



**Arembe v Fadhalmula & another (Civil Appeal E116 of 2018)
[2023] KEHC 2009 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E116 OF 2018
DKN MAGARE, J
FEBRUARY 24, 2023**

BETWEEN

**ZACHARIA MAGOMA (SUING AS THE LEGAL REPRESENTATIVES OF THE
ESTATE OF THE LATE MELLEN KWAMBOKA AREMBE APPLICANT**

AND

HUSSEIN FADHALMULA 1ST RESPONDENT

KISUMU CLASSIC LTD 2ND RESPONDENT

JUDGMENT

1. This is an appeal on quantum, in particular loss of dependency. Hon E Soita awarded 500,000/=for loss of dependency, which aggrieved the Appellant herein. Liability in the matter is not contested. The court found that there was no proof of earnings hence used a global amount.

Analysis

2. The duty of the first Appellate Court is now settled. Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others [1968] EA 123* set out the correct position, which has been used over time. They considered several decisions of the house of lords and the former court of Eastern African before rendering themselves as doth:-

' An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally.'

3. In relation to this matter, this court has the same powers as the court of Appeal in relation to the lower court. This court therefore is to bear, in mind that it did not see nor hear witnesses. I will defer to the



trial court on the demeanor and truthfulness of those witnesses unless the conclusions are not flowing from the generality of the evidence.

Loss of dependency

4. The court awarded Kshs 500,000/= as loss of dependency for a mother with 2 children aged 7 and 14 years. Such painful death leaves no eye with no tears. Instead of the court considering the age of the deceased and the age of the dependants, the court used a global figure to award damages. He compared oranges and potatoes (no pun intended) in arriving at the award.
5. The court the finding and holding in case of *Chania Shuttle –vs- Mary Mumbi (2017) eKLR*. In that case the court used a global figure of Kshs 360,000/= for a 57-year old man with grown up children. The court is thus obligated to consider inflationary trends, the income and circumstances of the deceased, the age and type of dependants left behind and generally the circumstances of life of the deceased including age. The court cannot afford to copying and pasting an old award without adapting it to the individual circumstances.
6. This is the same figure the court adapted without by increasing the award slightly. The loss of adult children losing their father is not and can never be equated with a 7- and 14-year old losing their mother. It will be a tragedy of cataclysmic proportions not to know and regard that the young children's lives have been shattered that only Allah will protect them.
7. The court did not consider that in the Mary Mumbi case, the deceased was a 56-year old with adult children. In this case the deceased was 37 years old with 2 children aged 16 years and 9 years. The two cases do not have same parameters and such the court fell into error.
8. The court did not consider at all the presence of a husband and 2 minors who were dependent on the deceased. Whereas death of a 57-year old father with adult children is sad, death of 37 year old mother of 7 year old is a life changing tragedy. The awards should be worlds apart.
9. Hon lady Justice Njoki Mwangi, in *Bash Hauliers v Dama Kalume Karisa & another [2020] eKLR* held as doth regarding proof of dependency

' 39. This court was urged by the appellant's Counsel to set aside the award of loss of dependency for lack of proof. In the case of Leonard O Ekisa & Another vs Major K Birgen [2005] eKLR, Judge Dulu had the following to state on the issue of proof of dependency:-

'Dependency is a matter of fact. It need not be provided by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances'.

40. This court adopts the reasoning by Judge Dulu in the above case that a parent or child of a deceased in the Kenyan set up does not need to produce evidence of such support as it is commonplace for most of the parents who are earning to support their children up to a certain age.



10. Further, the court treated the deceased as unemployed. The deceased was not unemployed. She was a business lady in Nakuru. She had a single business permit for which she paid Kshs 4,250/=. The Death certificate indicated that she was a business lady. The deceased could not be said to have worked when she was running a business which was licensed by the county by the County Government of Nakuru.
11. It is however easy to establish her earning. No bank statements were produced or income statements from the business. However, we are guided from the amount of licence fee she paid that she must have had a small business in Nakuru Municipality. She was potentially an employer. From the authorities I have seen as analyzed below, a small business person in Nakuru can earn a net of about 15,000-30,000/=.
12. Looking at it the other way, if she was working for her business, she follows in the second tier of employees, whose minimum wage of Kshs 18,201/= being the equivalent of a storekeeper in the former municipalities with effect from May 1, 2017.
13. Being a business lady she will have worked to ripe old age of 60 years. However due to vicissitudes of age her life could have considerably been shortened. I therefore adopt a multiplier of 15 years. This takes into consideration that the youngest child was 7 years (9 years at the time of testimony) and the husband could have still relied on her.
14. On this, I am persuaded by the decision of *Joseph Mwangi Wanyeki v Alex Muriithi Mucoki & another [2019] eKLR*, where the court stated-

