



Njoroge (Suing as the Legal Administrator of the Estate of Francis Karanja Wainaina - Deceased) v Ponderosa Logistic Ltd (Civil Appeal 92 of 2016) [2024] KEHC 1606 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 92 OF 2016
SM MOHOCHI, J
FEBRUARY 22, 2024**

BETWEEN

CAROLINE WANJIRU NJOROGE (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF FRANCIS KARANJA WAINAINA - DECEASED) APPELLANT

AND

PONDEROSA LOGISTIC LTD RESPONDENT

(Being An Appeal from the Judgement/Decree of Honourable Magistrate J. Wanyaga in Molo PMCC No. 314 of 2014 delivered on 4th august 2016)

JUDGMENT

Introduction

1. The Appellant was the Plaintiff in Molo PMCC No. 314 of 2014. In the Complaint dated 27th August, 2014 filed on 9th December, 2014 the Appellant sought judgement against the Respondent, Defendant therein, for fatal injuries that the deceased sustained through a road accident that occurred on or about 11th May, 2014 along the Eldoret Nakuru Road at Salgaa area. The Deceased was traveling on motor vehicle registration number KBA 890B when the Respondent's driver controlled KBL 248Q/ZD3982 and hit motor vehicle registration number KBA 890B from behind causing the deceased fatal injuries.
2. The Respondent entered appearance and filed its Defence on 5th January, 2015. The Respondent filed an amended Defence dated 25th March, 2015 on 27th March, 2015. It denied the allegations in the Complaint and in the alternative blamed the driver of motor vehicle registration number KBA 890B for the accident.



3. Parties consented on liability at 15%:85% in favour of the Plaintiff. By judgment of the Trial Court dated 4th August, 2016, the Trial Court awarded the Plaintiff
 - a. Liability 15:85 against the Defendant
 - b. General Damages under the *Law Reform Act* Nil
 - c. General Damages under Fatal Accident Act
 - d. Loss of Dependency Kshs. 1,152,000
 - e. Less 15% contribution Kshs. 172,800
 - f. Special Damages Kshs. 70,000Total Kshs. 1,049,200

The Appeal

4. The Appellant being dissatisfied by the said judgment preferred an appeal on quantum only vide Memorandum of Appeal dated 2nd September, 2016 on the following grounds:
 - a. That the Learned Trial Magistrate erred in law and in fact in failing to consider the appellants submissions;
 - b. That the Learned Trial Magistrate erred in law and in fact in applying wrong principles of law in awarding a sum of Kshs. 152,000 under the loss of dependency and which sum is inordinately low in the circumstances;
 - c. That the Learned Trial Magistrate erred in law and in fact in failing to award the correct basic salary and awarding wrong multiplier and/or multiplicand;
 - d. That the Learned Trial Magistrate erred in law and in fact in failing to award the Appellant pain and suffering as per the relevant law.
5. The Appellant prayed that the Appeal be allowed and the Trial Court's finding be set aside, reviewed, revised and or substituted with the Courts judgment.
6. The Court on 25th April, 2023 directed that the Appeal be heard by way of written submissions. The Appellant filed submissions dated 6th June, 2023 on 7th June, 2023. The Respondent filed its submissions dated 19th October, 2023 on 23rd October 2023.

Appellant's Submissions

7. The Appellant submitted that the damages under the Fatal Accident Act was on an erroneous multiplier thus the Appellant ended being awarded a very low amount and urge the Court to review the same to a multiplier of 33 years and relied on the authority in Kenya Wildlife service vs Geoffrey Gicheru Mwaura (2018) eKLR where the Court relied on the case of Ezekiel Bargetuny.
8. The Appellant faulted the Court for not awarding damages under the *Law Reform Act* as well as failing to give reasons thereto. That the deceased died on his way to the hospital and was in a considerable amount of pain and as such should be awarded for pain and suffering and relied on the case of Joseph Kahiga Gathii & Paul Mathiya Kahiga (Suing as the administrator s of the estate of Late Lydia Wanjiku Kahiga & Elizabeth Murugi Kahaiga (Both deceased) vs Worl Vision Kenya & 2 Others where the deceased died on their way to hospital and were awarded damages for pain and suffering.



9. On loss of expectation of life, the Appellant submitted that the deceased died at the age of 37 and such deserved damages for loss of expectation of life. Reliance was placed in the case of Francis Wainaina Kirungu (suing as the administrators of the estate of the late John Karanja Wainaina) v Elijah Oketch Adella.

