



Macharia & another v Undusu & Iganza (Suing as Personal Administrators and Legal Representatives of the Estate of Mincelet Kavanyiri) (Civil Appeal E001 of 2022) [2024] KEHC 11445 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E001 OF 2022
JN KAMAU, J
SEPTEMBER 30, 2024**

BETWEEN

KELVIN MUORIA MACHARIA 1ST APPELLANT

TSUSHO CAPITAL KENYA 2ND APPELLANT

AND

MARGRET NGESA UNDUSU & CASPER IGANZA (SUING AS PERSONAL ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF MINCELET KAVANYIRI) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. O. Ongeru (SPM) delivered at Vihiga in Principal Magistrate's Court Case No 213 of 2019 on 14th April 2022)

JUDGMENT

Introduction

1. In his decision of 14th April 2022, the Learned Trial Magistrate, Hon S. O. Ongeru, Senior Principal Magistrate, entered judgment in favour of the Respondent herein as follows:-

Pain and Suffering Kshs 50,000/=

Loss of Expectation of Life Kshs 100,000/=

Loss of Dependency

$2/3 \times 15,000 \times 30 \times 12$ Kshs 3, 600,000/=

Special Damages Kshs 210, 500/=

Kshs 3,960,500.00



Plus costs and interest at court rates

2. Being aggrieved by the said decision, on 11th May 2022, the Appellants herein filed a Memorandum of Appeal dated 9th May 2022. They relied on five (5) Grounds of Appeal. They filed their Supplementary Record of Appeal dated 23rd April 2024 on 30th April 2024.
3. Their Written Submissions were dated 16th February 2014 and filed on 20th February 2024. Their Supplementary Written Submissions were dated 23rd April 2024 and filed on 30th April 2024. The Respondents' Written Submissions were dated 9th April 2024 and filed on 5th June 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court. The court deemed it prudent to address the issue under the following distinct heads.

I. Law Reform Act Cap 26 (laws Of Kenya)

7. This court considered the award under the Law Reform Act under the following distinct and separate heads.

A. Loss Of Expectation Of Life

8. The Appellants submitted that the Trial Court grossly misdirected itself and treated the evidence and submissions on quantum superficially consequently arriving at a wrong conclusion.
9. They contended that the general principle of law was that for an appellate court to interfere with an award of damages, it must be shown that the trial court in awarding damages took into consideration an irrelevant fact or the sum awarded was inordinately low or too high that was a wholly erroneous estimate of the damage, or if it was established that a wrong principle of law was applied as held in the case of *Butt vs Khan* [1981] KLR 349.
10. They pointed out that damages should represent a fair compensation and not be excessive. In this regard, they cited the case of *Osman Mohammed & Another vs Saluro Bundit Mohammed* Civil Appeal No 30 of 1997 (eKLR citation not given) where it was held that damages had to be within limits set out by the decided cases and also within limits the Kenyan economy could afford.
11. They submitted that the Trial Court erred by awarding Kshs 100,000/= for loss of expectation of life as the same was a bit excessive. They submitted that Kshs 80,000/= would be sufficient in the circumstances. They relied on the case of *Chen Wembo & 2 Others vs I.K.K & Another* (Suing as the



- Administrator and Personal Representative of CRK (deceased) [2017] eKLR where the court upheld the award of Kshs 80,000/= for loss of expectation of life for being within the conventional standard.
12. On their part, the Respondents submitted that they had initially proposed a sum of Kshs 250,000/= for loss of expectation of life. They contended that given her young age, the deceased suffered loss of an illustrious life. They averred that the Appellants had failed to set out any relevant fact which the Trial Court omitted or any irrelevant fact which the Trial Court took into consideration in making the award for loss of expectation of life. It was their case that the Trial Court's award of Kshs 100,000/= was not excessive and urged this court to uphold the same.
 13. To buttress their argument, they placed reliance on the cases of *In Yaf Japan Motors Limited & 2 Others vs Wambughu & Another* KEHC 22438 KLR where the court upheld an award of Kshs 200,000/= for loss of expectation of life, *Violet Jeptum Rahedi vs Gilbert Kubai Mbogori* [2013] eKLR where a sum of Kshs 150,000/= was found to have been reasonable for loss of expectation of life and *Lawrence Theuri Mwangi (Suing as the Personal Representative of the Estate of the Late Benson Mwangi Theuri (Deceased) vs Thomas Mutunga Musau t/a Tenoji Motors Ltd & Another* [2019] eKLR where an award of Kshs 120,000/= was made under this head.
 14. Right at the outset, this court wished to point out that while an appellate court ought to determine whether or not the trial court exercised its discretion or did not misdirect itself on the basis of the material that was adduced during trial, nothing stopped it from re-evaluating the evidence that had been adduced vis a vis considering comparable awards and coming to its own conclusion as was held in the cases of *Selle & Another vs Associated Motor Boat Co Ltd & Others (Supra)* and *Kenya Ports Authority vs Kushton (K) Ltd* (2009) 2 EA 212
 15. It was this court's considered view that the Appellant's proposal would be on the lower side in view of the inflationary trends. On the other hand, the award of Kshs 100,000/= for loss of expectation of life was not unreasonable.
 16. In arriving at this figure, this court associated itself with the holdings in the following cases:-
 1. *Joseph Mugweru Njenga & Another vs Joseph Kamau Ng'ang'a* [2018] eKLR where the court therein awarded a sum of Kshs 100,000/= for loss of expectation of life.
 2. *Pleasant View School Limited v Rose Mutheu Kithoi & another* [2017] eKLR, where this very court upheld an award of loss of expectation of life at the sum of Kshs 100,000/=.

II. Fatal Accidents Act Cap 32 (laws Of Kenya)

17. This court considered the award under the Fatal Accidents Act under the following distinct and separate heads.

A. Multiplicand

18. The Appellants submitted that the Trial Court erred by forming an opinion that the deceased was earning Kshs 20,000/= per month prior to her death and further erred by awarding Kshs 15,000/= as perceived income prior to her death, without evidence in both instances. They argued that although Margret Ngesa Undusu (hereinafter referred to as "PW 1") testified that the deceased was a teacher employed by BOM and earned Kshs 15,000/=, he did not adduce any pay slips to confirm the said monthly pay.
19. They argued that in the absence of evidence of proof of earning of the deceased, the Trial Court ought to have reverted to the minimum wage of Kshs 13,572.90 for a general labourer, for all other areas as



per the Regulation of Wages (General) (Amendment Order) 2018 (Legal Notice Number 2) under the column of a general labourer as the monthly income of the deceased prior to her death.

20. They were emphatic that the College Leaving Certificate from Kaimosi Teachers College and the letter from Visiru Primary School in the Supplementary Record of Appeal dated 23rd April 2024 purporting to confirm that the deceased was a teacher and worked at the said Visiru Primary School where she was earning Kshs 15,000/= per month was not conclusive proof of her earning in the absence of a letter of appointment or a copy of pay slip from the said school. They urged the court not to rely on the said documents in determining her monthly income prior to her death.
21. On their part, the Respondents submitted that the Appellants had clearly misrepresented the Trial Court's finding on the deceased's earnings. They averred that his assertion that the Trial pegged the monthly income of the deceased at Kshs 15,000/= without any evidence was erroneous as in their list of documents at item (q) there was the letter from Virisu (sic) Primary School where the deceased was a Board Management Retained Teacher and which was produced as exhibit by consent.
22. They further pointed out that they produced the deceased's Certificate from the Teachers Service Commission (TSC) which showed that she was a registered teacher. They pointed out that she had not been deployed to teach but she would have earned more in the future. They produced her college certificate showing that she qualified as a P1 teacher.
23. Notably, PW 1 testified that the deceased, who was her daughter, died as a result of the accident that occurred on 21st June 2017. She stated that the deceased was thirty (30) years of age at the time of her death was employed as a teacher by BOM and was earning a monthly income of Kshs 15,000/=. However, she did not produce any pay slips to show how much the deceased earned monthly.
24. So as to determine what was the appropriate multiplicand in this matter, this court had due regard to the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated that it did not subscribe to the view that the only way to prove the profession of a person had to be by the production of certificates and that the only way of proving earnings was by production of documents as this would occasion a lot of injustice to very many Kenyans who were illiterate and kept no records yet they earned their livelihood in various ways.
25. In that case the Court of Appeal found that the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.
26. In the absence of any contrary evidence from the Appellants, this court was persuaded to believe the Respondents' testimony that the deceased was a teacher. However, it was not clear if she earned Kshs 15,000/= monthly.
27. Although the Trial Court relied on the testimony of PW 1, and awarded Kshs 15,000/= as the amount the deceased earned monthly, it did not give reasons for having arrived at the said conclusion. It is important that reasons are given for each determination to enable the appellate court understand the reasoning of such decision and therefore determine whether the determination was correct or not.
28. Notably, Order 21 Rule 4 of the Civil Procedure Rules, 2010 stipulates as follows:-

