



**Danstar Holdings Limited & another v Kamau & another (Suing on their behalf & as administrators of the Estate of Bernard Mwangi Nyambura (Deceased)) (Civil Appeal 39 of 2019) [2023] KEHC 24197 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 39 OF 2019  
FN MUCHEMI, J  
OCTOBER 26, 2023**

**BETWEEN**

**DANSTAR HOLDINGS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**MARTIN NYAGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LUCY WAIYEGO KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER MAINA ..... 2<sup>ND</sup> RESPONDENT**

**SUING ON THEIR BEHALF & AS ADMINISTRATORS OF THE ESTATE OF  
BERNARD MWANGI NYAMBURA (DECEASED)**

*(Being an Appeal from the Judgment and Decree of Hon. E. H. Keago (SPM)  
delivered on 17th May 2019 and corrected under Section 99 of the Civil  
Procedure Act on 28th June 2019 in Baricho SPMCC No. 139 of 2017)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment in Baricho SPMCC No. 139 of 2017. The claim arose from a road traffic accident whereas by consent liability was apportioned at the ratio of 15 : 85 with the appellants bearing 85%. The respondents were awarded damages as follows:-
  - a. Pain and suffering Kshs. 50,000/-
  - b. Loss of expectation of life Kshs. 100,000/-
  - c. Loss of dependency Kshs. 3,733,632/-



- d. Special damages Kshs. 799,875/-
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 4 grounds of appeal summarized as follows:-
    - a. The learned trial magistrate erred in law and in fact by awarding general damages for pain and suffering that is manifestly excessive yet the deceased died immediately after the accident;
    - b. The learned trial magistrate erred in law and in fact in adopting a multiplier of 16 years in calculating the award of loss of dependency failing to take into account the vagaries and uncertainties of life
    - c. The learned trial magistrate erred in law and in fact in adopting a multiplicand of Kshs. 29,169/- in calculating loss of dependency and failed to take into account that the deceased's place of residence was Kirinyaga which area is neither a city nor a municipality as stipulated in the minimum wage schedule.
  3. Parties put in written submissions to dispose of the appeal.

### **Appellants' Submissions**

4. The appellants submit that from the Certificate of Death and the respondents' filed statements, the deceased died on the very day of the accident. Further the appellants contend that the respondents did not allege or prove that the deceased was admitted to any medical facility and thus the deceased died at the scene of the accident. Thus the trial court ought to have awarded Kshs. 10,000/- as general damages for pain and suffering which is the amount applicable where death occurs on the same day. The same was stipulated in the cases of *Ann Njoki v Umoja Flour Mills & Another* [2006] eKLR and *HBAO & Others v Marisons Traders & Freight Co. Ltd* [2019] eKLR. Accordingly, the appellants submit that the award of Kshs. 50,000/- given by the trial court is excessive and ought to be reduced to Kshs. 10,000/-.
5. The appellants submit that the deceased was 49 years at the time of death and was survived by his wife, 45 years and his two children who were 21 years and 15 years. Relying on the case of *James Wambua Nyikal & Another v Mumias Sugar Company Ltd & Another* [2011] eKLR the appellants propose that a multiplier of 6 years is adopted. The appellants argue that the deceased was left with 11 years to attain public sector retirement age. The appellants take cognizance of the fact that the deceased engaged in business but argued that the multiplier adopted by the trial court was excessive. To support their contentions, the appellants rely on the cases of *Nyamai Petronila & Another v Monica Usyoki* [2020] eKLR, *Isaack Abdikarim Abdile & Another v Rose Kinanu Muchai* [2016] eKLR and *HBAO & Others v Marisoni Traders & Freights Co. Ltd* [2019] eKLR where the courts adopted a multiplier of 11 years and urges the court to adopt a multiplier of 8 years.
6. The appellants further submit that the respondents did not prove the deceased's occupation or income and therefore proposed that the adoption of the applicable statutory minimum wages guidelines in determining the multiplicand. The appellants state that the deceased was a resident of Kariguini sub location in Kirinyaga as confirmed by the Chief's letter and permit for burial. Since he died on 30<sup>th</sup> January 2016, they submit that the regulation of Wages (General) (Amendment) Order, 2015 was applicable and the minimum wage payable to a general labourer under column 4 was Kshs. 5,844/-.
7. The appellants argue that the trial magistrate presumed that the deceased's alleged occupation was a driver then observed that the minimum wage applicable was that of drivers in Kirinyaga but erroneously indicated the same as Kshs. 29,169/-. In arriving at Kshs. 29,169/- the trial magistrate was guided by the Regulation of Wages (General) (Amendment) Order 2017 for category



