



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rentco Africa Limited v Macharia (Suing as the Legal Representative  
of the Estate of Samuel Macharia Murabai Deceased) (Civil Appeal  
E006 of 2022) [2023] KEHC 24218 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24218 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E006 OF 2022  
FN MUCHEMI, J  
OCTOBER 25, 2023**

**BETWEEN**

**RENTCO AFRICA LIMITED ..... APPELLANT**

**AND**

**STELLA WAMBUI MACHARIA (SUING AS THE LEGAL  
REPRESENTATIVE OF THE ESTATE OF SAMUEL MACHARIA MURABAI  
DECEASED) ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. A. Lorot (CM)  
delivered on 28th January 2022 in Wang'uru CMCC No. E018 of 2020)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Wang'uru Chief Magistrate in CMCC No. E018 of 2020 in a suit based on a claim arising from a road traffic accident. By consent of the parties liability was apportioned at the ratio of 15:85 with the appellant bearing 85%. The respondent was awarded damages as for pain and suffering Kshs.30,000/-, loss of expectation of live Kshs.100,000, loss of dependency Kshs.3,480,000/- and special damages of Kshs.30,200/-. The total award was Kshs. 3,640,200/- subject to the agreed ration.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds condensed to one that the learned trial magistrate erred in law in awarding damages for loss of dependency at Kshs.3,480,00/- which amount is manifestly excessive.
3. Parties put in written submissions to dispose of the appeal.



## **Appellant's Submissions**

4. The appellant submits that the trial court adopted a multiplier of 29 years which was on the higher side. Relying on the case of *Edner Gesare Ogega vs Aiko Kebiba* (Suing as the father & legal representative of the Estate of Alice Bochere Aiko (Deceased) [2015] eKLR the appellant urges the court to use a multiplier of 12 years which takes into consideration the vicissitudes and uncertainties of life that would have probably curtailed the deceased's life before he reached the age of 60 years.
5. The appellant submits that the trial court adopted a multiplicand of Kshs. 30,000/- yet the respondent did not produce any documentary proof such as a payslips to show the deceased's earnings. The appellant argues that the trial magistrate ought to have applied the minimum wage for an unskilled employee under the Regulation of Wages (Agricultural Industry) (amendment) Order 2015 which is provided at a sum of Kshs. 5,436/-.
6. The appellant relies on the cases of *John Wamae & 2 Others vs Jane Kituku Nziva & Another* [2017] eKLR and *Mwanzia vs Ngalali Mutua & Kenya Bus Ltd* (no citation given) and urges this court to adopt a global sum as the respondent did not prove the profession of the deceased nor did she produce any records or accounts to prove his earnings. The appellant urges the court to be guided by the case of *John Wamae & 2 others vs Jane Kituku Nziva & Another* [2017] eKLR and award a sum of Kshs. 400,000/-. Accordingly, the appellant urges the court to interfere with the trial court award as the trial magistrate failed to properly consider the evidence tendered before him thereby arriving at an erroneous high estimate.

## **The Respondent's Submissions**

7. The respondent relies on the cases of *Bwana Mohammed Bwana vs Silvano Buko Bonaya & 2 Others* [2015] eKLR, *Abdi Nassir Nuh vs Abdureheman Hassan Halkano & 2 Others* [2010] eKLR, *Floris Pierro & Another vs Giancarlo Falasconi* (Suing as the administrator of the Estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR, *Municipal Council Kitale vs Fedha* (1983) eKLR and *Chege Suleiman* [1988] eKLR and submits that the omission by the appellant to attach a certified copy of decree and the respondent's submissions in the record of appeal is fatal and thus the appeal is incompetent and ought to be struck out.
8. The respondent further relies on the case of *Jacob Ayiga Maruja & Another vs Simeon Obayo* [2005] eKLR and submits that it is not a requirement that one has to produce documentary evidence to prove income. The respondent submits that the deceased died at the age of 31 years and that he was a business man earning Kshs. 30,000/- per month and produced the death certificate which indicated that the deceased was a business man. The respondent further submits that the deceased was in good health and would have lived till the age of 60 years as there is no evidence of vicissitudes which may have shortened his life. The respondent relies on the decisions of *Innocent Keti Makaya vs Peter Kipkore Cheserek & Another* [2015] eKLR and *Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another* (suing as the administrators & personal representatives of the Estate of Josephine Weyanga Tsuma (Deceased) [2019] eKLR to support her submissions.
9. The respondent further relies on the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR and submits that there is no evidence that the trial court acted on wrong principles of law, misapprehended the facts or made a wholly erroneous estimate of the damage she suffered. The respondent submits that she further relies on her submissions in the trial court on quantum in support of their proposal for the award of Kshs. 3,480,000/-for loss of dependency.



## Issues for determination

10. The main issues for determination are:-
  - a. Whether the appeal is defective for failure to attach a decree;
  - b. Whether the trial court erred in awarding an inordinately high award for loss of dependency.

## The Law

11. 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.”

12. 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.

13. 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.”