Respondent's Submissions

10. The Respondent in opposing the Appeal submitted and faulted the Trial Court by relying on the statutory minimum wage to estimate earnings despite lack of evidence of employment and by adopting the multiplier approach without evidence of income and relied on *Moses Mairura Muchiri vs Cyrus Maina Macharia* (Suing as the representative of the Estate of Mercy Nzula Maina (deceased) and further the case of *John Kipkemboi & Another v Morris Kedolo* [2019] eKLR. The Respondent urged the Court to find that the global approach should have instead been applied. Reliance was placed on *Muranga HCC No. 225 of 2013 Put Saranjevo Gen Eng. Co. Ltd vs Esther W. Njeri & Johnson Mwangi Gucha* (Suing as the Legal Representative of the Estate of Sylvester Muhia Gucha (deceased) & 2 Others and *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another*. According to the Respondent, the sum of Kshs. 1,000,000 was appropriate under *Fatal Accidents Act*.
11. Further that since the deceased passed away on the same day just a few hours after the accident, the award of Kshs. 10,000 was adequate under pain and suffering and that the sum of Kshs 100,000 was reasonable under loss of expectation of life.
12. On the issue of lost years, the Respondent urged the Court to refrain from duplication as the award for loss of dependency under the *Fatal Accidents Act* and Lost Years under the *Law Reform Act* would go to the same beneficiaries. It relied on *Hellen Waruguru Waweru* (Suing as the Legal Representative of Peter Waweru Mwenja (deceased) vs *Kairie Shoe Store Limited* (2015) eKLR.

Evidence

13. PW1, Carolyn Wanjiru Njoroge stated that she brought the case on behalf of her husband the deceased. That the deceased was working as a conductor in motor vehicle registration KBA and had worked in the for 5 years and that all documents got lost at the scene. She produced the Police abstract as "P-Exh1", and the "death Certificate as "P-Exh2". She also produced Grant ad Litem as "P-E-Exh3", chief letter as "P-Exh4", birth certificates of two children as "P-Exh5 (a) & (b)" and receipts for funeral expenses as "P-Exh6",

Analysis and Determination

14. This being a first appeal, this Court is obligated to re-evaluate and re-consider the evidence adduced in the Trial Court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified as such give due allowance to it. [*Selle v Associated Motor Boat Company Ltd* [1968] EA 123.], *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
15. The Parties having entered a consent on liability the Appeal is predominantly on the quantum of damages awarded by the Trial Court.
16. Having therefore considered the Record of Appeal and the rival positions by the parties thereto the issue for determination is thus:
 - a. Whether the award for general damages was inordinately too low to warrant the Court's interference.



Quantum of General Damages

17. The Appellant had claimed for damages under the [Law Reform Act](#) as well as the [Fatal Accidents Act](#). The Appellant has faulted the Trial Court for failure to award damages under the [Law Reform Act](#) and further failing to give reasons thereto. The Court has considered the evidence and the submissions by both parties' advocates.
18. The Trial Court in declining to allow damages under the [law reform act](#) relied on the decision by Justice Musinga in *Lydia Kerubo Otwor vs Kipkebe Ltd* (2010) eKLR to suggest that there would be double compensation.
19. Damages under the [Law Reform Act](#), are awardable pursuant to the provisions of Section 2(5) of the Act which provides that:
 - “(5) the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the [Fatal Accidents Act](#) or the [Carriage by Air Act](#) 1932 of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).”
20. Justice Njagi in *West Kenya Sugar Co. Limited v Philip Sumba Julaya* (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR stated:
 21. This issue was settled in the case of *Hellen Waruguru Waweru* (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v *Kiarie Shoe Stores Limited* [2015] EKLR where the Court of Appeal held that;
 - “19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two Courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.”
 20. This Court has explained the concept of double compensation in several decisions and it is surprising that some Courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the [Law Reform Act](#) and dependants under the [Fatal Accidents Act](#) are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the [Fatal Accidents Act](#) should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the [Law Reform Act](#), hence the issues of duplication does not arise.
 25. The words 'to be taken account' and 'to deducted' are two different things. The words in Section 4 (2) of the [Fatal Accidents Act](#) are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower Court shows that in reaching the figure awarded under the [Fatal Accidents Act](#), the trial judge bore in mind



or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

22. In view of the above there is no legal requirement for the Court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*. The argument by the advocates for the appellant on the issue does not stand.
21. This Court is of the view that the Appellant is entitled to award damages for pain and suffering and loss of expectation of life under the *Law Reform Act*.

Pain and Suffering

22. The deceased died on 11th May, 2014 the same day of the accident while on his way to the hospital as evidenced by the death certificate dated 26th October, 2014 and the Police Abstract dated 29th October, 2014.
23. In Josephine Kiragu v Vya Hauliers Lts [2017] eKLR Njoki Mwangi J stated:
- “On the issue of pain and suffering, in the case of Benedeta Wanjiku Kimani (supra) the Court had the following to say:-
- “For award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs. 10,000/= to shs. 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently that life itself was until cut short by the accident worth something to the estate.”
24. In the present case, the deceased died instantly. It is however my considered opinion that his death which was occasioned by being run over by a trailer must have resulted in excruciating pain before he died. I also consider that an award of Kshs.10,000/= for pain and suffering in the year 2015 when the judgment was delivered was on the lower scale due to the passage of time from when the accident happened in the year 2002. I therefore set aside the award of Kshs.10,000/= and hereby substitute an award of Kshs.30,000/= for pain and suffering.
25. In Sukari Industries Limited V Clyde Machimbo Juma Homa Bay [2016] EKLR where the deceased had died immediately after the accident and the Trial Court had awarded Ksh. 50,000/= for pain and suffering, Majanja J. held that:
- “(5) 5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”
26. The Court associates with the above-mentioned decisions and point out that it is not enough to say that because the deceased died on the same day of the accident did not suffer. The accident claimed the