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”



29. Under the Regulation of Wages (General) (Amendment Order) 2018 (Legal Notice Number 2) which was applicable regulation herein as the deceased died on 21st June 2017, the minimum wage for general labourers in all other areas was Kshs 6, 896.15. Having determined that the deceased was a teacher and had certification from the TSC, a sum of Kshs 15,000/= was not unreasonable as a salary of a teacher in a primary school. Indeed, a teacher could not be deemed to have been at the level to earn a minimum wage, which was applicable to general labourers who may be unskilled. This court therefore left the multiplicand of Kshs 15,000/= undisturbed.

B. Multiplier

30. The Appellants pointed out that the Trial Court also erred when awarded a multiplier of thirty (30) years on the basis of life expectancy at sixty (60) years. It was emphatic that the said award was unjustifiable. They asserted that their opinion that the deceased would have lived up to forty five (45) years had it not been for the accident was reasonable.
31. To buttress their point, they relied on the case of *Shiva Carriers Ltd vs Loise Jepkoech Sang & Another* [2018]eKLR where the court cited with approval the case of *Hanna Wangaturi Moche & Another vs Nelson Muya Nairobi HCCC No 4533/1993* (eKLR citation not given) where it was held that in determining the right multiplier, the right approach was to consider the age of the deceased, the balance of earning life, the age of the dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lumpsum.
32. On their part, the Respondents argued that the age of the deceased at the time of death was not challenged by the Respondents. They asserted that the retirement age in Kenya was sixty (60) years and that the post mortem report showed that the deceased had normal nutrition and physique and had no adverse medical findings and/or disease on her body save for injuries from the accident. They invited the court to take judicial notice of the vast developments in medical arena that had improved people's way of life in our country and the fact that there were many retirees living and working beyond sixty (60) years of age.
33. They argued that taking away fifteen (15) years was not only punitive but also negated the deceased's robust life expectancy on mere speculation that she would not have lived until sixty (60) years. They contended that the multiplier of thirty (30) years was warranted. They urged the court to uphold the same and/or in the alternative, adopt a multiplier of not less than twenty eight (28) years.
34. In determining whether or not the Trial Court exercised its discretion judiciously, this court had due regard to the case of *Patrice Ombogo Bundi & Another* (suing as the Personal representatives of the Estate of Douglas Bundi Ombogo) vs *The Guardian Coach Limited* [2022] eKLR in which it adopted a multiplier of sixteen (16) years where the deceased therein was aged thirty six (36) years at the time of death.
35. This court also had due regard to the case of *Joseph Njuguna Mwaura vs Builders Den Limited & Another* [2014] eKLR where the court adopted a multiplier of seventeen (17) years where the deceased was aged thirty five (35) years at the time of death.
36. In the case of *James Njiri & 2 Others vs FPU & Another* [2019] eKLR, the deceased therein was aged twenty nine (29) years at the time of his death. The appellate court therein adopted a multiplier of thirty one (31) years.
37. As was seen hereinabove, there was no clear-cut formula of assessing what the appropriate multiplier would be. However, courts had to be guided by comparable cases so to arrive at conclusions that were not so wide apart as to cause inconsistency and confusion to those relying on the decisions.



38. Taking into account all the past decisions relating to the issue of a multiplier, this court agreed with the Appellants herein that the multiplier of thirty (30) years where a person was aged thirty (30) years at the time of her death was disproportionate and not comparable to past decisions where the persons died at the same age as the deceased herein.
39. This court therefore found and held that the Trial Court misdirected itself in having adopted a multiplier of thirty (30) years and there was therefore merit in disturbing the said figure as it did appear to this court that the Trial Court did not take into account the vagaries of life that could have shortened the deceased's life as a teacher.
40. On the other hand, a multiplier of fifteen (15) years as had been proposed by the Appellants was on the lower side.
41. Taking the uncertainties and vagaries of life into consideration, this court determined that a multiplier of twenty (20) years was fair in the circumstances of the case herein.
42. In arriving at the said conclusion, this court considered the following cases:-
 1. In the case of *Bash Hauliers vs Dama Kalume Karisa & another* [2020] eKLR, the appellate court upheld a multiplier of twenty (20) years where the deceased therein was aged thirty two (32) years at the time of his death.
 2. In the case of *Pleasant View School Limited vs Rose Mutheu Kithoi & Another* (Supra), this very court left undisturbed the multiplier of twenty (20) years where the deceased was thirty six (36) years.

C. Dependency Ratio

43. The Appellants submitted that as the deceased was not married and did not have children but was taking care of her mother and siblings, a dependency ratio of 2/3 applied was applicable.
44. On their part, the Respondents submitted that the issue of the support the deceased accorded her family was not challenged in cross-examination and remained uncontroverted facts.
45. The Appellants did not appear to have objected to the ratio of 2/3 that was awarded under this head. However, there was a general inclination by courts to adopt a dependency ratio of 1/3 where a deceased had been unmarried and had no children while 2/3 was reserved for deceased persons who had been married with children.
46. In arriving at this conclusion, this court had due regard to the following cases:-
 1. *Petronila Muli v Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR where the court adopted a dependence ratio of 1/3 where the deceased was unmarried and took care of her parents.
 2. *Dismas Muhami Wainarua v Sapon Kasirimo Maranta* (Suing as administrator and or personal representative of the estate of Partinini Sapon (Deceased) [2021] eKLR where the appellate court rejected the dependency ratio of 1/2 as there was no proof that the deceased supported his parents to that extent and adopted 1/3 dependency ratio.
 3. *Rodgers Kinoti v Linus Bundi Murithi & another* [2022] eKLR where the appellate court substituted the 2/3 dependency ratio that was awarded by the trial court with 1/3 dependence ratio where the deceased was unmarried.



47. As the Appellants were not objecting to the dependency ratio of 2/3, this court left the same undisturbed.

III. Special Damages

48. The Appellants submitted that the Trial Court erred by awarding the Respondents Kshs 210,500/= yet the Respondents had pleaded special damages in the sum of only Kshs 160,500/=. In this regard, they cited the case of *Agroline Hauliers Limited & Joseph Opiyo Omollo vs Michael Abongo Kisemba Migori HCCA No 6 of 2015* where it was held that special damages must be pleaded and proved.
49. On her part, the Respondent submitted that there was no appeal against the award of special damages and therefore invited the court to dismiss the appeal against the said award.
50. The Trial Court indicated that the Respondents had pleaded and proved a sum of Kshs 210,500/=. It, however, failed to justify of how it had arrived to the aforesaid amount. This court noted that the receipts the Respondents adduced as proof of the claim for Special damages did not amount to Kshs 210,500/=. The receipts that were legible to the court amounted to the sum of Kshs 200,500/=. They had pleaded for special damages in the sum of Kshs 160,500/=.
51. The Appellants had therefore demonstrated that there was a lawful basis to interfere with the finding of the Trial Court in this regard as special damages had to be specifically pleaded and specifically proven. In this regard, this court found and held that the Respondents were only entitled to the sum of Kshs 160,500/= which the Appellant conceded to and was within the receipts of Kshs 200,500/= that they tendered in support of their claim for special damages.
52. The Respondents' argument that the Appellants had not appealed the award of special damages fell on the wayside as the Memorandum of Appeal showed that the Appellants appealed on quantum and/or damages generally which in the mind of this court was inclusive of the award on special damages.

Disposition

53. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal dated 9th May 2022 that was lodged on 11th May 2022 was merited. The effect of this is that the Judgment of Kshs 3,950,500/= that was entered by the Learned Trial Magistrate in Vihiga PMCC No 213 of 2019 on 14th April 2022 in favour of the Respondents herein against the Appellants herein be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondents herein against the Appellants herein jointly and severally for the sum of Kshs 2,710,500/= made up as follows:-

Pain and Suffering Kshs 50,000/=

Loss of Expectation of Life Kshs 100,000/=

Loss of Dependency Kshs 2,400,000/=

$2/3 \times 15,000 \times 12 \times 20$

Special Damages Kshs 160,500/=

Kshs 2,710,500/=

Plus costs and interest thereon. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit while damages under the *Fatal Accidents Act* Cap 32 (Laws of Kenya) and the *Law Reform Act* Cap 26 (Laws of Kenya) will accrue interest at court rates from the date of judgment of the lower court until payment in full.



54. As the Appellants partly succeeded in their Appeal herein, it is hereby directed that parties will bear their respective own costs of the Appeal herein.

55. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

