



Wasilwa v Mulongo & another (Suing as the legal and personal representative of the Estate of the Late James Simiyu Wafula) (Civil Appeal E033 of 2021) [2023] KEHC 3913 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E033 OF 2021
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

SAUL SIMIYU WASILWA APPELLANT

AND

CAROLINE LUMBASI MULONGO 1ST RESPONDENT

LUCY AMOIT MAMAI 2ND RESPONDENT

SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES SIMIYU WAFULA

JUDGMENT

1. This Appeal arises from a suit seeking compensation for the death of a 44 years old man which arose as a result of a road accident. The Appeal is against the trial Court's assessment of quantum. In the suit, the Appellant was the Defendant whereas the Respondents were the Plaintiffs.
2. By the Plaint filed on 28/02/2017 in Bungoma Chief Magistrate Court Civil Case No. 80 of 2017, the 1st Respondent sued the Appellant seeking general damages, special damages, costs of the suit and interest. The Plaint was filed through Messrs Elizabeth Chunge & Co. Advocates.
3. It was alleged that the accident occurred on 09/02/2015 near Ndengelwa along the Bungoma-Webuye road and involved a motorcycle registration number KMCL 798M which the deceased was riding and the motor vehicle registration number KBS 829S alleged to be owned by the Appellant.
4. It was alleged that the Appellant's said vehicle was negligently and carelessly driven thus causing it to knock the deceased's said motor cycle. It was further alleged that as a result, the deceased suffered fatal injuries.



5. By an Application filed on 24/03/2017, the 2nd Respondent sought to be joined into the suit as an interested party. Her ground was that she was the 2nd widow to the deceased. The Application was later allowed by consent on 23/05/2017
6. Meanwhile, the Appellant filed his Statement of defence on 13/04/2017 wherein he denied liability and, in the alternative, blamed the deceased for causing or contributing to the accident. The same was filed through Messrs Mbugwa, Atudo & Macharia Advocates.
7. On 09/07/2018, a further consent was recorded whereof Judgment on liability was entered at 70%:30% in favour of the Respondents. The suit then proceeded to trial on the issue of quantum. At the trial, the 1st and the 2nd Respondents (widows to the deceased) testified as PW1 and PW2, respectively. On the Appellant's part, no witness was called.
8. After the hearing, the trial Court delivered its Judgment on 24/10/2019 awarding damages to the Respondents in the following terms:
 - a Pain & suffering - Kshs 20,000/-
 - b Special damages - Kshs 30,000/-
 - c Loss of expectation of life - Kshs 100,000/-
 - d Loss of dependency - Kshs 3,948,480/-
-Kshs 4,098,480/-
 - e Less award under *Law Reform Act* -Kshs 100,000/-
Kshs 3,998,480/-
 - f Less 30% contribution - Kshs 1,199,544/-
 - g Net Award - Kshs 2,798,936/-
9. Interest and costs of the suit were also awarded.
10. In computing the "loss of dependency" item in (c) above, the trial Court adopted a multiplicand (monthly income) of Kshs 58,840/-, multiplier (number of years the income is likely to be earned) of 12 years and dependency ratio (proportion of the income that was used by the deceased to cater for the dependents) of ½. The computation was therefore as follows:
Kshs 25,608.60 x 10 x 12 x ½ = 1,536,480/-

Grounds of Appeal

11. Aggrieved by the trial Court's said decision on quantum, the Appellant filed this Appeal on 11/06/2021. In the Memorandum of Appeal, the following 8 grounds were cited:
 - i. The Learned Magistrate erred in fact and law by failing to apply or applying wrong principles in assessment of lost years by using a multiplicand that was so excessive in the circumstances.
 - ii. The Learned Magistrate erred in fact and law by failing to take into account relevant factors and as a result ended up with a wrong decision on the multiplicand.
 - iii. The Learned Magistrate misapprehended the evidence on record, the consequence of which he reached a wrong decision on the multiplicand.



- iv. The Learned Magistrate erred in fact and law by making an award of general damages which is so inordinately high so as to amount to a wholly erroneous multiplicand.
 - v. The Learned Magistrate erred in law and in fact by taking into account irrelevant and extraneous factors leading to an excessive award to the Respondents;
 - vi. The Learned Magistrate erred in fact and law by arriving at conclusions on the multiplier based on assumptions as opposed to evidence and the law.
 - vii. The Learned Magistrate erred in fact and law by proceeding to pronounce judgment on the multiplicand in favour of the Respondent in total disregard of the Appellant's submissions.
 - viii. The Learned Magistrate exercised his discretion capriciously in arriving at a multiplicand of Kshs. 25,608.60 as the net salary.
12. Two Records of Appeal were filed. The first one was filed on 30/10/2021 by the Appellants. The second was filed on 12/10/2022 by the 1st Respondent.
 13. It was then directed that this Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 16/01/2023 and the 2nd Respondent filed on 19/01/2023. There are also Submissions by the 1st Respondent dated 16/01/2023 but there is no indication on when they were filed.

Appellant's Submissions

14. The Appellant's Counsel submitted that from the payslip issued by the Teachers Service Commission and also from the two widows' evidence, the deceased was a secondary school teacher, his basic salary was Kshs 55,580.60, net salary was Kshs 25,608.60 and it is the net salary that the deceased used to cater for the family. He therefore submitted that it is the net salary that must form the basis of the amount to be used as the multiplicand.
15. On the multiplier, Counsel submitted that considering that the deceased died at the of 44 years according the Certificate of death on record and considering that he was employed in the formal sector as a teacher, his retirement age as a civil servant was 60 years. He however submitted that taking into account the vicissitudes in life that would have most likely shortened the life of the deceased including natural causes of death, accidents and diseases, a multiplier of 10 years should be adopted.
16. Counsel relied on the case of *In the matter of the Estate of Eva Mayaa Manase (Deceased) (2012)* eKLR where a multiplier of 14 years was adopted for a deceased person who was due to retire at 60 years.
17. He also cited the decision in *Dhara Wholesales Ltd. v Teresia Kaimenyi Muthamia & another (2009)* eKLR where the deceased died at the age of 44 years and a multiplier of 11 years was adopted.
18. However, Counsel then stated that they do not dispute the multiplier of 12 years adopted by the trial Magistrate but that their major issue is on the multiplicand that was used.
19. He then submitted that Section 4 of the *Fatal Accidents Act* provides that the people who can benefit in the estate of a deceased are the wife, husband, parent and children, that the 1st Respondent's (PW1) evidence was that she was married to the deceased although she did not have children with him, that she was living with other children with the deceased but she did not establish who these other children were and that the 2nd Respondent testified that she had two children with the deceased but she did not have birth certificates to establish this fact. In the circumstances, he proposed a dependency ratio of ½.
20. He therefore proposed that the assessment should be as follows:



Kshs 25,608.60 x 10 x 12 x ½ = 1,536,480/-

21. Counsel faulted the trial Magistrate for adopting the basic salary as the multiplicand instead of the net salary and thus arriving at the inordinately high sum of Kshs 3,948,480/- under loss of dependency.
22. On the preference for the net salary as the multiplicand, he relied on the decisions in *Crown Bus Services Ltd & 2 others vs Jamila Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (deceased)) [2020]* eKLR and *Simon Kiplimo Murey & 3 Others vs Kenya Bus Management Services Limited & 4 Others [2014]* eKLR.

1st Respondent's Submissions

23. Counsel for 1st Respondent submitted that the deceased was a teacher, an adult of sound mind, energetic and of good health, the assessment by the trial Court should be upheld, in fact the award was too low, an appellate Court can only interfere with an award for damages if the award is inordinately low or so excessively too high that there must be a wholly erroneous estimate of the damages and that in order to justify reversing or reviewing damages or a decision on quantum of damages it will be necessary that this Court should be fully convinced either that the trial Magistrate acted upon some wrong principle of law or that the amount awarded was so extremely high or extremely very low as to make a contrary decision in its judgment.
24. On the principles upon which an appellate Court can interfere with assessment of damages, Counsel referred to the decision in *Rook versus Rairrie* (1941) I ALL ER 297 and *Butt versus Khan* (1981) KLR 349.
25. Counsel also submitted that in assessing damages, the general method of approach should be that comparable damages should as far as possible be awarded by comparable awards but it must be recalled that no two cases are exactly alike as the Court observed in *Simon Taveta versus Mercy Mutitu Njeru, Civil Appeal No. 26 of 2013 [2014]* eKLR.
26. In conclusion, Counsel defended the trial Magistrate and submitted that the award reflects the nature and gravity of the damage suffered, the trial Magistrate based his assessment on the general method of approach and the comparable award on damages was based on comparable awards in previous cases, the award was reasonable in the circumstances and as a result of the death of the deceased the widows and the children have suffered. He also referred to the factor of inflation and cited the decision of Riechi J in *Agroline Hauliers Limited versus Kennedy Asiko Makbota in Bungoma High Court Civil Appeal No. 33 of 2019*.
27. In conclusion, Counsel prayed that this Court should not interfere with the award, the appeal be dismissed for lack of merit and the Judgment of the trial Court be upheld.

