

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E52 OF 2024

BETWEEN

**THE BOARD OF MANAGEMENT KAMUWONGO MIXED
DAY SECONDARY
SCHOOL & JOHN MWANTHI
MWANZIA.....APPELLA
NTS**

AND

**LYDIA KALEE NZUKI & ROSEMARY MWIKALI MWANZIA
(Suing as the legal representatives of the Estate of the
Late GIFT NZUKI alias GIFT SAMUEL
MWANGANGI -Deceased).....
RESPONDENTS**

*(Being an appeal from the judgment of the Honorable Paul
Wechuli, Principal Magistrate, delivered in Kithimani PMCC No.
E068 of 2023 on 1st February 2024)*

JUDGMENT

Background

1. This appeal arises from the judgment delivered in Kithimani PMCC No. E68 Of 2023. The appellants seek that this court set aside or vary the trial court judgment on the quantum of damages awarded to the respondents. This judgment was precipitated by a plaint dated 30th March 2023, in which the

respondents, claimed that on 2nd April, 2022 along Matuu-Mwingi Road at Kanyonyo Area, the deceased, Gift Nzuki alias Gift Samuel Mwangangi, was a passenger on motor vehicle registration number KCF 076H Toyota Premio. It was alleged that motor vehicle registration number KDA 514P, negligently, carelessly and/or recklessly driven and/or controlled by the 2nd appellant left its lane and violently collide with the Motor vehicle KCF 076H Toyota Premio causing the deceased suffered fatal injuries.

2. Consequently, the respondents sought special damages, general damages, special damages, damages under the Fatal Accidents Act for the benefit of the dependants, damages under the Law Reform Act for the benefit of the estate of the deceased, cost and interests of the suit and any other relief the court deemed expedient.
3. The appellants herein, in a defense dated 19th May 2023 denied the respondents' claim in its entirety and put them to strict proof thereof. They also, without prejudice pleaded that the accident was caused by, or substantially contributed to by the negligence of the deceased.
4. The parties recorded a consent order on the 23rd November 2023 and agreed to apportion liability as follows; the respondent would bear 20% liability and the appellant would bear 80% liability. This consent was adopted as an order of the court.

5. The trial court rendered in a judgment dated 1st February 2025 awarded Ksh.1,000,000 as loss of dependency, Ksh.200,000 for pain and suffering, Ksh.200,000 for loss of expectation of life and Ksh.221,500 as special damages. The total sum being Ksh1,621,500 less the 20% liability making the total award Ksh1,297,200.
6. This decision has triggered the appeal before me. The appellant filed this appeal vide the Memorandum of Appeal dated 23rd February 2024 on seven (7) grounds reproduced verbatim as follows. That:-

(1) The honourable Learned Trial Magistrate erred in law in entering judgment in favour of the respondents whereas the same failed to prove his claim to the required standard.

(2) The Honourable Learned Trial Magistrate erred in law and fact in the assessment of damages payable.

(3) The Honourable Learned Trial Magistrate erred in law and fact in granting 2/3 dependency ratio to the respondents without them proving evidence on dependency.

(4) The Honourable Learned Trial Magistrate erred in fact and in law in awarding the respondents Kshs. 1,621,500/= as loss of dependency which award was too excessive in the circumstances.

(5) The Honourable Learned Trial Magistrate erred in law and in fact in failing to accord due regard to the appellants submission and authorities on quantum and applicable principles for assessment of damages in similar circumstances.

(6) The Honourable Learned Trial Magistrate erred in law and facts in relying on extraneous evidence in arriving at the decision on quantum.

(7) The Honourable Learned Trial Magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching to an erroneous decision.

7. Consequently, the appellant prays that the appeal be allowed and the Judgment in CMCC No. E068 of 2023 be either set aside or varied downwards. They also urged that the respondents pay the costs of this appeal and of the lower court and such further relief as may appear just to the court.
8. The appeal was canvassed by way of written submissions. Both parties have filed their respective submission summarised as follow;

Appellants' Submissions

9. The appellants have isolated two issues for this court's determination as follows, (i) whether the Learned Magistrate

erred in law and in fact the assessment of general damages payable to the Estate of the Deceased, and (ii) whether the Honourable Learned Magistrate erred in law and in fact in awarding Kshs.1,000,000 as loss of dependency .

