



Mwangi ((Suing as the Administrator of the Estate of Beatrice Njeri Kamau - Deceased)) v Ngige & another (Civil Appeal E101 of 2022) [2023] KEHC 23311 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E101 OF 2022
GL NZIOKA, J
OCTOBER 4, 2023**

BETWEEN

**SAMUEL KAMAU MWANGI APPELLANT
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF BEATRICE NJERI
KAMAU - DECEASED)**

AND

**STEPHEN MAINA NGIGE 1ST RESPONDENT
JAMES MBURU CHEGE 2ND RESPONDENT**

((Being an appeal from the Judgment of Hon. Nathan Shiundu Lutta, Chief Magistrate vide Naivasha Chief Magistrate Case No. E061 of 2021, delivered on 30th November, 2022))

JUDGMENT

1. By a plaint filed in court on October 14, 2021, dated October 12, 2021, the plaintiff (herein “the appellant”) sued the defendants (herein “the respondents”) jointly and severally for general damages, special damages of Kshs 466,256.00, loss of future earnings, future nursing care of Kshs 2,760,000, future medical care of Kshs 2,304,000, costs and interest on above at court rates from the date of filing suit.
2. Subsequently upon demise of the original appellant, the plaint was amended wherein vide an amended plaint dated 1st March 2021 was filed substituting the deceased plaintiff with her next of kin, one Samuel Kamau Mwangi suing as the Administrator of the Estate of Beatrice Njeri Kamau (Deceased). The prayers in the amended plaint were also amended to the extent that, the sum of Kshs 466,256.00 sought for was substituted by an enhanced sum of Kshs 499,256.00.
3. Subsequently upon service of the plaint, the defendants vide a statement of defence dated 2nd November 2021 denied liability. The matter was set down for hearing. However, before the hearing



proceed, on October 26, 2022, the parties recorded a consent settlement on liability whereby judgment was entered in favour of the plaintiff as against the defendants in the ratio of 80:20. It was further agreed that the parties would rely on the documents on record to assess damages. Further the parties would file submissions on quantum.

4. The parties filed their respective submissions. The appellant filed submission's dated October 26, 2022 and sought for damages as follows: -
 - a. General damages - Kshs 8,000,000
 - b. Loss of earning capacity - Kshs 7,800,000
 - c. Medical care - Kshs 2,304,000
 - d. Nursing and domestic care -Kshs 2,760.000
 - e. Special damages - Kshs 499,256,00Total - Kshs 21,363,256.00

The appellant cited several authorities as indicated in the submissions in support of its claim.

5. The respondents on their part filed submissions dated November 2, 2022, and proposed that a sum of Kshs 600,000 be awarded as general damage, and that all the other claims be dismissed for want of evidentially proof, save that the court could award special damages pleaded and proved.
6. At the conclusion of the case, the trial court vide a judgment dated November 30, 2022, entered judgment on quantum in favour of the appellant as follows;-
 - a. Liability 80:20 in favour of plaintiff
 - b. Special damages of Kshs 466,256.00
 - c. General damages Kshs 6,000,000

The court ordered that the sum would be subject to the agreed contribution. The appellant was also awarded costs and interest.

7. However, the appellant is aggrieved by the subject judgment and appeals against the same vide a Memorandum of Appeal dated February 20, 2023, on the following grounds: -
 - a. That the learned Magistrate erred in law and fact in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.
 - b. That the learned Magistrate erred in law in awarding general damages which were so inordinately low as to represent an entirely erroneous estimate of the compensation due to the appellant, owing to the nature of the injuries sustained and the residual disabilities there to.
 - c. That the learned trial Magistrate erred in law and fact in failing to award all the special damages pleaded and proved.
 - d. That the learned trial Magistrate erred in law and fact in failing to award loss of earning capacity, medical care, nursing care and domestic help as pleaded and proved.
 - e. That the learned Magistrate erred in law and fact in writing a judgment which failed to meet the criteria set out in the Civil Procedure Rules.



