



Mafisi v Luvandale & another (Suing as the Legal Representative & Administrator of the Estate of Kevin Lisaka - Deceased) (Civil Appeal E023 of 2022) [2023] KEHC 22877 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E023 OF 2022
JN KAMAU, J
SEPTEMBER 27, 2023**

BETWEEN

JOYCE MIDEVA MAFISI APPELLANT

AND

JANET ANDIA KISALI 1ST RESPONDENT

ABRAHAM MALENGWE LUVANDALE 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE & ADMINISTRATOR OF THE
ESTATE OF KEVIN LISAKA - DECEASED**

(Being an appeal from the Judgment and Decree of Hon R. M. Ndombi (SRM) delivered at Vihiga in Principal Magistrate's Court Case No 150 of 2021 on 30th June 2022)

JUDGMENT

Introduction

1. In her decision of 30th June 2022, the Learned Trial Magistrate, Hon R. M. Ndombi, Senior Resident Magistrate, entered judgment in favour of the Respondent herein as follows:-

Loss of Dependency Kshs 2,656,344.80

Pain and Suffering Kshs 20,000.00

Loss of Expectation of Life Kshs 100,000.00

Kshs 2,656,344.80

Less 20% contributory negligence Kshs 532,268.96

Kshs 2,125,075.84



Plus costs and interest

2. Being aggrieved by the said decision, on 29th July 2022, the Appellant filed a Memorandum of Appeal of even date. She relied on eight (8) grounds of appeal.
3. Her Written Submissions were dated 31st March 2023 and filed on 4th April 2023 while those of the Respondents were dated 26th April 2023 and filed on 27th April 2023. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. The Appellant did not challenge the apportionment of liability, the award of loss of expectation of life and the dependency ratio. She also abandoned her ground of appeal relating to the multiplier. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the quantum that was awarded was excessive in the circumstances by virtue of the Learned Trial Magistrate having applied a wrong multiplicand warranting interference by this court. The court therefore dealt with Grounds of Appeal Nos (1), (2), (3), (4), (5) and (8) together as they were all related. The court addressed Ground of Appeal No (7) separately as it dealt with a different issue.

I. Multiplicand

7. The Appellant relied on the case of *Denshire Muteti Wambua vs Kenya Power & Lighting Co Limited* [2013] eKLR which cited with authority the cases of *Kemfro Africa Limited t/a vs Meru Express Service Gathogo Kanini vs A.M.M. Lubia & Another* [1982-88] 1 KAR 777 where the common thread was that an appellate court will only interfere with an award of the trial court if it is demonstrated that the amount was so inordinately low or so inordinately high that it must have been a wholly erroneous estimate.

A. Deceased's Occupation

8. The Appellant placed reliance on the case of *Global Vehicles Kenya Limited vs Lenana Road Motors* [2015] eKLR where it was held that one could not purport to lead evidence that was contrary to the pleadings and that of *Douglas Odhiambo Apel & Another vs Telkom Kenya Limited* [2014] eKLR where the holding was that special damages had to be specifically pleaded and strictly proven.
9. She submitted that the Learned Trial Magistrate erred in having treated the deceased who was a certificate student in engineering as a Grade Artisan I instead of an ungraded artisan because there was no evidence that he had undergone grading tests or was undergoing such grading tests. She therefore urged this court to treat the deceased herein as an ungraded artisan.



