



**Karanja & another (Suing as the Legal administrators for the Estate of)
Peter Ritha Muharu - Deceased) v Njuguna & another (Civil Appeal
E053 of 2022) [2023] KEHC 22151 (KLR) (12 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E053 OF 2022
GL NZIOKA, J
SEPTEMBER 12, 2023**

BETWEEN

**JOSEPH MUHARU KARANJA & STEPHEN KURIA KARANJA (SUING AS
THE LEGAL ADMINISTRATORS FOR THE ESTATE OF) PETER RITHA
MUHARU - DECEASED) APPELLANT**

AND

**SIMON MWANGI NJUGUNA 1ST RESPONDENT
GEORGE MICHUKI WAMBU 2ND RESPONDENT**

*(Being an appeal against the decision of D. N. Sure Senior Resident Magistrate delivered
on 22nd June, 2022 vide Senior Principal Civil Suit No. E030 of 2021 at Engineer Court)*

JUDGMENT

1. The appeal herein arises from the judgment delivered on June 22, 2022 vide Civil Case No E030 of 2021 at Engineer Senior Principal Magistrate's Court.
2. The plaintiff (herein "the appellant") vide a plaint filed in court on March 12, 2021 sued the defendants (herein "the respondents") jointly and severally for damages arising out of a fatal road traffic accident which occurred on November 16, 2020 along Nairobi — Naivasha road at Kobil petrol station involving motor vehicle registration number KCU 881P and the deceased appellant, who was a pedestrian and sustained fatal injuries.
3. However, the respondents denied liability vide a joint statement of defense filed on September 7, 2021 and attributed the cause of the accident on the negligence to the deceased.



4. The case proceeded to full hearing and by a judgment delivered on 22nd June, 2022 the trial court stated and ordered as follows:

“I have considered the case of *Jemimah Keruboh Nyarango v Christine Anyango Owalla & Another* [2022] eKLR and find the plaintiff has, on a balance of probability, proven as against the defendant who I hold 80% liable and accordingly award him Kshs 1,308,788.8/ — made up as follows:

- a. Pain and suffering----- Kshs 50,000/
- b. Loss of expectation of life--Kshs 200,000/=
- c. Loss of dependency----- Kshs 1,579,336/=
- d. Special damages -----Kshs 56,650/=
- e. Sub Total -----Kshs 1,885,98
- f. Less------(Kshs 250,000/=)

Kshs 1,635,986/=

- g. Less 20%------(Kshs 327,197.2/=)
- h. Total-----Kshs 1,308,788.8/=

The plaintiff will also have the costs and interest of the suit.

5. However, being aggrieved by the subject judgment, the appellant has appealed against it vide a memorandum of appeal dated, July 20, 2022, on the following grounds: -

- a. That, the learned Magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions and therefore deducted Kshs 250,000 from the award of quantum payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant.
- b. That, the learned Magistrate erred in law and in fact in adopting minimum wage of Kshs 9,870.85 instead of Kshs 30,627.45 as per Kenya Gazette supplement No 1 of January 8, 2019 and thereby arrived at a very low award on loss of dependency.
- c. That, the learned Magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.

6. That as a result the appellant is seeking for the following orders;

- a. That the judgment/decree of the Honourable court dated June 22, 2022 be reviewed and/or set aside and the court to re-access damages payable to the appellant.
- b. That the Respondent do bear the costs of this appeal.



7. Be that as it may, the appeal is evidently on quantum. It was disposed of vide filing of submissions. The appellant submitted that this court's role in hearing the appeal was stated in the case of; Peter M. Kariuki v Attorney General (214) eKLR by the Court of Appeal as follows: -

"We have also, as we are duty bound to do as a first appellate court, to consider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusion reached by the trial judge are consistent with the evidence." (see Selle & Another —v Associated Motor Boat Co Ltd & others (1968) E.A 123).

8. The appellant further argued that, the deceased was a pedestrian when he was knocked down by the respondent's vehicle. That, before he met his death, he was a long distance driver aged forty (40) years and was survived by his parents and two (2) children, though taking care of one of them.
9. That, the death certificate produced in court duly states that the deceased was a long distance driver and as supported by the evidence of (PW1) that he was a long distance driver which evidence was not rebutted.
10. The appellant relied on the case of; Board of Trustee Meru Diocese Kirimara Parish v Dores Wanjia Bore (2020) eKLR where the court stated that: -

"In this case the failure by the defendant to adduce evidence, not only to challenge the evidence but to give their side of the story must impact this appeal negatively. The defendant did not controvert the evidence tendered by the plaintiff. The respondent discharged their burden of proof to the required standard, that is on a balance of probabilities."

11. It was argued that, contrary to the evidence adduced, the trial Court "decided to make the deceased a lorry driver and adopted a lower multiplier without any justification". That, the court would have either stated that he was a general worker but if it agreed with the death certificate that he was a driver, then it should have also agreed with the evidence on record that he was a long distance driver and adopt the wages given by the appellant in its submissions and provided for by the regulation of wages and/ or Kshs 27,000 per month and not then lower figure. Hence this is obviously an error.
12. The appellant further submitted that, the learned trial Magistrate after awarding the deceased under Law Reform Act, decided to deduct the same amount of; Kshs 250,000 from the award, which is also an error. That, the law is clear on the same, since this is an appeal on award of damages, the appellant is aware that this is a discretion of the court.
13. That, the principles applicable to the appellate court were settled in the case of; Privy Council In Nance v British Colombia Electric Railway Co Ltd (1951) AC 601, 613 and in Mbogo v Shah (1968) EA93, as follows:

"A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice." (emphasis added)

14. Further, the trial court overlooked the appellant's submissions and decided to consider irrelevant factors, ending up awarding the respondent a lower award under loss of dependency. The appellant urged the court to re-assess the award under the loss of dependency and find that the deceased was a



long distance driver and the applicable wage is Kshs 27,000, which then works as follows: $27,000 \times 12 \times 20 \times 2/3 = \text{Kshs } 4,320,000$.

15. As regards the issue of Kshs 250,000 the appellant argued that, section 2(5) of the [Law Reform Act](#) (Cap 26) states that: -

“The rights conferred by or for the benefit of the estate of the deceased person shall be in addition to and not in derogation of any’ rights conferred on the dependants of the deceased persons by Fatal Accident Act.”

16. That, pursuant to the above provision, it is not in order to have deducted the subject sum. The appellant relied on the case of:

[Crown Bus Services Ltd & 2 Others v- Jamila Nyongesa & Awida Nyongesa \(Legal Representatives of Alvin Nanjala \(Deceased\)\)](#) 2020 eKLR

17. However, the respondent in response, argued that the award was aptly calculated and serves to adequately compensate the estate of the deceased. That, the court correctly exercised its discretion in adopting the minimum wage for a lorry driver which was Kshs 9,870.85 with 20 years being the length of time deceased would have lived, which was more than fair in the circumstances where “the deceased authored his own death”.

18. That, the deceased was not assured of a longer life, if the accident had not claimed his life and therefore the multiplier adopted by the trial court should be disturbed as the court did not consider the vagaries and vicissitudes of life.

19. The respondent relied on the case of; Nairobi HCCC No 4580 of 1987 - [Christine Shoi & another v East African Cement Co Ltd & another](#) as quoted in [Leonard Wanganga Ngara & 2 others v Joyce Warurii Ndung'u & 2 others](#) [2020] eKLR), where the court stated that although the plaintiff could have worked up to age 55, there was a chance that due to vagaries of life, the plaintiff would have died earlier.

20. That, the law is settled awards cannot be awarded under both Acts as held the case of; [Dismas Mubami Wainarua v Sapon Kasirimo Maranta \(suing as Administrator and or Personal representative of the Estate of Partinini Sapon \(Deceased\)\)](#) (2021) eKLR and that any rightful award should factor in a deduction of the amount classified as being loss of expectation of life.

21. Further, in the case of [Hellen Waruguru Waweru \(Suing as the legal representative of Peter Waweru Mwenja \(Deceased\)\) v Kiarie Shoe Stores Limited](#) (2015) eKLR (as quoted in [Seremo Korir & another v SS \(suing as the legal representative of the estate of MS, Deceased\)](#) (2019) eKLR) the Court of Appeal dealt with the issue of double compensation under the [Law Reform Act](#) and the [Fatal Accidents Act](#) and stated as follows:-

“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. ”

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.