8. The appeal was canvassed vide filing of submissions. The appellants filed submission dated 3rd April 2023 and stated in a nutshell that the assessment of general damages is a discretion of the trial court and the appellate court can only interfere with an award based on wrong principles of law, or where the court misapprehends the evidence. Further personal claims that are comparable to the matter should as far as possible be compensated with similar awards.
9. The appellant further submitted that, in awarding Kshs 6,000,000 as general damages the trial court did not consider the authorities cited by the appellant in his submissions, and/or did not follow those authorities or distinguished them, as such it erred. Further the court failed to have regard to inflationary trends.
10. That, the decision in *Emmanuel Kombe Nzai -vs- Basavi Co. Ltd & Another* (2017) eKLR, the case the trial court relied on to award Kshs 6,000,000 was rendered in the year 2017 and therefore Kshs 8,000,000 should have been awarded.
11. The appellant further submitted that, the special damages of Kshs 499,256.00 was properly pleaded and proved, yet the court awarded Kshs 466,256.00 in its wisdom. Furthermore the trial court did not aptly address its mind and/or evaluated evidence on the issue of loss of earning capacity, medical care and nursing and domestic help thus the court erred in failing to make pronouncement on the same.
12. That, the plaintiff did not have to prove the deceased was salaried employee or in business in order to qualify for award of loss of earning capacity as held in the case of *Butler -vs- Butler* (1984) KLR and other cited authorities. That all the claims not addressed by the trial court were recoverable as they are chose in action supported by section 2(1)(2) of the *Law Reform Act*, and section 82 of the *Law of Succession Act*.
13. However, the respondents in rebuttal submissions dated July 4, 2023, argued that the object of damages is to compensate a party for pain and suffering and not enrich a party. Further the court ought to consider the impact of excessive awards both to the economy and general public. Finally, the award herein on general damages took into account the effluxion of time, and the several authorities reflected in the submissions were relied on.
14. As regards loss of earning capacity, the respondent argued that there was no proof thereof. That a litigant cannot just quote figure of Kshs 5,000 (as earning per day) from thin air, make no effort to prove it and expect an award. That the case of John Ayiga Maraja & another -vs- Simon Obya Civil Appeal No 167 of 2022, relied on by the appellant to argue that he was not required to adduce evidence was never, meant to displace the burden of proof required of a party who alleges a fact. Furthermore no evidence was adduced to support allegation that, the deceased was running a business. Thus the court did not err in dismissing the claim. Further, if any award is given, it should be limited to the period of working days which the deceased survived and not 307 days, and since she was elderly, she could not work throughout, therefore 100 days be considered.
15. On the issue of medical and domestic care it was submitted that, these were special damages, to be specifically pleaded and proved. That despite the deceased's demise, the plaint was not amended to prove the sum incurred, and/or supported by receipts. Therefore the appellant failed to meet the burden of proof.
16. Finally on special damages it was submitted that, the receipts in court amounted to a sum of Kshs 466,255.00 awarded and should be upheld.
17. Having considered the appeal in the light of the material placed before the court as supported by the submissions of the parties. I observe and note from the outset that, while exercising appellate



jurisdiction herein, this court is duty bound to evaluate the evidence adduced in the trial court afresh and arrive at its own decision.

18. Furthermore being an appeal on quantum, the court appreciates the legal principles of law, cited by both parties which the court should consider while interfering with the assessment of damages by the trial court. Finally the court appreciates the fact that, assessment of damages is the discretion of the trial court.
19. Be that as it were, it also suffices to note that the appellate court evaluates evidence adduced in the trial court and at all times it should not be swayed by any additional evidence and/or new arguments advanced at the appeal stage which the trial court did not have the benefit thereof.
20. Having observed as aforesaid, I find that as regards the award of general damages, the trial court relied on the case of *Emmanuel Kombe Nzai* (supra). The decision in that matter was rendered in the year 2017. The decision of the trial court herein was rendered in the year 2022, therefore the argument of the appellant that six (6) years have gone by is valid and should have been considered. That fact is not reflected in the judgment of trial court. Even then comparing the injuries in the case of *Emmanuel Kombe Nzai* (Supra) I note that they were more severe than those sustained by the deceased herein.
21. Thus whereas all the other injuries are comparable, the plaintiff in that matter, suffered in addition to other comparable injuries, “fracture dislocation of the chest centre bone (manubro-sternum) and loss of consciousness. Therefore as much as the award of Kshs 6,000,000 herein did not take into account the inflation factors, in my considered opinion the award herein would have been below Kshs 6,000,000 and probably enhanced to that figure by inflation. I am therefore inclined not to interfere with that award.
22. In making that decision I fully associate with the arguments that compensation of bodily injuries or assessment of damage should be balanced so that the plaintiff is compensated as far as is practically possible for pain and suffering without crippling down the economy and in particular insurance companies liable to pay, due to high awards, with effect of collapse of the companies and loss to the entire public or country. The award of Kshs 6,000,000 is thus reasonable and fair in the given circumstances herein.
23. As regards the claims of damages for loss of future earning, nursing care and domestic help and future medical care, I note that the trial court did not address itself on the same at all. Therefore it is not in vain when the appellant submits that the court erred. Of course, the question that arise is whether failure to address those claims is an omission or amounts to an error. Be that as it were, as the trial court did not consider these claims it becomes extremely difficult for the appellate court to address itself on the same.
24. The appropriate action would be to remit the matter to the trial court for consideration of the same. However the question that, arises is whether that will serve the interest of justice and/or expeditious disposal of the matter. In view of the fact that, this court is evaluating the evidence adduced afresh, I hold the view that, this court can deal with the same. However, with utmost due respect a trial court ought to address all the prayers in the plaint or pleading.
25. Be that as it may, I have analysed the evidence adduced, the submissions tendered in the trial court and I find that the plaintiff pleaded that, the deceased was 63 years, a business lady earning Kshs 5,000 per day. The submissions was made to the effect that, due to the nature of injuries sustained, she could not carry on the business anymore, and in that case, there was no need to support the claim for loss of earning. However, the respondents strongly opposed that position and argued that there should have been proof of existence of the business and total income therefrom.



