



Atina (Suing as the Personal Representative of the Estate of Peter Omari Onyancha -Deceased) v China Quinjian International Group (Kenya) (Civil Appeal 161 of 2021) [2023] KEHC 3655 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 161 OF 2021
CW GITHUA, J
APRIL 27, 2023**

BETWEEN

EVERLINE NYABOKE ATINA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER OMARI ONYANCHA - DECEASED) APPELLANT

AND

CHINA QUINJIAN INTERNATIONAL GROUP (KENYA) RESPONDENT

(Being an appeal from the Judgement of Hon. S.K Onjoro-PM in Kisii CMCC No. 309 of 2020 delivered on the 19th November 2021)

JUDGMENT

1. This appeal emanates from the judgement and decree of the lower court in which the appellant, Everline Nyaboke Atina, the widow and Administratrix of the Estate of the late Peter Omari Onyancha was awarded a total of Kshs 1,042,508 as general and special damages following the death of the deceased in a road traffic accident whose occurrence was blamed on the negligence of the respondent's driver and or agent in driving Motor vehicle Registration Number KCL 505 E which on October 20, 2019 collided with a motor cycle on which the deceased was riding as a pillion passenger.
2. The award was made under the *Law Reform Act* and the *Fatal Accidents Act* after the parties entered into a consent on liability in the ratio of 85:15% in favour of the appellant against the respondent which was taken into account in determining the final amount payable to the appellant. The award was itemized as follows;
 - a. Pain and suffering - Kshs 100,000
 - b. Loss of expectation of life - Kshs 100,000



- c. Loss of dependency - Kshs 726,308
 - d. Special damages - Kshs 116,000
 - Less 15% contribution - Kshs 156,376
 - Total Kshs 886,131.80
3. The appellant was dissatisfied with her award for loss of dependency which in her view was inordinately low. In her memorandum of appeal filed on December 17, 2021, the appellant primarily complained that the learned trial magistrate erred in law and fact by misapplying the legal principles applicable to assessment of damages and specifically faulted the trial court for adopting a multiplicand of Kshs 9,081.35 instead of the deceased's entire salary as a teacher and applying a multiplier of 10 years without considering the mandatory retirement age capped at 60 years for persons employed in the public service like the deceased. She invited this court to set aside the award made by the trial court for loss of dependency and substitute it with an award assessed by the court.
 4. The appeal was prosecuted by way of written submissions following directions issued by the court on August 23, 2022. The appellants submissions were filed on September 2, 2022 while those of the respondent were filed on September 21, 2022.
 5. As the awards made under the Law Reform Act were not challenged on appeal and there was no contest on the award of special damages, it is my finding that the only issue for my determination in this appeal is whether the learned trial magistrate erred in his assessment of damages under the Fatal Accidents Act.
 6. In her submissions, the appellant maintained her contention that the learned trial magistrate erred by failing to apply established legal principles in the determination of awards for loss of dependency as set out in the case of *Beatrice Wangui Thairu vs Hon Ezekiel Bangetuny & Another*, Nairobi HCC No 1638 of 1988 and claimed that the multiplicand adopted by the trial court did not reflect the deceased's total earnings and the multiplier failed to take into account the years of service he had left before retirement.
 7. According to the appellant, the learned trial magistrate should have considered the deceased's total monthly income amounting to Kshs 34,395 comprising of his salary as a teacher in the sum of Kshs 27,195 and his extra income of Kshs 15,000 from his farming activities; that the trial court erred by taking into account statutory deductions and loans reflected in the deceased's payslip which had been fully paid by the time of the deceased's demise and by disregarding his income from farming on grounds that the same had not been proved.
 8. It was the appellant's case that damages for loss of dependency in this case should have been calculated as follows;

Kshs 34,395 x 2/3 x 12 x 19 years which formula took into account the deceased's income, age at the time of his death, the number of his dependents and his lost years.
 9. On its part, the respondent in its submissions supported the trial courts award for loss of dependency arguing that the multiplicand of Kshs 9,081.35 and the multiplier of 10 years used by the court were fair and reasonable and should not be disturbed; that the same were based on the evidence on record.