10. She relied on several cases amongst them Fredrick Ochieng Odera vs Nakuru Teachers Training College [2018] eKLR and Mbithuka Benson v Nzuki Muthama & Another [2020] eKLR where an ungraded artisan was defined “as one who carries out simple repairs and maintenance work with a reasonable proficiency in a particular trade or trades although not in possession of and Trade Test Certificate.”
11. On their part, the Respondents asserted that since the deceased was in college, there was no way of knowing if he would have proceeded or not proceeded to take the grade trade test. They pointed out that a qualification to pursue a grade trade test was a certificate for any course as was set out in Section 4 of the Industrial Training Act Cap 237 (Laws of Kenya).
12. They pointed out that there was no way the deceased would have had the qualifications the Appellant had asserted he ought to have had because he was still in college. It was their contention, however, that in view of the competitive market and the aggressiveness of the generation today, he would definitely have proceeded to take a grade test. They therefore urged this court to treat him as an Artisan Grade I.
13. In this regard, they relied on the case of Jesse Gichuru Wanyama & Another vs Videlis Auma Wanyama & Another (suing as the administrator of the Estate of Wiston Siro Maloba[2021] eKLR where the appellate court upheld an award on the multiplicand where the deceased was an intern and there was no proof that he would undertake a grade test.
14. They also referred the court to the case of Muritu Kinyanjui vs Jane Muthoni Njiru & 2 Others [2020] eKLR where the court applied a minimum wage for an artisan grade I where the deceased was a printer repairer.
15. Notably, both parties agreed that the applicable minimum wage herein was under the Regulation of Wages (General) (Amendment) Order 2018 as the deceased died on 26th June 2021. The Regulation of Wages (General) (Amendment) Order came into force on 1st May 2018. The contention was whether or not the deceased could be treated as Artisan Grade I and from a municipality.
16. The Learned Trial Magistrate adopted a minimum Artisan Grade I on the basis of the fact that there was no evidence that he lived an unhappy life, would have been unemployed or failed to upgrade later in life.
17. She found the case of Francis Njeru vs Geoffrey M. Ndegwa Muiruri [2020] eKLR that the Appellant relied upon during trial to have been distinguishable from the facts of this case as there was no indication whether the deceased therein was a graded mechanic and/or the training that he underwent. She therefore adopted a minimum wage in sum of Kshs 28,822.10 for an Artisan Grade I in respect of the deceased herein.
18. This court looked at the letter from Sigalagala National Polytechnic dated 26th July 2021 that was tendered in evidence by his father, Abraham Malengwe, the 1st Respondent herein which showed that the deceased herein was due to sit for a Kenya National Examination Council exam in Craft Certificate in Electrical Engineering Module II in August 2021. This was about two (2) months before he died following a road traffic accident.
19. There was no indication in the said letter or demonstration from the Respondents of how many modules the deceased was remaining so as to conclude his course. There was also no indication that he was to attend attachment or an apprenticeship and indentured learnership as stipulated in Sections 7B and Section 19 of the Industrial Training Act respectively. This information could have assisted the court in appreciating how far he was in completing his education with a view to coming up with an appropriate multiplicand.



20. Having said so, it was easier to fathom the career he may have taken once he completed his studies as he was in a tertiary institution. Indeed, it is more difficult to foresee career paths of children who die while in primary and secondary schools. In the case of *Joshua Mungania & Another vs Gregory Omondi [2018] eKLR, Majanja J* found and held that the career path of the deceased therein was not speculative as she was a university student, which was closer to this court's thinking.
21. Even so, the future career path of any person is to some extent speculative. No one can with certainty say that he or she will be in a particular stage years to come. In the same breath, the deceased's career path still remained speculative because there was no guarantee that the course he studied for would have led him to a career in electrical engineering. He could also have dropped off along the way, fallen sick or failed to get employment after conclusion of his course.
22. On the other hand, he was only twenty three (23) years at the time of his death. The sky could also have been his limit as he could have grown in his career to the point of being a professor in electrical engineering where he would have earned more than the minimum wage that both parties had proposed.
23. In the case of *Jesse Gichuru Wanyama & Another vs Videlis Auma Wanyama & Another* (suing as the administrator of the Estate of *Wiston Siro Maloba* (Supra) that the Respondents relied upon, there was more certainty of what qualifications the deceased therein had attained at the time of his death. The deceased therein was a twenty five (25) year old and was a diploma holder in Technical Education Programme and was at the time of his death, an intern at Fintech Company Limited earning a salary of Kshs 20,000/=. *Sergon J* upheld the minimum wage of Kshs 19,360.50 that was the basic minimum wage of an Artisan Grade I as per the Regulation of Wages (General) (Amendment) Order, 2012.
24. Further, in the case of *Muritu Kinyanjui vs Jane Muthoni Njiru & 2 Others* (Supra) that the Respondents also relied upon, the deceased therein was a printer repairer whose job was easily ascertainable as an Artisan Grade I and the Regulation of Wages (General) (Amendment) Order, 2006 was adopted therein.
25. Undoubtedly, any figure that would be adopted as a multiplicand in this case would be merely speculative because the deceased did not have an income or engaged in any gainful employment at the time of his death. In view of the vicissitudes of life, it was more prudent to assess a multiplicand on the basis of the stage that a deceased was at the time of his or her death.
26. As the deceased herein was a student and did not possess any grade test certification at the time of his death, he was for intents and purposes an ungraded artisan. His position was different from the deceased persons in the cases the Respondents had relied upon in support of their case who already had attained their qualifications and were in occupations that were ascertainable.
27. Taking into account that it was not clear what career the deceased herein would have ended in, what income he would have been earning until he retired, if he was to retire at all, and whether he would have been in good health to have continued working until he retired, generally, considering the vagaries of life, this court found it fair to treat him as ungraded Artisan as he had to take several steps before attaining Artisan Grade I, if at all.

B. Deceased's Place Of Occupation

28. The Appellant faulted the Learned Trial Magistrate for having adopted a minimum wage for a former municipality. She submitted that the deceased hailed from Wamulume Location, Vihiga County and that there was no evidence that he resided or worked in a former municipality or in Ruiru or Mavoko or in Limuru. He thus urged this court to adopt a minimum wage of Kshs 13,975/55 for 2021 for "all other areas"



29. On their part, the Respondents annexed a copy of a list of Municipalities as per the Local Government Act Cap 265. They averred that the Appellant did not provide any proof that Sigalala National Polytechnic was not situated in Kakamega Town. They asserted that the fact that the college was twelve (12) kilometres from Kakamega did not qualify it to have been “all other areas.” They added that the deceased resided and died in Chango which was within a municipality. It was therefore their submission that the applicable minimum wage for the deceased fell under major cities.
30. This court looked at the Vihiga Municipality Integrated Development Plan 2018-2022 that the Respondents submitted before this court showing that Mbale was a major urban centre within the Vihiga Municipality. They also annexed a copy of the Local Government Act Cap 265 (Laws of Kenya) showing that there was a Vihiga County Council and Vihiga Municipal Council. Notably, the Local Government Act stood repealed by virtue of Section 1 of the County Governments Act that stipulates as follows:-
- “This Act may be cited as the County Governments Act, 2012 and shall come into operation upon the final announcement of the results of the first elections under the Constitution.”
31. Further, Section 134(1) of the County Governments Act provides that:-
- “The Local Government Act (Cap. 265) is repealed upon the final announcement of all the results of the first elections held under the Constitution.”
32. It was evident that by virtue of the repeal of the Local Governments Act, Vihiga fell under the category of former municipalities as at 26th June 2021. Notably, the Regulation of Wages (General) (Amendment) Order, 2018 referred to minimum wages in Nairobi, Mombasa and Kisumu cities in the first category, former municipalities and town councils of Mavoko, Ruiru and Limuru in the second category and all other areas as the third category. Vihiga thus fell in the second category and not in the first and third categories.
33. The Learned Trial Magistrate adopted the minimum wage for a person working in a former municipality or town council of Mavoko, Ruiru and Limuru. She did not, however, give her reasons for having arrived at the said conclusion. It is important that reasons are given for each determination so that the appellate court is able to understand the reasoning of such decision as the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010 that stipulates as follows:-
- “Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”
34. Indeed, it was speculative of where the deceased could have worked after he completed his studies until he retired and when he would retire, if at all. The fact that he hailed from Vihiga County did not imply that he had to get employment in that County. He could have worked in any part of the country.
35. However, in the absence of any proof to the contrary and purely for purposes of ascertaining his minimum wage at the time of his death, this court adopted Vihiga as his place of residence as he had born there and still studied within that area. This court therefore adopted the minimum wage of an ungraded artisan in a former municipality as the same was fair in the circumstances of the case herein.
36. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (8) were partially merited and the same be and are hereby allowed.



II. Submissions

37. Ground of Appeal No (7) was dealt with under this heading.
38. The Respondents did not submit on this issue. On her part, the Appellant argued that the Learned Trial Magistrate ignored her submissions and referred this court to the cases of Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd (Supra) and Ram Gopal Gupta vs Nairobi Tea Packers Limited & 2 Others [2017] eKLR where the holdings were that other than setting out the cases in its decision, a trial court ought to comment on the cases that parties relied upon.
39. This court looked at the cases the Appellant relied upon during trial and agreed with her that indeed, the Learned Trial Magistrate did not make reference to the many cases that she relied upon. She only relied on the case of Francis Njeru vs Geoffrey M. Ndegwa Muiruri (Supra).
40. While courts are called upon to make reference to cases that support a party's case to avoid a perception of bias by the losing party, there is no legal obligation on a trial court to comment on each and every case. Indeed, there is a tendency for parties to inundate courts with numerous cases when a point can be made by relying on only one case.
41. This court perused the Record of Appeal and noted that the Appellant herein relied on so many authorities which could have overwhelmed the Learned Trial Magistrate. She could not therefore have been faulted on not citing all the cases that the parties herein had relied upon. In any event, she cited the case of Francis Njeru vs Geoffrey M. Ndegwa Muiruri (Supra) the Appellant had relied upon on the issue of multiplicand which was the sole basis of the Appeal herein.
42. This court did not therefore find Ground of Appeal No (7) to have been merited and the same be and is hereby dismissed.

Disposition

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 29th July 2022 was partially merited. The effect of this is that the Judgment of Kshs 2,125,075.84 that was entered by the Learned Trial Magistrate in Vihiga PMCC No 23 of 20228 on 30th June 2022 in favour of the Respondents herein against the Appellant be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondent herein against the Appellant herein jointly and severally for the sum of Kshs 1,340,421.44 made up as follows:-

Loss of Dependency Kshs 1,555,526.80

$1/3 \times 16,907.90 \times 23 \times 12$

Pain and Suffering Kshs 20,000.00

Loss of Expectation of Life Kshs 100,000.00

Kshs 1,675,526.80

Less 20% contributory negligence Kshs 335,105.36

Kshs 1,340,421.44

Plus costs and interest at court rates from the date of judgment of the lower court until payment in full.



44. As the Appellant was partly successful in her Appeal, each party will bear its own costs of the Appeal herein.

45. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27^T DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE

