

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL APPEAL NO. E112 OF 2023

MARIO GRAPPI (suing on behalf of the
estate **GUGLIELMINA**
of
BELLELLI.....APPELLANT
VERSUS
REV. FR. BERNARD MWAMBINGU MALASI1ST
RESPONDENT
THE CATHOLIC DIOCESE OF
MALINDI REGISTERED TRUSTEES.....2ND RESPONDENT

JUDGMENT

1. The Appeal herein arises from the judgment delivered in Malindi CMCC No. 186 of 2019 instituted by the Appellant as legal representative of the estate of Guglielmina Bellelli (the deceased) by way of a plaint dated 20.8.19 and amended on 14.4.23 against the Respondents. The Appellant claimed both general and special damages under the Fatal Accidents Act and the Law Reform Act on his own behalf and on behalf of the deceased's dependents, arising from a road traffic accident. The Appellant's case was that on 11.12.18 at about 5 pm, the deceased was a lawful passenger aboard motor vehicle registration number KCC 303 R along Gongoni-Marereni Road, when the 1st Respondent as authorized driver of the 2nd Respondent so negligently, recklessly and carelessly drove the said motor vehicle registration that he lost control of the same and occasioned an accident. As a result of the accident, the deceased sustained fatal injuries.
2. In spite of service, the Respondents did not defend the suit and judgment on liability was entered against them. Thereafter judgment was delivered on 14.6.23, and the learned Magistrate awarded the Appellant the following sums:

Liability against the Respondents	100%
Pain & suffering	Kshs. 100,000/=
Loss of expectation of life	Kshs. 100,000/=
Special damages	Kshs. 1,075,975/31
Costs and interest at court rates	
3. Being aggrieved by the quantum of damages, the Appellant preferred the Appeal herein, the summarized grounds of which are that the learned Magistrate erred in fact and in law by:
 - 1) Failing to put into consideration the Appellant's evidence and submissions on quantum of general damages and loss of expectation of life.

- 2) Finding that the Appellant and the deceased's daughter's dependency on the deceased was not proved, thereby arriving at a wrong finding.
4. The Appellant prayed that the Court reassess the award on loss of expectation of life and general damages based on the evidence and submissions. He also prayed for costs.
5. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However, the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in **Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123** by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High 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 made due allowance in this respect.
6. I have re-examined the entire record and given due consideration to the submissions filed. The Appellant's evidence is that the deceased was a retired banker aged 65 years and enjoyed good health and was still energetic. She engaged in self-employment businesses where she got income. She used to provide emotional and financial support and upkeep for the Appellant and their 42 year old daughter who depended on her. She paid all outgoings for their house in Italy, household sundry expenses and clothing for the family.
7. In the impugned judgment, the trial Magistrate stated as follows regarding loss of expectation of life:

I award KES 100,000/= conventional figure as enunciated by superior courts.
8. On loss of dependency, the trial Magistrate stated:

On this head, I award nothing as no evidence was adduced to prove that the plaintiff who stated that he was a clerk with a plumbing company and his daughter whose age and/or occupation was not disclosed to court depended on the accused.
9. On loss of expectation of life, the Appellant faulted the trial Magistrate for awarding the sum of Kshs. 100,000/= yet he had urged the court to award the sum of Kshs. 200,000/= due to passage of time and inflation.

10. It has been stated time and again by our superior courts that the generally accepted principle is that very nominal damages will be awarded for loss of expectation of life, the conventional award being Kshs 100,000/-. In the oft cited case of **Benham vs Gambling, (1941) AC 157** the reason for moderate awards for loss of expectation of life was stated as follows:

In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.

11. Duly guided, I see no basis for departing from the generally accepted principle. I accordingly find that an award by the trial Magistrate of Kshs. 100,000/= under this head to be adequate.
12. On loss of dependency, the Appellant faulted the trial Magistrate for not making any award under this head, yet it had been proved that the deceased earned Euro 41,649.00 per year in pension and retirement benefits and that the Appellant and his daughter depended on the deceased for their upkeep. Other than stating that the Appellant and his daughter were dependent on the deceased, no evidence of such dependency was availed. Indeed, in his testimony, the Appellant stated that he was a clerk with a plumbing company. Nothing of the daughter's status was indicated in the witness statement or in the Appellant's testimony. In the premises, the trial Magistrate cannot be faulted for his finding that dependency was not proved.
13. Additionally, there was no proof of the deceased's earnings. The record shows that the Appellant did not state in his witness statement nor in his testimony in the court below how much the deceased earned. It is only in submissions that the claim that the deceased earned Euro 41,649.00 per year in pension and retirement benefits was introduced.
14. It is trite law that submissions are not evidence. This was the holding in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another CA NRB Civil Appeal No. 240 of 2011 [2014] eKLR** where Court of Appeal stated:

Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to

convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.

15. While the record contains a document from the Internal Revenue Service, indicating that the deceased's total income in 2016 is Euro 41,469.00, the same also indicates various deductions, including gross tax of Euro 11,215.00. The same document also indicates that total tax deductions and credits amount to Euro 2,742 and withholdings of Euro 11,371.00. No explanation was given by the Appellant as to what each figure in the document means. It is thus not possible to know from the said documents, the exact net income of the deceased.
16. It is noted that the Respondents did not participate in the proceedings in the court below. Accordingly, the matter proceeded to formal proof. In the circumstances, the Appellant was obligated to present his case with precision given that the court did not have the benefit of testing the evidence through cross examination. The question of the deceased earnings therefore, ought to have been answered with clarity and finality in order to determine the damages to be awarded under this head.
17. A party who elects to go the route of actual earnings to make a case for an award of loss of dependency, is obligated to prove the earnings. It is not for the court to crack its head trying to decipher the meaning of the documents exhibited by such party. From the document on record, which was not even referred to in the Appellant's witness statement or testimony, the net amount of the deceased's earnings cannot be ascertained. In the premises, it is not possible to determine the damages to be awarded under this head. I therefore find no reason to interfere with the trial court's finding.
18. The upshot is that the Appeal lacks merit and the same is dismissed. No order as to costs.

DATED SIGNED and DELIVERED in MALINDI this 5th day of December 2025

M. THANDE
JUDGE

