



**Nzioka (Suing on her own behalf and as Administrator of the Estate of Gideon Mwanthi Nguyo - Deceased) v Mwangangi & another (Civil Appeal 283 of 2021) [2022] KEHC 15711 (KLR) (Civ) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15711 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 283 OF 2021**

**JN MULWA, J**

**NOVEMBER 28, 2022**

**BETWEEN**

**ZIPPORAH NTHAMBA NZIOKA (SUING ON HER OWN BEHALF AND AS ADMINISTRATOR OF THE ESTATE OF GIDEON MWANTHI NGUYO - DECEASED) ..... APPELLANT**

**AND**

**JAMES MWOVI MWANGANGI ..... 1<sup>ST</sup> RESPONDENT**

**ABDIRAHMAN SALAD AWALE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Milimani Commercial Courts in CMCC No 9080 of 2018 delivered by the Hon BJ Ofisi (RM) on April 30, 2021)*

**JUDGMENT**

1. The deceased, Gideon Mwanthi Nguyo, died in a road traffic accident which occurred on April 8, 2017 along the Eastern Bypass. The accident involved the 1<sup>st</sup> respondent's motor vehicle registration number KCH 066L in which the deceased was travelling as a passenger, driven at the time by the 1<sup>st</sup> respondent's agent, which collided with a lorry registration number KBT 804H owned by the 2<sup>nd</sup> respondent. The appellants sued the 1<sup>st</sup> respondent for general damages resulting therefrom in Milimani CMCC No 9080 of 2018.
2. The 1<sup>st</sup> respondent denied the claim in entirety and blamed the accident on the negligence of the driver of the lorry registration number KBT 804H. As such, the 1<sup>st</sup> respondent enjoined the owner of the lorry, being the 2<sup>nd</sup> respondent herein, to the suit as a third party.



3. The 2<sup>nd</sup> respondent filed a defence contending that the accident was solely or substantially occasioned by the 1<sup>st</sup> respondent.
4. Upon hearing the claim, the trial court held the respondents herein 100% jointly liable for the accident and awarded the appellants damages as follows: Kshs 1,500,000/- for loss of dependency; Kshs 50,000/- for pain and suffering; and, Kshs 100,000/- for loss of expectation of life.
5. Being aggrieved by the said decision, the appellants' and the 1<sup>st</sup> respondent lodged an appeal and a cross appeal respectively in this court. The appeal challenges the trial court's assessment of the quantum of damages while the cross appeal challenges both liability and quantum.
6. In their memorandum of appeal dated May 25, 2022, the appellants raised eight grounds of appeal which can be summarized as follows:
7. In their memorandum of appeal dated May 25, 2022, the appellants raised eight grounds of appeal which can be summarized as follows:
  1. That the learned trial magistrate erred in law and in fact in failing to evaluate the evidence placed before the court as regards damages under the Law Reform Act and the Fatal Accidents Act.
  2. That the learned trial magistrate erred in law and in fact in failing to hold that the appellant was entitled to higher awards in damages under the Law Reform Act as well as the Fatal Accidents Act.
  3. That the learned trial magistrate erred in law and in fact in failing to award funeral expenses to the appellants.
  4. That the learned trial magistrate erred in law and in fact in failing to consider the case law and authorities cited by the appellants.
8. The 1<sup>st</sup> respondent on the other hand raised five grounds in his memorandum of cross-appeal dated June 24, 2021. The same can be summarized as:
  1. That the learned trial magistrate erred in fact and in law in failing to apportion liability in the ratio of 50:50 as between the defendant and the third party upon holding that the said parties were jointly liable for the occurrence of the subject accident.
  2. That the learned trial magistrate erred in fact and in law in making excessive awards under the head of pain and suffering and loss of dependency.
  3. That the learned trial magistrate erred in fact and in law in failing to deduct the sum of Kshs 100,000.00 awarded for loss of expectation of life from the award for loss of dependency in view of the fact that the persons entitled to the deceased's estate are the same persons in whose benefit the action under Fatal Accidents Act has been brought.
9. The appeal was canvassed by way of written submissions which this court has given due consideration. The only issues for determination are whether the learned trial magistrate erred in failing to indicate the extent of each of the respondent's liability and whether the damages awarded by the trial magistrate are too high as to amount to an erroneous estimate.



## Whether The Learned Trial Magistrate Erred In Failing To Apportion Liability Between The Respondents Herein?

10. The general rule is that a trial court's finding on apportionment of liability should not be interfered with save in exceptional cases as it is an exercise of discretion. In *[Khambi and another v Mahithi and another](#)* [1968] EA 70, it was held thus:

“It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.”

11. The 1<sup>st</sup> respondent is not disputing the trial court's finding that both drivers of the subject motor vehicles that collided were to blame for the accident. However, he has taken issue with the fact that the learned trial magistrate failed to apportion liability in the ratio of 50: 50 as between him and the third party who is the 2<sup>nd</sup> respondent herein. Referring to the case of *[Rabab Wanjiru Nderitu v Daniel Muteti & 4 others](#)* [2016] eKLR, he stated that since the accident involved a head on collision, the trial court ought to have inferred equal blame to both drivers.

12. In the judgment delivered by the trial court on April 30, 2021, the learned magistrate held the respondents herein 100% jointly and severally liable for the accident. In the premises, I find it necessary to highlight the meaning of joint and several liability. In the case of *[Republic v PS in Charge of Internal Security ex parte Joshua Paul](#)* [2013] eKLR, the court cited the case of *[Dubai Electronics v Total Kenya & 2 others](#)*: Nairobi High Court Civil Case No 870 of 1998 in which joint and several liability was explained as follows: -

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.”

13. From the above authority, it is evident that by holding the respondents herein 100% jointly and severally liable for the accident, the learned magistrate meant that the appellants can recover the full judgment sum against either of the respondents then the one who paid can seek reimbursement from the other. Should that be the case in road traffic accident cases where parties are held equally liable? Definitely not. In *[Lakhanshi v Attorney General](#)* [1971] EA 120, Lutta, JA cited with approval the judgment of Lord Denning in *[Baker v market Harbourough Industrial Co-operative Society Ltd](#)* [1953] where it was held that:

“In a situation where a collision had occurred, and it was not reasonably possible on the evidence adduced to decide who was to blame, that liability should be apportioned at 50:50 % as between the two motor vehicles.”

14. The record is clear that none of the drivers testified in the trial court and no evidence was tendered from which this court can reasonably determine who was to blame for the accident. In the premises



and guided by the above authority I hold the respondents herein liable for the accident in the ratio of 50:50. Accordingly, the cross appeal is found to be meritorious on the issue of liability. The trial court's order that the defendant and the third party are held 100 jointly liable is hereby set aside and substituted with an order that liability is apportioned between the two parties at the ratio of 50:50.

### **Whether The Damages Awarded By The Trial Magistrate Are Too High As To Amount To An Erroneous Estimate**

15. This issue shall be determined under different headings which represent the nature of damages awarded.
16. As a general principal, the assessment of damages is a matter of the exercise of court discretion and as such, an appellate court will normally be slow to interfere with such discretion unless the trial court misdirected itself in arriving at the award in question. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR stated as follows in this regard:

“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...”

#### **i. Damages Under The Law Reforms Act**

##### **a. Pain And Suffering**

17. Both the appellants and the 1<sup>st</sup> respondent were aggrieved with the award made by the trial magistrate in this regard. The appellants faulted the trial court for disregarding their evidence on this but did not propose a different figure from what was awarded by the trial court.
18. On the other hand, the 1<sup>st</sup> respondent contended that the trial court's award of Kshs 50,000/- under this head is inordinately high since the deceased died immediately after the accident. In his view, an award of not more than Kshs 20,000/- would be sufficient compensation in the circumstances. He relied on the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, where the court observed that awards under this head range from Kshs 10,000/- to Kshs 100,000/- and higher damages would be awarded if the pain and suffering was prolonged before death. He also placed reliance on *Moses Koome Mithika & another v Doreen Gatwiri & another (Suing as the legal representative and Administrator of the Estate of Phineas Murithi (deceased))* [2020] eKLR in which the appellate court upheld an award of Kshs 10,000/- where the deceased died on the spot.
19. Damages for pain and suffering are recoverable by the estate of a deceased person as compensation for the pain suffered before death which results from an accident. In *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, Majanja, J observed thus:

“...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.
20. In the instant case, it is not disputed that the deceased died on the spot. Given that the sums awardable under this head have ranged from Kshs 10,000/- to Kshs 100,000/- from past precedents, I cannot say



that the sum of Kshs. 50,000/- awarded by the trial court is inordinately high or unreasonable as to warrant interference. See *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR. I therefore decline to upset it.

#### **b. Loss Of Expectation Of Life**

21. The appellants contended that the trial court's award of Kshs 100,000/- under this head was inordinately low. They relied on several cases to propose an award of Kshs 150,000/- in its place. These are: *Agnes Mutinda Ndolo & another v Mboya Wambua & another* [2017] eKLR where the court awarded Kshs 150,000/- for pain and suffering; *Trakana Mombasa Limited & another v George Amwayi Isaya* [2020] eKLR where the court awarded Kshs 7,000,000/-; *Sukari Industries Limited v Clyde Machimbo Juma* (*supra*) and *Regina Chelimo Magut & another v Linear Coach Limited* [2020] eKLR where courts upheld awards of Kshs 100,000/-.
22. On his part, the 1<sup>st</sup> respondent submitted that the award of Kshs 100,000/- was sufficient in the circumstances of this case.
23. I have looked at the cases cited by the appellant and I find that some of them are distinguishable from the instant case. Particularly, in the *Trakana Mombasa Limited* case (*supra*), the respondent suffered injuries that resulted in 70% permanent disability and seriously affected his normal functioning.
24. The conventional award for loss of expectation of life is Kshs 100,000/=, see the case of *Hyder Ntbenya Musili & another v China Wu Yi Limited & another* [2017] eKLR. The trial magistrate's award of Kshs 100,000/- is therefore not so unreasonable as to present an erroneous estimate. It is upheld

#### **ii. Damages Under The Fatal Accidents Act Loss Of Dependency**

25. Both the appellant and the 1<sup>st</sup> respondent were aggrieved by the award made by the trial court under this head.
26. The appellants are aggrieved by the global award of Kshs 1,500,000/- made by the trial court and have urged this court to adopt the multiplier approach in determining the appropriate compensation under this head. She submitted that the deceased who died at the age of 53 years was a business man who operated a uniform shop and had secured tenders from various schools to supply uniforms. It was also her submission that the deceased was involved in dairy farming which supplemented his income. She noted that his net income from both ventures was an average of Kshs 450,000/- per month but asked the court to adopt Kshs 300,000/- as the multiplicand for purposes of computation of loss of dependency.
27. As for the multiplier, the appellant submitted that since the deceased was in the informal sector as an entrepreneur and businessman, he would probably have worked until the age of sixty years which is the official retirement age in Kenya. She therefore urged that the court adopts a multiplier of 7 years. Reliance was placed on the following: *Regina Chelimo Magut & another v Linear Coach Limited* [2020] eKLR where Musyoka, J adopted a multiplier of 15 years for a deceased who was 45 years; *Agnes Mutinda Ndolo & another* (*supra*) where the court adopted a multiplier of 21 years for the deceased who was 39 years old at the time of death.
28. As regards the dependency ratio, the appellant submitted that a dependency ratio of 2/3 is appropriate in the circumstance of this case since the deceased had a wife and five children, all of whom were dependent on him. In totality therefore, the appellant proposed an award of Kshs 16,800,000/- as damages for loss of dependency, calculable as follows:  $Kshs\ 300,000 \times 12 \times 7 \times 2/3 = 16,800,000/-$ .



29. On the other hand, the 1<sup>st</sup> respondent was of the view that the global award made by the trial court under this head was inordinately high. He submitted that since the appellant did not prove the deceased's occupation and earnings, a global award of Kshs 800,000/- would have sufficed in the circumstances of this case.
30. In the alternative, he contended that if the court were to use the multiplier approach proposed by the Appellants, then the sum of Kshs 10,107.10, being the minimum wage for a general labourer in Machakos County under the Regulation of Wages (General) (Amendment) Order, 2015, should be used as the multiplicand. As regards to the multiplier, he concurred with the applicants' submission that the deceased who was aged 53 years at the time of his death would have worked until the official retirement age of 60 years. However, he contended that if due allowance is given to vagaries, vicissitudes and uncertainties of life, the deceased would have worked for another 5 years which according to him would be a reasonable multiplier in this case. On the dependency ratio, The 1<sup>st</sup> respondent agreed with the appellants that since the deceased was married with 5 children, a dependency ratio of 2/3 would suffice. Accordingly, he urged that the amount of damages awardable to the Appellants would be calculated as follows:
- $$10,107.10 \times 12 \times 5 \times 2/3 = 404,284.00/-.$$
31. Further, the 1<sup>st</sup> respondent submitted that the damages under this head should be reduced by the amount awarded under the *Law Reform Act* since the people who are entitled to the deceased's estate are the same persons for whose benefit the action under the *Fatal Accidents Act* has been brought. In support, he relied on the case of *Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko Deceased)* [2015] eKLR.
32. From the evidence of PW1 Zipporah Nthamba Nzioka, the appellant herein, it is not in dispute that her husband, the deceased herein, was 53 years old at the time he died. It is also not in dispute that the deceased had a wife and five children namely: Kelvin Nzioka Mwanthi aged 25 years; Elizabeth Nzula Makola aged 21 years; Solomon Nguyo Mwanthi aged 19 years; Dominic Kimuyu Mwanthi Aged 17 years; and, Jemimah Muthike Mwanthi aged 12 years. PW1 testified that the deceased was involved in a business called Zipporah Outfitters which dealt with supply of school uniforms. He was also involved in dairy farming and transport business and they earned between Kshs 450,000/- to 500,000/- per month from the three business ventures.
33. However, no evidence was tendered to prove the deceased's earnings from the above mentioned businesses or to prove that the businesses were owned by the deceased solely or jointly with the appellant herein. From the documents tendered in evidence, it appears that both the Uniform shop called Zipporah Outfitters and the dairy business were the appellant's ventures and not the deceased's. As regards the uniform shop, the appellant produced a letter from Matungulu Sub-county Administration Office addressed to her demanding payment for a single business permit and a receipt of Kshs 5000/- paid by her in that respect. Both of these documents relate to the year 2018 after the deceased had passed on. As regards the dairy farming, the records from Kambusu Dairy Self Help Group are in the appellant's name and not the deceased. Also produced is an animal movement permit issued to the deceased by South Kinangop Veterinary Department in May 2000 and a No objection certificate issued to the deceased in July 2011 by the District Veterinary Office Kangundo allowing him to move cattle from Limuru to Kangundo. However, nothing has been produced in the form of receipts or statement of accounts to show what the deceased earned from the said business.
34. In her judgment, the trial magistrate elected to make a global lump sum award for the reason that no evidence had been adduced to prove the deceased's earnings or that he was a business man. Indeed,



our jurisdiction is awash with authorities to the effect that where circumstances do not favour the application of the multiplier approach, the global approach should be adopted. The learned magistrate took note of this and cited authorities to that effect which I do not need to reproduce herein. In the premises, I find no fault with the trial court's decision to adopt the global award approach in the circumstances of this case. I will therefore not delve into the issues raised by the appellant and the 1<sup>st</sup> respondent with regard to the multiplier approach.

35. The court's role at this point therefore is only limited to determining whether the trial court's award of Kshs 1,500,000/- for loss of dependency was too low or manifestly high in the circumstances of the case. In making a global award, apart from comparison with previous trends or precedents, courts will also consider other factors such as the general health of the deceased before he met his death, his age and the number of dependents, particularly children below the age of eighteen years. In *Amazon Energy Limited v Josephine Martha Musyoka & another* [2019] eKLR, Justice Nyakundi reduced the trial court's global award of Kshs 2,500,000/- for loss of dependency to Kshs 1,200,000/- for reason that the deceased was 56 years old and his only child was in college.
36. In the instant case, the evidence on record shows that only two out of the five children of the deceased were aged below 18 years at the time of his death. In the premises, I find that the sum of Kshs 1,500,000/- awarded by the trial magistrate for loss of dependency was not too low or manifestly excessive in the circumstances of the case to warrant interference by this court.
37. Another issue raised by the 1<sup>st</sup> respondent is that the award for loss of dependency ought to be reduced by the amount awarded under for loss of expectation of life since the net benefit will be inherited by the same dependents under the *Law Reform Act*. In support of this position, they relied on the case of *Edner Gesare Ogega v Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko - Deceased)* [2015] eKLR where the court took a similar view.
38. In my view, the issue of double compensation does not arise because the two Statutes independently provide for award of damages. This was the view taken by the Court of Appeal in *Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another (suing as Administrators of the Estate of Philip Musyoka Muthoka)* [2020] eKLR.

### iii. Special Damages

#### a. Funeral Expenses

39. None of the appellants' grounds of appeal addressed the issue of funeral expenses. However, in their submissions filed herein, they urged this court to award them a nominal sum of Kshs 70,000/- being the sum expended towards funeral expenses, obtaining burial permit, death certificate, motor vehicle search and the letters of administration. They submitted that in fatal accident claims, courts take cognizance of the fact that funeral expenses were incurred even in instances where the same were not documented or pleaded. They relied on the case of *MNM v DNMK & 13 others* [2017] eKLR, where the court held that:

“A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v Mubea* (1970) EA 476).”

40. On the other hand, the 1<sup>st</sup> respondent submitted that the sum sought should not be awarded as no specific figure was pleaded and no such relief was sought in the plaint. It was thus his view that parties



are bound by their pleadings. He relied on the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR where the court held that:

“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Kshs 60,000/= we have awarded herein apply strictly to the circumstances of this case.”

41. I have looked at the plaint dated October 10, 2018. The plaintiffs did not specifically plead or pray for any special damages whatsoever, leave alone funeral expenses. The same cannot therefore be awarded at the appellate stage.

### **Conclusion**

42. For the foregoing, I find and hold as follows:

1. The appellants’ appeal on quantum of damages lacks merit and is hereby dismissed.
2. The 1<sup>st</sup> respondent’s cross appeal on both liability and quantum only succeeds on the issue of liability.
3. The trial court’s decree that the defendant and the third party are held 100 jointly and severally liable is hereby set aside and substituted with a decree that liability is apportioned between the two parties at the ratio of 50:50.
4. Each party shall bear own costs of the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**JN MULWA**

**JUDGE**

