



**Ngigi & another v Mati & another (Suing as the Legal Representatives
of the Estate of the Late Doreen Kanana) (Civil Appeal E1363 of 2023)
[2024] KEHC 10693 (KLR) (Civ) (22 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10693 (KLR)

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

CIVIL

CIVIL APPEAL E1363 OF 2023

REA OUGO, J

AUGUST 22, 2024

BETWEEN

JOHN GATHUMBI NGIGI 1ST APPELLANT

DAVID MATHU CHEGE 2ND APPELLANT

AND

JACOB MWITHALI MATI 1ST RESPONDENT

HENRY MATI M'LITHARA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
DOREEN KANANA**

*(Being an appeal from the judgment of the Hon. Magistrate
S.A Opande P.M delivered on 14th February 2023 in the Chief
Magistrate's Court at Milimani Civil Suit No. MCCC/E11966 of 2021)*

JUDGMENT

1. The respondent in his suit at the lower court alleged that on 16/5/2020, the deceased was walking along the Outering Road, service lane, and was knocked by motor vehicle KBE 140P. The respondent averred that the 1st appellant was the registered owner of the vehicle and the 2nd appellant his driver. It was pleaded that the 2nd respondent drove the vehicle at high speed that he lost control causing the accident that caused the deceased fatal injuries.
2. It was averred that the deceased died at the age of 24 years, was a businesswoman earning Kshs 40,000/-. Her children, Victor Munenen Henry and Philip Mwenda, suffered loss of dependency under the Fatal



- Accident Act as a result of her death. The 1st appellant is vicariously liable for the negligent acts of his driver.
3. The appellants filed their defence denying the appellant's claim and averred that if any accident occurred then the same was occasioned by the negligence and carelessness of the deceased.
 4. The trial magistrate entered judgment on liability in the ratio of 70:30 in favour of the respondent against the respondent. The court awarded damages as follows:
 - a. Loss of expectation of life Kshs 100,000/-
 - b. Loss of dependency Kshs 3,365,856/-
 - c. Pain and suffering Kshs 40,000/-
 - d. Special damages Kshs 61,740/-Total Kshs.3,567,596/-.
 5. The appellant dissatisfied with the decision of the subordinate court has filed an appeal vide his memorandum of appeal dated 5/12/2023. He raises the following grounds:
 - i. The learned magistrate erred in law and fact in making an award of general damages that was excessively high.
 - ii. The learned magistrate erred in law and fact by failing to appreciate the submissions filed by the appellant in liability.
 - iii. The learned magistrate erred in law and fact by departing from the conventional award of damages for similar circumstances.
 6. The appeal was canvassed by way of written submissions. The appellants on the issue of liability submit that it was improbable if not possible for Pw3 to have been an eyewitness to the accident. This means that the evidence he gave is not credible. Therefore, the evidence of Dw1 ought to be considered as the true first-hand account of the occurrence of the accident. It was submitted that the plaintiff/deceased should shoulder the highest liability and they suggested 80%.
 7. The appellant on damages only challenged the award of loss of dependency. The appellants submit that the trial magistrate erred in applying the multiplier approach and argued that it ought to have adopted the global approach. The respondent did not demonstrate that the deceased was in any gainful employment and the death certificate shows that she was unemployed. It was submitted that if a multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of a particular case (see *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR). The appellants further submitted that in *David Mangondi Senema & another v Joseph Saboo & another* [2019] eKLR the 31-year-old family man with a wife and three children. The court awarded a global sum of Kshs 1,200,000/-. In *Moses Koome Mithika & another v Doreen Gatwiri & another* (suing as the legal representative and administrator of the estate of Phineas Murithi (deceased) [2020] eKLR the court awarded a global sum of Kshs 1,000,000/- where the deceased who was 20 years old had a wife and 2 children. They urged the court to adopt a global sum of Kshs 1,000,000/-.
 8. The respondent opposed the appeal. They submitted that the trial court noted that the appellants conceded that liability be apportioned in the ratio of 80:20. The appellants failed to adduce evidence to support their averments on how the trial court erred in their finding of liability. The respondent's



witness was on his way from work when he witnessed the accident and blamed the appellants for the accident.

9. On loss of dependency, the respondent submitted that it urged the lower court to apply a 2/3 dependency ratio as the deceased had two children and used 36 years given that the deceased was 24 years old. It argued that the multiplicand was 40,000/-. The respondent submits that the appellants have not offered any reason why the court should opt for the global sum approach. They support the finding of the trial court.

