



**Said & another v Kariuki & another (Suing in their Own Behalf and as Administrators of the Estate of Nancy Wangeci Kariuki) (Civil Appeal E003 of 2021) [2023] KEHC 24217 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E003 OF 2021  
FN MUCHEMI, J  
OCTOBER 26, 2023**

**BETWEEN**

**FATUMA SAID ..... 1<sup>ST</sup> APPELLANT**

**ABDULAHI MOHAMMED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RUTH WANJIRA KARIUKI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KARIUKI ..... 2<sup>ND</sup> RESPONDENT**

**SUING IN THEIR OWN BEHALF AND AS ADMINISTRATORS OF THE  
ESTATE OF NANCY WANGECI KARIUKI**

*(Being an Appeal from the Judgment and Decree of Hon. A. K. Mwicigi  
(SPM) delivered on 4th December 2020 in Baricho SPMCC No. 114 of 2018)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Baricho Senior Principal Magistrate in SPMCC No. 114 of 2018 arising from a road traffic accident where as a consent was recorded on liability and 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. 7,914,390/-
  - d. Special damages Kshs. 84,390/-



2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 3 grounds summarized as one ground that the learned trial magistrate erred in law in awarding damages for loss of dependency yet there was no documentary evidence to support the multiplicand that was used.
3. Parties put in written submissions to dispose of the appeal.

### **Appellants' Submissions**

4. The appellants submit that the deceased was aged 23 years at the time of her death and that she was a business woman selling new and second hand clothes. The appellants submit that the trial court failed to take into consideration the vagaries of life when he settled for the age of 55 years as the age the deceased would have stopped working. The appellants rely on the case of *Charles Masoso Barasa & Another vs Chepkoech Rotich & Another* [2014] eKLR and propose that the court adopt a multiplier of 15 years.
5. The appellants submit that the trial magistrate relied on bank statements held in the name of the deceased for the period of 1<sup>st</sup> January 2017 to 11<sup>th</sup> January 2018 to arrive at the multiplicand of Kshs. 60,000/- as the deceased's monthly income. The appellants submit that the said bank statements do not support their contention that the deceased used to earn a daily income of Kshs. 3,000/- from her business as the deposits were irregular. The appellants contend that for two months from 6<sup>th</sup> July 2017 to 23<sup>rd</sup> August 2017 the deceased made deposits totalling to Kshs. 7,900/- and no further deposits were made by the deceased into the account as from 23<sup>rd</sup> August 2017 till her demise. The appellants argue that it translates to deposits of Kshs. 3,950/- per month. As such, the appellants argue that by the trial court concluding that the deceased earned Kshs. 60,000/- per month amounted to mere assumptions which are not backed by facts.
6. The appellants thus submits that in the absence of evidence of the deceased's occupation and income prior to her death, the court ought to have adopted minimum wage in calculating the loss of dependency. The appellants rely on the case of *Mildred Mumbi Kanake & Another (Suing as the legal representatives & administrators of the Estate of Peter Mwangi Waciuri (Deceased) vs Robert Kariuki Nyaga* [2019] eKLR and submits that the high court upheld the decision of the trial court in adopting the minimum wage as the multiplicand, despite the plaintiff producing bank statements of the deceased proof of income. The appellants urge this court to adopt the statutory minimum wage prevailing at the time of the deceased's death as the multiplicand. The minimum statutory wage in 2017 for a general labourer was Kshs. 6,896.15/- as per the Regulation of Wages (General) (Amendment) Order 2017. Thus the award ought to work out as follows:-

$$6,896.15/- \times 12 \times 15 \times 1/3 = 413,796/-.$$

### **The Respondents' Submissions**

7. The respondents submit the deceased was 23 years old when she died and she had just completed her secondary school education. The respondents submit that the deceased was selling second hand clothes and used to earn Kshs. 3,000/- per day. In support of that, the respondents produced bank statements of the deceased. The respondents further stated that the deceased was also attending a beauty and salonist course at the time of her death.
8. The respondents further submit that before the trial court, they proposed a multiplier of 32 years and relied on the cases of *Lucy Kanini Irungu vs Chege Wabome & 2 Others* [2017] eKLR and *West Kenya Sugar Company Limited vs Brenda Akinyi Odhiambo (Suing as the legal representative of the Estate of Paul Odhiambo Okoth (Deceased))* [2019] eKLR where the High Court adopted a multiplier of 32



years in relation to a 23 year old. Conversely the appellants had submitted for 15 years and relied on the cases of *David Waiya Kariuki vs Peter Syttle* (2004) eKLR where a multiplier of 15 years was applied in respect of a person aged 25 years and *Charles Masoso Barasa & Another vs Chepkoech Rotich & Another* (2014) eKLR where a multiplier of 15 years was adopted in respect of a person aged 28 years.

9. The respondents submit that the trial court adopted a multiplier of 32 years based on the agreement that the deceased could have worked beyond 60 years and taking into account the vicissitudes of life. As such, the respondents argue that the contentions made by the appellants are baseless as the trial magistrate took into consideration the vicissitudes of life. Further, both parties in their submissions agreed that the deceased would have worked past the age of 60 years and thus the court could have applied a multiplier of at least 37 years. The respondents further argue that the deceased was in good health and the nature of her work as a business lady was not particularly dangerous or risky to reduce her life expectancy. Moreover, the appellants did not produce any evidence to support the contentions that the deceased's life expectancy would have been diminished. The respondents thus rely on the decisions in *Cornella Elaine Wamba vs Shreeji Enterprises Ltd & Others* [2012] eKLR and *Board of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku Muriithi & Another* [2014] eKLR and submit that the trial court correctly exercised its discretion and applied the correct principles. Furthermore, the appellants submit that the appellants have not demonstrated which wrong principle the trial court applied or how the trial court exercised its discretion capriciously. To support their contentions, the respondents rely on the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR.
10. The respondents submit that the deceased was a business lady selling second hand clothes and bank statements were produced in support. During cross examination, the respondents stated that the deceased was not banking her entire earnings as she was taking care of her parents. The respondents further state that the statement from Fortune Sacco Society shows that the deceased had a savings account and that she was making deposits of Kshs. 200 to Kshs. 1800/-. The respondents rely on the case of *Jacob Ayiga Maruja & Francis Karani vs Simeon Obayo* [2005] eKLR and submit that they proved that the deceased was a business lady and further the appellants did not controvert the evidence adduced by them.
11. The respondents further submit that the appellants faulted the trial court for relying on assumptions in arriving at the deceased's earnings. They further alleged that from the deceased's bank statement, she could not have been earning Kshs. 3,000/- per day. The respondents argue that PW1 on cross examination gave a reasonable explanation as to the amount deposited in the deceased account. The witness stated that the deceased was not depositing the entire daily income since she used some of it in maintaining her parents. The respondents further argue that it is not rational that the deceased would deposit her entire earnings in her account as she would need to boost her business, cater for her expenses and take care of her dependants. Further, the respondents argue that the recommended saving rate is 10% – 15% of the income for the deceased's age group. As such, the respondents contend that it is not implausible that the deceased was earning Kshs. 3,000/- per day.
12. The respondents submit that they tendered uncontroverted evidence that the deceased was a business lady and thus there is no basis to revert to minimum wage of a general labourer as alleged by the appellants. In support of these contentions, the respondents rely on the cases of *Mary Njeri Murigi vs Peter Macharia & Another* [2016] eKLR and *John Njoroge Mubia vs Rose Karimi Njoroge (Suing as the legal representative of the estate of Loise Nyambura Njoroge (Deceased) & 2 Others* [2022] eKLR. The respondents maintain that the deceased's occupation is not in doubt as the evidence was not controverted and the deceased's death certificate indicates that the deceased was a business woman.



## Issues for Determination

13. The main issues for determination are:-
  - a. Whether the trial court erred in adopting a multiplicand of Kshs. 60,000/- for assessment of loss of dependency damages.
  - b. Whether the court erred in adopting a multiplier of 32 years.

## The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs 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.”

15. It was also held in *Mwangi vs 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.

16. Dealing with the same point, the Court of Appeal in *Kiruga vs 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.”

17. 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 a Multiplicand of Kshs.60,000/-.