14. 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 Appeal is fatally defective

15. The respondent submits that the appeal is fatally defective for failure by the appellant to attach a decree and a copy of her submissions in the Record of Appeal which renders the appeal incurably defective. I have perused the record of appeal and noted that the appellant attached a certified copy of the judgment.

In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of the overriding objectives of the *Civil*



Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.

16. Further in the case of Emmanuel Ngade Nyoka vs Kitheka Mutisya Ngata [2017] eKLR the court of Appeal held:-

According to the Judge, the record of appeal before him had a certified copy of judgment of the trial court. Consequently, he said that the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.

17. It is evident that the lower court file is only supplement by the record of appeal. It contains the decree. In my view, the failure to attach the decree is a technicality which ought not to invalidate the appeal. The record shows that the appeal was duly admitted for hearing as required by Order 42 of the Civil Procedure Rules. It is my considered view that no prejudice will be occasioned to the respondent by the failure to attach the decree because he already have a copy of the proceedings. In the case of South Nyanza Sugar Co. Ltd vs Daniel Obara Nyandoro (2010) eKLR the court stated:-

18. Therefore it is my considered view that the appeal herein is not fatally defective for failure to attach a decree and copy of the respondent's submissions.

**Whether the trial court erred in awarding an inordinately high award for loss of dependency.**

19. 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 own for that awarded by the court below simply because it would awarded 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.”

20. 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.”

21. 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.

22. The record shows that the learned magistrate in his judgement stated that he only received submissions from the respondent. It is noted that there are submissions in the court file by the appellant and bearing a court stamp of 17<sup>th</sup> January 2022. The honourable magistrate did not have the benefit of the appellant's submissions prior to rendering his decision. this explains why the learned magistrate was only guided by the respondent's submissions Section 78 (1) (a) and (2) of the *Civil Procedure Act* which provides:-

Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

23. Equally Order 42 Rule 32 of the Civil Procedure Rules provides that:-

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

24. This court will, therefore proceed to consider the submissions of the parties and the entire evidence adduced in the lower court and as well as the submissions in this appeal.

25. The bone of contention herein is the multiplier and multiplicand used by the trial court. The appellant argues that although the respondent stated that the deceased was a businessman and used to earn Kshs. 30,000/- per month, she did not provide proof of the deceased's earnings. The appellant argues that the deceased was a businessman earning Kshs. 30,000/- per month. She produced the death certificate which indicated that the deceased was a businessman before his death. From the evidence on record the respondent did not produce any proof of the income of the deceased. Further, it is my view that the learned magistrate erred in using Kshs. 30,000/- as the multiplicand without proof of the deceased's earnings.

26. It is trite law that where there is no evidence of income, the court is free to resort to minimum wage as was stipulated in the case of *Petronila Muli vs Richard Muindi Sayi & Catherine Mwendu Mwindu* (2021) eKLR. The deceased died on 3<sup>rd</sup> April 2020. Therefore the order applicable is the Regulation of Wages (General) (Amendment) Order 2018. The deceased was a resident of Kimara sub location in Mwea East Sub County as stipulated in the Chief's letter dated 15/7/2020 and therefore column 4, "other areas" of the Regulation of Wages (General) (amendment) Order 2018 is applicable. At the time of his death, the deceased was riding his motor cycle. He therefore falls in therefore it is my category of



boda riders that is comparable to the category of mechanist (motor vehicle repairs) and their minimum wage as per the schedule is Kshs. 13, 431.30/- for workers living in other areas. Thus, this court upon re-evaluation of the evidence tendered finds that the minimum wage applicable in respect to the deceased was Kshs. 13,431.30/-.

27. On the issue of multiplier, the appellant argues that the multiplier of 29 years was on the higher side and argued that the trial magistrate failed to take into account life's uncanning and unpredictable circumstances that would lower the chances of survival of the deceased. Relying on the case of Edner Gesare Ogega vs Aiko Kebiba (Suing as the father & legal representative of the Estate of Alice Bochere Aiko (Deceased) [2015] eKLR the appellant urges the court to adopt a multiplier of 12 years. I have perused the court record and noted that the deceased aged 31 at the time of death. The court in adopting a multiplier of 29 years took into consideration that the deceased would have worked until the age of 60 years old. It is my considered view that the multiplier of 29 years is reasonable in the circumstances. The deceased was young and healthy and his life was cut short due to the occurrence of accident. The proposal by the appellant for 12 years as the multiplier considerably low and not practical based on the young age and good health of deceased.
28. I proceed to assess the loss of dependency as follows:-  
$$13,431.30/- \times 29 \times 12 \times 1/3 = 1,558,030.80/-$$
29. The award of Kshs.3,480,00/- for loss of dependency of the court below is hereby substituted with Kshs.1,558,030.80/-. The other items of the damages remain intact. The total award is Kshs.1,718,230/- less 15 percent of 257,734.50/-. The total payable by the appellant to the respondent is Kshs.1,460,496/-.
30. The appeal is partly successful.
31. The appellant shall meet the costs of this appeal.
32. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 25<sup>th</sup> day of October , 2023