' The mere fact that the deceased earnings from farming activities and boda-boda business was not supported by actual receipts and other accountable documents does not mean it is a speculative component as an estimate of the loss suffered by virtue of his death. I do not subscribe to the narrative that an approach on assessment on damages on loss of dependents is a question of mathematical precision.

The Respondent's evidence taken as a whole satisfied the standard of proof on a balance of probabilities that the deceased earned Kshs 30,000/= from his boda-boda business and farming activities. The Appellant never controverted this direct evidence from the claimant. I am therefore inclined to use the figure of Kshs 30,000/= as a guide to support the gross monthly income from both farming and boda-boda business enterprise.

In my view on income earnings I am guided by the dictum of Jacob Ayiga Maruja & another v Simeon Obayo 2005 eKLR. Applying the principles in Jacob Ayiga Maruja case to the present appeal I am not persuaded that the Learned Magistrate was wrong in any way to calculate loss of earnings by the deceased on account of income of Kshs 30,000/=".

15. I adopt a dependency ratio of 2/3 being a mother and wife. On this I rely on the persuasive decision delivered recently in *Joseph Mwangi Wanyeki v Alex Muriithi Mucoki & another* (supra), where the court, Justice R Nyakundi, stated as follows: -

' In this case the respondent proved the fact of death and dependency. The presumption in law is that deceased is taken to spend 1/3 of his income to himself while 2/3 is available as reserve for the dependants. The main provisions in the *Fatal Accidents Act* is to provide guidelines for compensation in the event of a wrongful death for the pecuniary losses of persons who were dependent on the deceased.'

16. This works out as follows: -



Loss of dependency – Kshs 18,201 x 2/3 x 12 x 15 = Kshs 2,184,120/=

17. Consequently, it follows that the award of Kshs 500,000/= is inordinately low as to amount to an erroneous estimate of damages., the test was laid in *Butt vs Khan [1981] 1 KLR, 349, 356* where Law JA stated as doth: -

' An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.'

18. In *George Kirianki Laichena vs Michael Mutwiri, (2011) (eKLR)* The court rendered itself as follows:-

' It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H west & Son Ltd vs Shepherd [1964] AC 326* at page 353:-

'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought.

In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does however not proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.'

19. I am satisfied that I have jurisdiction to set aside the award of Kshs 500,000/= for loss of dependency and in lieu thereof, enter Judgment for Kshs 2,184,120/= under that head.

Special damages

20. Although there is no cross appeal, a sum of Kshs 70,000/= is a duplication some transport allowance is over leave. Transport money is not part of the funeral expenses. The correct amount proved is Kshs 296,000/=.

21. Given that the rest of the judgment was not disturbed, except on special damages as aforesaid, I enter judgment as follows in favour of the Appellant and against the Respondent for: -

- a. Loss of dependency Kshs 2,184,120/=
- b. Pain and suffering Kshs 20,000/=
- c. Loss of expectancy of use Kshs 200, 000/=
- d. Special damages Kshs 296,675/=.

Total = Kshs 2, 720, 795



Determination

22. The Appeal is allowed to the extent that the general damages for loss of dependency of Kshs 500,000/= and Specials is Kshs 366,675/= are set aside and in lieu thereof Judgment on loss dependency for a sum of Kshs 2,184,120 and special damages of 296,675 is entered.
23. Therefore, I enter Judgment for a total sum of Sum of Kshs 2,720,795/= with interest. The same to attract interest from the date of judgment in the lower court.
24. The court awarded costs in the lower court. That is to remain. However, given that this Appeal proceeded by way of formal proof appeal, each parties is to bear their costs.

DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 24TH DAY OF FEBRUARY THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Miss Ogande for the Appellant

No Appearance for the Respondent.