10. On the first issue, it is submitted that assessment of damages are matters that are within the discretion of the trial court and the appellate court ought to respect that discretion if properly exercised. The decisions in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited [2015] eKLR** and **Catholic Diocese of Kisumu v Tete [2004] eKLR** are relied on to buttress this submission.

11. On the second issue, it is submitted that because the deceased was a minor, and died at 3 years old, a global approach suffices in the assessment of an award for the loss of dependency. The decisions in **Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR**, **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another - Nairobi HCCC. No. 1638 of 1988 (unreported) at page 248 as cited in the case of Mutete & another v Bosire & another (All suing as the Personal Representatives & Legal Administrators of the Estate of Evans Nyang'au Maturu (Deceased)) (Civil Appeal E036 of 2023) /2024) KEHC 5155 (KLR) (25 April 2024) (Judgment), Mwanzia Vs Ngalali Mutua And Kenya Bus Services (Msa) Limited & Another as quoted in Chabhadiya**

Enterprises Ltd & Another V Sarah Alusa Mwachi (Suing As The Legal Administrator And Personal Representative Of The Estate Of Late Faiza Musa - (DECEASED) /2018/eKLR and Rosemary Onyango & another vs. Mohamed Jenjewa Ndoyo & another (2019) eKLR are relied on to bolster this submission.

12. This court is urged to make an award of Kshs. 400,000 for loss of dependency under the global sum approach while noting the age of the deceased and further taking into account the vagaries of life.
13. On pain and suffering, it is submitted that the trial court in its legal analysis, made an award of Kshs. 100,000 as damages for pain and suffering in favour of the deceased. However, in the disposition section of the judgment, the trial court misapprehended this amount as KShs. 200,000. It is urged that this was an innocent error of a clerical nature and this court should move and make a corrective amendment pursuant to its inherent powers.
14. The appellants conclude by contending that the trial court made an excessive award under the heads of general damages and this court should set it aside and award commensurate or fair award of general damages.

Respondents' submissions

15. The respondents have outlined two issues for this court's determination. Firstly, whether the damages

awarded by the trial are too high as to amount to an erroneous estimate and secondly who should bear the costs of this appeal.

16. On the first issue, it is submitted that courts of law have over the time pronounced themselves to impute that the sums awardable for pain and suffering range from Kshs.10,000 to Kshs.100,000. It is therefore urged that the sum of Kshs.100,000 was within the award often awarded by courts in similar matters and also sufficient.
17. This court is urged to uphold the trial court's award of Kshs.200,000 for loss of expectation of life as the amount is not only reasonable but also sufficient considering the current economic times. The decisions in **William Juma v Kenya Breweries Ltd Nairobi HCCC No 3514 of 1985** and **David Mwaniki Waithera & another v Jemimah Mwikali Moto [2020] KEHC 6604 (KLR)** are relied on to buttress this submission.
18. On loss of dependency, the respondents rely on case of **Daniel Mwangi Kimemia & 2 Others v J.G.M. & Another**, where the court awarded a sum of Kshs.1,000,000 under this head when deceased was aged 4 years old. Guided by this decision, this court is urged to uphold the trial court's award of Kshs.1,000,000.
19. It is submitted that the award made by the trial court was proper, was guided by sound legal principles and that the global approach adopted was lawful in all its aspects.

20. The respondents submit that they pleaded and proven the special damages in the sum of Kshs 409,370.00 which was not awarded by the trial court as pleaded and they urge this court to award this amount.
21. On the second issue, the respondents submit that the appellants should bear the costs of this suit. The respondents conclude by urging that this appeal lacks merit and should be dismissed with costs.

Analysis and Determination

22. I have considered the grounds of appeal, read through the record of appeal and the submissions of the parties. It is clear that this appeal is only against the quantum of damages awarded by the trial court.
23. Therefore, the issues that present for determination by this court are whether the awards for pain and suffering of Ksh.100,000, loss of expectation of life of Ksh.200,000, loss of dependency of Ksh.1,000,000 and special damages of Ksh.221,500 granted by the trial court were erroneous or unjustified and/or excessive in the circumstances of this case.
24. This is a first appeal. As enunciated **in Selle v. Associated Motor Boat Co. Ltd [1968] EA**, this first appellate 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.

