



Mwiti (Being sued as the Administrator of the Estate of Julius Mwiti Mitobi - Deceased) v Kangai & another (Suing as a Legal Representative of the Estate of Eric Mutwiri Kamiu – Deceased) (Civil Appeal E022 of 2022) [2023] KEHC 25171 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 25171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E022 OF 2022
LW GITARI, J
OCTOBER 27, 2023**

BETWEEN

KAREMA MWITI (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF JULIUS MWITI MITOBI - DECEASED) APPELLANT

AND

JOY KANGAI & ANAMPIU JACOB KINOTI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF ERIC MUTWIRI KAMIU – DECEASED) RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and decree of the trial court in Meru CMCC No. 142 of 2016 delivered on 24th January, 2022. In the suit before the Chief Magistrate’s Court the respondent was claiming general and special damages under the *Fatal Accidents Act* and the Law Forms Act. The court entered Judgment for the respondent and assessed the damages as follows:

1. Liability - 100%
 2. Pain and suffering - Nil
 3. Loss of expectation of life- Nil
 4. Loss of dependency – 5,400,000/-
 5. Special damages - 160,000/-
- Total – 5,560,000.00.

The appellant was dissatisfied with the said Judgment and filed this appeal.



The grounds of appeal as listed in the Memorandum of Appeal dated 15th February, 2022 are as follows:

- a. That the learned magistrate erred in law and in fact in awarding general damages for loss of dependency at Ksh. 5,400,000/= which amount is manifestly excessive.
- b. That the learned magistrate erred in law and in fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case while arriving at the award in damages.
- c. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.

2. The Appellant thus prayed That:

- a. The Appeal herein be allowed and the judgment of the lower court be set aside.
- b. The costs of the Appeal be granted to the Appellant.

3. The Respondent's claim was based on the facts that on or about 17th July, 2015 at about 5.00 a.m., one Jotham Mutwiri Anampiu (deceased) was a lawful passenger in motor vehicle registration no. KBS 206M Toyota Fielder along Thika-Sagana road at Swara area when Julius Mwiti Itobi (deceased) so negligently and carelessly drove motor vehicle registration no. KBS 206M Toyota Fielder causing the same to collide with the motor vehicle of one G.M. Kariuki with the registration no. KBK 261 KZE 5927 M.BEZ strailer. As a result of the collision, Jotham Mutwiri Anampiu suffered fatal injuries. The Appellant was sued as the administratrix of the estate of the said Julius Mwiti Itobi.

4. The Appeal was canvassed by way of written submissions which I have highlighted below.

Appellant's Submissions

5. It is the Appellant's submission that the main issue for determination by this Court is whether the learned magistrate erred in law in awarding general damages for loss of dependency at Kshs. 5,400,000/=. According to the Appellant the said award was manifestly excessive.
6. On the multiplier, it was the Appellant's submission that since the deceased was 33 years when he met his death, it is not certain how long he would have lived or his retirement age. However, the Appellant proposed the use of 15 years as the multiplier having considered that the deceased was working in the informal sector, the uncertainties of life and dwindling economic status of the country.
7. On the dependency ratio, it was the Appellant's submission that the use of 2/3 as the dependency ration was reasonable considering that the deceased was married with two children.
8. As for the multiplicand, it was the Appellant's submission that the Respondent's claim that the deceased used to earn Kshs. 45,000/= planting trees for 30 days at Kshs. 1,500/= and Kshs. 25,000/= as a pastor had not been proven by evidence. The Appellant thus urged this Court to disregard the Respondent's claim on the multiplicand and proposed the use of Kshs. 25,000/=. By the Appellant's calculation, Kshs. 3,000,000/= (25,000/= x 2/3 x 15 x 12) should have been awarded under the head of loss of dependency.
9. It was further the Appellant's submission that the trial court failed to appreciate the weight of the Appellant's submissions and annexed authorities hence arrived at an erroneous judgment. The Appellant thus prayed for the appeal to be allowed as prayed with costs to the Appellant.



Respondent's Submissions

10. On their part, the Respondents submitted that the trial court was right in awarding the Respondent Kshs. 5,400,000/= as damages for loss of dependancy. Further, that the special damages Kshs. 160,000/= as awarded by the trial court was specifically pleaded and proven.
11. On whether the trial court failed to consider the submissions of both parties, it was the Respondent's submission that contrary to the assertion by the Appellant, the trial court did put into consideration submissions by both parties. The Respondent further stated that on the contention that the trial court's judgment was against the doctrine of stare decisis, courts do not always have to rely on precedents while making its decision and as such implored this Court to find as such since the learned magistrate had the discretion to make her decision based on her individualized evaluation guided by the principles of law. The Respondent thus urged this Court to dismiss this appeal with costs and uphold the trial court's judgment.

Issues for Determination

12. From the pleadings on record, the grounds of appeal and the submissions of the parties, the main issues that arise for determination are:
 - a. Whether the award of Kshs. 5,400,000/= as general damages for loss of dependency and Kshs. 160,000/= as special damages was erroneous.
 - b. Whether the trial court considered the Appellant's submissions as well as the evidence presented before it in arriving at its decision.

Analysis

13. This Court is the first appellate court. I am aware of the Court's duty to evaluate the entire evidence on record bearing in mind that it had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. The court stated:

“An appeal to this court from 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 conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally.”

I will therefore proceed with a summary of the facts and evidence given in the trial but leave room for the fact that I had no opportunity to see the witnesses so as to assess their demeanor.

14. PW1 was Joy Kangai and the wife to the deceased. She adopted her statement dated 10th July, 2020 as her evidence in Chief. It was her evidence that her late husband was a pastor at EAPC Kabuule Church earning Kshs. 25,000/= and that he had two children.



15. PW2 was Reverend Kinoti Anampiu Jacob a brother to the deceased. It was his evidence that the deceased had no defined salary but he used to get a stipend of Kshs. 25,000/= from an NGO known as TIST dealing with environmental issues.
16. PW3 was Rev. Joel Gikundi working with Pentecostal Church as the overseer – Igembe. He adopted his statement dated 4th November, 2021 as his evidence in chief. He stated that the deceased was under his leadership. He corroborated PW1’s testimony that the deceased used to be paid Kshs. 25,000/= as a church minister of E.A.P.C Kabuule Church.
17. PW4 was PC Rogers Mwititi. He confirmed that the subject accident did occur on the material day and stated that the scene was visited by different people including CI Kuambula, Corporal Kisau, PC Nzioki, PC Okeyy, PC Githwani, PC Kibet and PC Kinoti. He further stated that investigations were done and the same were complete. That the investigations showed that the accident occurred on the lane where the trailer was. He blamed the driver of the Fielder KBS 206M for failing to keep to his lane and as a result caused a head on collision.
18. The Appellant, on the other hand, closed his case without calling any witnesses. The appellant is challenging the quantum of damages awarded by the trial magistrate.
19. In the case of Mbogo & Another vs Shah [1968] EA 93, it was held that an award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.
20. I am further guided by the case of Kigaragar v Agripiana Mary Aya [1982-1988] KAR 768, where the Court of Appeal held that an appellate court would interfere with the Trial Court’s decision if it was shown that the sum awarded was demonstrably wrong or that the award was based on wrong principle or it was so manifestly excessive or inadequate, that a wrong principle may be inferred.
21. Similarly, in Mkube v Nyamuro [1983] LLR at 403, Kneller JA & Hancox Ag JJA held that-

“ A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

In the case of Bashur Ahmed But-v- Uwais Ahamed Khan (1982-1988) KAR the court set parameters under which an appellate court will interfere with an award of general damages. The court held:-

“ An appellate court will not disturb an award for general damages unless it is so inordinately low or high 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.”

In this appeal, the appellant has not challenged the finding of the learned trial magistrate on liability. The learned trial magistrate held as follows:-

“ There is no doubt from the evidence on record that the deceased was travelling aboard motor vehicle registration number KBS 206 M Toyota Fielder. In the absence of any evidence from the defendant, I find that the plaintiff’s evidence is not controverted and find the defendant 100% liable.”

It is borne out by the record that the appellant did not tender any evidence.



Secondly the evidence by PW4 – the investigating officer which is uncontroverted is that the driver of the said motor vehicle KBS 206M was to blame for the accident as he failed to keep to his lane and cause a head on collision with the oncoming motor vehicle. I find that the decision of the trial magistrate on liability was well founded on the facts and the law and this court has no reason to interfere with it.

I find that the deceased driver of the motor vehicle KBS 206M was to blame for the accident and liability of 100% shall stand.