Analysis and Determination

10. I have considered the submissions in this appeal. This being the first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

11. No 81695 PC Jackline Naeku (Pw1) testified that she is stationed at Embakasi Police Station. On 16/5/2020 at 10:30 p.m., an accident occurred at Outering Road. It was reported at Embakasi Police Station. From the investigations by CPL Munyao, the vehicle was blamed for the accident. On cross-examination, Pw1 testified that she did not visit the scene to ascertain whether there was a zebra crossing and that no one was charged.
12. Henry Mati M’lithara (Pw2) testified that on 16/5/2020 he received a call from a good Samaritan that the deceased was involved in a road accident. He went to Nairobi and confirmed that the deceased died as a result of the accident. He testified that the deceased had two children and was earning Kshs 40,000/-. He testified on cross-examination, he testified that he got to know of Pw1’s earnings from her colleagues.
13. Cheye Wafula (Pw3) testified that on the material day, he was walking along the Outering Road service lane headed home when the 2nd appellant carelessly controlled the vehicle causing it to lose control and veer off the road. He blamed the 1st appellant’s driver for failing to take precautions and driving at high speed. He further testified on cross-examination that the vehicle came from behind him. There were lights at the scene. He explained that he worked at Cyber at the time of the accident. He saw the deceased walking alone.
14. David Mathu Chege (Dw1) testified that the deceased appeared on the road. She emerged between the parked vehicles and ran attempting to cross the road. The lady was naked and had mud on her. Dw1 applied emergency brakes and swerved to the extreme right. The front right tyre hit the road pavement but the vehicle struck the deceased on the left side of the car and it ran over her. On cross-examination, he testified that the post-mortem report showed that the deceased was in maroon clothes.
15. The trial magistrate apportioned liability to both parties because it was dark during the time of the accident. In this case, the appellants questioned the credibility of Pw3 and urged the court to take judicial notice of the nationwide curfew. Anyone who was out at the time must have been an essential



service provider. I do take judicial notice that there was a nationwide curfew however it was not unusual to have a few people fail to comply with it. In this case, the deceased was not an essential service provider but was outside contrary to the curfew. Therefore, it was plausible that Pw1 was outside after curfew.

16. The respondent's case was that the 2nd appellant was driving at high speed. Dw1 on the other hand testified that he was driving at 40 km/hr. At this speed, Dw1 could have seen the deceased and brought the vehicle to a stop to avoid hitting her. From the evidence of Dw1, it is not clear whether he saw the deceased as he testified in his examination in chief that the deceased was naked only to testify on cross-examination that the deceased was indeed dressed in maroon clothing during her post-mortem. It appears that Dw1 must have been driving at high speed. However, the deceased was a pedestrian and owed a duty of care to other road users to move with due care and follow the Highway Code (see Patrick Mutie Kimau & another v Judy Wambui Ndurumo [1997] eKLR). Therefore, the trial magistrate's apportionment of liability at 70:30 cannot be unreasonable.
17. I now turn to consider the award of damages made under the head loss of dependency. The factors under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR as follows:

‘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..’
18. The appellant at the lower court urged the trial magistrate in their submissions to adopt the minimum wage as the deceased's earnings. They now urge this court to find the trial magistrate fell in error as it ought to have used the global approach.
19. The court in *Rottger v Dusa & another ((Suing on Behalf of the Estate of Wilson Baya Thoya - Deceased)) (Civil Appeal 063 of 2023)* [2023] KEHC 26630 (KLR) (18 December 2023) (Judgment) held that the adoption of the multiplier approach falls within the discretion of the court. The court should consider the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency in adopting the multiplier approach (see *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* which was quoted with approval in *Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003* [2007] eKLR).
20. The trial court in its judgment held that no evidence was produced showing what the deceased earned or that she was a skilled worker. There was however evidence that the deceased lived in Nairobi and provided for her two children. Pw2 also testified that the deceased would occasionally send him money. Pw2 testified that the deceased earned Kshs 40,000/- from her business. In his cross-examination, he testified that the deceased worked near Pipeline in Nairobi. However, the nature of the business that the deceased was engaged in is unclear. I agree with the holding of the trial court that there was no evidence that the deceased was a skilled worker. In my view, she earned monies that she used to look after her family, and therefore, the trial magistrate was correct in adopting the minimum wages for a general worker.
21. In conclusion, the appeal lacks merit and is hereby dismissed. I affirm the award of the trial magistrate and taking into account the apportioned liability, the damages awarded to the respondent are as follows:
 1. Loss of expectation of life Kshs 100,000/-
 2. Loss of dependency Kshs 3,365,856/-



3. Pain and suffering Kshs 40,000/
Total Kshs 3,505,856/-
Less 30% liability Kshs 2,454,099/-
4. Special damages Kshs 61,740/-
Net Total Kshs 2,515,839/-

22. The respondent shall have the cost of the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 22ND DAY OF AUGUST 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellants - Absent

Respondent - Absent

Diana -C/A

