



REPUBLIC OF KENYA



**Githua & 2 others v Maina & another (Suing as legal administrators  
of the Estate of Beth Waithiegeni Maina (Deceased)) (Civil Appeal  
E060 of 2022) [2023] KEHC 24033 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24033 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E060 OF 2022  
FN MUCHEMI, J  
OCTOBER 24, 2023**

**BETWEEN**

**NELSON NDERITU GITHUA ..... 1<sup>ST</sup> APPELLANT  
EQUITY BANK LIMITED ..... 2<sup>ND</sup> APPELLANT  
REAL INSURANCE CO LTD ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ANTHONY MURIITHI MAINA ..... 1<sup>ST</sup> RESPONDENT  
ROSEMARY WANJIKU MAINA ..... 2<sup>ND</sup> RESPONDENT  
SUING AS LEGAL ADMINISTRATORS OF THE ESTATE OF BETH  
WAITHIEGENI MAINA (DECEASED)**

*(Being an Appeal from the Judgment and Decree of Hon. G. Wathira  
(RM) delivered on 8th June 2022 in Kerugoya CMCC No. E144 of 2021)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Kerugoya Resident Magistrate in CMCC No E144 of 2021 arising from a road traffic accident whereby judgment was delivered in favour of the respondents as against the appellants in the following terms:-
  - a. Liability 100%
  - b. Pain and suffering Kes 20,000/-
  - c. Loss of expectation of life Kes 100,000/-



- d. Loss of dependency Kes 2,376,464/-
  - e. Special damages Kes 336,750/-
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 in awarding damages for loss of dependency at Kes 2,376,464/- which was manifestly excessive;
  - b. The learned trial magistrate erred in law in awarding special damages of Kes 336,750/- which was not strictly proven.
3. Parties put in written submissions to dispose of the appeal.

### **Appellants' Submissions**

4. The appellants submit that the deceased died at the age of 36 years as per the death certificate and was survived by her mother and her two children. The deceased was an employee of the County Assembly of Nyeri earning a net pay of Kes 14,852/- per month as per the payslip produced. The appellants submit that although the deceased was alleged to have been running her own business which earned approximately Kes 60,000/-, the respondents did not produce any proof of earnings or even operations for the court to infer from. The appellants further argue that on cross examination, the respondent testified and confirmed that there were no books of accounts, licence or receipts produced to corroborate that the deceased ran the business as alleged. As such, the appellants argue that the same have not been proved and thus urge the court to adopt a dependency ratio of 2/3 as the deceased would have provided for her children.
5. The appellants rely on the case of *Sukari Industries Limited v Ismael Ombaka Omar & another* (2017) eKLR and submit that owing to the vagaries of life, it is no guarantee that the deceased would have lived to a ripe old age. Thus the appellants urge the court to adopt a multiplicand of 20 years. Thus it would work out as follows:-

$$14,852/- \times 20 \times 12 \times 2/3 = 2,376,320/-$$

6. The appellants further rely on the cases of *Beatrice Wangui Thairu v Hon. Ezekiel Barnigentuny & another*, Nairobi HCCC No 1638 of 1988 and *Anne Wanjiku Ngugi & another v Attorney General* (2005) eKLR and urges the court to consider a discount of 10% payable as the award is being paid in lump sum.
7. The appellants further submit that special damages must be strictly pleaded and proved. The appellants argue that the respondents sought Kes 401,750/- as special damages but the trial court proceeded to award Kes 336,750/-. The appellants argue that the said amount is excessive since there are no receipts produced to corroborate that indeed the respondents spent the said amount. Thus the appellants submit that the court ought to award Kes 102,050/- as receipts were produced in respect to that amount whereas the rest were invoices raised without any proof that the said payments were made.

### **The Respondents' Submissions**

8. The respondents submit that the appellants are buying time in order to balance their books as the trial court agreed with the award proposed by the appellants and it is alarming that the appellants are now questioning the award given which was based on their submissions. The respondents further submits that the award of loss of dependency, the appellants proposed a sum of Kes 2,376,320/- whereas the



trial court awarded Kes 2,376,464/- which is too nominal a variance to spend endless months and resources in mounting an appeal.

9. The respondents rely on the case of *George Gichanga Karanja & another v Mwangi Nderitu Ngatia* [2018] eKLR and submit that it is not the duty of the payee to ensure that there are revenue stamps on a receipt but that of the recipient of the money. As such, the respondents urge the court not to disturb the award on special damages.

### **Issue for determination**

10. The main issue for determination is whether the appeal has merit.

### **The Law**

11. 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.”

12. 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.

13. 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.”

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

15. 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.”

16. Similarly in *Sbeikh 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.”

17. 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.

18. In the instant case, the appellants are faulting the trial court for adopting a multiplier of 20 years. The appellants have no objection to the deceased’s salary as the multiplicand or the dependency ratio. On perusal of the appellant’s submissions I have noted that although they have appealed on the award of loss of dependency, they themselves have adopted a multiplier of 20 years and used the deceased’s salary and the final award reads Kes 2,376,320/-. Notably, the trial court awarded a sum of Kes 2,376,464/-. In essence the appellants are disputing the award by Kes 144. I have perused the court record and noted that the deceased’s net salary was Kes 14,852.90/- as per the pay slip attached and that is what the court used as the said multiplicand. The appellants on the other hand have used Kes 14,852/- as the multiplicand which explains the difference of Kes 144/-. As such, it is my considered view that the deceased was 36 years old and thus a multiplier of 20 years was reasonable. A fact that has been admitted by the appellants themselves. As such the award of Kes 2,376,464/- is reasonable and not inordinately high as argued by the appellant. Regrettably, the appellants have wasted precious judicial time appealing on an issue that they themselves have agreed on. I would call it a frivolous ground of appeal.

### **Whether the special damages awarded were specifically pleaded and proved.**

19. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of *Hahn v Singh* Civil Appeal No 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may



not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

20. The appellants argue that the respondents pleaded Kes 401,750/- as special damages in their plaint but they only proved Kes 102,050/-. The appellants further argue that pursuant to section 19 of the [Stamp Duty Act](#), the receipts ought to be stamped and therefore the trial court erred in awarding Kes 336,750/- as the said receipts did not have revenue stamps.
21. I have perused the court record and noted that the trial court arrived at the award of Kes 336,750/- from Kes 336,200/- for funeral expenses and paid invoice of Kes 550 for obtaining a copy of motor vehicle records. The court record shows that the funeral expenses total to Kes 336,200/-.
22. On the issue of the revenue stamp, the cases of [Benjamin Muela Kimono v Daniel Kipkirong Tarus & another](#) [2011] eKLR and [Joseph Kimani & another v James Kangara Kabanya](#) [2017] eKLR, both courts held that it is the duty of the receiver of the money who has the duty to affix the revenue stamps, not the payee who cannot be penalized for omissions of the receiver.
23. Moreover the Court of Appeal in [Paul N. Njoroge v Abdul Sabuni Sabonyo](#) [2015] eKLR stated that before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty.
24. Thus it is my considered view that the trial court was correct in finding that the respondents proved special damages to the sum of Kes 336,750/-.

### **Conclusion**

25. In view of the foregoing, I find that the appeal lacks merit and it is hereby dismissed with costs to the respondents.
26. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 24<sup>th</sup> day of October , 2023

