



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugambi (suing as the Legal Representative of Mary Ciakuthi Joel (Deceased) v Micheni  
(Civil Appeal 25 of 2019) [2022] KEHC 538 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 538 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CIVIL APPEAL 25 OF 2019  
LW GITARI, J  
MARCH 24, 2022**

**BETWEEN**

**PHARES MUGAMBI GILBERT (SUING AS THE LEGAL REPRESENTATIVE OF  
MARY CIAKUTHI JOEL (DECEASED)) ..... APPELLANT**

**AND**

**JOSEPH MICHENI ..... RESPONDENT**

*(This is an appeal from the judgment that was delivered in Chuka P.M.C.C. No. 54 of 2015)*

**JUDGMENT**

1. This is an appeal from the judgment that was delivered in Chuka P.M.C.C. No. 54 of 2015. The Appellant herein had sued the Respondent in the lower court seeking general and special damages following a road traffic accident that resulted in the death of her mother, Mary Ciakuthi Joel (deceased).
2. The claim was brought under the *Fatal Accidents Act* (Cap 32 of the Laws of Kenya) and the *Law Reform Act* (Cap 26 of the Laws of Kenya). The lower court awarded damages as follows:
  - a. General damages for pain and suffering -Kshs. 10,000/=
  - b. Loss of expectation of life - Kshs. 100,000/=
  - c. Loss of dependency - Nil
  - d. Special damages - Kshs. 79,500/=TOTAL - Kshs. 189,500/=
- e. Plus interest and costs.
3. The Appellant was dissatisfied with the award and filed this appeal on the grounds, inter alia, that the learned magistrate erred in law and fact in:



- a. Failing to award loss of dependency as provided under the *Fatal Accidents Act* despite the submissions by the Appellant.
  - b. Making mere and unproven assumption that all the children of the deceased were grown and were not being supported by the deceased.
  - c. Failing to adopt a multiplier approach and award damages for loss of dependency in spite of submissions by the Appellant.
  - d. Failing to use a minimum income at the time of the accident and making a mere and unproven assumption that the deceased was not earning some living.
  - e. Awarding the Appellant Kshs. 10,000/= for pain and suffering with no reasons thereof.
  - f. Holding that the deceased was not earning Kshs. 30,000/= when the same was not challenged.
  - g. Failing to consider that the deceased was taking care of her husband who was paralyzed as was adduced by the Appellant's evidence.
  - h. Holding that the deceased was a farmer whereas the deceased was a prominent cereal dealer and a farmer.
  - i. Failing to take into consideration the evidence adduced by the plaintiff, and which was not challenged, in her judgment.
  - j. Failing to apply the legal principles and thus arriving at an untenable decision.
  - k. Issuing a judgment that was full of errors and against the weight of evidence and a travesty of justice.
4. The appellant thus urged this court to allow this appeal by setting aside the judgment of the trial court and re-assessing the damages due to the Appellant.
  5. The appeal was canvassed by way of written submissions.

#### **Appellant's submissions**

6. The counsel for the Appellant filed his submissions on 18<sup>th</sup> May 2021. The Appellant alleged that the deceased left behind seven dependants and thus submitted that the trial court erred in failing to make an award under the 'Loss of Dependency' head. It was further the Appellant's submission that damages awarded for pain and suffering were too low.

#### **Respondent's submissions**

7. The Respondent filed his written submissions on 1<sup>st</sup> July 2021. He opposed the appeal and submitted that the award by the trial court was not inordinately low or high as to occasion a miscarriage of justice. He thus urged this court to dismiss this appeal and uphold the judgment of the trial court.

#### **Issue for determination**

8. I have considered the appeal, the submissions by the parties, and the evidence tendered before the trial court. The main issues for determination, in my view, are:
  - a. Whether there should have been an award of general damages in respect of loss of dependency?
  - b. Whether award for Kshs. 10,000/= for pain and suffering was adequate?



## Analysis

9. This is a first appeal. The duty of this court as a first appellate court has been expressed in numerous authorities including *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; *Peters v Sunday Post Ltd* [1958] EA 424; and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
10. The above authorities hold the common position that a first appeal is by way of re-trial. Simply put, this court is under the duty to reconsider and re-evaluate the evidence on record and draw its own conclusions. In reconsidering and re-evaluating the evidence, this court must bear in mind and give due allowance to the fact the trial court had the advantage of seeing and hearing the witnesses who testified before it. It is not for this court to review the findings of the trial court simply because it would have reached different results if it were hearing the matter for the first time. [See: *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123]
11. The suit in the lower court was instituted vide a Plaint dated and filed on 1<sup>st</sup> April 2015. The appellant's claim that that on or about 12<sup>th</sup> December 2007, Mary Ciaku Joel (deceased) was lawfully walking along the Meru-Chuka highway when the Respondent so carelessly, negligently and/or recklessly drove and/or controlled motor vehicle registration No. KAV 801C Toyota Matatu causing it to hit the deceased, running over her, and resulting in fatal injuries.  
  
