

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E035 OF 2024

(Being an Appeal from the Judgment delivered by Hon. E Mbicha, Principal Magistrate, Makindu Law Courts, on 14th March, 2024 in PM Civil Case No. 409 of 2014)

CALEB ODHIAMBO ODHIAMBO

COAST BUS (MOMBASA) LIMITED

APPELLANTS

VERSUS

ANNA WAMBOI WANGECHI *(Suing as the Personal representative of the estate of the late* **JOSEPH KARIUKI**

WAMBUI **RESPONDENT**

JUDGMENT

1. The Deceased, **Joseph Kariuki Wambui**, was involved in a road accident along Nairobi-Mombasa Road on 25th December, 2011, as a result of which he sustained fatal

injuries and died a few hours after the accident. His legal representative, the Respondent, blamed the Appellants for the accident and brought a suit at the lower Court seeking special damages at Kshs.56,700/= as well as general damages under the **Fatal Accidents** and the **Law Reform Act**.

2. The Court delivered the Judgment on 4th March, 2024, in which it found in favor of the Respondent. It apportioned liability at 100% against the Appellants and awarded the Respondent the following damages; Pain and Suffering-Kshs.100,000/=, Loss of Expectation of Life-Kshs.200,000/=, Loss of Dependency-Kshs.1,500,000/=, and special damages at Kshs.56,700/=.

3. The Appellants were dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 4th April, 2024. They listed the following Grounds of Appeal;

1) That the Learned Principal Magistrate erred in awarding to the Respondent a sum of Kshs.1,500,000.00 for Loss of Dependency under the Fatal Accident Act in respect of the Deceased

who was 11 years at the time of his death which said sum is so excessive and amount to an erroneous estimate of the damages payable to the Respondent.

2) That the Learned Principal Magistrate erred failing to give any or any adequate reason or reasons of how he computed the global award of Kshs.1,500,000.00 for Loss of Dependency.

3) That the Learned Principal Magistrate erred in adopting the wrong principles of law whilst awarding a global sum of Kshs.1,500,000.00 to the Respondent for Loss of Dependency under the Fatal Accidents Act.

4) That the Learned Principal Magistrate erred in awarding to the Respondent a sum of Kshs.100,000/= for Pain and Suffering in spite of holding that the Deceased died a few hours after the accident.

5) That the Learned Principal Magistrate erred in awarding to the Respondent a sum of Kshs.200,000/= for Loss of Expectation of Life in respect of the Deceased who was only 11 years old without giving any or any adequate reasons for doing the same.

6) That the Learned Principal Magistrate erred in Law and in fact in not deducting the statutory deductions payable to the Deceased whilst assessing damages payable under the Fatal Accident Act.

7) That the Learned Principal Magistrate erred in awarding special damages of Kshs.56,700.00 to the Respondent when there was no documentary evidence adduced before him in support thereof.

8) That the Learned Principal Magistrate erred in law in making awards under the various heads by failing to take into account the tender age of the Deceased and that the general damages awarded

to the Respondent would be invested to earn interest. If the Learned Principal Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the Respondent under each head.

9) That the Learned Principal Magistrate erred in law in failing, to appreciate the significance of the various facts that emerged from the evidence of the Appellants' witnesses; to consider or properly consider all the evidence before him and; to make any or any proper findings on the aspect of quantum of damages on the evidence before him.

10) That the Learned Principal Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the Appellants.

4. They asked this Court to allow the appeal and set aside the judgment of the lower Court.

5. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

6. The Appellants submitted that the lower Court was wrong in its assessment of damages, arguing that the awards were inordinately high. They submitted that the award of Kshs.100,000/= for Pain and Suffering was inordinately high, considering that the Deceased died immediately after the accident, and instead proposed that an award of Kshs.20,000/= would be reasonable. They also submitted that the award of Kshs.200,000/= for Loss of Expectation to Life was inordinately high, considering that the Deceased was 11 years, and instead proposed that an award of Kshs.50,000.00 would be reasonable.

7. They also submitted that the award of Kshs.1,500,000.00 for Loss of Dependency was an erroneous estimate, arguing that the Court considered factors which he ought not to

have considered and failed to consider other facts that would have been relevant. They argued that the Deceased's level of abilities could not be ascertained because the Respondent did not tender evidence to show that the Deceased was in school, the level of his abilities, and as well as his future prospects. They also submitted that the Respondent did not prove dependency and instead proposed that an award of Kshs.600,000/= would be reasonable.

Respondent's written Submissions

8. The Respondent submitted that the lower Court was right in assessing and awarding the aforesaid damages, arguing that the court properly analyzed the issues and applied the relevant principles. She submitted that the awards for Loss of Dependency and Loss of Expectation of Life were reasonable, arguing that courts had made similar awards in circumstances similar to the facts of this case. She also

submitted that the award for Pain and Suffering at Kshs.100,000.00 was reasonable, stating that the Deceased endured pain and suffering before his death since he died later that day, in the hospital, while receiving treatment.