Award on loss of dependency

25. Bearing this in mind, I commence with the award on loss of dependency. The trial court awarded Ksh.1,000,000 for loss of dependency. The appellants contend that this is excessive and should be reduced to Ksh.400,000 while the respondents urge that the trial magistrate's award was correct.

26. I am guided by the Court of Appeal's decision in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** where it was held that:

"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 that 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."

27. Similarly, in **Butt v. Khan Civil Appeal No. 40 of 1997** it was held:

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

28. What therefore emerges is that the principles on which an appellate court will disturb an award of damages are well settled. An appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages.

29. As such, the question that arises is whether the trial court’s award of Ksh.1,000,000 was excessive and unjustified as claimed by the appellants.

30. I am guided by the Court of Appeal in **Denshire Muteti Wambua - v- Kenya Power & Lighting Co, Ltd. Civil Appeal No. 60 of 2004**, where the court stated that: ***“..awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness”*** and as was stated by Lord Denning in **Kim Pho Choo - v - Camden & Islington Area Health Authority, (1979) 1 All ER 332**, that in assessing damages, the injured person is only entitled to what is in the

circumstances, a fair compensation for both the plaintiff and the defendant.

31. I note that the trial court in making the award for loss of dependency utilised the global sum approach. The learned magistrate considered comparable case law in similar circumstances, the age of the deceased and current inflation and came to the conclusion that Ksh 1,000,000 was sufficient.

32. It is this court's finding that the trial court's award of Ksh 1,000,000 was not excessive and unjustified. The trial court took into account comparable awards made in the past and based the award on them. I find no reason to interfere with this award and find it just and fair in the circumstances of this case. Accordingly, I find that the award of Kshs 1,000,000 for loss of dependency was proper.

Award on pain and suffering

33. The appellants submit that the award by the trial court was Ksh 100,000 for pain and suffering but in the disposition section of the judgment, misapprehended this amount as Kshs.200,000. I have noted this clerical error and amend this award to Ksh.100,000. I also note that in various decisions of the High Court, the award under this head have ranged from Ksh.10,000 to Ksh.100,000. Therefore, save for the misapprehension, the trial court was not excessive or erroneous making this award.

Award on loss of expectation of life

34. The trial court considered the age at which the deceased died and pegged the loss of expectation of life at Ksh.200,000. In **David Mwaniki Waithera & another v Jemimah Mwikali Moto [2020] KEHC 6604 (KLR)**, the court awarded Ksh 150,000 for loss of expectation of life. In **Mose & another v Kakai [2025] KEHC 1766 (KLR)**, the court awarded Ksh 120,000 for loss of expectation of life. Given the current rate of inflation and the circumstances of this case, I cannot fault the trial court's award and find it to be just and not excessive.

Award on special damages

35. On the award of special damages, the trial court awarded Kshs.221,500. The respondents submit that they pleaded and proved Ksh.409, 370 which was not awarded by the trial court. The appellants did not submit on this award.

36. It is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court. The Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985]** KLR 716, at P. 717, and 721 held: ***“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act***

complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

37. I note from the record that the respondents claim for special damages in their plaint was for Ksh.221,500 being police abstract Ksh.200, death certificate Ksh.50, funeral expenses Ksh.,750, Motor Vehicle Search Ksh 500, and legal fees for obtaining limited grant ad litem Ksh 30,000. The trial court found these to have been pleaded and proved. Having gone through the record, I find no reason to interfere with this award.

38. In the result, the appellants’ appeal partly succeeds on the issue of correcting the clerical error on the award for pain and suffering. Consequently, the trial court’s judgment on quantum dated 1st February 2024 is hereby set aside and substituted with judgment as follows:

a) Pain & suffering.....	Kshs. 100,000
b) Loss of expectation of life.....	...Kshs. 200,000
c) Loss on dependency.....	Kshs. 1,000,000
d) Special damages.....	Kshs 221, 500
SUB TOTAL.....	Kshs.1,521,500
Less 20% contribution	
Net Damages.....	Kshs. 1,217,200

39. The respondents are awarded costs of this appeal.
It is so ordered.

Dated, signed and delivered at Machakos this day of 12th
February, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant