



**Maina & another v Kamande & another (Civil Appeal E001 of 2021)
[2024] KEHC 13101 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E001 OF 2021
J WAKIAGA, J
OCTOBER 31, 2024**

BETWEEN

ANN NYAMBURA MAINA 1ST APPELLANT

FRANCIS GACHAU NDUNGU 2ND APPELLANT

AND

JOSEPH NGUGI KAMANDE 1ST RESPONDENT

MONICA WANGARI 2ND RESPONDENT

*(being an appeal from the Judgement and Decree of Hon. E. Agade
(SRM) dated 3rd December 2020 in Kigumo Civil Suit No. 226 of 2018)*

JUDGMENT

1. This appeal arises out of the judgement and decree of the trial Court herein delivered on the 3rd of December 2018 in which she found on liability at 50:50 between the Appellant and the Respondent and proceeded to make the following awards:
 - a. Special DamagesKshs. 60,485
 - b. Pain and suffering Kshs. 300,000
 - c. Loss of expectation of life Kshs. 200,000
 - d. Loss of dependencyKshs. 3,000,000.
2. Being aggrieved by the said award, the Appellant filed this appeal and raised the following grounds of appeal:
 - a. The trial Court erred in law and fact in awarding an excessive amount as damages under pain and suffering.



- b. The Court erred in law and fact in awarding an excessive amount under loss of expectation of life against the principles of stare decisis.
- c. The learned magistrate erred in law and fact by failing to deduct the award under the Law Reform Act from the total damages as the dependents were the same.
- d. The Court erred in awarding an excessive amount as global sum in general damages against the principles of stare decisis.

Submissions

3. Directions were issued on the determination of the appeal by way of written submissions and on behalf of the Appellants, it was submitted that the deceased died seven hours after the accident and that the general principle is that nominal damages for pain and suffering shall be awarded for the death occurring immediately after the accident whereas higher damages shall be awarded if the pain and suffering is prolonged before death as was stated in Sukari Industries Limited v Clyed Machimbo Juma [2016] eKLR and Hyder Nibenya Musili & another v China Wu Yi & another [2017] eKLR.
4. It was submitted that an award of Kshs.30,000 would have been appropriate based on the cases of FMM & another v Joseph Njuguna Kuria & another [2016] eKLR where Kshs.50,000 was awarded, Silverstone Quarry Limited & Another v Beatrice Kanguta & another [2020] eKLR where Kshs.50,000 was awarded and Alan Owiti Awuor & Another v Tabitha Micere Mathu [2021] eKLR where Kshs.100,000 was awarded.
5. On loss of expectation of life, it was submitted that an award of Kshs. 100,000 would have been suitable based on the case of Chari Mewanfine & another v William Mbukuli Nyende & another [2020] eKLR.
6. On loss of dependency it was submitted that the trial Court was not properly guided while arriving at the global figure since the deceased was aged 30 years and therefore a sum of Kshs.1,500,000 would have sufficed based on the following cases: Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014]eKLR where a lumpsum of 3 Million was reduced to Kshs.700,000, Makueni Colurts Limited & another v Felistus Kanini Ndunda [2020] eKLR where an award of Kshs.2,500,000 was reduced to Kshs.1,800,000, Karanja Edwin v Rabab Wanjiku Njoroge [2018] eKLR where Kshs.700,000 was awarded on appeal.
7. It was contended that based upon the stated cases and having taken into account the high inflationary trends a sum of Kshs.1,500,000 would have been an appropriate compensation and the Court was urged to award the same.
8. On behalf of the Plaintiff/ Respondent it was submitted that the trial Court considered the fact that the deceased suffered intracranial haemorrhage and that in arriving at the award under pain and suffering the Court was persuaded by the following cases: Stella Nasimiyu Wangila & another v Raphael Oduro Wanyama [2016] eKLR where Kshs.500,000 was awarded and Joyce Mumbi Mugi v The Cooperative Bank of Kenya Ltd where Kshs.300,000 was awarded.
9. The Court was urged to look at the following decided cases where an award of Kshs.200,000 was given: Muli & Another v Nzioka [2022] KEHC 244(KLR) and Wareng High School v Metto & another [2022] KEHC 13129(KLR).
10. It was stated that what determines an award under this heading was how long the deceased took before he either died or lost consciousness as was stated in the case of Wambua v SMM & Another.



11. On loss of expectation of life, it was submitted that the award by the trial Court was within the range as supported by the cases of *Citi Hoppa Bus Limited & another v Maria Clara Rota* [2021] eKLR and *Wanyanga & another v Ndora & another* [2023] KEHC 2532(KLR).
12. On loss of dependency, it was submitted that the trial Court used the global award for the reason that it was not tenable to use the multiplier approach for lack of evidence to support the deceased earnings. The Court considered the fact that the deceased was survived by a young family and that the same considered all the relevant factors including the age of the deceased in his health and age in making the award. In support of the submissions reference was placed on the following cases; *MNM & another v Solomon Karanja Githinji* [2015] eKLR where a 46 year old was awarded Kshs.3,000,000, *Ndeti & another v Mwangagi & another* [2022] KEHC 15732 where Kshs.2,500,000 was awarded, *Stephen Murathi v Brenda Makena* [2021] eKLR, where Kshs.2,500,000 was awarded, *Rozco Co Limited v Casmiel Odhiambo Okati* [2019] eKLR where Kshs.2,300,000 was awarded and *David Mbuba & another v Victoria Mwangeli Kimwalu & another* [2018] eKLR where Kshs.2,500,000 was awarded on appeal.
13. It was submitted that the appeal lacked merit and should be dismissed.
14. This being a first appeal, Court is under a legal duty to re-evaluate the proceedings before the lower Court and to come to its own conclusions thereon.
15. By a plaint thereon the Respondent sued the Appellant for damages arising out of a traffic accident on 15th October 2017 involving the Appellant's motor vehicle registration number KAL 398Y and motor Cycle registration number KMCW 656A which the deceased was riding. The Respondent attributed the accident to the negligence of the 1st Appellant as the driver of the said motor vehicle.
16. The 2nd Appellant filed a statement of defence in which she denied that the 1st Appellant was her driver and attributed the accident to the negligence of the deceased.
17. At the hearing PW1 Monica Wangari Chege testified that her husband the deceased was involved in an accident from which he died the following day, having been admitted at hospital. She stated that she did not witness the accident. In cross examination she stated that she did not have any marriage certificate save for the birth certificate of the children which did not bear the name of the deceased as their father.
18. PW2 Peter Irungu Mbao stated that he was with the deceased as the rider of the motor cycle which collided with the Appellant's motor vehicle which was trying to overtake.
19. In finding on liability, the Court had this to say: "since I can not tell who encroached on the side of the motor vehicle and vice versa, I will take the safe bet and apportion liability of 50:50 between the deceased and the Defendant". It must be noted that the Appellant did not appeal on liability and there is no cross appeal by the Respondent and therefore the issue of liability is not part of the issues to be determined in this appeal.
20. From the memo of appeal and the submissions the only issue for the Court's determination is whether the trial Court award on damages was justifiable. Put differently, whether the award was so high that this Court ought to interfere with the same.
21. The principles upon which an Appellate Court may interfere with the trial Court's assessment of damages are now well settled in Kenya which requires no exercise of judicial mind. In the case of *Kemfro v Lubia* (1982-88) KLR the Court stated that assessment of substituting damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for the award of the Court below simply because it would have awarded a different figure had it been the trial Court.



22. On the issue of pain and suffering, in awarding the Appellant the sum of Kshs.300,000 the Court relied on the decisions of the High Court and I therefore find no fault with her determination thereon, loss of expectation of life award was also supported by relevant decisions of the High Court all which were binding upon her and therefore find no merit with the determination of the Court. On the use of the global sum award, I note that there is no scientific formula in arriving at the same provided that similar case attracts similar award.
23. As submitted by the Respondent in arriving at the award herein the Court took into account all the relevant consideration and the fact that the Appellant expected a lower award is not a ground for this Court to interfere with the determination of the Court.
24. I therefore find no merit on the appeal herein which I hereby dismiss with cost to the Respondent. The trial Court award is hereby affirmed.

SIGNED DATED AND DELIVERED AT MURANGA THIS 31ST DAY OF OCTOBER 2024.

J. WAKIAGA

JUDGE

In the presence of :

Mr. Muturi for Mr. Wanjohi for Respondent

Mutei for Applicant

Jackline – Court Assistant

