



Nyabongoye (Suing as the Legal Representative of Teresia Bwari Nyaberi - Deceased) v Mobegi & 2 others (Civil Appeal E003 of 2022) [2023] KEHC 3458 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E003 OF 2022
WA OKWANY, J
APRIL 27, 2023**

BETWEEN

**JAMES NYABERI NYABONGOYE (SUING AS THE LEGAL REPRESENTATIVE
OF TERESIA BWARI NYABERI - DECEASED) APPELLANT**

AND

JARED MOBEGI 1ST RESPONDENT

AGGREY MWOLE LUGA 2ND RESPONDENT

KINYANA TRAVELLERS SACCO LIMITED 3RD RESPONDENT

*(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) – RM
Nyamira dated and delivered at Nyamira on the 20th day of December 2021
in the original Nyamira Chief Magistrate’s Court Civil Case No. 148 of 2019)*

JUDGMENT

Introduction

1. The Appellant herein, James Nyaberi Nyabongoye, sued the Respondents in Nyamira CMCC No 148 of 2019 in his capacity as the Legal Representative of the Estate of Teresia Bwari Nyaberi (deceased). In the said suit, the Appellant sought under *Fatal Accidents Act* and *Law Reform Act* together with special damages arising out of a road traffic accident involving the deceased.
2. The Appellant’s case was that on 2nd September 2019, the deceased was walking along Kericho – Kisii Road when the Respondents’ driver, servant and/or agent drove the Respondents’ motor vehicle Reg No KCB 239B Toyota Matatu so recklessly and negligently thereby permitting it to veer off the road and knock down the deceased who, as a result, suffered fatal injuries.
3. The case was heard by the trial Magistrate who, at the end, entered judgment on liability at 50% to 50% in favour of the Plaintiff/Appellant and awarded damages under the *Law Reform Act* only and



declined to make any award under the *Fatal Accidents Act* on the basis that the age of the deceased was not proved. The trial court also awarded the Appellant the special damages and costs.

4. Aggrieved by the said Lower Court judgment, the Appellant filed the instant appeal in which he listed the following grounds of appeal: -
 1. That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him very superficially and consequently came to a wrong conclusion on the same.
 2. That the learned trial magistrate wholly misdirected himself by apportioning liability at 50% against the Appellant while there was no evidence disclosed to sustain such finding.
 3. That the learned trial magistrate acted arbitrarily by arriving at a decision which was wholly unjustified and in contrast to the evidence on record.
 4. That the learned trial magistrate misdirected himself and was totally biased by not considering the death certificate produced as exhibit in court hence has resulted in miscarriage of justice.
 5. That the learned trial magistrate failed to apply his judicial mind properly by failing to award general damages on loss of dependency without any legal justification whatsoever.
 6. That the learned trial magistrate failed to give a well-reasoned and considered judgment in light of evidence adduced before him.
 7. That the learned trial magistrate misdirected himself by failing to consider the submissions of the Appellant together with the authorities annexed.
5. The appeal was canvassed by way of written submissions which I have considered.
6. On liability, Mr Nyachae, Learned Counsel for the Appellant, submitted that there was no evidence to show that the deceased contributed to the accident in any way considering the evidence on the record which indicated that the deceased was on the left edge of the road. The Appellant argued that the Respondents' driver was wholly to blame for the accident.
7. The Appellant submitted that the trial court erred in failing to award damages for loss of dependency in the face of evidence to show that the Appellant depended on the deceased who was a farmer earning the sum of Kshs. 20,000/= per month. The Appellant noted that award of a global sum for damages for loss of dependency is applicable even in respect to children.
8. It was the Appellant's case that the trial Magistrate did not give a well-reasoned judgment.
9. The Respondents, on their part, submitted that the Lower Court correctly analyzed the evidence tendered before it and arrived at the right decision on liability and quantum.
10. The Respondents submitted that the Lower Court was justified in its decision not to award damages for loss of dependency as the age of the deceased was not proved and could not be ascertained. For this argument, the Respondents cited the decision in the case of *James Achoka Omae & Another v Joseph Kirui & Another* [2004] eKLR where it was held that: -

“It is now established law that a party has to prove dependency. A party cannot pluck a figure from the air and say that the deceased used to utilize, let's say a half of his salary, to support his family. The Plaintiffs have to establish that indeed the deceased actually utilized the said amount of his salary to support his family. In the circumstances of this case, and having



evaluated the evidence, adduced by the Plaintiff, I would put dependency at the ration of 2/5.”

11. The Respondents urged this court to stick to the general rule that the appellate court should be slow to interfere with the discretion of the trial court in the award of damages.
12. I have carefully considered the Record of Appeal and the parties’ arguments. I am cognizant of the duty of the first appellate court to re-evaluate and re-analyze the evidence tendered before the trial court in order to arrive at its own verdict while bearing in mind the fact that it neither saw nor heard the witnesses testify.
13. The appeal before me is on the twin issues of liability and quantum.

Liability

14. Sections 107,109 and 112 of the *Evidence Act* on the burden of proof, were discussed in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that: -

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

15. In the present case, PW1, Hellen Kwamboka, testified that she witnessed the accident when the Respondents’ vehicle travelling from Kisii to Kericho veered off the road and knocked the deceased who was off the road.
16. PW3 Cpl Albert Mincha, a Police Officer attached to Nyamira Police Station, testified that according to the police record, the point of impact was on the edge off the left side of the road. He also stated that there is a junction on the left side of the road such that a vehicle approaching the junction should move at a moderate speed. He further stated that the police preferred charges against the driver of the motor vehicle for the offence of causing death by dangerous driving, but that he did not know the outcome of the traffic case.
17. DW2, Jared Momanyi, the driver of the motor vehicle in question, testified that he had on the material day stopped the vehicle to allow a lorry to pass and when the vehicle started to move the deceased suddenly emerged from the right side of the road and crossed when the vehicle knocked her.
18. The trial court held as follows on liability: -

“This court has read the statements in the police file. Boniface Basweti, the conductor in the subject motor vehicle, did not explain how the accident happened. He only stated that he heard something knocked by the vehicle they were in. When he stepped out of the vehicle, he found the deceased lying on the road and bleeding from the head.

Other than the statement of DW2, there is no other statement from a witness who saw how the accident occurred.

The sketch plan in the police file shows that the point of the impact was on the edge of the left side of the road, as one faces Kericho direction from Kisii general direction. The blood stains were found on the road. This demonstrates that the point of impact was on the road and not completely off the road as alleged by PW1.



Having said that, DW2, told this court that the deceased emerged from the right side of the road to the left side as one faces Kericho direction from Nyamira direction. Since the point of impact was on the edge of the left side of the road, it means that the deceased had almost completed crossing the road from the right side.

In that case, DW2 ought to have seen her in advance and taken some mitigating steps to try and avoid hitting her. The fact that he failed to see her in advance, proves that he was not attentive at the time. Based on the facts of this case, this court expected DW2 to hit the deceased from the right side of his car or from the front side.

DW2 confirmed that he hit the deceased using the left side of the bonnet. Clearly, for the deceased to have moved from the right side to the left side of the road and hit by the left side of the bonnet, a reasonable person would have expected DW2 to have seen the deceased before she reached the left side of the road.

Due to the foregoing reasons, this court apportions liability at 50% against the deceased and 50% against DW2.”

19. My finding is that the trial court did not analyze the evidence presented before it in totality. It was not correct for the trial court to hold that there was no other eye witness to the accident other than DW2 when PW1 testified that she witnessed the accident when the deceased was knocked while off the road. The testimony of PW1 was corroborated by the testimony of PW3 who stated that the point of impact was on the left side of the road. DW2 also confirmed that the vehicle hit the deceased on the left side of the bonnet.
20. A perusal of the judgment reveals that the trial court doubted the Respondents’ version on how the accident happened. The court observed that if indeed the deceased crossed from the right side of the road to the left, DW2 could have seen her before she reached the left side of the road.
21. My finding is that the Respondents’ claim that the deceased was crossing the road at the time the accident took place is not consistent with the evidence that was presented by witnesses from both sides.
22. Having regard to the totality of the evidence presented by the parties, I find that the trial court should have apportioned liability at 80% to 20% in favour of the Appellant.

Quantum

23. The guiding principles in deciding whether or not to interfere with the award of damages made by the trial Court have been established in various judicial pronouncements. It is trite that assessment of damages is a matter within the discretion of the trial court which the appellate court should be slow to interfere with except where it is shown that the award is inordinately high or low to represent an erroneous estimate or where the court proceeded on a wrong principle. This is the position that was taken by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) v Kiarie Shore Stores Limited* [2015] eKLR where it was held that: -

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor or left



out of account a relevant one or that, short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.”

24. In the instant case, the Appellant’s main challenge on quantum was on the failure by the trial court to make an award for loss of dependency. The Appellant pleaded that the deceased was aged 48 years at the time of her death and that she was a farmer earning Kshs 20,000/= per month. The Appellant produced a Death Certificate showing that the deceased was aged 48 years.
25. The post mortem report similarly placed the age of the deceased at approximately 48 years. The trial court held as follows on the age of the deceased and loss of dependency: -

“This court notes that the age of a deceased person affects the awards to be made under this heading. It affects the multiplier, ratio and multiplicand. If the multiplicand and ratio are ascertainable but the age of the deceased is not, then no award can be made under this heading. This is because the formula/computation will not be complete.

