assessing the damages are that the court must assess the value of annual dependency i.e multiplicand. The court must then determine the net income of the deceased and multiply the multiplicand with a number of years which is the multiplier.
17. The Respondent had no documentary proof of what the deceased was earning. The Appellant has proposed the use of the minimum wage to determine the multiplicand. In dealing with such a similar situation, the Court of Appeal in the case of *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga* [2020] eKLR observed that:

“In our view, there was sufficient evidence that the deceased was a business lady. All that was required of the court was to assess the net income of the deceased, given the business enterprise that she was undertaking and the evidence that was available before the court.”
18. The trial court noted that that the deceased had acquired a single business permit to run an animal feeds shop. Considering that all the three children of the deceased were minors and their birth certificates had been produced in evidence, the trial court estimated that the deceased was earning Kshs. 30,000/= per month. In my view, this assessment was reasonable in the circumstance of this case. The parties had adopted the evidence. The award was far below what was adopted. It was a fair exercise of discretion in the circumstances.
19. As for the multiplier, the deceased was aged 42 years old at the time of the accident. At the age of 42 years, the deceased could have worked up to 60 years and beyond. However, the vicissitudes of life have to be taken into account. The young age of the children left behind must also be taken into account.
20. The last born of the deceased was born on 2nd April, 2020. He was only one (1) year and he therefore would have been dependent on the deceased beyond the age of 60 years. In the case of *Benedeta Wanjiku Kimani (supra)* a multiplier 16 years was adopted for a deceased aged 44 years old while in *Kenya Power & Lighting Co (supra)*, a Multiplier of 12 years was applied for a deceased aged 47 years. In the circumstances, it is my view that the multiplier of 18 years was reasonable. The trial magistrate adopted the age of sixty years as the age the deceased would have retired. I find that the assessment was based on case law and was not based on wrong principles and cannot be said to have been erroneous or wrong. Based on the principles for assessment of damages, I find no reason to interfere with the multiplier adopted by the trial magistrate.
21. Turning to the dependency ratio, it is not disputed that the deceased was a family man with wife and children who depended on him. I find no fault with the trial court’s finding in applying the ratio of 2/3



as part of income deceased was using to maintain his family. The adopted ration was based on evidence unlike what is raised in the Memorandum of Appeal.

The appellant has submitted that the level of dependency of the 4 dependants was never established. She has urged the court to remove the widow as a dependant as she is able to fend for herself. The claim for loss of dependency is founded under the *Fatal Accidents Act* (Cap 32 Laws of Kenya). The preamble to the Act states that it is an Act of Parliament for compensating the families of persons killed in accidents. Under Section 4 the *Act* provides for the action to be filed for benefit of family of deceased. It provides;

“Every action brought under 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....”

The *Act* recognizes a wife as a dependant for the purpose of the *Act*. A wife is a dependant unless the contrary is proved. As for the children, the Chief’s letter indicates that they were all minors and this is buttressed by their birth certificates.

I am of the view that dependency was proved and the ratio of 2/3 was properly applied.

22. All factors considered, it is my view that the assessment of loss of dependency at Kshs. 4,320,000/= (that is Kshs. 30,000 x 12 x 18 x 2/3) was reasonable and not inordinately high.

Special Damages

23. The principle is that special damages must be both pleaded and proved. That is why Lord Goddard C.J. in *Bonham Carter vs Hyde Park Ltd* [1948]64 TLR 177 said -

“... Plaintiffs must understand that, if they bring actions for damages it is not enough to write particulars and so to speak, throw them at the court, saying “this is what I have lost, I ask you to give these damages, they have to be proved.”

24. The Respondent pleaded for a sum of Kshs. 101,500/= as special damages. In proof thereof, the Respondent produced a bundle of receipts for expenses incurred following the death of the deceased. From the evidence, the award of Kshs. 101,500/= under this head is justified as that is the amount that was pleaded and proved. I note that the appellant has not challenged this award.

Conclusion

25. The upshot of the above analysis is that the awards under the different heads fit well with the circumstances of the case as well as the age of the deceased safe for the award on pain and suffering which I reduce from 100,000/ to 10,000/-. As such, it is my view that the appeal lacks merit and is dismissed.

No orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE

