



**Matunda (Fruits) Bus Services Limited v Owino & another (Suing as Representatives of the Estate of the Late John Otieno Odol) (Civil Appeal 94 of 2019) [2023] KEHC 2179 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2179 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 94 OF 2019  
HK CHEMITEI, J  
MARCH 23, 2023**

**BETWEEN**

**MATUNDA (FRUITS) BUS SERVICES LIMITED ..... APPELLANT**

**AND**

**MILLICENT AKOTH OGITO ..... 1<sup>ST</sup> RESPONDENT**

**PHOEBE ACHIENG OWINO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS REPRESENTATIVES OF THE ESTATE OF THE LATE JOHN OTIENO ODOL**

*(Being an appeal from the judgment of Honourable S.M Wabome (Chief Magistrate), delivered on 30th April 2019 in Molo CMCC NO. 243 of 2018)*

**JUDGMENT**

1. This appeal arises from an accident that occurred on December 31, 2017 or thereabout involving motor vehicle registration number KCC 003A along Eldoret-Nakuru road at Migaa area, where the appellant by itself, servant, agent and/or employee so negligently drove the said motor vehicle that it lost control and got involved in an accident as a result of which it caused the death of the deceased who was lawfully travelling in the said motor vehicle.
2. The respondent filed a suit against the appellant claiming *inter alia* damages under Fatal Accidents Act and Law Reform Act, special damages and costs of the suit plus interests. The matter proceeded to its conclusion where the parties herein entered a consent on liability on the ratio of 5:95 against the appellant and the court awarded the respondent damages for pain and suffering Kshs 20,000/=, loss of dependency Kshs 800,000/= and special damages for Kshs 45,300/= together with costs of the suit plus interest until payment in full.



3. Aggrieved by the said judgement, the appellant filed this appeal based on the following grounds; -
  - a. That the learned magistrate erred in law and in fact in awarding a higher amount on general damages without considering the evidence and the submissions on general damages given on behalf of the appellant while considering his judgment.
  - b. That the learned magistrate erred in law and in fact in disregarding the evidence adduced by the appellants thereby arriving at a wrong decision as to quantum payable to the plaintiff.
4. When the matter came up for hearing the court ordered that the same be canvassed by way of written submissions, which both parties have complied.

### **Appellant's Submissions**

5. The appellant's counsel submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding quantum of Kshs 800,000/= as loss of dependency. That the same was the main contention as it was inordinately high, excessive and the trial court arrived at the said award without any basis or justification. The court's attention was drawn to the cases of *Rosemary Onyango & another v Mohamed Jenjewa Ndoyo & another* [2019] eKLR and *H.K.M v Francis Mwongela Mabere* [2017] eKLR.
6. The appellant's counsel urged the court to find that the trial magistrate erred in fact and law in awarding the respondent Kshs 800,000/= as damages under the *Fatal Accident's Act*. That the same should be substituted with Kshs 500,000/= as the deceased died aged 2 years old.
7. Lastly, the appellant's counsel submitted on costs and that the same should follow event as per the provisions of section 27 (1) of the *Civil Procedure Act*. He urged the court to allow the appeal as prayed and the appellant be awarded costs.

### **Respondent's Submissions**

8. The respondents' counsel submitted that PW1 testified that the deceased was 2 years old when he died as a result of a road accident on December 31, 2017. That the principles laid down in awarding damages for loss of dependency in case of a minor was cited in the Court of Appeal case of *Sheik Mushtaq Hassan v Nathaniel Mwangi Kamau & 5 others* (1982-88) 1 KAR, The said court held that in assessing damages under loss of dependency in case of a deceased minor the goal all the time was the assessment of a fair award in the circumstances of any case.
9. The respondents' counsel while placing reliance on the case of *Kenya Breweries Limited v Saro* [1991] Mombasa civil appeal No 441 of 1990 (eKLR), submitted that a party was entitled to compensation for the untimely death, regardless of age, under loss of dependency. The respondents' counsel further placed reliance on the case of *Daniel Mwangi Kimemi & 2 others v JGM & another (The Personal Representatives of the Estate of NK (DCD))* [2016] eKLR where the court awarded Kshs 1,000,000/= to a minor under the said limb in 2016.
10. He urged the court to enhance the award by the trial court of Kshs 800,000/= to Kshs 2,000,000/= taking into account the age of the authority and factors of inflation. That special damages of Kshs 45,300 as awarded by the trial court was specifically proven.