lives of the driver and his conductor. The pain from injuries that follow a car wreck is indescribably. The deceased succumbed to injuries inflicted on him as a result of the accident. He further did not die on the spot he died on his way hospital. The Court therefore under this head finds that the award the sum of Kshs. 50,000 is reasonable.

Loss of Expectation of Life

27. The deceased was aged 37 years. There was no evidence tabled before Court to show that the deceased may have suffered from any health issues. He had a lot to look forward to in life.

28. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows:-

“As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.” (emphasis added).

29. In view of the above decision, the Court finds it reasonable in the circumstances to award a conventional award of Kshs. 100,000 for pain and suffering.

Loss of Dependency

30. PW1, testified that she was the widow of the deceased and produced Grant ad litem issued to her. She also produced the death certificate which indicated that the deceased died at 37 years of age. Further, she testified that the deceased was employed as a matatu conductor earning about Kshs. 15,000/- per month. She went on to testify that the deceased died at the age of 37 years and leaving behind 2 children and a widow who depended on him. On cross examination, she testified that he did not have any document to show that the deceased was earning Kshs. 15,000 per month.

31. When claiming under this head the Court considers the nature of employment, circumstances, terms and evidence produced in support of allegation of employment. If the deceased was employed and his salary is not determined, his income may be determined by reference to the government wage guidelines issued from time to time. Where the nature of employment is not clear, the Court exercises its jurisdiction and awards a global lump sum. In the instant case, the Trial adopted the multiplicand approach.

32. The Court cannot thereof automatically assume his nature of work or his income or when he would have retired for purposes of arriving at an award.

33. In Frankline Kimathi Mbariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwititi Gakungu deceased [2020] eKLR the Court stated:

“(23)In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.



[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

34. Even if it were to rely on the testimony of PW1, there ought to have been evidence in support. In *Frankline Kimathi Baariu & another vs Philip Akungu Mitu Mborothi* (supra) Marete J stated that:-

“I am aware of the decisions of the Court of Appeal to the effect that the evidence of income is not to be proved by only documentary evidence. However, in the circumstances of this case, the evidence produced is not convincing. This is so considering that; the respondent is said to be a director with Gikunju Company Limited where the deceased was allegedly employed. He has access to all the records of that company including but not limited to the deceased’s letter of employment, payment records of the deceased amongst others. He decided to withhold them from the Court.”

35. It is not clear how much the deceased made at the end of every month or from his job as a conductor. The Court also takes judicial notice that the matatu industry at times operates on piece meal basis and individuals are paid per days worked. The Trial Court adopted the minimum wage approach to use the multiplier approach.

36. In *Mary Khayesi Awalo & Another v Mwilu Malungi & Another Eldoret HCC 19/97 Nambuye J* held that the multiplier approach is just a method of assessing damages and *Albert Odawa v Gichimu Gichenji Nakuru HCCA 15/2003 [2007] e KLR – Ringera J* stated that:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency -are knowable with undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice never do.”

37. In the premise, there is no evidence of annual or monthly income for the deceased. The figure provided for the income of the deceased is not convincing to adopt the multiplicand approach. An award of damages being in the discretion of the Court I am inclined to award a global lump sum figure.

38. In *Frankline Kimathi Baariu & another vs Philip Akungu Mitu Mborothi* (suing as the Administrator and Personal Representative of Anthony Mwiti Gakungu (supra) the deceased was aged 36 years and left behind two children aged 16 and 8 years and the Court awarded the sum of Kshs. 1,300,000.

39. In the instant case, the deceased died aged 37 years and left behind a widow and two children. Therefore, considering the rate of inflation and the value of the Kenyan currency the Court awards a global sum of Kshs. 1,500,000 which is considered reasonable and moderate in the circumstances for loss of dependency.

40. The award for special damages is not contested and was proven the same shall not be disturbed.

41. In conclusion the Appeal succeeds and the Appellant is awarded

a. General damages:

i. Pain and suffering Kshs 50,000;



- ii. Loss of expectation of life Kshs 100,000,
- iii. Loss of dependency Kshs 1,500,000
Total Kshs 1,650,000
Less 15% contribution
- b. Special damages Kshs. 70,000
- c. Costs of the Appeal together with interest from the date of this judgment until payment in full.
- d. Interest on special damages shall accrue from the time of filing the suit.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 22ND DAY OF FEBRUARY 2024.

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MOHOCHI S. M.

JUDGE