18. The Court of Appeal in *Catholic Diocese of Kisumu vs 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.”

19. Similarly in *[Sheikh Mustaq Hassan vs 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.”

20. The Court of Appeal in *[Chunibhai J. Patel & Another vs 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. The appellants argue that the trial court erred by using a multiplicand of Kshs. 60,000/- as the deceased's monthly income yet the same was not proved. The appellants argue that from the deceased's bank statements, the deceased deposited Kshs. 200 – Kshs. 300 per day. Further for two months, from 6<sup>th</sup> July 2017 to 23<sup>rd</sup> August 2017 the deceased deposited only Kshs. 7,900/- and no further deposits were made in her account till her demise. The appellants then argued that the deceased only deposited Kshs.3,950/= per month being the average from said deposits. The respondents led evidence that the deceased was a business lady earning Kshs.3,000 per day. The respondents' witness testified that the discrepancy in the deposits made in the deceased's account was because she was not depositing the entire amount since she used some of the income in helping her parents.
22. The trial court in its judgment took into consideration that the respondents' testimony was credible and was not shaken on cross examination. Further the trial court considered the fact that the deceased had money in the bank on a regular basis was an indicator that she was engaged in business.
23. I have perused the bank statement produced by the respondents. It is noted that deposits were made in her account but there is no evidence of the income of Kshs.3,000 per day. The bank statements do not show regular deposits and furthermore the deposits made range from Kshs.200- Kshs.700/- with the highest amount made on 24/7/2017 being Kshs.1,800/- as argued by the appellants, from 6<sup>th</sup> July 2017 to 23<sup>rd</sup> August 2017, a period of two months, the deceased deposited only Kshs.7,900/- which is far below the income given by the respondent. In my view, the deposits shown in the bank statements were irregular making it difficult to ascertain the amount the deceased earned daily or on monthly basis.



24. Therefore in the absence of evidence of the deceased's earnings, the trial court ought to have applied the minimum wage. This principle was stipulated in the case of *Petronila Muli vs Richard Muindi Savi & Catherine Mwendu Mwindu* [2021] eKLR where the court stated:-

On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income.

25. The deceased died on 11/11/2017 and thus the applicable guidelines are as per the *Regulation of Wages (General) (Amendment) Order, 2017*. The respondents led evidence that the deceased used to sell second hand clothes. Therefore her category can be classified as that of a general labourer. From the burial permit for the deceased resided at Thigirichi in Kirinyaga which falls under the column for "all other areas". The minimum statutory wage for a general labourer was Kshs. 6,896.15/- as per the Regulation of Wages (General) (Amendment) Order, 2017. 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. 6,896.15/-.
26. In my considered view, the magistrate in the court below erred in using the multiplicand of Kshs.60,000/- which was not supported by any cogent evidence. The court ought to have applied the minimum wage applicable in her category with multiplicand of Kshs.6,896/-. The damages for loss of dependency are hereby assessed as follows.

$6,896 \times 12 \times 32 \times 1/3 = 882,707.20$  which amount I hereby award.

#### **Whether the Court Erred in Adopting A Multiplier of 32 Years.**

27. The appellants contend that the multiplier of 32 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, It was proposed that the court adopts a multiplier of 15 years. The respondents argue that the deceased was 23 years at the time of her demise and she was in good health that both parties had agreed before the court that the deceased would have worked until 60 years of age and therefore the multiplier of 32 years was reasonable.
28. In regard to the multiplier, it is on record that the appellant and the respondent agreed in the submissions that the deceased was a young person and would have lived an active life up to the age of 55 years. In Kenya, people in the public service retire at the age of sixty (60) years. If the deceased was to live up to retirement age, it is not unlikely that she would have carried on with her business or whatever income earning activity up to 60 or more years. In adopting the multiplier of 55 years, the court did not err and as such, I find no basis of interfering with the multiplier adopted by the court below.
29. The award for loss of dependency of Kshs.7,914,390/- is hereby set aside and substituted with Kshs.882,707.20ct. The other items of damages remain undisturbed. The total damages payable to the respondents amount to Ksh1,117,097.20ct subject to the agreed ratio of 85:15.
30. Each party shall meet its own costs of this appeal.
31. 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

