



**Mwithale & another v Mwenda (Suing as the Legal Representative
of the Estate of Boniface Mauki Mbiti - Deceased) (Civil Appeal
E023 of 2021) [2024] KEHC 364 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E023 OF 2021
LW GITARI, J
JANUARY 25, 2024**

BETWEEN

SILAS MUTHINE MWITHALE 1ST APPELLANT

FELIX MUTWIRI 2ND APPELLANT

AND

**CHARLES MBITI MWENDA (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF BONIFACE MAUKI MBITI - DECEASED) RESPONDENT**

JUDGMENT

1. The Respondent herein, Charles Mbiti Mwenda, filed suit in Marimanti CMCC No. E001 of 2020 as the legal representative of the estate of Boniface Mauki Mbiti (the “deceased”) who died in a road traffic accident.
2. The brief facts of the case are That the deceased was involved in a fatal road traffic accident along the Maua-Gatithini road involving motor vehicle registration number KCD 627X owned by the 1st Appellant and driven by the 2nd Appellant. The deceased was aged 25 years old and was a student at Meru Teachers Training College pursuing a Diploma in Education.
3. The parties recorded a consent on liability at 80:20 in favour of the Respondent. After a full trial, the trial magistrate made the following award vide the judgment dated and delivered on 16th September, 2021:
 - i. Law Reform Act – Kshs. 150,000/=
 - ii. Fatal Accidents Act – Kshs, 2,000,000/=
 - iii. Specials – Shs. 16,170/=



4. Aggrieved by the said decision of the trial court, the Appellants preferred the instant appeal based on the following grounds:
 - a. That the learned trial magistrate erred in law and fact by awarding damages for loss of dependency in the sum of Kshs. 2 Million which award is inordinately excessive in the circumstances and amounts to a wholly erroneous estimate of damages payable.
 - b. That the learned trial magistrate erred in law and fact by departing from the doctrine of precedents and thereby arrived at an award for loss of dependency That is inordinately excessive.
 - c. That the judgment of the learned trial magistrate is against the law and weight of evidence on record.
5. The Appellants thus prayed That the instant appeal be allowed with costs and the award for loss of dependency be set aside and substituted with a reasonable award.
6. The appeal was canvassed by way of written submissions which I have considered. The main issue That arises for determination by this court is whether the award of damages by the trial court was erroneous or inordinately excessive.

Analysis

7. 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. See for example the case of *Selle v Associated motor Boat Co. & others* [1968] E.A. 123 where it was stated 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 make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either That he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

In *Mwanasokoni –v- Kenya Bus Service Limited* (1982-88) 1 KAR 278. It was stated That on a 1st appeal it is now well settled, it is to revisit the evidence on record, evaluate and reach its own conclusion. See also *Kiruga-v- Kiruga* (1988) KLR. The 1st appellate court has a duty to evaluate the evidence and reach its own independent finding.

8. PW1, Charles Mbiti Mwenda, is the Respondent herein and the father of the deceased. he adopted his witness statement as his evidence and produced a list of documents as his exhibits. On cross examination, he stated That the deceased was 25 years and was not employed as he was still learning. PW1 further stated That the deceased was not married and did not have any children. That marked the close of the Respondent’s case. In his statement he had stated That the deceased was knocked down by a motor vehicle on 13/4/2019 and died the same day while being treated.
9. The Appellants opted not to give any evidence and the trial magistrate went on to consider the award of quantum of damages based on the submissions by the parties.



10. The factors under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR as follows:

‘An appellate court will not disturb an award for general 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 arrived at a figure which was either inordinately high or low...’

In the case of *Kemfro Africa Ltd T/A Meru Express Services –v- Lubia & Another* (1987) KLR 27 the court stated That;

“the principles to be observed in deciding whether it is justified in disturbing the quantum of damages awarded are whether the Judge took into account irrelevant factors left out on or the award was inordinately high or low That it must be wholly erroneous estimate of damages.”

