Koresa & another (Suing in their own behalf and as administrators of the Estate of Abdul Mohamed Artan alias Abdul Mohammed Artan) v Stephen & another (Civil Appeal E090 of 2022) [2023] KEHC 24191 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24191 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E090 OF 2022

FN MUCHEMI, J

OCTOBER 26, 2023

BETWEEN

NAIMO ALI KORESA ..... 1ST APPELLANT

YASMIN ABDI ..... 2ND APPELLANT

SUING IN THEIR OWN BEHALF AND AS ADMINISTRATORS OF THE ESTATE OF ABDUL MOHAMED ARTAN ALIAS ABDUL MOHAMMED ARTAN

AND

EVANGELINE KALINGU STEPHEN ..... 1ST RESPONDENT

DANIEL KITHURE MUCHIRI ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. M. Ireri (SRM) delivered on 5th October 2022 in Baricho SPMCC No. E037 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Baricho Senior Resident Magistrate in SPMCC No. E037 of 2020 arising from a road traffic accident whereby by consent liability was apportioned at the ratio of 15: 85 with the respondents bearing 85%. The appellants 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 1,200,000/-

d. Special damages Kshs 31,800/-

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 11 grounds of appeal summarized as follows:-

   a. The learned trial magistrate erred in law in awarding damages for loss of dependency which were inordinately low in the circumstances;

   b. The learned trial magistrate erred in fact and in law by failing to award a global sum commensurate to the stature of the deceased taking into consideration the evidence adduced.

   c. The learned trial magistrate misdirected himself in law and in fact by failing to consider the uncontroverted evidence on the deceased's earnings.

3. Parties put in written submissions to dispose of the appeal.

Appellants' Submissions

4. PW1, the deceased's wife in a statement stated that the deceased was aged 48 years at the time of his death and that the deceased was working as a driver, employed by Lake Turkana Wind Power Company earning Kshs 30,000/- per month. PW1 further testified that the deceased had initially been employed on contract basis and was set to begin permanent employment in 2015. The appellant stated that they had two children together with the deceased and produced their birth certificates. She further stated that the deceased used to maintain her and their children. To prove dependency she produced a letter from the area chief.

5. The appellants submit that the trial magistrate erred by adopting a global sum for loss of dependency as the sum total of award was not commensurate to the stature of the deceased. The appellants further appreciate that although the trial court exercised its discretion and adopted a global sum, it was manifestly low and they argue that there was sufficient evidence to warrant the application of the multiplier/multiplicand approach.

6. The appellant further submit that the trial court erred by finding that they did not prove the deceased's income and argue that she adduced uncontroverted evidence that the deceased was a driver who was earning a salary of Kshs 30,000/- and that he was employed on contract basis. It was further submitted that a letter from his employer Lake Turkana Wind Power which indicated that the deceased's contract was going to be changed to permanent basis on 1/1/2015 was produced but unfortunately he died before then.

7. The appellants further rely on the cases of *Jacob Ayiga Maruja & Francis Karani v Simeon Obayo* [2005] eKLR and Mahenzo Kathengi & Another Chambeyu (Suing as the legal representatives of the *Estate of Hamisi Chambeyu Munyaka) v Magunadu Company Limited & Another* [2019] eKLR and submits that the trial court's insistence on documentary proof to show the deceased's earnings was erroneous. The appellants maintain that their testimony was uncontroverted and as such, the trial magistrate ought to have believed it.

8. Moreover, the appellants contend that even if the trial court did not believe their testimony that the deceased earned Kshs 30,000/-, the trial court ought to have applied the applicable minimum wage. To support their contentions they rely on the cases of Vincent Kipkorir Tanui (Suing as the administrator or personal representative of *the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & Another* [2018] eKLR, Wilson Ondicho Mboga v Nicholas Maina Arisi & Another (Suing as the legal administrators of *the Estate of Alice Kwamboka (Deceased)* [2022] eKLR and *Paul Ouma v Sarah Akinyi & Another* HCCA No. 7 of 2016. The appellants argue that under the Regulation

of Wages (General) (Amendment) Order, 2013, the minimum wage for the least calibre of a driver (cars and light vans) was Kshs 10,071/-. This is as stipulated under column 4 for all other areas such as Marsabit. Thus at the very least, the appellants argue that the learned magistrate ought to have applied the sum of Kshs 10,071/- as the multiplicand.

9. The appellants submit that the deceased was aged 48 years at the time of death as indicated in his death certificate. It was further stated that he was in good health and he would have been active until the age of 70 years. Additionally, since he was working in the private sector, he would have continued to work even after the statutory age of 60 years. The appellant thus rely on the cases of *Cornelia Elaine Wamba v Shreeji Enterprises Ltd & Others* [2012] eKLR and *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* [2014] eKLR and submit that a multiplier of 18 years is reasonable.

10. Therefore the appellants pray for a sum of Kshs 4,320,000/- for loss of dependency being made up as follows:-

    30,000/- x 12 x 18 x 2/3 = 4,320,000/-

11. The appellants contend that even if the court adopts the minimum wage it would work out as Kshs 1,450,224/- which is higher than what the trial court awarded.

12. The appellants argue that they do not disagree that the trial court had the discretion to make a global award. They submit that it was improper in the circumstances as the award did not commensurate the stature of the deceased. The appellants rely on the cases of *Chunibahi J. Patel & Another v P. F. Hays & Others* [1957] EA 748 and Ndeti & Another (Suing on their own behalf and as administrators of *the Estate of Gerald Ndeti Mutua(Deceased) v Mwangangi & Another* (Civil Appeal E282 of 2021) [2022] KEHC 15732 (KLR) and submit that whatever approach a court takes, it should result to a fair estimate of the loss. It was submitted that the trial magistrate in adopting the global sum, ought to have taken into consideration the deceased's age, earning power and the dependants.

13. The appellant argue that the cases the trial magistrate were not comparable. In the case of *Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representatives of the Estate of the late David Githae Kiririo Taiti* where the deceased was aged 68 years and left behind a wife and adult children. the appellants argue that the decision is not comparable as the working life of a 68 year old is not comparable to that of a 48 year old and the dependency of a wife and adult children cannot be the same as a wife and minor children. Similarly, the case of *Hashi Hauliers & Another v Joel Songok & Another* (*supra*) where the deceased was 38 years, a farmer and was survived by his mother and 3 brothers. The appellant argue that the working life and dependants make this decision incomparable. The dependency of a mother and brothers is not comparable to that of a wife and children. As such, the appellants contend that given the cited cases are incomparable, it follows that the trial court's award is in breach of the principle that comparable cases should so far as possible attract comparable awards.

14. The appellants rely on the cases of Ndeti & Another (Suing on their own behalf and as administrators of *the Estate of Gerald Ndeti Mutua (Deceased) v Mwangangi & Another* (*supra*) and *M. N. M. & Another v Solomon Karanja* [2015] eKLR and submit that the global sum of Kshs 1,200,000/- was inordinately low in the circumstances.

The Respondents' Submissions

15. The respondents submit that the judgment of the trial magistrate was regular and well within the law. The respondents submit that the appellants claimed that the deceased at the time of his demise was aged 48 years and that he was a drier working on a contract basis with Lake Turkana Wind Power

earning approximately Kshs 30,000/- per month. the respondents contend that the appellants did not attach any of the deceased's bank statements or accounts to prove that the deceased earned the said amount, instead they only produced a letter of offer to employ the deceased which is not conclusive proof of earnings.

16. Furthermore, the respondents submit that there was no confirmation as to whether the offer was accepted. The respondents further agree with the trial court that the document did not show the alleged payment of Kshs 30,000/-. The respondents argue that the appellants in their pleadings indicated that the deceased used to earn approximately Kshs 30,000/- meaning by use of the word approximately, the appellants just picked the figure out of the blues. The respondents argue that if the deceased was actually employed and had a contract, then the salary of the deceased would have been certain and pleaded with certainty and should have been accompanied by the deceased's bank statements or statement of accounts.

17. The respondents contend that the learned magistrate was lenient and gracious enough to have adopted a global sum rather than to adopt a multiplier approach in awarding loss of dependency. The respondents relies on the case of *Tobias Odoyo Oburu v Jane Kerubo Miruka & Another (Suing as the legal representatives of John Onywoki Sanganyi (Deceased) & Another* [2018] eKLR and urges the court to adopt a multiplicand of Kshs 5,218/- for a general labourer as the minimum wage set out in Regulation of Wages (General) (Amendment) Order 2013. The respondents further urge the court to adopt a multiplier of 12 years as stipulated in the case of *Caroline Leah Awino (also as Aduogo Caroline) v Francis Kipsang Ngetich (Suing as personal administrators ad litem and/or personal representative of the Estate of Mary Jepkurgat (Deceased)* [2019] eKLR. Thus the award on loss of dependency should work out as follows:-

    5218/- x 12 x 12 x 2/3 = 500,929/-.

