



REPUBLIC OF KENYA



Njane (Suing as the legal representative of the Estate of the Late David Kungu Miki) v Oyoo & another (Civil Appeal E022 of 2021) [2023] KEHC 19559 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E022 OF 2021**

A MSHILA, J

JUNE 30, 2023

BETWEEN

**DORCAS NUNGA NJANE (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF THE LATE DAVID KUNGU MIKI) APPELLANT**

AND

ISAIAH ODOUR OYOO 1ST RESPONDENT

ISAACK NGUMI MBURU 2ND RESPONDENT

JUDGMENT

1. This judgment determines the appellant's appeal filed on February 17, 2021 vide the Memorandum of Appeal dated February 15, 2021.
2. The appellant suing on behalf of the estate of David Kungu was the plaintiff in Githunguri Civil Case No. 43 of 2020. He sued the Defendants claiming general and special damages arising out of a road traffic accident that occurred on July 14, 2019, which resulted in the death of David Kungu.
3. According to the Plaintiff the deceased was a lawful passenger in Motor Vehicle Registration No. KAX 267B which was involved in a self-involving accident on July 14, 2019 along Kibicho Kwa Maiko Road at Thuita, it had overturned thereby causing fatal injuries to the deceased.
4. The 2nd respondent filed his defence dated August 10, 2020 denying the averments of the claim whereas the suit against the 1st respondent vide a Notice of Withdrawal dated August 27, 2020 was withdrawn.
5. A consent on liability was also recorded in the ratio of 20:80 in favour of the appellant. And the trial court was left to determine the Quantum of damages in which the parties filed written submissions. In its judgment, the trial court awarded the following damages:
 - a. Pain and suffering Kshs. 30,000/=



- b. Loss of Expectation of life Kshs.100,000/=
 - c. Loss of dependency Kshs.922,464/=
 - d. Special damages Kshs. 189,550/=
 - Sub-Total Kshs. 1,242,014
 - Less 20% Kshs. 248,402
6. Aggrieved by the judgment, the appellant filed the Memorandum of Appeal citing the following grounds of appeal:
- a. That the Honourable Magistrate erred in law and in fact by applying the wrong and inaccurate multiplicand and dependency ratio and failed to consider the correct factors and or applied or considered, erroneous, irrelevant and or extraneous factors in determining the loss of dependency.
 - b. The Honourable Magistrate erred in law and in fact allowed deductions from savings and loans in determining the multiplicand applicable
 - c. The Hon. Magistrate erred in law and in fact by adopting a dependency ratio of 1/3 rather than 2/3 in spite of the fact that the deceased was married and had a 10-year-old son.
 - d. The Hon. Magistrate erred in law and in fact by holding that the dependency ratio of a 10-year-old son had to be strictly proved
 - e. The Hon. Magistrate in determining the multiplicand failed to note that the only deductions attributed to taxes were Kshs 18,255/= for PAYE and NHIF and not Kshs. 61,111,90/=
 - f. The Hon. Magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions and authorities on quantum on applicable principles for assessment of damages of the Appellant on record.
 - g. The Hon. Magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion.
7. The appellant pleaded with the court to allow the appeal, set aside the judgment of the trial court and vary the orders thereto as follows:
- a. The Multiplicand be varied upwards to Kshs. 62,075/=up from Ksh.19,218/=
 - b. The dependency ratio be varied to 2/3
 - c. Damages under the head loss of dependency be varied to Kshs 5,959,200/=
 - d. The net judgment amount be varied to Kshs. 5,023,000/=
8. The court directed the appeal to be heard by of written submissions.



Appellant's Submissions

9. Written submissions on behalf of the appellant were filed submissions dated November 22, 2021, therein this court was reminded of its duty to re-evaluate the evidence of the trial court and come up with its own conclusion as cited in the *Selle v Associated Motor Boat Company Ltd* (1968) EA 123,126.
10. Three issues were for determination in the appeal; it was submitted in the first issue that the trial court erred in applying a wrong multiplicand and the dependency ratio by applying erroneous irrelevant and or extraneous factors. The trial court erred in adopting a dependency ratio of 1/3 rather than 2/3 as the deceased was married and had a 10-year-old son. The guiding principles in the assessment of damages are the age of the deceased, income at the time of death and the dependency ratio. And placed reliance on the case of *Petronila Muli v Richard Muindi Savi & Catherine Mwendu Mwindu* (2021) eKLR where the court held:-

“the formula for assessment of dependency is the Multiplicand that the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased as a result of premature death.”

11. The Appellant submitted that the trial court erred in holding the dependency of the son had to be strictly proved. The lack of documentary evidence as proof of dependency could not mean the son was not dependent on the deceased. The Birth Certificate filed in the supplementary affidavit on November 2, 2020 was conclusive proof the son depended on the deceased.
12. On the issue of loan and savings deductions the Appellant submits the trial court failed to take into consideration the only deductions to be considered were the PAYE at Kshs 18,255/= and NHIF and not the loan deductions, as the loan deductions only go to the period when the loan was in force. Case cited is *Joshua Mulinge Itumo (suing For And On Behalf Of The Estate Of Damaris Nduku Musyimi Deceased) v Bash Hauliers Limited & Anor* (2021) eKLR.
13. The Appellant submits the trial court was obligated to use the total net salary of Kshs 80,330/=less statutory deductions only and proceed to subtract the loan balance of Kshs. 2,191, 035/= from the total amount of Kshs 3,386,549/=
14. Further counsel submits the trial court failed to consider the appellant submissions in its judgment.
15. In conclusion the appellant urged the court to allow the appeal and vary the multiplicand from Kshs 19,218/= to Kshs. 63,575/= and the dependency ratio varied from 1/3 to 2/3. While the net judgment amount be varied upwards.

2Nd Respondent's Submissions

16. The 2nd Respondent submitted that no evidence was adduced to prove dependency in form of Birth Certificates, baptism cards, school records and/or marriage certificate. The rationale applied by the court was said to be appropriate and correct as the appellant failed to prove dependency. Reliance was placed in the case of *Stella Nasimiyu Wangila & another v Raphael Oduro Wanyamah* (2016) eKLR. The Appellant in persuading the court to only have statutory deductions from the deceased's salary when coming up with the multiplicand would lead to double compensation as the deceased benefited from the loans that he was servicing. Reliance was placed in the case of *Janet Chonge Walumbe & 2 others v Julius Mwaniki & another* (2019) eKLR. The court was urged to use the net pay of Kshs.19,218/= as the deceased's income and a multiplicand of seven (7) years as the deceased was a public officer.



17. The court was urged to dismiss the appeal.

Issues For Determination

18. Having considered the appeal, the evidence adduced in the trial court and the written submissions as filed. The issues framed for determination are:

- i. Whether the trial court applied the correct dependency ratio.
- ii. What was the net salary of the deceased at the time of his death.

Analysis

19. The duty of the first appellate court is to subject the evidence in the trial court to re-appraisal, and draw its own conclusions being careful to note that this court did not have the opportunity of seeing and hearing the witnesses first-hand. As stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though 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, this 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 (*Abdul Hammed Saifvs- Ali Mohamed Sholan* (1955), 22 EACA 270).”

Whether the trial court applied the correct dependency ratio

20. On this issue, the trial court held dependency had not been proved by the appellant and opined the ratio of 1/3 was proper.
21. As per the evidence adduced the deceased was a family man as he was married and had left behind a son aged 10 years, who depended on him prior to his demise. The appellant proved the marriage and adduced a copy of the birth certificate. It, therefore, follows the correct ratio to use for a person who had a family is 2/3 as opposed to the 1/3 adopted by the trial court.
22. This court thus satisfied that the trial magistrate erred in adopting a ratio of 1/3 when the deceased was survived by a wife and children.
23. On the multiplier, the court adopted a multiplier of 12 years as the deceased died aged 53 years and was employed as a prison officer with a gross salary of Kshs.80,330/= and the retirement age being 65 years he would have served for 12 years before retirement. This court is satisfied with the multiplier of 12 years that was adopted by the trial court and finds no good reason to interfere with its decision.

What is the net salary of the deceased at the time of his death

24. On the issue of the multiplicand the trial court adopted Kshs. 19,218/= after the statutory deductions and the various loan deductions. The trial court opined that it would use the deceased take-home after all deductions in computing the multiplicand



25. The loan advanced to the deceased is a benefit to the deceased estate and the only amount that ought to have been deducted from the computation of the multiplicand are the statutory deductions which have no benefit to the estate of the deceased.

26. In *Beatrice Wangui Thairu v Hon Ezekiel Bargetuny & another* Nairobi HCCC 1638 of 198, the court held: -

“The principles applicable to an assessment of damages under the Fatal Accident Act are all too clear. The court must in the first instance find out the value of the annual dependency which is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years of purchases. 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 dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the received in lumpsum and would if wisely invested yield returns of an income nature.”

27. This court is persuaded by the above decision and finds that the trial court erred in holding the net salary as Kshs. 19,218 after deducting the statutory deductions and the loan amount advanced to the Deceased.

28. It is trite law that the assessment of damages is a discretion of the trial court and the appellate court should be slow to reverse the trial court’s decision unless it is evident the trial court erred in adopting the wrong principles and the award arrived at is inordinately too high or low, as stated in *Kemfro Africa Ltd another v Lubia & another* as follows: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

29. This court is satisfied that the trial court misdirected itself and finds that this is a suitable case that warrants interference with the trial court’s erroneous findings under the above head; this award ought to have been tabulated as follows:

62,075

Findings And Determination.

30. For the foregoing reasons this court makes the following findings and determinations;

i. This court finds the appeal to be with merit and it is hereby allowed.

ii. This court finds that the trial court erred in adopting a dependency ratio of 1/3; This court hereby sets aside the judgment on the dependency ratio and substitutes it with 2/3; The trial courts award of Kshs 922,464 under the head loss of dependency is hereby set aside and substituted with the award calculated as follows:

Kshs.62,075



iii. This court having made a determination on the quantum under the head loss of dependency makes a Final Award as set out hereunder;

Pain and suffering Kshs. 30,000/=

Loss of Expectation of life Kshs. 100, 000/=

Loss of dependency Kshs. 5,959,200/=

Special damages Kshs. 189,550/=

Sub-Total Kshs. 6,278,750/=

Less 20% Kshs. 1,255,750 /=

Total Kshs. 5,023,000/=

iv. The appellants shall have the costs of the Appeal.

31 Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 30TH DAY OF JUNE, 2023.

A. MSHILA

JUDGE

In the presence of:

Ndegwa – h/b for Kibathi for the Appellant

Miss Kosgey – for 2nd Respondent

