



Ngania & 2 others v Adulu (Suing as the Legal Representative of the Estate of Clinton Morgan Kiprotich) (Civil Appeal E005 of 2023) [2024] KEHC 4005 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E005 OF 2023
AC MRIMA, J
APRIL 25, 2024**

BETWEEN

**MOSES NGANIA 1ST APPELLANT
WATER MISSIONS PROJECT 2ND APPELLANT
TIMOTHY CHEBESAI KIPCHUMBA 3RD APPELLANT**

AND

**NANCY NDOYI ADULU (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF CLINTON MORGAN KIPROTICH) RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon. S. N. Makila (Principal Magistrate)
in Kitale Chief Magistrates Civil Case No. 244 of 2022 delivered on 8 th March 2023)*

JUDGMENT

Background:

1. On 31st March 2022, Clinton Morgan Kiprotich, [hereinafter referred to as ‘the deceased’], was fatally knocked down by a Motor vehicle registration number KBB 158X, belonging, managed and being driven by the 1st, 2nd and 3rd Appellants herein respectively. The deceased was riding a motor cycle along the Kitale - Webuye road.
2. Through the Plaint dated 2nd June 2022, Nancy Ndoyi Adulu, the Respondent herein instituted Kitale Chief Magistrates Civil Case No. 244 of 2022 on behalf of the deceased’s estate. It was her case that the Appellants herein were negligent and responsible for causing the accident.
3. The Respondent sought damages under Law Reform Act for loss of expectation of life and damages for lost years, loss of dependency and loss of earning capacity under Fatal Accidents Act.



4. The Appellants challenged the suit through the Statement of Defence dated 11th June 2022. They generally denied the Respondent's claims and asserted that if indeed there was an accident, it happened on account of the deceased's negligence.
5. However, on 2nd November 2022, the parties recorded a consent on liability. Accordingly, judgment on liability was entered in the ratio of 20%:80% in favour of the deceased; jointly and severally against the Appellants herein.
6. In its assessment of damages under *Law Reform Act* and *Fatal Accidents Act*, the trial Court, based on the evidence presented, awarded Kshs. 50,000/- for pain and suffering. As regards loss of expectation of life, the Court awarded an agreed sum of Kshs. 100,000/-.
7. The trial Court then assessed loss of dependency based on Section 4 of the *Fatal Accidents Act*. It utilized the multiplicand approach as opposed to the global/lumpsum approach.
8. On the basis that the deceased was 29 years of age at time of his death and was working as Laboratory Technician at Kiungani Secondary School earning a monthly salary of Kshs. 30,000/-, the Court adopted the multiplier of 20 years. Accordingly, it entered judgment of Kshs. 4,092,650/-.

The Appeal:

9. The Appellants were dissatisfied with the trial Court's assessment of quantum.
10. Through the Memorandum of Appeal dated 15th March 2023, they urged the following grounds of appeal: -
 1. That the learned trial magistrate erred in law and fact in adopting the wrong principles in making a determination as to the damages payable thereby arriving at an erroneous figure/ amount payable.
 2. That the learned trial magistrate erred in law and in fact in making an award of Kshs. 50,000/- for pain and suffering contrary to the evidence on record.
 3. That the learned trial magistrate erred in law and in fact in making an award for loss of dependency which was excessive in the circumstances and in view of the evidence on record.
 4. That the learned trial magistrate erred in law and in fact in making an award of Kshs. 165,700/- as general damages yet the Plaintiff produced receipts amounting to Kshs. 90,000/-
 5. That the learned trial magistrate erred in law and in fact in awarding excessive damages to the respondent in total disregard of the evidence on record.
11. The Appellants urged their case further through written submissions dated 6th July 2023.
12. In making their case that the award of damages for pain and suffering was excessive, the Appellants submitted that the evidence on record indicated that the deceased died on the spot. They made the proposal that in the circumstances, the deceased ought to have been awarded Kshs, 10,000/- instead of Kshs 50,000/-.
13. The Appellants referred to *Rai Cement Limited -vs- Stephen & Another* (suing as the Legal Administrator of the Estate of Zablun Khaemba Wanyama (Deceased) (2022) eKLR where an award of Kshs. 30,000/- was made.
14. In contesting the quantum on loss of dependency, the Appellants submitted that the Respondent did not adduce any evidence including the Birth Certificate to establish that indeed the deceased left behind



a son. It further was their case that the Respondent conceded that he was not entirely dependent on the deceased.

15. The Appellants submitted that the dependency ratio of 2/3 was not standard or automatic. It was their case that no material was placed before the Court to demonstrate how the Respondent depended on the deceased. Reference was made to Tom Oluoch Oloo -vs- African Safari Club (2019) eKLR where it was observed that dependency is a matter of evidence. They submitted that dependency ratio of 1/3 would have been reasonable in the circumstances.
16. In challenging the multiplicand approach, the Appellant submitted that the Respondent failed to prove that the deceased was earning Kshs. 30,000/-. It was its case that the letter adduced by the Respondent did not suffice as proof of earning since there ought to have been payslips.
17. The Appellants urged the Court to be guided by the minimum wages of a general labourer as per the Regulation of Wages (General) Amendment) Order 2020 of Kshs 7,240/- in the circumstances.
18. The Appellants further challenged the special damages. It was their case that the trial Court fell into error for awarding Kshs. 167,700/- and yet only Kshs, 131,250/- was pleaded.
19. The Respondent challenged the appeal through written submissions dated 3rd July 2023.
20. It was her case that the trial Court did not err in using the multiplicand approach since all the parameters including his age, occupation as a Laboratory Technician at Kiungani Secondary School and his earning were produced in Court.
21. The Respondent relied on various decisions among them HCCC No. 4533 of 1993, Hannah Wangaturi Moche & Another -vs- Nelson Muya and HCCC No. 2343 of 1993 Marko Mwenda -vs- Bernard Mugambi & Another on the use of multiplier approach and the ratio of 2/3.
22. With respect to the award for pain and suffering, the Respondent submitted that Kshs. 50,000/- was adequate under the head since the deceased did not die on the spot. It was her case that he died several hours after the accident.
23. In the end, the Respondent claimed that the special damages of Kshs. 165,000/- was pleaded and specifically proved.
24. The Respondent urged the Court not to upset the trial Court's findings for failing to demonstrate how the trial Court was misguided.

Analysis:

25. From the foregoing appreciation of the disputants' respective cases, the issues that arise for determination are as follows;
 - i. Whether the trial court assessment of quantum of damages in respect to pain and suffering was proper.
 - ii. Whether the use of multiplier approach and 2/3 dependency ratio in awarding loss of dependency was in order.
 - iii. Whether special damages were correctly awarded.
26. I will hence consider the issues sequentially, but first the Court's role in this appeal.
27. As the appeal is on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor



oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)

28. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

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 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.

29. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.
30. Having laid down the law guiding the determination of this appeal, this Court will now deal with the issues raised by the Appellants.

i. Pain and suffering:

31. Under this head, the trial Court awarded the deceased Kshs. 50,000/-. The contest is that the amount is high since, according to the Appellants, the deceased died on the spot. The Respondent on the other had contended that the deceased died a couple of hours after the accident, hence, the justification of the amount.
32. The Respondent testified that the deceased died 4 hours after the accident at Kitale District Hospital while undergoing treatment.
33. It is notable that during cross-examination, the Respondent admitted that he did not witness the accident. The Appellants did not call any witnesses. Therefore, the only recourse to establish the contention are police and hospital documents.
34. I have keenly looked at the Police Abstract form. In the injury section it was written 'fatal' meaning that the accident resulted in death.
35. The Certificate of Death, Mortuary Admission Form and the Burial Permit all indicate that the deceased died on 31st March 2022, the same day the accident happened.
36. I also have had the occasion to interrogate the Post Mortem Form. The circumstances of the death were filled as follows: -
- The deceased was riding a motorcycle when he was knocked down by a motor vehicle and died. Please examine the body to ascertain the cause of death.
37. All the foregoing documentary evidence point to the inevitable conclusion that indeed the death was spontaneous. There is nothing on record to corroborate the Respondent's claim that it happened four hours after the accident.



38. If that were to be the case, there would be some evidence in the nature of treatment charts indicating how the hospital managed the deceased's injuries before he succumbed.
39. That being the case, the outstanding issue is whether the award of Kshs.50,000/- was excessive in the circumstances.
40. This Court will, hence, be guided by *Hyder Nthenya Musili & Another -vs- China Wu Yi Limited & Another* [2017] eKLR, where 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....

41. From the foregoing, the acceptable range where there is no prolonged pain and suffering is between Kshs. 10,000/- and Kshs.100,000/-. In view of the fact that the deceased did not suffer for a protracted period of time, as considered against the need not to interfere unnecessarily with the trial Court's exercise of discretion, I do not see a reason to disturb the trial Court's findings.

ii. The Loss of Dependency:

42. The Appellants challenged all the aspects of this award. They contended that the Respondent did not adduce any evidence including the Birth Certificate to establish that indeed the deceased left behind a son and that the Respondent conceded that he was not entirely dependent on the deceased.
43. The Respondent produced a Chief's Letter of introduction for purposes of taking out Letters of Administration Ad-Litem further evidence of dependency. The letter indicated that the deceased was depended upon by his mother, [the Respondent herein], his three-year-old son, Ithan Lemwel Kipkemei and his sister Hildah Lorazon Chambura.
44. As regards the income, there was on record the letter dated 23rd May 2022. It was authored by Priscilla Wasike the Principal Kiungani Academy Secondary School. It indicated that the deceased, before his death, worked in the school as an Assistant Laboratory Technician from the year 2020. It was the Principal's evidence that the deceased was earning Kshs. 30,000/- monthly. The Court adopted the said income.
45. The deceased's age was also contested by the Appellants that it was not proved. Concededly, the deceased's Certificate of Birth was not produced.
46. There was, however, on record the deceased's Identification Card and Certificate of Death. The former was produced as P. Exh 2. It showed that the deceased's year of birth is 1993. The Court tabulated the age of deceased at 29 years old at the time of his death. The Court further found that the deceased would have worked for 20 more years and that his dependency ratio was 2/3.
47. With the foregoing parameters, can the trial Court be said to have erred in tabulating the loss of dependency?
48. There was material on record to corroborate the Respondent's claim. On the loss of dependency, it is generally settled in law that global/lumpsum damages are awarded in instances where the Court is left



with no choice since there is absolutely no proof of the deceased's monthly earnings, the Regulation of Wages (General) Amendment) Orders is not applicable and that the use of the multiplier approach would be tantamount to the Court engaging in speculation.

49. Given the state of the record in this matter, it is this Court's finding that the trial Court was right in settling for the multiplier approach. I will, therefore, deal with the multiplicand, multiplier and the dependency ratio.
50. On the multiplicand, even though in this case no payslips were produced to confirm earnings, there was a communication from where the Deceased worked on his income. The letter was produced in evidence. The lack of any proper books of account from the school cannot, therefore, ipso facto, mean that the deceased did not have income.
51. The Court of Appeal in Civil Appeal No. 167 of 2002 *Ayiga Maruja & Another -vs- Simeone Obayo* (2005) eKLR the Court observed;

.... We do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and that earn their livelihood in various ways. If documentary evidence is available that it well and good. But we reject any contention that only documentary evidence can prove these things.
52. Further, the trial Court cannot be faulted for using the multiplicand of Kshs. 30,000/= since even the Regulation of Wages (General) (Amendment) Order, 2018 [which was in force in March 2022] provided for monthly earnings of around Kshs. 27,024/= for a Grade I Artisan which category the deceased would ordinarily fall had there been no evidence of income.
53. This Court, therefore, finds that the multiplicand of Kshs. 30,000/= monthly is reasonable. The same is hereby upheld.
54. On the multiplier, the deceased was aged 29 years old. The retirement age in Kenya is at 60 years. The deceased had around 31 years of his active working life. The trial Court settled for a multiplier of 20 years. This Court finds it as quite reasonable considering the vicissitudes of life.
55. There is also the dependency ratio of 2/3 adopted by the trial Court. Dependency is a question of fact that must be demonstrated by way of evidence.
56. The evidence adduced before the trial Court could only support the fact the deceased supported his one son and lived with his grandmother as the Respondent was not able to take care of him. There was no tangible evidence that the deceased supported his sister. It was also not clear if the father to the deceased was alive and what support the Respondent received from the deceased's grandmother.
57. Taking the foregoing into consideration coupled with the fact that the deceased was not married, it is the finding of this Court, respectfully so, that the dependency ratio of 2/3 was steep thereby warranting this Court's intervention.
58. Since Courts have overtime found that the ratio of 1/3 to be on the lower side, this Court finds that the circumstances of this case would call for equal apportionment.
59. Therefore, the loss of dependency in this case would be arrived at Kshs. 30,000 x 20 x 12 x 1/2. That would translate to Kshs. 3,600,000/=.



iii. Special damages:

60. Special damages are a unique breed of compensation. They must not only be specifically pleaded but also be strictly proved. In *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa*, KSM CACA 179 of 1995 (UR), the Court of Appeal observed as follows;

... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.

61. The Respondent pleaded for expenses for a Coffin, lowering gear, hearse, transport for hire, Advocates fees and purchase of two bulls for the funeral at Kshs. 165,000/=.

62. This Court has keenly interrogated the exhibits. The trial Court was right in awarding the sum pleaded for.

Disposition:

63. Coming to the end of this judgment, this Court notes that the loss of expectation of life was acceded to by both parties at Kshs. 100,000/=. That was what was awarded by the Court.

64. Further, this Court wishes to profusely apologize to the parties for the late delivery of this decision. The delay is attributed to the cumulative heavy workload in the two High Court stations under yours truly docket.

65. Having said as much, the appeal herein partly succeeds and the following final awards do hereby issue: -

- Liability: - 80%: 20%
- Pain and suffering - Kshs. 50,000/-
- Loss of expectation of life - Kshs. 100,000/-
- Loss of dependency - Kshs.3,600,000/-
- Special Damages - Kshs. 165, 000/-
- Subtotal - Kshs. 3, 915,000/-
- Less 20% contribution - Kshs. 783,000/-
- Grand Total.....Kshs 3,132,000/-

Orders accordingly.

66. Since the appeal has partly succeeded, each party to bear their own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Miss. Tuwei, Counsel for the Appellants.

No appearance for Mr. Savatia, Counsel for the Respondent.



Chemosop/Duke – Court Assistants.