22. Based on the evidence of PW4, the trial magistrate was correct to find the driver of KBS 206M Toyota Fielder 100% liable for failing to keep to his side.

Loss of Dependency:

23. The deceased died at the age of 26 years old. From the evidence of PW2 and PW3, the deceased was working as a Pastor earning Kshs. 25,000/=. It also came out in evidence that at the time of his death, the deceased was married and had two children.

24. The trial court adopted a multiplicand of Kshs. 25,000/=: a multiplier of 27 years and $\frac{2}{3}$ as the dependency ratio. Hence, the learned arrived at an award of Kshs. 5,400,00/= plus costs and interest of the suit constituted as follows:

- a. Loss of dependency – $25,000 \times 27 \times \frac{2}{3} = 5,400,000/=$
- b. Loss of expectation of life – NIL
- c. Pain and Suffering – NIL
- d. Special Damages 160,000/=
- e. Costs and Interest of the suit

25. I have considered the submissions by the Appellant as well as the Respondent both in the appeal and in the suit before the trial court. The Appellant had proposed an award to be made as follows:

- a. Pain and suffering – Kshs. 10,000/=
- b. Loss of expectation of life – Kshs. 100,000/=
- c. Loss of dependency – $Kshs. 25,000 \times \frac{2}{3} \times 15 \times 12 = Kshs. 3,000,000/=$
- d. Special damages – The court to take note of the damages pleaded and proved.

In *Nkube –v- Nyamoro* (1983) KLR 403 as quoted in *Kenya Women Microfinance Ltd –v- Martha Wangari Kamau* (2011) eKLR the Court stated:-

“A court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

In her Judgment the trial magistrate stated as follows on the issue of the multiplicand.

“The plaintiff’s Counsel urged the court to adopt a multiplicand of Ksh.70,000/- and relied on the case of *Jacob Ayiga Maraja and Francis Karani –v- Simeon Obongo* (suing as the Administrator of the estate of Thomas Ndenga Obongo) .C.A No. 167/2002 Kisumu, testified that the deceased was employed as a quantifier by International Small Group of Tree Planting earning Ksh.1500/- per visit and used to make 25,000 per month. Her witness,



PW3 produced a letter (exhibit) 13 confirming that the deceased was a Pastor and earning Ksh.25,000/-. As for the amount he used to earn as a quantifier with International Small group of Tree Plaintiff nothing was produced to prove the same.....”

I find no basis to consider a figure of Ksh.45,000/- alluded to. I will adopt a multiplicand of Ksh.25,000/-.

From the foregoing, it is clear that the learned trial magistrate based her finding on the evidence placed before her. She did a proper analysis of the Evidence. There was no misapprehension of the evidence.

With regard to the multiplier, the learned trial magistrate applied the age of 33 years which was indicated on the birth certificate and a multiplier of twenty seven (27) years. She noted that the deceased would have worked up to the retirement age of 60 years. The appellant had relied on the case of Beatrice Wangui Thairu –v- Hon. Ezekiel NBI H.C.C.C No. 1638/1988.

In the case of court stated that-

“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 dependants and the chances of life of the deceased and the dependants.”

The appellant had suggested a multiplier of fifteen years. The appellant submitted that a sum of Kshs.3,000,000/- would be sufficient and cited the case of Tayab –v- Kinany where Potter JA Morris of Borth –Y- Gest in West 1H) & Sons Limited –v- Shepard that the court should have awarded comparable awards for comparable injuries.

This as stated dealt with awards for injuries and is therefore not relevant.

26. I agree with the Appellant that a brother is not a dependant envisaged under Section 4 of the *Fatal Accidents Act*. I note that the wife and children are dependants who were entitled to damages. The trial magistrate was therefore right in applying a dependency ratio of 2/3. The assessment of a multiplier is a matter of exercise of Court’s discretion. The court will not interfere with that exercise of unless it is shown that it was not done judiciously and fairly. There is nothing to warrant me to interfere with the exercise of the discretion. The respondent had pleaded for a multiplier of thirty four (34) years which the trial magistrate declined. The trial magistrate cannot be faulted for arriving at a multiplier of twenty seven (27) years.

Conclusion:

27. For the reasons stated, I find that the appeal is without merits. I order as follows:
1. The appeal is dismissed.
 2. Costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF OCTOBER 2023.

L. W. GITARI

JUDGE