The death certificate indicates that the deceased died at the age of 48 years. PW2 stated that his wife, the deceased herein, was around 30 years old at the time of her death. He explained that he married her in the year 1960 and they have 13 children. Their first child was born in the year 1961.

PW2 further said that according to his national identity card, he was born in the year 1940 and hence was 81 years old. He also stated that his wife was slightly younger than him.

The police file covering report reads that the deceased was 48 years. The investigating officer, P.C. Towett, indicated in his statement that the deceased was 70 years old. The post-mortem report showed that the deceased was 48 years old.

DW2 said that the deceased looked elderly.

From the foregoing, it is evident that the age of the deceased could not have been 48 years at the time of her death. The reason is simple. The deceased married PW2 in the year 1960 and their first child was born in the year 1961.

Whether or not the deceased got married at a very young age, she was alive in the year 1960 and therefore she could not have been 48 years old at the time of her death. If she was 48 years old, it means that she was born in the year 1971. That would be interpreted to mean that she was not alive in the year 1960, when she got married to PW2.

This court cannot purport to ascertain the correct age of the deceased in the circumstances of this case. It is for the plaintiff to prove the deceased’s age and this court is of the view that the age of the deceased has not been proved. As demonstrated herein above, there is a lot of uncertainty and doubt over the age of the deceased.

As mentioned earlier, age affects the award to be made under this heading. In the absence of the determination of age, this court cannot calculate a fair, reasonable and just award under this heading.”

26. It is the decision by the trial court not to make any award for loss of dependency on the basis that the correct age of the deceased was not established that is the subject of this appeal. In *Chunibhai J Patel*



and *Another v PF Hayes and Others* [1957] EA 748, 749, the court considered the law on assessment of damages under the *Fatal Accidents Act* and held as follows: -

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase. (Emphasis added)”

27. The question which then begs an answer is what method the court should adopt in determining the multiplier and multiplicand where the age and earnings of a deceased person cannot be ascertained, with certainty. The answer to this question can be found in the decision in *Mwanzia v Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa v Gichumu Gitbenji* [2007] eKLR, where the court observed that: -

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

28. Similarly, in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR, it was held as follows: -

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the 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 each particular case.”

29. As I have already stated hereinabove in this judgment, the trial court found that there was a discrepancy in the age of the deceased as stated in the documents availed before the trial court and the oral evidence presented by the Appellant. In effect, no cogent evidence was presented to support the allegation that the deceased had any dependants or even to ascertain her age. In *Frankline Kimathi Maariu & another vs Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR the court dealt with a similar issue and held as follows: -

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”



30. Guided by the principles advanced in the above cited cases, I find that this would have been an appropriate case for the trial court to adopt the global sum approach rather than the multiplicand or multiplier method in determining the amount to be awarded for loss of dependency. I therefore find that the trial court proceeded on a wrong principle and in failing to make an award for loss of dependency merely because the age of the deceased was not established. I therefore set aside the finding on loss of dependency and substitute it with a finding for a global sum of Kshs 700,000 under *Fatal Accidents Act*. I find guidance in the decision in *China Civil Engineering & another v Mwanyoba Kazungu Mweni & another* [2019] eKLR where the Court on Appeal upheld a global sum award of Kshs 700,000 for loss of dependency where the deceased was aged 79 years old.
31. In *Moses Maina Waweru vs Esther Wanjiru Gitbae (Suing as the personal representative of the Estate of the late David Gitbae Kiririo Taiti)* [2022] eKLR the deceased died at the age of 68 years and left one dependant, the court made an award of Kshs 800,000 for loss of dependency.

Disposition

32. In the upshot, I allow this appeal, set aside the trial Magistrate's judgment relating to the loss of dependency and substitute it with a global sum of Kshs. 700,000/=. As there was no contention on the award under the heads of loss of expectation of life and pain and suffering, I will uphold the Lower Court's awards under those headings.
33. In sum, I allow the appeal in the following terms: -
- a. Loss of Dependency – Kshs. 700,000/=
 - b. Loss of Expectation of Life – Kshs. 100,000/=
 - c. Pain and Suffering – Kshs. 20,000/=
 - d. Special Damages – Kshs. 75,550/=
- Total – Kshs. 895,550
- Less 20% Contribution – Kshs. 179,110/=
- Net Total – Kshs. 716,440/=
34. General damages will attract interest, at court rates, from the date of judgment in the lower court until payment in full. Special damages will earn interest from the date of filing suit until payment in full. The Appellant shall have costs of the suit in the court below and costs of this appeal assessed at Kshs 50,000.
35. This file is marked as closed.
36. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 27TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE

In the Presence of: -

Mr. Njuguna for Ng'ang'a for the Appellant

Mr. Nyachae for the Respondents



