



REPUBLIC OF KENYA



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Kirera v DMK (Suing As The Legal Representatives Of The Estate Of BM) (Civil Appeal E025 of 2024) [2025] KEHC 1684 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E025 OF 2024
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

BENJAMIN KIMATHI KIRERA APPELLANT

AND

**DMK (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
BM) RESPONDENT**

*(An appeal from the Judgment of Hon. T.A. Sitati (S.P.M) in
Githongo SPMCC No. E009 of 2023 delivered on 31/1/2024)*

JUDGMENT

1. By a Plaint dated 26/4/2022, the Respondent herein sued the Appellant herein seeking general damages under both *Fatal Accidents Act* and *Law Reform Act*, special damages of Ksh.157,180 together with costs and interest. The Respondent pleaded that on or about 1/5/2019, the deceased, a minor, in the company of his mother was walking off the road along Biashara street in Githongo Market, when the Appellant so negligently, carelessly, recklessly and/or dangerously drove, managed and/or controlled motor vehicle registration No. KBR 759L thereby causing an accident whereby the deceased was fatally injured.
2. The deceased was a one-year-old child at the time of his premature death who enjoyed good, healthy and happy life with his family. As a result of the death of the deceased, his parents have suffered loss and damage.
3. The Appellant denied the claim by his statement of defence dated 4/9/2023 and prayed for the Respondent's suit to be dismissed.
4. Upon full hearing, the trial court found the Appellant to have been 100% liable for the accident and awarded general damages for pain and suffering of Ksh.30,000, Ksh.150,000 for loss of expectation



of life, Ksh.800,000 for loss of dependency and special damages of Ksh. 157,180 = Ksh. 1,137,180 together with costs and interest.

The Appeal

5. On appeal, the Appellant filed his Memorandum of Appeal on 20/2/2024 listing 4 grounds as follows:
 1. The trial Magistrate erred in law and fact in awarding the Respondent Kshs. 800,000/= for loss of dependency for a 1-year-old infant, a damages under the *Fatal Accidents Act* which award was too excessive in the circumstances.
 2. The trial Magistrate erred in law and fact in awarding the Respondent Kshs. 150,000/= for loss of expectation of life for a 1-year infant, a damages under *Law Reform Act* which award is excessive in the circumstances.
 3. The court erred in holding the appellant 100% liable for the accident when there was no sufficient evidence to support that finding.
 4. The trial Magistrate erred in law and fact in failing to accord due regard to the Appellant's submissions and authorities on quantum on applicable principles for assessment of damages.

Duty of the court

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] EA 123).

The Evidence

7. PW1 PC Roba Tomno Wahome of Meru police station produced the police abstracts for the deceased and his mother as exhibits in court. He testified that, "On 01/May/2019 a report of fatal road accident incident was filed at our station by good Samaritans. Time of incident 7.00 pm at Githongo market along the Biashara street involved KBR 759L Toyota Succeed and 4 Pedestrians. The driver was one Benjamin Kimathi Kirera. The driver was reversing from a garage and in the process reversed at high speed, lost control and rammmed into the pedestrians. The pedestrians were standing on a veranda across a shop. The result was: 1. Brian Mwitii died on the spot. 2. Miriam Gacheri Nkirote got injured. Scene was visited by Corporal Mwaniki, PC Momanyi and PC Diver Kabiru. Occurrence Book 11/01/05/2019 is the entry for the incident. After our investigations, we established that Benjamin Kimanthi Kirera was to blame. He was charged with traffic offence of causing death by dangerous driving in Tr. 445/2019 causing death by dangerous driving on 12/07/2019. The police issued two abstracts for BM (deceased) by Cpl Mwaniki where handwriting and signature are familiar to me as I have worked with him. The Base Commander Chief Inspector Lekakeir signed on it and I know his signature since I have worked with him, similar details of signing for the abstract for Mirriam."
8. On cross examination, he stated that, "The Abstract indicated that the driver's name as Benjamin Kirera. The traffic case is Tr 445/2019 is still pending. I personally did not visit the scene. The report is not indicated. We have a police hotline. The defendant recorded his witness statement. I have his witness statement here."
9. PW2 Dennis Mwongera Kirimi, the Respondent herein and a butcher adopted his statement recorded on 26/4/2022 as his evidence in chief. He produced letters of Administration Ad litem dated 20/7/2022, copy of records, death certificate for Brian Mwitii dated 10/9/2019, Post Mortem report of 06/05/2019 and bundle of receipts as exhibits in court.



10. On cross examination, he stated that, “Yes, I filed with my Advocate a Chief’s letter showing that I am a father to the deceased infant. I did not witness the Traffic incident.
11. PW3 Mirriam Gacheri Nkirote, and a resident of Githongo adopted her witness statement dated 15/6/2023 as her evidence in chief. She went further to state that, “DK is the father of the deceased B.”
12. On cross-examination, she stated that, “On the material date I was holding the infant in my arms. I was on the road. The vehicle was reversing from a garage. It was 7 PM. I did not see the oncoming reversing car. I was chatting with another person. Yes, I was the caretaker as a mother to B who depended on me.”
13. On re-examination, she stated that, “I dodged the car but it struck the baby. It was along the street separating the shops opposite each other.
14. PW4 Lucy Kinanu Kithure adopted her witness statement dated 15/6/2023 as her evidence in chief.
15. On cross examination, she stated that, “Mirriam is a casual worker-farming too. I have not seen her cook and sell chips. I know her. She does live close to our place-not far. I have not seen her sell chips. Mirriam was standing on the highway. The vehicle was moving from the nearer garage into the highway. This is from the Meru town general direction headed towards Githongo market. She was on the left-hand side as one faces Githongo from Meru. Yes, she was then crossing the road. Yes, if she was careful, she could have seen the approaching car. It hit her using its rear side. She was carrying her infant in her left hand as she walked.”
16. On re-examination, she stated that, “The vehicle was emerging from a garage in a reverse. It hit her using its left rear side.”
17. The Appellant closed his case without calling any witnesses.

Submissions

18. The Appellant submits that an award of Ksh.400,000 for loss of dependency would suffice since it is uncertain whether the parents of the deceased would have derived any benefit from him if he had lived a normal life, and cites *Civiscope Limited v Gilbert Kimatare Nairi & LLilian Napudoji Nairi (Suing as Personal Representatives of the Estate of Gilbert Nairi Lemayian (Deceased))* (2021) eKLR, *GKN & another (suing as Personal Representatives of the Estate of GNL (Deceased) v Civiscope Limited* (2021) eKLR. He urges that the conventional award for loss of expectation of life is Ksh. 100,000, as held in *Wainaina & another (Suing as Father and Wife to and Administrators of Paul Wainaina Gikonyo – Deceased) v Ndirangu & another* (Civil Appeal 120 of 2023) [2024] KEHC 2708 (KLR) (7 March 2024) (Judgment).
19. The Respondent cites *Selle and another v Associated Motor Boat Company Ltd & Others* (1968) EA 123, *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR and *Mwangangi & another v FKM (Suing as Legal Representative of the Estate of the late AMK)* (Civil Appeal E11 of 2021) [2021] KEHC 291 (KLR) on the duty of the first appellate court and interference with an award of damages by the trial court. He faults the Appellant for failing to testify or call any witnesses to support his defence, and cites *Patrick Muli v E.M (Minor suing through her Mother and Next Friend WG)* [2021] eKLR. He urges that the deceased was a healthy 1 year old with a promising future, and the award of Ksh. 150,000 for loss of expectation of life was justified by reason of the inflation rates, and cites *Francis Wainaina Kirungu (Suing as Personal Representative of the estate of John Karanja Wainaina - Deceased v Elijah Oketch Adellah* (2015) eKLR, *Agnes Mutinda Ndolo & Another v Mboya Wambua & 2 Others* (2017) eKLR and *Henry Waweru Karanja & Another v Teresiah Nduta Kagiri (Suing as the legal representative of the estate of Francis Wainaina Ng’ang’a – deceased)* [2017] eKLR. He urges



that courts have acknowledged that children, regardless of their age, are expected to provide for their parents, and cites *JNK (Suing as the Legal representative of the Estate of MMM-Deceased) v Chairman Board of Governors Boys High School* (2018) eKLR, *Patel M. Kariuki v Attorney General* (2014) eKLR, *Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR – Deceased)* [2020] eKLR, *Daniel Mwangi Kimemi & 2 others v JGM & another (the personal representatives of the estate of NK –DCD)* [2016] eKLR, *Justus N. Ngiavi v Francis Kaberia Rubucha & another (Suing as Legal Representatives of Estate of Gabriel Munene Kaberia)* (2020) eKLR, *Mini Bakeries (NBI) Limited & Another v Zamzam Josephine Akinyi Aindo (Suing as the legal representative ad litem of estate of the late Jamalddin Ramadhan (Deceased))* [2019] eKLR and *Winfred Marita Onsumu v Joshua Nyamenia Ogari & Zipporah Kerubo Ogari (Suing as the legal representative of the Estate of Shadrack Onsongo-Deceased)* (2020) eKLR. He urges that he proved his case on a balance of probabilities and the awards made under the various heads were reasonable.

Analysis and Determination

20. After considering the grounds of appeal raised by the Appellant, the issues for determination are whether the apportionment of liability at 100% was justified, whether the awards made by the trial court for loss of expectation of life and loss of dependency were inordinately high; and whether the Appellant’s submissions and authorities were considered.