Issues for Determination

9. Having considered the Grounds of Appeal and submissions by the parties, I observed that the Appellants seek reassessment of quantum of damages and that they do not dispute liability which was assessed against them as 100%. Thus, the only issue for determination is whether the lower Court's assessment of damages was reasonable and justified.
10. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give

allowance for that. (See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR**.)

11. Accordingly, this Court is being required to undertake a wholesome review of the Appellant suit at the lower Court and come up with its conclusion.

Whether the lower court's assessment of damages was reasonable and justified

12. It is a well-established principle in our legal system that an appellate Court should exercise caution and restraint where it has been called upon to review a trial court's award of damages. This rule was succinctly said by the Court of Appeal in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, where the court said:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate

of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

13. This principle was restated by the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**, where it stated:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by

taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

14. The two binding authorities underscore that the interference of the trial Court’s award of damages should occur at very exceptional circumstances, especially where the trial Court acted on wrong principle of law, or misapprehended the facts, or made a wholly erroneous estimate of the damage suffered.

15. I have relooked at the facts to determine whether the lower Court misapprehended the facts while assessing the quantum of damages. In the judgment, the Court considered the fact that the Deceased was 11 years at the time of his age. He also considered the fact that he died a few hours after the accident.

16. The Respondent was **PW1**, and the only witness at the lower Court. Concerning the age of the Deceased, the Respondent, who is the mother of the Deceased, told the

Court that she did not have a birth certificate for the Deceased. She however produced a death certificate that indicated that the Deceased was 11 years when he died. She had indicated the same age in her pleading, the Plaint. Based on these facts, I find that this was sufficient evidence to proof age and thus the lower Court did not misapprehend the facts when it found that the Deceased was 11 years at the time of his death.

17. Regarding when the Deceased died, the Respondent told the Court that the Deceased died while at the hospital. The death certificate indicates that he died at Makindu District Hospital on 25th December, 2011, which was the date of the accident. Based on these facts, I find that the lower Court did not misapprehend facts when it found that the Deceased died a few hours after the accident.

18. Based on the above observations, I find that the lower Court did not misapprehend the facts around the death of the Deceased and his age.

19. However, the authorities cited above established that an appellate Court can rightly interfere with an award for

damages if it finds that the award was a wholly erroneous estimate of the damage suffered. Thus, the next issue to determine is whether the lower Court's awards were wholly erroneous estimates of the damage suffered.

20. Courts have established parameters that should help an appellate court determine whether a particular award of damages is an erroneous estimate of the damage suffered. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR**, the Court held:

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurable with the injuries sustained.

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

21. Similarly, in the case of **Penina Waithira Kaburu v LP [2019] eKLR**, the Court outlined factors that should guide a Court in arriving at the correct estimate of quantum of damages. It held:

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a

previous case where the injuries for which the award are relatively similar.”

22. I shall now assess the award of damages under each of the heads.

Loss of Dependency

23. Before I determine whether the award under this head was manifestly high and erroneous, I shall first analyze how Courts have awarded damages in similar circumstances.

24. In **Gadd Construction Limited & 2 others v JEE & another (Suing as Administrator of the Estate of the Late MOE- Deceased) [2023] eKLR**, the Court awarded Kshs.1,300,000.00/= for a child who was 14 years. In **Mpaka Muriuki Japheth v HMM & another [2021] eKLR**, the Court awarded Kshs.1,500,000.00/= for a child who was 13 years and a class 8 pupil.

25. Similarly, in **Nderitu v Kiswii (Suing as mother and personal representative of the Estate of Janet Kavindu Kingesi (Deceased) [2023] eKLR**, the Court awarded Kshs.1,800,000.00/= for a child who was 10 years. Lastly,

in Makueni Courts Ltd & another v Felistus Kanini Ndunda (Suing as the legal representatives of the estate of Eric Mutuku) [2020] eKLR, the Court awarded Kshs.1,800,000.00/= for a child who was 12 year at the time of his death.

26. From the evidence on record, the Deceased was an 11 year old boy, and the only child of his mother. He was a standard 4 pupil at Mwijabu Primary School.

27. Looking at similar awards, the age of the Deceased, and factoring in inflationary rates, I find that the lower Court's award of Kshs.1,500,000/= is not excessive nor was it too high or fraught with lack of regard for the due principles. The said award is within the normal range of similar awards and thus there is no basis upon which this court can disturb the said award. The same is hereby upheld.

