



**Muigai & another v Gathoni (Civil Appeal E026 of 2022)
[2023] KEHC 27573 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E026 OF 2022
F WANGARI, J
SEPTEMBER 29, 2023**

BETWEEN

GRACE NJAMBI MUIGAI 1ST APPELLANT

**CHARLES MWANGI NJORE (THE PERSONAL REPRESENTATIVES OF
DANIEL NGARUIYA MWANGI (DECEASED) 2ND APPELLANT**

AND

CAROLINE NDATA GATHONI RESPONDENT

*(Being an appeal against the judgment of the Hon. Magistrate Mr. J.B. Kalo
delivered at Mombasa on 17th February, 2022 in Mombasa CMCC No. 330 of 2019)*

JUDGMENT

1. This is an appeal from the Judgment and decree of the Learned Chief Magistrate Hon. J.B. Kalo in Mombasa CMCC 330 of 2019 delivered on 17/2/2022.
2. The appellants set out 8 grounds of appeal on damages awarded to the Appellants as loss of dependency, and they prayed that the said award be set aside and/ or suitably enhanced and or increased in favour of the appellants.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



4. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. I have looked at the Appellant’s grounds of appeal and in particular, the written submission by the Appellants. The Respondent did not file her submissions.
6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

:“[A]n 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 allowances in this respect”

Analysis and Determination

7. In an appeal against assessment of damages, an Appellate Court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

8. The Appellants submitted that the trial Magistrate erred in law and fact in awarding a global award of Ksh. 800,000 by way of general damages under the loss of dependency to them. They further submitted that the court failed to consider that the deceased was earning a monthly salary of Ksh. 48,000 prior to his demise.
9. I have perused through a letter dated 08/09/2017 from the Director Salchem Pharmacy, Nakuru addressed “To whom it may concern” stating that the deceased was their employee between 6/8/2012 to 15/1/2016 earning a gross salary of Ksh. 48,000.



10. In the judgment subject to this appeal, the trial Magistrate stated that there was no evidence in regard to the deceased's occupation and income. Upon perusing the above mentioned letter, I find that it falls short of the following;
 - a. It is not stated under what capacity the deceased was employed in the pharmacy. Was he a professional, was he a casual labourer? That we cannot tell from the letter.
 - b. There is no attached document to proof that indeed the deceased was earning the salary as stated. The employer ought to have attached the copy of payslip, payment voucher, money transfer or any other document in support.
 - c. In default of the above, the said Director of the company or any other witness with authority to testify on behalf of the company would have answered the above questions, but he was not called as a witness.
11. It is for the above reasons that I do agree with the Honourable Magistrate that there was no proof of occupation and earnings, hence he rightfully applied the global award as general damages under loss of dependency.
12. As to the issue of costs, the same follows the event. That is what section 27 of the Civil Procedure Act. However, the court has the discretion to direction otherwise. In the circumstances, I direct that each party to bear their own costs.
13. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The appeal is hereby dismissed as it lacks merits.
 - b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 29TH DAY OF SEPTEMBER, 2023.

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F. WANGARI

JUDGE

In the presence of:

Kenga Advocate for Appellants

N/A for Respondent

Barile, Court Assistant