10. The principles that guide an appellate court in deciding whether or not to disturb an award of damages made by a trial court are now well settled. The said principles were well articulated by the Court of Appeal in *Butt vs Khan* (1978) eKLR wherein the Court stated as follows;

“An appellate court will not disturb an award of 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.”

11. Further, the Court of Appeal in *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR expounded on the above principles and expressed itself thus;

“.....it is firmly established that this Court will be disinclined to merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled....”

12. That said, it should always be remembered that dependency or the extent thereof is a question of fact which must be established by evidence in the course of a trial. Generally speaking, the formula for calculating damages for loss of dependency is establishing the deceased’s annual income usually known as the multiplicand and multiplying it with the number of working years lost by the deceased in view of his or her premature death and the ratio of the deceased’s income which was spent on his or her dependents usually referred to as the dependency ratio.

13. In this case, the appellant has only challenged the multiplicand and the multiplier applied by the trial court in assessing damages for loss of dependency. She did not contest the dependency ratio used by the trial court.

14. Starting with the challenge on the multiplicand, the record shows that in settling for a multiplicand of Kshs 9,081.35, the learned trial magistrate considered the contents of the payslip tendered in evidence by the appellant which showed that he was earning a monthly gross salary of Kshs 27,195 but his net salary after loans and statutory deductions amounted to Kshs 9,081.35. I find nothing wrong with the multiplicand adopted by the learned trial magistrate since ideally, the amount used as the multiplicand should represent what used to be the deceased’s actual disposable income or net earnings as opposed to gross salary or total turnover in cases where the deceased was engaged in business.

15. Although the appellant claimed in her submissions that the deceased had completed servicing his loans at the time he met his death, no evidence to that effect was availed to the trial court. The appellant also failed to adduce any evidence to establish her claim that besides being a teacher, the deceased was also a farmer and that he used to earn an extra income of Kshs 15,000 from farming.

Flowing from the foregoing, I find that the learned trial magistrate was justified in applying a multiplicand of Kshs 9,031.35 and not the Kshs 34,395 proposed by the appellant.

16. With respect to the impugned multiplier, it is not disputed that the deceased was 47 years old at the time of his death. The court record shows that in deciding on the multiplier, the learned trial magistrate considered the deceased’s age and the fact that he had 13 years to go before attaining the mandatory



retirement age of 60 years. He found 10 years to be a reasonable multiplier taking into account the vicissitudes of life.

The appellant has advanced the view that the trial court ought to have used a multiplier of 19 years but did not lay any good basis for that proposition.

17. Given the positions taken by the parties on the issue of the multiplier, it is prudent to look at previous decisions in which the deceased persons were in almost the same age bracket as the deceased in this case in order to determine whether the multiplier adopted by the trial court was reasonable.

In case of *Nelly Nduku Mutua (suing as the legal representative of the estate of James Mutua Makenzi (deceased) versus Africa Line Transport Co Limited & another* [2019] eKLR, the court adopted a multiplier of 10 years for a deceased who died at the age of 48 years.

In *Crop Africa Limited versus Joseph Murangiri* (2020) eKLR, the appellate court upheld the trial courts multiplier of 11 years where the deceased died aged 47 years .

In *Richard Macharia Nderitu versus Phillemon Rotich Langas* (2013) eKLR, the court used a multiplier of 10 years where the deceased met her death at the age of 47 years.

18. In this case, it was not disputed that the deceased was a teacher who was bound to retire at the age of 60 years. Given that he passed on at the prime age of 47 years, I agree with the learned trial magistrate that God giving him life, he would have worked for 13 more years before retirement if his life had not been cut short by the accident in question. However, considering the vagaries of life and persuaded by the aforementioned comparable authorities , I am satisfied that the multiplier of 10 years applied by the trial court was fair and reasonable in the circumstances of this case.

For all the above reasons, I find no reason to fault the trial courts assessment of the damages awarded to the appellant for loss of dependency. Contrary to the submissions made by the appellant, I find that the award was fair and reasonable taking into account the evidence that was presented before the trial court. It is consequently my conclusion that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 27TH DAY OF APRIL 2023.

C. W. GITHUA

JUDGE

In the presence of:-

Mr. Omandi holding brief for Ms. Angasa for the appellant

Ms. Anyango for the Respondent

Mr. Quinteen Court Assistant