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. That the court in afore decision further stated as follows on the issue of double compensation : -

'Similarly, I am in agreement with the appellants that the suit, having been brought by the respondent on behalf of himself and the deceased's mother, they both stand to benefit under both: the Law Reform Act and Fatal Accidents Act which would amount to double compensation, if no deduction is made.'

23. It was submitted that the lower Court was correct to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act and in doing so rely on Patrick Barasa v Serah Wambui Karumba (suing as the legal representative of the estate of Late Albert Chebaya [2019] eKLR; Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina (Deceased) v Elijah Oketch Adellah [2015] eKLR and Hellen Warungu Waweru (suing as the legal representative of Peter Waweru Menja (Deceased) v Kiarie Shoe Stores Ltd [2015] eKLR [as quoted in Dismas Mubami Wainarua v Sopon Kasirimo Maranta (suing as administrator and or personal representative of the estate of Partinini Supon (Deceased) [2021] eKLR. In the matter, it was also held that;

'The appellant argued that the trial court made a double award when it failed to deduct the award under the Law Reform Act from that under the Fatal Accidents Act. The law is settled that there cannot be awards under both the Law Reform Act *and the Fatal Accidents Act where the beneficiaries are the same. The suit was filed for and on behalf of the same beneficiaries. The trial court should have, therefore, deducted the award under the Law Reform Act from that under the Fatal Accidents Act.'

24. The parties rested their arguments and as a first appellant court, the loyal legal duty is to re-evaluate the evidence adduced afresh and draw its own decision on the contested issue, noting its lack of benefit of the demeanour of any witnesses who testified.

25. Pursuant to the grounds of appeal and arguments of the parties; two issue stand out for consideration being; the sum adopted as the deceased's wages and used to calculate loss of dependency and the amount of; Kshs 250, 000 deducted from the final sum awarded as compensation.

26. As regards the first issue, it was the plaintiff's evidence that the deceased was a "long distance driver" as stated by PW1 and the death certificate. However, no single document: a payslip, a letter from the employer or any kind of evidence to support the evidence of PW1, that the deceased was a long distance driver. Furthermore, I have looked at the death certificate and it clearly indicates that his profession as a; "driver" and not a long distance driver. Therefore, the sum of; Kshs 27,000 suggested by the appellant was not supported.



27. Be that as it were, the learned trial Magistrate relied on Legal Notice No3 of January 8, 2019. That notice does not to be correct as the correct Legal Notice No3 is dated December 19, 2018 and provides the wages of a lorry driver as Ksh. 9870.85. I do concur with the appellant that, there was no justification by the trial court why the court applied LN No 3 and treated the deceased as a lorry driver. This is informed by the fact that, the LN No 3 recognizes other drivers such as; tractor driver and harvester driver.
28. However, the highest wage is payable to the lorry driver and that is what the trial court applied and therefore the appellant benefitted in that regard. Furthermore, in the absence of evidence to support the fact that the appellant was a long distance driver, the court could have dismissed the claim or anchor it on any other law and/or treat the deceased as unskilled employee. Taking into account the circumstances of this case, the court did the best it could and I decline to interfere with that finding.
29. As regards the figure of Kshs 250,000 deducted from the awards, I note that there is no shred of explanation why the same was awarded and deducted and therefore the same cannot be sustained. In that regard I set aside the order deducting the same.
30. The upshot of the aforesaid is that, the appeal succeeds only in so far as the sum of Kshs 250,000 is reinstated. The rest of the orders remain as ordered by the trial court.
31. The sum awarded is as follows:

- a. Pain and suffering-----Kshs 50,000
 - b. Loss of expectation of life-----Kshs 200,000
 - c. Loss of dependency-----Kshs 1,579,336
 - d. Special damages-----Kshs 56,650
 - e. Sub Total-----Kshs 1,885,986
 - f. Less 20%-----Kshs 377, 197.20
- Total-----Kshs 1,508,788.80*

32. It is so ordered.

Dated, delivered and signed on this 12th day of September, 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Owour for the appellant

Mr. Njuguna for the respondent

Ms. Ogutu: court assistant