26. In my considered opinion, there is indeed no dispute that the deceased suffered very serious injuries confining her to a wheel chair. In the given circumstances she could not run a business (if any). However with due respect to the appellant's submissions, assessment of damages are matter of facts that require proof. It was incumbent upon the plaintiff to prove by any shred of evidence that, the deceased was carrying on a business and the income therefrom. There was no such evidence availed. The business license alluded to in the plaintiff's list of documents is not in the subject documents in the record of appeal.
27. The questions that arises are; how would the court prove existence of the alleged business and the income of Kshs 5,000 per day and not any other sum. It is a fact that, income from a business is not constant, and one can one take judicial notice of the fact that, there would be good and bad day in business, therefore she could make less or more than Kshs 5,000 per day. I find that, as much as the deceased may have been running a business, it was necessary to establish and/or prove the same. Had that been done, then assessment for loss of earning would have been made for the period she lived between the date of the accident and her demise. It is difficult to calculate the claim herein on an abstract figure of five thousand shillings (Kshs 5,000) per day. The claim therefore fails.
28. As regards the claims for nursing and domestic care, and future treatment, I do concur with the respondent's submissions, once a party claims an identifiable and/or specific amount of money, it supposes that figure is certain, ascertainable and is capable of proof. It is indeed a matter of special damages. Therefore the same should be specifically pleaded and strictly proved. Further, I note from the amended plaint that no single paragraph makes reference to those claims, save for the sums in the final prayers. I therefore find that the respondent's submissions to that effect are valid. Even if the same had been pleaded, being future and continuing expenses, they would terminate upon the demise of the victim. In this matter, they would have been awarded for about one year, if pleaded and proved.
29. Furthermore the plaintiff would have been duty bound to produce receipts in proof of payment for the care taker, and further treatment. However I note that, the particulars of the subject payments are provided for in the submission of the plaintiff only. In the subject submissions it was stated that she was paying Kshs 2,000 in cash for physiotherapy, and the figure sought of Kshs 2,304,000 was for a period of 3-4 years. The plaintiff unfortunately did not live for that period of time, and the argument that, the action is a chose in action that survived her is not tenable because physiotherapy was for the benefit of the deceased and not the Administrator and/or her Estate. Even then, not a single receipt of payment of physiotherapy was produced.
30. In the same vein, though she is alleged to have had 3 workers and paid each ten thousand shillings (Kshs 10,000) which she was to pay for six (6) years, the finding on the afore paragraph applies herein. That the deceased did not live for six (6) years after the accident and no evidence was adduced to support the payment made. Effort should have been made in that regard. Further upon the death of deceased the claims herein should have been amended in the plaint.
31. Finally as regards the special damages, the trial court stated that the plaintiff claimed and proved Kshs 466,256.00. However it does appear that the trial court did not note the amended plaint where the claim was for Kshs 499,256.00. Had the trial court noted the same it would not state the claim was of Kshs 466,256.00. I therefore find that, the trial court erred in that regard. I set aside the sum of Kshs 466,256.00 awarded as special damages and substituted it with Kshs 499,256.00.
32. The resultant of the aforesaid is that, judgment is entered in favour of the appellant as against the respondents as follows
 - a. General damages Kshs - 6,000,000



- b. Special damages - Kshs 499,256.00
Total - Kshs 6,499,256
Less 20% contributory negligence - Kshs 1,299,851.20
- c. Amount payable is - Kshs 5,199,404.80

33. The plaintiff shall have costs of the suit in the lower court and in this appeal. As regards interest it shall be paid on a sum awarded in the trial court from date of judgment therein and on the difference of enhanced sum being Kshs 33,000 less 20% Kshs 6,600 = Kshs 26,400, interest from date of this judgment.

34. It is so ordered

DATED, DELIVERED AND SIGNED THIS 4TH DAY OF OCTOBER 2023

GRACE L. NZIOKA

JUDGE

In the presence of

Mr. B.G Wainaina for the appellant

Ng'ang'a for respondent

Ms Ogutu court assistant