18. The respondents rely on Section 107 of the *Evidence Act* and submit that the appellants were unable to discharge the burden of proof placed upon them.

Issue for determination

19. The main issue for determination is whether the trial court erred in adopting the global sum approach instead of the multiplier approach.

The Law

20. 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."

21. 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.

22. 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."

23. 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 trial court erred in adopting the global sum approach instead of the multiplier approach.

24. 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 won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant 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."

25. 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."

26. 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.

27. In the instant case, the appellants fault the trial court for adopting a global sum instead of applying the multiplicand/multiplier approach. Further, the appellants contend that the sum under the global award is inordinately low.

28. In *Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi (Suing as administrator and personal representative of Antony Mwiti Gakungu (Deceased)* [2020] eKLR where the court was dealing with a similar issue stated:-

> In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

29. In the same breadth, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the Estate of Mercy Nzula Maina (Deceased)* [2016] eKLR held as follows:-

> It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.

30. From the foregoing, it is evident that there are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income of the deceased, whereas the other school advocates for a global award.

31. I have perused the trial court's judgment and noted that the learned magistrate exercised his discretion and relying on the case of *Francis Odhimabo Nyinja & 2 Others v Josephine Malala Owinyi (Suing as the legal administrator of the Estate of Kevin Osore Rapando (Deceased)* [2020] eKLR decided to adopt a global award approach. The trial court explained that the appellants produced the deceased's death certificate to show that he was a driver. Furthermore, it was the appellants' evidence that the deceased was earning Kshs 30,000/- per month however the document she produced from Lake Turkana Wind Power was an offer to employ the deceased permanently but there was no confirmation as to whether the offer was accepted. The trial court further indicated that the letter did not show payment of Kshs 30,000/-. Considering that there was no cogent evidence to show the deceased's earnings, and the circumstances of the case, the trial magistrate considered the view that a global award approach was more reasonable instead of a multiplier approach. The trial magistrate was guided by the cases of Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of *the Estate of the late David Githae Kiririo Taiti* [2022] eKLR and *Hashi Hauliers & Another v Joel Songok & Another* (2021) eKLR and took into account the age of the deceased, the rate of inflation and the age of the authorities and arrived at the figure of Kshs 1,200,000/-.

32. Upon perusal of the trial record, in particular the letter dated 15th December 2014 and noted that the same indicates that the deceased was employed by Lake Turkana Wind Power on a contractual basis as

a driver. The said letter is an offer for permanent employment which was set to begin in January 2015. On further perusal of the letter it is evident that the same does not indicate any amount such as Kshs 30,000/- per month as salary of deceased. Furthermore, since this is a letter of offer of employment, there was no proof that the deceased accepted the offer. All we could deduce from the said letter was that the deceased was a driver. However, the deceased's earnings cannot be ascertained from the said letter. Therefore it is my considered view that the trial court did not err by adopting a global award in the absence of proof of the deceased's earnings. Furthermore, the court has to consider other factors that the trial court ought to have taken into account in settling for a global award such as previous trends, the general health of the deceased before he met his death, his age as well as the number of dependent children and their ages. On perusal of the court record, the deceased was in good health and 48 years old at the time of his death. He left behind two children who are 19 years and 14 years. The respondent witness stated that at the time of hearing of the case, one child was in Form One whereas the other was undergoing university studies. Thus the length of dependency would not have been for a long period. In the premises, the age of the deceased and the years he would have worked were considered in making the award. It is my considered view that the sum of Kshs 1,200,000/- awarded by the trial court magistrate for loss of dependency was not too low in the circumstances of the case to warrant interference by this court.

33. I have considered the judgement of the magistrate and I am of the considered view that the court below did not err in adopting a global sum which in my view was reasonable in the circumstances. The court considered all the necessary factors in making the award. As such I find no basis of interfering with the award.

34. This appeal is dismissed for lack of merit.

35. I have considered the circumstances of this appeal and the fact that the discretion to award costs is vested in the court. I therefore order that each party meet their own costs of this appeal.

36. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October 2023