2nd Respondent's Submissions

28. Counsel for 2nd Respondent also generally defended the trial Magistrate's findings. He too set out the principles that an appellate Court should consider when dealing with an appeal seeking to reverse an award of damages. He quoted the decision in *Butler v Butler* CA No. 49 of 1983 and listed the principles, namely, where the trial Court acted on wrong principles, where the Court has awarded so excessive or so little damages that no reasonable Court would uphold it and that the Court has taken into consideration, or not taken into consideration matters it ought to have considered, and in the result, arrived at a wrong decision.



29. Counsel opined that the Appellant had not demonstrated that the said principles were violated by the trial Court. He prayed that the Appeal be dismissed.

Analysis & determination

30. This being a first appeal, the role of this Court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The Court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. The duty of an appellate Court was set out in *Selle –vs- Associated Motor Boat Co [1968]* EA 123 as follows: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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.”

Issues for determination

31. In my view, the issue that arises for determination in this appeal is the following;
Whether the trial court erred in its assessment of the loss of dependency award
32. I now proceed to analyse and answer the issue.
33. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan {1981}* KLR 470 where the Court pronounced itself as follows;
- “An appellate court will not disturb an award for damages unless it is 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”.
34. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubo v Nyamuro [1983]* LLR at 403, where Kneller JA & Hancox Ag JJA held that-
- “A Court of appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.
35. In computing loss of dependency, the Court must first determine three items, namely, multiplicand (annual income), multiplier (number of years the income is likely to be earned) and dependency ratio (proportion of the income that was used by the deceased to cater for or take care of his dependants).



Multiplicand

36. The Appellant contested the amount used in calculating the multiplicand and posited that the Court should have adopted the net pay after deductions as the amount to apply rather than the gross pay. Curiously, neither of the Respondents, in their Submissions, responded specifically to the Appellant's challenge against the trial Magistrate's adoption of the basic salary as the multiplicand. Be that as it may, the Court will still analyse the issue.
37. In *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased)) [2020] eKLR*, (supra) Muriithi J expressed himself on the issue of adoption of a multiplicand as follows;
- “Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.”
38. On the same issue, the Court of Appeal in Kisumu Civil Appeal Number 48 of 2016-*Mary Osano (Personal Representative of the estate Charles Otwor Ogechi-Deceased) vs. Simon Kimutai [2020] eKLR*, stated as follows:
- “Counsel for the appellant submitted that the deceased's net pay as evidenced by a copy of his payslip was Kshs 53,550 per month, with a house allowance of Kshs 45,000 per month which totals to Kshs 98,550. The statutory deductions as contained in the payslip are; P.A.Y.E at Kshs 23,947; NHIF at Kshs 320 and NSSF at Kshs 3748 which totals to Kshs 28,015. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.”
39. The Appellant sought to have the multiplicand computed using the net salary. However, adopting the principles laid down in the Court of Appeal case cited above, it is apparent that this cannot be the position. I am therefore in agreement with the findings of the trial Court on the multiplicand as applied.

Multiplier

40. Regarding the multiplier, I note that the Appellant's Counsel in his Submissions stated that he had no major issue with the multiplier of 12 years adopted by the Court. I will however also still analyse the same since it is one of the grounds of appeal.
41. In *Beatrice Wangui Thairu vs Honourable Ezekiel Barngetuny & Another, Nairobi HCC 1638 of 1988*, Ringera, J (as he then was) held at page 248 as follows:
- “The court should ... multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants.
.....”



42. It is trite law that Courts are to be guided by comparable awards when determining damages. Further, when determining a multiplier, the Court should factor in the vagaries and vicissitudes of life, age of the deceased, his health and retirement age among other factors.
43. In *Beatrice Mukulu Kanguta & another v Silverstone Quarry Limited & another [2016]* eKLR, the Court adopted a multiplier of 10 years for a deceased who was 48 years old while in *Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013]* eKLR, a multiplier of 16 years was adopted for a 44 years old deceased.
44. I have considered the submissions and the relevant authorities and I am in agreement with the multiplier of 12 years that was applied by the trial court. I find that the same was not excessive in the circumstances.

Dependency ratio

45. The Appellant has not challenged the dependency ratio of $\frac{1}{2}$ applied by the trial Court. He has in fact supported it. In the circumstances, I shall not disturb the same.

Final Orders

46. Having failed to demonstrate that the trial Court erred in its adoption of the multiplicand and the multiplier, the appeal consequently fails in its entirety. The appeal is hereby dismissed with costs to the Respondents.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA
JUDGE