of drivers (heavy commercial vehicle) in Nairobi, Mombasa and Kisumu. The appellants argue that the deceased was not based in Nairobi, Mombasa or Kisumu and neither was he driving a heavy commercial vehicle. The appellants submit that had the respondents proved the deceased was a driver, the trial court ought to have applied Kshs. 11,279.50/- as the multiplicand. However they urge the court to adopt a multiplicand of Kshs. 5,844/- since the respondents did not prove that the deceased was a driver. Therefore they contend that loss of dependency ought to work out as follows:-

Kshs. 5,844/- x 12 x 8 x 2/3 = 374,010/- OR

Kshs. 11,279/- x 12 x 8 x 2/3 = 721,888/-.

### **The Respondents' Submissions**

8. The respondents submit that the trial court relied on the case of *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others* [2013] eKLR where the court awarded Kshs. 50,000/- for a deceased who died on the same. Accordingly, the respondents submit that the award is not excessive and should not be interfered with.
9. On the multiplier, the respondents state that they relied on the case of *Joyce Wangechi Mbugua & Another v Harman Singh Mariwa & Another* [2016] eKLR where the court adopted a multiplier of 16 years and the deceased was 49 years. The respondents argue that the trial court in adopting a multiplier of 16 years was justifiable as the court was guided by the said case. The appellant cited the case of *James Wambura Nyikal v Mumias Sugar Company & Another* [2011] eKLR which the respondents argue was not applicable in the circumstances as the deceased in the said case was an employee of a parastatal and was to retire at the age of 55 years whereas in the present case the deceased was a businessman and would have worked until the age of 70 years.
10. The respondents rely on the case of *Jacob Ayiga Maruja v Francis Karani v Simeon Obayo* [2005] eKLR and submit that documentary evidence is not the only proof of earnings when determining the multiplicand. The respondents further contend that they produced a bundle of receipts in support of school fees payments and rent payments which were paid from the deceased's earnings. The respondents submit that the deceased's first born was pursuing a diploma in law at Mount Kenya University and his brother was in a private school which indicates that the deceased was earning an amount of Kshs. 90,000/-. One of the receipts for school fees dated 5/9/2014 showed that the deceased paid school fees at Mount Kenya University amounting to Kshs. 49,000/-. Therefore the deceased's business must have made at more than at least Kshs. 41,000/-. Thus the respondents argue that it was reasonable to conclude that the deceased earned Kshs. 90,000/- per month, considering the school fees he paid and the additional recurrent expenditures of food, clothing, rent and maintenance of his motor vehicle. As such, the respondents contend that the multiplier and the multiplicand adopted by the trial court is fair and reasonable.

### **Issues for determination**

11. The main issues for determination are:-
  - a. Whether the award for pain and suffering is manifestly excessive;
  - b. Whether the trial court erred in adopting a multiplicand of Kshs. 29,169/-.
  - c. Whether the trial court erred in adopting a multiplier of 16 years.



## The Law

12. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

13. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

14. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

15. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

### **Whether the award for pain and suffering is manifestly excessive.**

16. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

17. Similarly in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for



an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

18. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR the court stated:-

As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/- to Kshs. 100,000/- with the higher damages being awarded if the pain and suffering was prolonged before death.

19. In the instant case, it is not disputed that the deceased died on the same day. The trial magistrate awarded a sum of Kshs. 50,000/-relying the case of *Alice O. Alukwe v Akamba Public Service Ltd & 3 Others* [2013] eKLR. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, the sum of Kshs. 50,000/- awarded by the trial court is reasonable and hence I do not see any reason to interfere with it.

Whether the trial court erred in adopting a multiplicand of Kshs. 29,169/-.

20. The Court of Appeal in *Chunibhai J. Patel & Another v P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

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 dependents, 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 dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

21. In the instant case, the appellants are faulting the trial court for adopting a multiplicand of Kshs. 29,169/-. It is argued that the respondents did not prove the deceased's occupation or his earning and thus the court ought to have been guided by the minimum wage as per the Regulation of Wages (General) (Amendment) Order 2015 as Kshs. 5,844/- for a general labourer under column 4.

22. The trial learned magistrate in his judgment used the statutory minimum wage as per the Regulation of Wages (General) (Amendment) Order, 2015 and awarded Kshs. 29,169/- as the wage for drivers within Kirinyaga.

23. I have perused the court record and noted that the deceased died on 30/1/2016 and thus the applicable guidelines are as per the Regulation of Wages (General) (Amendment) Order, 2015. The respondents led evidence that the deceased was a driver of his motor vehicle registration number KRX 288, which was a lorry. From the burial permit and the Chief's letter dated 11/2/2016, the deceased resided at Kariguini sub location in Murang'a which falls under the column for “all other areas”. The minimum statutory wage for a driver of a heavy commercial vehicle was Kshs. 21,811.10/- as per the Regulation of Wages (General) (Amendment) Order, 2015. Therefore upon re-evaluation of the evidence tendered, it is my considered view that the minimum wage applicable in respect to the deceased was Kshs. 21,811.10/-. This amount ought to have been used as the multiplicand as opposed to Kshs.29,169/-.



24. It is my considered view that the magistrate erred in using the wrong multiplicand.

**Whether the trial court erred in adopting a multiplier of 16 years.**

25. The appellants contend that the multiplier of 16 years adopted by the trial court is on the higher side as the learned magistrate did not factor in the vicissitudes and vagaries of life which could have shortened the life of the deceased. As such, they propose the court adopts a multiplier of 8 years. The respondents argue that the deceased was 49 years at the time of his demise and he was in good health.
26. The trial court in adopting the multiplier of 16 years took into consideration that the deceased died at the age of 49 years and he would have properly continued to work as a driver up to the age of 65 years.
27. I have perused the authorities cited by the appellant and noted that in the cases of *Nyamai Petronila & Another v Monica Usyoki* [2020] eKLR and *Isaack Abdikarim Abdile & Another v Rose Kinanu Muchai* [2016] eKLR where the courts adopted a multiplier of 11 years for the deceased persons who were 49 years old and was a plumber and business man respectively. I have further been guided by the cases of *Wachira Joseph & 2 Others v Hannah Wangui Makumi & Another* [2021] eKLR where the deceased was a mason aged 51 years and the court adopted a multiplier of 9 years. Further in the case of *Irene Kagundu & Mary Wanda Kagundu v W. K. Tilley Muthaiga Ltd & Another* [2008] eKLR where the court adopted a multiplier of 11 years for a deceased person who was 49 years old. Taking into account the vicissitudes of life, I find it more reasonable to adopt the retirement age in the public service in Kenya of 60 years. The multiplier of 16 years is a bit on the higher side and I hereby adopt eleven (11) years as the applicable multiplier.
28. Therefore the award of loss of dependency shall work out as follows:-  
 $21,811.10/- \times 11 \times 12 \times 2/3 = \text{Kshs. } 1,919,376.80 \text{ /-}$
29. In view of the foregoing, I find that the appeal is partially successful. The award of Kshs. 3,733,632/- on loss of dependency is set aside and substituted with an award of Kshs. 1,919,376.80/- which is subject to the liability ratio of 15 : 85 agreed by parties.
30. Other damage items remain undisturbed. The total award of Kshs. 2,869,251.80/- is subject to the agreed ratio on liability.
31. Each party will meet their own costs of this appeal.
32. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 26<sup>th</sup> day of October, 2023.