11. The Appellants have not challenged the award of Kshs. 150,000/= under the *Law Reform Act* or the award of Kshs. 16,170/= as special damages. The only issue That the Appellants have raised is the award of Kshs. 2,000,000/= for general damages under the *Fatal Accidents Act* as they term the said award as inordinately excessive.
12. The trial court found That the multiplier approach was not the most appropriate in assessing the damages for loss of dependency in this case. That the global sum method is the better approach in the circumstances of this case. Considering That the deceased was 25 years old, without a child and with no source of income, it is my view That the trial court did not err in adopting the global sum approach in making the award for damages.
13. Loss of dependency is a question of fact. In awarding a global sum of Ksh.2 million, the trial magistrate considered several precedents including *Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another* [2019] eKLR where a global sum of Kshs. 1,200,000/= was awarded under the head of loss of dependency in an instance of 25-year old deceased young man. The trial court also considered the case of *Samwel Kimutai Koriri (suing as personal and legal representative of estate) of Chelangat Sileva v Nyanchwa Adventist Secondary) & Another* [2016] eKLR where the court awarded a sum Kshs. 1.8 million where the deceased was a student at a teacher’s training college.
14. The learned magistrate finally held That:

“The deceased clearly came from a needy family and That explains why he was still in a teacher’s college at the age of 25 years.

The aforementioned neediness is demonstrated by the fact That part of the deceased’s fees in college was paid through a CDF cheque as is clear from the Meru Teachers Training College receipt produced herein as an exhibit. It is also clear from That receipt That there were some fees balance for That first term of Kshs. 51,872/= which was even higher [than] the fee paid. The neediness of the deceased’s parents and siblings clearly brings out the high dependency on the survivor of a son whose star appeared to had started shinning. That demonstrates a clear loss of dependency. In my discretion and taking into account guidance in the foregoing decisions, I find the sum of Kshs, 2,000,000/= to be adequate compensation for loss of dependency.”



15. The question is whether the trial magistrate erred in awarding damages for loss of dependency which were excessive in the circumstances. Dependency is always a matter of fact to be proved by evidence. It is upon the applicant to adduce evidence to prove dependency.
16. The deceased was survived by his parents and siblings. This fact was considered by the trial magistrate and was a relevant factor.
17. In this case of Abdalla Rubeya Hemed –v- Kajumwa Mvurya & Kula La Mvunga suing as the legal representative of the estate of Jumaa M. Mwamtutu (deceased) (2017) eKLR where the deceased was unmarried, a global sum of 1,080,000.00 was awarded in 2017.
18. In Julius Nkubito Muriungi –v- John Guchunuku Mairoki where the deceased was twenty two (2) years old Kshs.654,550.40.
19. The case of John Macharia-v- Josphat Muriungi Muguange & Another (2020) eKLR the deceased was 31 years old. A global sum of 1,000,000/- for loss of dependency was awarded. It is trite That similar injuries should attract similar awards. The trial magistrate was bound by the decisions of the High Court which were placed before him. Although the trial magistrate had the discretion to determine the award of damages for loss of dependency. He was supposed to be guided by the principles That in awarding the damages, the award should not be so inordinately high or low as to represent an entirely erroneous award. The trial magistrate was also supposed to take into account relevant principles.
20. In this case the learned trial magistrate considered various authorities where the maximum award was Kshs.1,500,000/-.
21. The trial magistrate departed from the doctrine of precedents and by so doing awarded damages which were manifestly excessive. The case of Geoffrey Obiero & Another –v- Kenya Power & Lighting Corporation Limited & Another which the trial magistrate relied on the High Court on appeal had awarded Ksh.1,200,000/-. In the circumstances the trial magistrate’s award of Ksh.2,000,000/- was in-coordinately high. For this reason I find That I have reason to interfere with the award of damages awarded by the trial magistrate.
22. I find That an award of Ksh.1,200,000/- is fair and reasonable based on the relevant authorities cited by the parties.

Conclusion

23. For the reasons stated, I find That the appeal has merits and is allowed.

I order as follows:-

1. The award of Ksh.2,000,000/- by the trial magistrate for loss of dependency is set aside.
2. It is substituted with an award of Ksh.1,200,000/- general damages for loss of dependency.
3. Damages under *Law Reform Act* – Kshs.150,000/-
Special damages - 16,170/-.
The total Award comes to Kshs.1,366,170.00
Less 20% = 273,234 = Ksh.1,092,936.00
4. The appellant shall get half the costs of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF JANUARY 2024.



L.W. GITARI
JUDGE