The claim was filed for and on behalf of the estate of the deceased by her legal representative Phares Mugambi Gilbert. The claim is based on negligence. The claim was statute barred but the appellant had obtained an order dated 3/2/2015 issued by the Resident Magistrate Chuka granting the leave to file suit out of time.
12. The Plaintiff thus sought for the following orders:
  - a. General damages under both *Fatal Accidents Act* (Cap 32 of the Laws of Kenya) and the *Law Reform Act* (Cap 26 of the Laws of Kenya).
  - b. Special damages of Kshs. 85,800/=.
  - c. Costs of the suit.
  - d. Interest on (a), (b), and (c) above at court rates.
  - e. Any other relief that this Honourable court deems fit to grant.
13. Despite being duly served with a demand and the pleadings, the Respondent did not enter appearance or file a defence. The matter therefore proceeded for formal proof.
14. The Appellant herein testified as PW1. She adopted her statement dated 1<sup>st</sup> April 2016 as her evidence. It was her testimony that the deceased was aged 67 years and had 6 children. The deceased was a cereal dealer and used to get Kshs. 30,000/= or so per month. The Appellant's father used to depend on the deceased but died the following year. She alleged that the deceased used to support them financially. She produced in evidence the deceased's post mortem report, police abstract, death certificate, bundle of receipts, statutory notice, receipts for acquisition of grant, Limited Grant of Letters of Administration Ad Litem, motor vehicle copy of records, and a court order dated 1<sup>st</sup> April 2015 (for extension of time to file suit) as P.Exhibits 1-9 respectively.
15. PW2 was Jane Cianjoka, an eyewitness. She testified that on the material day, she was on her way home from church when she had the vibration of a car. She went to the scene to find out what had happened.



The vehicle was by the pavement next to the iron bars on the road. The deceased was in front of the vehicle in a critical condition. She died a few minutes later.

16. The trial court awarded the proposed liability 100% against the Respondent noting the evidence of PW2 and the fact that no contrary evidence was tender to show that the deceased contributed to the occurrence of the accident. The trial magistrate further held that having entered interlocutory judgment the issue of liability was resolved.
17. This appeal therefor only challenges failure to award general damages with respect to loss of dependency. It also challenges the award of damages for pain and suffering.
18. From the onset, I note that the Appellant in his Memorandum of Appeal dated 3<sup>rd</sup> July 2019 and filed on 25<sup>th</sup> September 2019 urges the court to “re-assess the damages due to the Respondent”. This obviously an error as the substance of the appeal seeks for the reassessment of the damages that are due to the Appellant. The error is mere technicality which can be cured by invoking the provisions of Article 159 of *the Constitution* of Kenya 2010. This court has power to amend which is donate by Section 100 of the *Civil Procedure Act*.

#### a) Loss of dependency

19. It is important in this appeal to restate the jurisprudential position in Kenya on the subject. This has been stated in *Havens v Patel* (1961) EA 268 (*Supra*) and *Kemfro Africa v Lubia* (1987) KLR 30 *Supra*. They assist the court to decide the best method of seeking to achieve a generally accepted standard of fairness.

A perusal of the provisions of the Act underpins the principles in the above authorities. The question whether the factors listed in the authorities exists is a matter to be proved with cogent evidence. In *Bor v Onduu* 1988 –(1992) 2 KAR 288 it was held-

“Loss of dependency is a matter of fact in every individual case and there is no rule of law that two thirds of any other fraction of deceased income is deemed to be what is spent on the family.....”

What is required of a party on a claim for dependency is to prove to the satisfaction of the court that at the time of the death of the deceased he was receiving some benefits from the deceased in which case he has lost that benefit as a result of the death and is therefore entitled to damages. This calls for prove of dependency on a balance of probabilities.

The Appellant’s claim was under the *Fatal Accidents Act* Cap 32, Laws of Kenya. The trial court was therefore obligated to consider the multiplicand, the multiplier and the dependency ratio to arrive at the loss. The extent of dependency is a question of fact to be established in each case. The facts must therefore be proved by adducing evidence.

20. The court in *Butt v Khan* (1977) I KAR held that:

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to entirely represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”



21. The formula for assessment of the above loss was ably stated by Ringera J, in *Beatrice Wangui Thairu v Hon Ezekiel Bangetuny & another* Nairobi HCC No 1638 of 1988 (UR) – that;

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency.

Such value is called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life of the dependants and the chances of life of the deceased and dependants.

The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature”.

22. Other than the above formula, some courts opt to apply the global award approach. The trial court applied the Ringera J formula in considering an award for loss of dependency which was proper for the trial court to do.

23. The trial court declined to award damages for loss of dependency on account that no evidence was presented before the court to show that the deceased had dependents and even if she did, there was no proof of their ages. The Appellant faults this finding claiming that it is not usual to find parents who continue to support their children well into adulthood. According to her, the blanket holding of the trial court that the children of the deceased were adult and they were therefore not supported by their deceased mother before her demise was erroneous.

24. It was the trial court’s holding that:

“Had dependency been proved... the court would have adopted the minimum wage as at 2007 and awarded Kshs. 762,520/=; made up as follows (11,920/= x 2/3 x 8 yrs x 12)”

25. Section 107 of the *Evidence Act* (Cap 80 of the Laws of Kenya) clearly provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”

26. In the persuasive case of *Rabab Wanjiru Nderitu v Daniel Muteti & 4 others* [2016] eKLR the court stated that:

“The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth of certificates or any other documents to confirm the same.”

27. In *Havens v Patel* EA {1961} 129, *Khemar v Murlinbar* {1958} EA 268, *Kemfor v Lubia* {1987} KLR 30 it was held that:

“In a claim under the *Fatal Accidents Act*, First, the Court must find out the annual loss of dependency: secondly, the annual loss should be multiplied by a reasonable figure representing so many years purchase: thirdly, the capital sum so found must be discounted



to allow for legitimate concerns as the prospects of the widow's remarriage and the fact that the award is being received in a lumpsum at once. In finding the annual loss of dependency the relevant income is the net earnings of the deceased and in choosing a multiplier, regard should be made to the ages and expectation of dependency by the dependants, the age expectation of earning life by the deceased and the vicissitudes of life of both the deceased and the dependants. Finally where the beneficiaries of the estate of the deceased are the same persons as the dependants under the *Fatal Accidents Act*, the amount awarded to the estate must be taken into account in making the award under the *Fatal Accidents act* in order to avoid over compensating the dependents."

28. It follows therefore that loss of dependency is a matter of fact. It depends on proof of existence of the deceased's income, the ages and expectation of dependency by dependants, and the age expectation of earning life.

29. As was discussed in *Taff Vale Railway Co v Jenkins* {1913} AC 1 cited in the persuasive case of *Kioko David Mutinda v Translink Logistics* (EA) Ltd [2020] eKLR:

"It is not a condition precedent to the maintenance of an adult under the *Fatal Accidents Act*. That the deceased should have been actually earning money or moneys worth or contributing to the support of the plaintiff at or before death of the deceased, provided that the plaintiff had a reasonable expectation of a pecuniary benefit from the continuance of his life.

The law is trite that a claimant (plaintiff) must satisfy the court on a balance of probabilities that they were being maintained.

30. The age of the dependants notwithstanding, (Note that the spouse was not named as a dependant as he had passed away long before the time of filing the suit) the onus was on the Appellant to prove that they were persons that were depending on the deceased before her untimely demise. From the record, there is no evidence to show that the deceased had dependants. I am inclined to uphold the finding by the learned trial magistrate that no dependency by the children was proved or demonstrated. None was proved.

31. With regard to the deceased's income, the Appellant alleged that the deceased was earning Kshs. 30,000/= per month from a thriving cereal business as alleged by the Appellant. Again, this claim was not substantiated by any evidence. The Appellant relied on the cited case of *Chania Shuttle v Mary Mumbi* [2017] eKLR to allege that it is not surprising that there is no proper documentation kept by small scale business given their informal nature.

32. This is indeed the position. The Court of Appeal in the case of *Jacob Ayiga & Another v Simeon Obayo* {2005} eKLR expressed itself as follows in this regard:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."



33. It is the practice that the minimum wage applicable at the time is what is used where there is no proof of income. I thus agree with the trial court's finding that Kshs. 11,920/= would have been applied as the multiplicand had dependency been proved.

34. From the foregoing, I opine that the appeal against the nil award of damages for loss of dependency fails.

b) Damages for Pain and Suffering

35. The Appellant has proposed an award of Kshs. 30,000/= in place of the award of Kshs. 10,000/= given by the court. The Appellant claims that the deceased must have suffered tremendous pain after she was knocked by the motor vehicle.

36. I note that the deceased died at the scene of the accident. As stated in the case of Butt (supra), an appellate court should only disturb an award of damages where the same is inordinately high or low as to entirely represent an erroneous estimate. In my view, the award by the trial court of Kshs. 10,000/= as damages for pain and suffering was reasonable as the deceased died so soon after the collision. I will therefore not disturb the award.

**Conclusion**

37. The upshot of the foregoing is that the instant appeal lacks merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 24<sup>TH</sup> DAY OF MARCH 2022.**

**L.W GITARI**

**JUDGE**

