



REPUBLIC OF KENYA



Oyugi & another v Yaa & another (Suing as the administrators of the Estate of the Late Ishmael Mangi Yaa) (Civil Appeal 88 of 2022) [2023] KEHC 21987 (KLR) (31 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 88 OF 2022
AK NDUNG’U, J
AUGUST 31, 2023**

BETWEEN

APOLLO OMONDI OYUGI 1ST APPELLANT

DAVIS MWABILI HEZRON 2ND APPELLANT

AND

ALEX MANGI YAA 1ST RESPONDENT

CELINAR PENDO KANZE 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
ISHMAEL MANGI YAA**

*(Appeal from the judgment of Hon R.M Amwayi dated 21st
September 2022 in Kaloleni PMCC No. E077A of 2020)*

JUDGMENT

CORAM: Hon. Justice A.K.Ndung’u

Mr Kiti Advocate for the Appellant

Miss Waithera for the Respondent

Background

1. By a Plaintiff dated July 6, 2020 and filed on July 13, 2020 at the Kaloleni Magistrate’s Court, the Respondents sued the Appellants for general damages for loss of dependency and loss of expectation of life, pain and suffering, special damages at Kshs 338, 400/- plus the costs of the suit and interest.
2. The Respondents, at paragraph 5 of the Plaintiff pleaded that on or about the 26th day of August 2019, At Kwa Randu area along Kaloleni-Mazeras Road, the 2nd Appellant, identified as the 1st Appellant’s



authorized driver, negligently and carelessly managed, controlled or failed to control the Motor Vehicle Registration No. KCV 807C Toyota Axio, that he caused the same to lose control, veer off the road and knocked down Ishmael Mangi Yaa (the deceased) who was lawfully standing on the pavement as a pedestrian. As a result, the deceased sustained and succumbed to fatal injuries.

3. Under the Particulars pursuant to the Statute, the Respondents pleaded that the deceased was aged 31 and in good health. That he was employed with a total monthly earning of Kshs 22,110/- and was the sole support for the Respondents and other two dependants. The Respondents pleaded that the deceased's expectation of life was considerably shortened and that his estate suffered loss and damages. The Respondents added that the deceased underwent excruciating pain from the injuries sustained to which he succumbed later.
4. The Appellants filed their Memorandum of Appearance and joint Statement of Defence dated 24th August, 2021. The Appellants denied the Respondents' averments made in the Plaint. They averred that if at all an accident occurred on the material date, which they denied, the same was either solely caused by and/or majorly contributed to by the negligence of the deceased. They urged the trial court to dismiss the claim with costs.
5. The trial court, after hearing the matter entered judgment on September 21, 2022 in favour of the Respondents in the following terms;
 - i. Liability 100 % in favor of the Plaintiffs [now Respondents].
 - ii. Pain and suffering – Kshs 50,000/-
 - iii. Loss of dependency – Kshs 4,245,120/-
 - iv. Loss of Expectation of life – Kshs 100,000/-
 - v. Special damages – Kshs 278, 605/-Total – Kshs 4,673,725/-
6. The said judgment is the subject of the present appeal. The Appellants cited the following grounds in their memorandum of appeal dated October 18, 2022; -The Appellants urged the court to allow the appeal; set aside the judgment of the trial court; assess general damages for loss of dependency; and condemn the Respondents to costs of the appeal.
 - a. The learned trial magistrate applied wrong principles in determining an award payable to the Respondent under the loss of dependency.
 - b. The learned trial magistrate erred in law and fact in awarding the respondent general damages for loss of dependency Kshs 4, 245, 120/- which is inordinately high.

The Evidence

7. Cellinar Pendo Mkare –PW1 adopted her written statement dated July 6, 2020 as evidence in chief. She produced in court documents contained in the list of documents dated July 6, 2020; supplementary list of documents dated March 5, 2021; and a further list of documents dated October 1, 2021. She told the court on cross-examination that she was the deceased's wife and that they had one child. She stated that she did not witness the accident but was informed that the deceased was pronounced dead upon arriving at Coast General Hospital on the date of the accident. PW1 stated that at the time of his death, the deceased was aged 31 and worked as a plant operator at Rhino Cement. That the deceased worked as a casual and was paid on a weekly basis with a total monthly income of Kshs 22, 110/-.



8. Ephraim Gaitho Gitonguri- PW2 testified that he was a human resource manager by profession and that the deceased was employed as an excavator at his former place of work, Athi River Mining Cement. He told the court that the deceased was earning Kshs 737/- per day, an equivalent of Kshs 22,000/- per month.
9. Police Constable John Mbugua- PW3 of Rabai Police Station testified that on August 26, 2019 at around 2130 hours, he attended a scene of accident at Kwa Randu area along Kaloleni- Mazeras Road. The accident involved motor vehicle registration no. KCV 807C, Toyota Axio being driven by Davis Mwabili, and the deceased, a pedestrian walking along the road. PW3 explained that the motor vehicle was from Kaloleni headed to Mazeras, and on reaching the accident location, the said vehicle overtook another unknown vehicle, and in the process veered off the road and hit the deceased who was also walking towards Mazeras. The witness testified that the location was on a sharp corner and with a continuous yellow line. The said deceased sustained fatal injuries and died on the spot. The 2nd Appellant was later charged with the offence of dangerous driving where he was found guilty and fined Kshs 30,000/- or serve 1 year imprisonment in default.
10. The above testimony marked the close of the Respondents' case at the trial court. Notably, the defence case was also closed without calling any witnesses.
11. The appeal was canvassed by way of written submissions summarized as hereunder;

The Appellants' Submissions

12. Regarding the first ground of appeal, counsel for the Appellants submitted that the trial magistrate erred in adopting the gross pay of Kshs 22,200/- as the multiplicand for general damages for loss of dependency, yet the evidence on record showed that that amount was not subjected to the requisite statutory deductions to wit, PAYE, NHIF and NSSF. To counsel, the court ought to have applied the sum of Kshs 18, 962/- being the net pay. To buttress this point, counsel relied on the cases of *Hellen Waruguru Waweru suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR; and *D.K.M suing as the legal representative to the Estate of J.M.M (deceased) v Mehari K. Towolde* [2018] eKLR.
13. On the second ground of appeal, it was submitted that since the Respondents failed to prove any damage suffered by the persons listed as dependants other than the deceased's wife and child, the trial court erred in making an estimation of how much the deceased contributed to the family. To the Appellants, the trial court therefore ought to have used a dependency ration of 1/3 as opposed to 2/3. Similarly, counsel relied on the case of *D.K.M suing as the legal representative to the Estate of J.M.M (deceased) v Mehari K. Towolde* [*supra*].
14. Counsel added that since the deceased was employed on a casual basis in a processing plant and given the vagaries and uncertainties of life, he would have worked for a period less than 20 years. In the ultimate, counsel urged the court to adopt the multiplicand of Kshs 18, 962/-; a dependency ratio of 1/3 and a multiplier of 20 years; and replace the trial court's award for loss of dependency with Kshs 1,516, 960/-.

The Respondents' Submissions

15. Counsel for the Respondent submitted that according to the Respondents' evidence before the trial court, the correct legal determination of the deceased's salary was the government regulation of wages. He argued that a plant operator was entitled to a gross monthly salary of Kshs 25, 804.20/-; and Kshs 22,656.2 after statutory deductions.



16. On whether the dependency ration of 2/3 was just, counsel relied on the case of *Gordon Ouma Sunda and anor v Adan Abdikadir Omar and another* [2019] eKLR.
17. Finally, on whether this court should apply a 20 years multiplier, counsel cited the case of Board of Governors of Kangubiri Girls High School and another v Jane Wanjiku and another [2014] eKLR where the court held that the choice of a multiplier is a matter of court's discretion which discretion must be exercised judiciously with reason. To counsel, the multiplier adopted by the trial court in this case was fair given the reasons stated in the impugned judgment. For the above reasons, counsel urged the court to find the appeal unmerited and dismiss the same with costs.
18. Having considered the record of appeal, submissions and authorities cited by the parties herein, I find that the following issues for determination arise;
 - i. Whether the trial magistrate applied the wrong principles in determining the award payable under the limb of loss of dependency.
 - ii. Whether the award of Kshs 4, 245, 120/- for loss of dependency was inordinately high.

Analysis and Determination

19. From the above, it is clear that the Appellants are only challenging the trial court's award on quantum of general damages for loss of dependency. On matters appeal on quantum, the parameters under which an appellate court will interfere with an award in general damages were well set out in the case of *Bashir Ahmed Butt -v- Uwais Ahmed Khan* (1982-88) KAR as follows; -

“An appellate court will not disturb an award for general 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...”

What is being faulted in this appeal is the award on loss of dependency. The Court of Appeal in Chuni bhai J. *Patel and Another -v- P. F. Hayes and Others* [1957] EA 748, 749, stated the assessment principles 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.”

20. One of the issues raised by the Appellants herein was that the monthly salary amount applied by the trial court was not the net salary of the deceased as is required. A perusal of the document identified as a note from the deceased's employer indicating his pay rate and monthly income, shows clearly that the deceased received monthly payments of Kshs 22,110/- calculated at a daily rate of Kshs 737/-. PW2 testified and produced a confirmation letter dated 21st September 2021 showing the deceased's nature of work as at the time of his death. The letter also shows that the deceased earned a gross daily rate of Kshs 737/- equivalent to Kshs 22, 110/- per month. In his testimony, PW2 confirmed that statutory deductions were paid and that the aforementioned amount as stated did not include deductions. My understanding is that the amount Kshs 22,110/- was the deceased's take home or net income a fact



confirmed by none other than his employers. In the circumstances, I cannot fault the trial court for relying on that multiplicand.

21. In any event, it is not in dispute that the deceased was an excavator/plant operator. According to Government Regulation of wages guidelines, the deceased was a Grade III artisan whose monthly salary is Kshs 25 804.20 and a statutory deduction of Kshs 3,148 would leave him with a net of Kshs 22,656.2 which is actually more than the multiplicand applied by the trial court.
22. The Appellants also argued that the trial magistrate was wrong in adopting a dependency ratio of 2/3 without any proof of dependency. The Appellants' contention was that there was no proof of dependency on the part of the other persons listed as dependants, being the deceased's parents. It was however not disputed that the deceased was survived by one wife and one child aged two years at the time the suit was filed.
23. It is trite that the extent of dependency is a question of fact as held by Ringera J. (as he then was) in [*Leonard Ekisa & Another -v- Major Birgen*](#) [2005] eKLR where the learned Judge stated; -

“There is no rule of law that 2/3 of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case. In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.”

24. The onus was on the Respondents to prove that the parents were indeed dependent on the deceased and the extent of loss they suffered. There was however no such proof. It was undisputed that the deceased was married and had one child, a minor, aged 2 years at the time of his demise. In the case of [*Hillary Tom Mboya v Jane Wangechi Njibia & another*](#) [2022] eKLR Seron J. while adopting the trial court's assessment in a case where the deceased was survived by a wife and a child aged 10 years, observed as follows; -

“38. I have keenly looked at the arguments for and against the use of multiplier and the superior court have been split on the appropriateness of the multiplier approach in such cases and as such the lower court cannot be faulted for choosing one over the other. In the case of *Crown Bus Services Ltd & 2 Others v Jamila Nyongesa and Amida Nyongesa (Legal Representative of Alvin Nanjala (deceased))* (2020) eKLR where the court stated thus: -

“In this case in the absence of any debilitating health concerns the court shall make only a small reduction of four (4) years on the public sector retirement age of 60 so that the multiplier of 35 years is used in the computation. The court notes that in one decision relied on by the appellant herself, namely *West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased)* [2020] eKLR, a multiplier of 33 were used for a deceased aged 21 years as in the present case. The deceased herein working in the private sector may well have worked beyond the retirement age of 60.”

39. Accordingly, I find no basis to interfere with the trial Magistrate's discretion of using the multiplier approach and assessing the loss of dependency at Kshs 1,947,384/=. The minimum wage of Kshs 14,319/= was as per the basic



minimum wage for a driver at that time. The multiplier of 17 years and the dependency ratio of 2/3 are reasonable in my view.”

25. In the present case, the trial court took into account the uncertainties of life and reasonably made a reduction of five (5) years on the public sector retirement age of 60 so that the multiplier of 24 years was used in the computation. The trial court also relied on a ratio of 2/3 since the deceased was supporting his family. The application of a dependency ratio of 2/3 for the deceased family, being the widow and minor child who had a long life ahead of him, was in the circumstances of the case, reasonable. I find no basis upon which to disturb the findings on dependency.
26. With the result that for reasons above stated the appeal herein lacks merit and is dismissed with costs to the Respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 31ST DAY OF AUGUST, 2023.

.....

A.K.NDUNG’U

JUDGE