Liability

21. PW3 recorded in her statement dated 15/6/2023 which was adopted as her evidence in chief that, “We were hit while standing on the side of the street, off the road with one Ngeera when the vehicle veered of the road. I was talking Ngeera who was holding my son. The vehicle did not stop there and proceed to hit the wall of tone of the buildings damaging it.” On cross-examination, she affirmed that, “I was on the road. The vehicle was reversing from a garage.”
22. Her evidence was corroborated by PW1 and PW2. PW1 was categorical in his testimony that, “The driver was reversing from a garage and in the process reversed at high speed, lost control and rammed into the pedestrians. The pedestrians were standing on a veranda across a shop.”
23. PW4’s version of the events of the fateful day can only be taken with a pinch of salt, for being self-contradictory. She recorded in her statement which she adopted as her evidence in chief that PW3 and the deceased were standing off the road when they were hit by the Appellant. Nevertheless, on cross examination, her said testimony erratically changed to the effect that PW3 was standing on the highway about to cross the road when the accident occurred.
24. Admittedly, the Appellant recorded in his statement dated 4/9/2024 that, “I was reversing my aforesaid vehicle from the garage where I had taken it when the brakes failed again and the garage being steep, the vehicle reversed with speed and knocked 2 persons who were stationed at the exit of the garage where they were selling food.”
25. The court finds that the Respondent proved on a balance of probabilities that the Appellant, without due care and attention, reversed the accident motor vehicle at high speed, thus fatally injuring the deceased. The deceased was a healthy boy whose long life was brutally cut short by the Appellant’s negligence and recklessness.
26. The court thus finds that the trial court’s apportionment of liability at 100% was proper and supported by the evidence on record.



Award of damages

27. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

“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. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470).”

Loss of expectation of life

28. While it is accepted that the conventional figure awardable under this head has been Ksh.100,000, the recent loss in the value of the shilling occasioned by inflationary trend would justify the enhanced figure of Ksh.150,000/-. The Court does not find reason to interfere with the award of Ksh.150,000/- for loss of life

Loss of dependency

29. Generally, Dependency as a matter of fact ought to be proved by evidence. However, in cases of infants and very young children whose prospect in the future may not render itself to a just assessment, a conventional sum should be adopted. While the Respondent maintains that his deceased son aged only 1 year would have supported them in future, the Appellant contends that it would be highly unlikely to predict what the deceased would have become in his adult years, to justify an award of Ksh.800,000 under this head.
30. The Court accepts the guidance of the Court of Appeal in *Kenya Breweries Limited v Saro* (1991) (eKLR) that:

“...In the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.”

31. The record is clear that the deceased was a healthy boy, who his parents reasonably expected would successfully commence and complete his education journey, enter the job market and support them in



their old age. Nonetheless, the court finds that the award of Ksh.800,000 for loss of dependency was on the higher side, for a 1 year old child, whose life had hardly started, bearing in mind the vicissitudes and vagaries of life.

32. In the 2021 case of GKN & another (suing as Personal Representatives of the Estate of GNL (Deceased) v Civiscope Limited (*Supra*), cited by the Appellant, the Court (C. Mwita J) upheld a trial court's award of Ksh.400,000 for loss dependency for a 2 year old deceased child.
33. This Court, after due consideration of the current inflationary trends finds that an award of Ksh.600,000 under this head would have been adequate recompense under this head for a child aged one (1) year in the 2024 Judgment.

Consideration of the Appellant's submissions and authorities

34. The Appellant faults the trial court for disregarding his submissions and authorities. That fault is misconceived because submissions are a mere guide to the court as they are not pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court's decision, as was aptly put by the Court (Patrick J.O. Otieno J) in *Charles Mutuma M'kanake v Diocese of Meru Trustees Registered* [2021] eKLR:

“This court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision.”

35. Besides, the fact that the trial court failed to agree with the submissions of the Appellant together with the authorities he cited cannot be construed to mean that they were not considered.
36. In truth, there is no substance in a ground of appeal for not considering submissions. The complaint of failure to consider submissions has merit only when such submissions would alter the result of the case: such a negative that the Court did not consider the party's submissions can only be demonstrated where the decision is silent as to such submissions and where taking it into account would obviously affect the result.
37. The trial court could have considered the submission and yet arrive at a different conclusion. The ground of appeal is then not that the court did not consider the submissions but that its apprehension of the submission was erroneous. Either way, the want of consideration by the Court of a submission by a party, or lack of evidence in the Judicial reasoning in the judgment of such consideration is not, of itself, a valid ground of appeal. The consequential ground of appeal is the erroneous application, non-application or misapprehension of the submission. Appellants better take counsel.

Orders

38. Accordingly, for the reasons set out above, the Court allows the appeal in terms as follows:
 1. The award of Ksh.150,000 for loss of expectation of life is affirmed.
 2. The award of Ksh.800,000 for loss of dependency is set aside and substituted with an award of Ksh.600,000.
 3. The other awards of general damages for pain and suffering of Ksh.30,000; special damages of Ksh.157,180 together with costs and interest remain undisturbed.
39. As the appellant has only partially succeeded in the appeal, there shall be no order as to Costs of the Appeal



Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mugambi, Advocate for the Respondent.

N/A for the Appellant.