Pain and Suffering

28. The evidence on record shows that the Deceased died the same day- some hours after the accident. **PW1** stated

that he died while at the hospital receiving treatment. I presume that the Deceased must have endured pain during his last moments, because he did not die on the spot. For these reasons, I find no reasons to disturb the lower Court's award of Kshs.100,000.00/= under this head. The same is also upheld.

Loss of Expectation of Life

29. An issue was taken with the award for Loss of Expectation of Life, which the Court had assessed at Kshs.200,000.00/=. The Appellants argued that this was inordinately high. In determining this issue, I have analyzed what the Courts have awarded in similar cases.

30. The Court in **Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased) [2020] eKLR** awarded Kshs.150,000.00/= for a child who was 7 years old. Similarly, the Court in **Nderitu v Kiswii (Suing as mother and personal representative of the Estate of Janet Kavindu Kingesi (Deceased) [2023] eKLR,**

awarded Kshs.120,000.00/= for a child who was 10 years at the time of his death.

31. I also note that in many other cases involving children, the Courts have awarded Kshs.100,000.00/= under this head. (See *Mpaka Muriuki Japheth v HMM & another* [2021] eKLR-13 year old child); (*Gadd Construction Limited & 2 others v JEE & another (Suing as Administrator of the Estate of the Late MOE- Deceased)* [2023] eKLR - 14 year old child); (*Onsoti (Suing as Legal Administrator of the Estate of the Late Leah Moraa Onsoti) v Wambui* [2025] eKLR - 13 year old child), and (*Makueni Courts Ltd & another v Felistus Kanini Ndunda (Suing as the legal representatives of the estate of Eric Mutuku)* [2020] eKLR-12 year old child).

32. That notwithstanding, it is my view that the sum of Kshs 200,000.00/= under this head is not manifestly excessive in the circumstances. I also uphold the same.

Special Damages

33. The Appellants were also dissatisfied with the the lower Court's award of Kshs.56,700/= for special damages. They stated that the award should not have been made, on grounds that there was no documentary evidence to support the claim for the special damages. They raised this issue in the Memorandum of Appeal but they did not submit on it in their written submissions. I shall nonetheless go ahead and relook whether the same award was merited.
34. The award of Kshs.56,700.00/= comprised Kshs.30,000.00/= used for funeral expenses, Kshs.25,000.00/= used to obtain Letters of Administration, Kshs.1,500.00/= used for motor vehicle search, and Kshs200.00/= used for Police Abstract.
35. I have relooked at the record and I have noted that the Respondent pleaded all these expenses in her Plaint. However, during the hearing, the Respondent told the Court that she did not have receipts to support her claim for the special damages. The question before this Court is whether the Respondent proved the claim to the required standard.

36. The Court of Appeal has on several occasions discussed whether a litigant must produce receipts as proof of burial expenses. In **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] KECA 56 eKLR**, the Court held that burial expenses need not be strictly proved because such expenses are matters of common notoriety, which the Court can take judicial notice. It observed as follows;

“We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved.....We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc”.

37. The above authority was applied by the Court in **Mohamed v Kazungu & another (Suing as the administrator and/or legal representative of the Estate of the Late Cosmas Iha Thoya (Deceased) [2024] KEHC 8649 (eKLR)**, where the Court allowed a claim for funeral expenses in the absence of receipts. The Court held as follows;

“In light of the authority above, I am also of the view that I need not strictly scrutinize the proof of funeral expenses. The pleaded amount in my view is reasonable taking into consideration the costs involved in planning a funeral which include; coffin, transport and food which may not be receipted. To require such receipts would cause inordinate hardship upon a claimant”.

38. Based on the above authorities, I find that amount pleaded for the funeral expenses, Kshs.30,000.00/=, was reasonable, considering the usual costs incurred in planning and conducting burial ceremonies like acquiring a coffin,

transport, and food which may not be receipted. I thus uphold the award for funeral expenses.

39. The other component of the special damages was Kshs.25,000.00/=, which the Respondent claimed she used to obtain Letters of Administration. The Respondent did not have a receipt for this as well. However, with regards to obtaining a Grant, the Respondent filed a copy of Letters of Administration *ad litem*. The copy formed part of her documents on record. It is trite that there were costs incurred in obtaining the said Grant and even in the absence of a receipt, I find that the award of Kshs.25,000.00/= is reasonable.

40. Consequently, I uphold the lower Court's award for special damages at Kshs.56,700/=.

41. The upshot is that the Appeal lacks merit and is hereby dismissed.

Disposition

42. These are the final orders of the Court.

a) I hold and find that that this appeal is unmerited and the same is dismissed with costs to the Respondent.

b) The costs of this appeal are hereby assessed at Kshs.100,000/= all inclusive.

43. It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 6TH day of MARCH, 2026.

.....
HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

No attendance for the Appellant

Mr. Koech Advocate, holding brief for Mr. Otieno, Advocate for the Respondent

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