## Analysis and Determination

11. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to 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. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* (1968) EA 123 where Sir Clement De Lestang (V.P) stated that:

“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”.

12. However, in *Peters v Sunday Post Ltd* [1958] EA 424, the court held that: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

13. I have perused through the entire record of appeal and considered the submissions by counsel for both parties. I note that liability is not contested and therefore the only issue for determination is whether the quantum award of Kshs 800,000/= for loss of dependency was inordinately high and exercise in the circumstances.

14. The appellant's counsel submitted that the trial court awarded quantum of Kshs 800,000/= as loss of dependency which was inordinately high and excessive and the trial court arrived at the said award without any basis or justification. The court's attention was drawn to the cases of *Rosemary Onyango & another v Mohamed Jenjewa Ndoyo & another* [2019] eKLR and *H.K M v Francis Mwongela Mabere* [2017] eKLR, where the court awarded Kshs 500,000/= and 200,000/= respectively for loss of dependency for the estate of a 2-year-old and a 7-year-old.

15. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the *locus classicus* case of *Bashir Butt v Khan* civil appeal No 40 of 1977 [1978] eKLR thus;

“An appellate court will not disturb an award of 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.”



16. Further, the Court of Appeal in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2)* [1985] eKLR held that: -

“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 that 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.”

17. Additionally, in the case of *Butler v Butler*, [1984] KRR 225 the court held as follows: -

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong decision.”

18. In the instant case as witnessed above, the bone of contention is in regard to how the trial magistrate arrived at the award of Kshs 800,000/= under the loss of dependency. The trial magistrate settled on the said amount while placing reliance on the case of Nakuru HCCC No 21773 of 2015 *Kinyanjui Njuguna v Texcal Flour by Four Safaris Ltd & another* (unreported) and rejected the amount of Kshs 200,000/= which was proposed by the appellant. The trial magistrate gave reasons for the said rejection that the said amount was extremely low and contemptuous especially in respect of human life. It was also the magistrate’s view that life is precious at any stage and all old people or adults have to go through every stage of life to reach their prime.

19. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by Ringera, J (as he then was) in *Grace Kanini v Kenya Bus Services* Nairobi HCCC No 4708 of 1989 where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

20. Further, the principles which ought to guide a court in awarding damages for lost years were set out succinctly by the Court of Appeal in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* civil appeal No 123 of 1983 [1986] KLR 457; [1982-1988] 1 KAR 946; [1986-1989] EA 137 also relied on by the respondent, as:



- (1) Parents cannot insure the life of their children;
- (2) The death of a victim of negligence does not increase or reduce the award for lost years;
- (3). The sum to be awarded is never a conventional one but compensation for pecuniary loss;
- (4) It must be assessed justly with moderation;
- (5) Complaints of insurance companies at the awards should be ignored;
- (6) Disregard remote inscrutable speculative claims;
- (7) Deduct the victim's living expenses during the "lost years" for that would not be part of the estate;
- (8) A young child's present or future earnings would be nil;
- (9) An adolescent's would real, assessable and small;
- (10) The amount would vary from case to case as it depends on the facts of each case including the victim's station in life;
- (11) Calculate the annual gross loss;
- (12) Apply the multiplier (the estimate number of the lost years accepted as reasonable in each case);
- (13) Deduct the victim's probable living expenses of reasonably satisfying enjoyable life for him or her; and
- (14) Living expenses reasonable costs of housing, heating, food, clothing, insurance, travelling, holiday, social and so forth.

21. In *William Juma v Kenya Breweries Ltd* Nairobi HCCC No 3514 of 1985 however appreciated that:

“In this country, the courts have taken into account the nature of our society and have correctly held that parents expect financial help from their children when they grow up. It is recognised that in our society children render useful services in the house or in the shamba, which relieves parents from financial expenditure on, say an employed worker. Those free services can be converted into money. The courts therefore have been awarding a lump sum figure to compensate parents of young children for pecuniary loss they have suffered or expect to suffer.”

22. I agree with Ringera, J ( as he then was) in *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 that:

“In adopting a multiplier the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the



age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without 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 should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

23. This court in adopting the principles applicable to loss of dependency for the deceased who was aged 2 years old holds that the trial magistrate having awarded a lump sum of Kshs 800,000/= for loss of dependency, did not err in law and in fact. The same being a global figure or award was reasonable in the circumstances.
24. The appeal is thus disallowed with no orders as to costs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**H. K. CHEMITEI.**

**JUDGE**

