



**Njenga & another v Hared & Aden (Suing as the Administrators
of the Estate of the Late Omar Mohamed Aden) (Civil Appeal
101 of 2019) [2022] KEHC 223 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 101 OF 2019
MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

SAMUEL NJENGA 1ST APPELLANT

KINGANGI EUTHYCUS 2ND APPELLANT

AND

KALTUMA HARED & ISMAIL MOHAMED ADEN RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE OMAR
MOHAMED ADEN**

*(Being an Appeal from the Judgement of the Magistrate Court in Kangundo (Honourable
Martha Opanga, SRM) delivered on 7th of October 2018 In SPMCC 174 of 2015)*

JUDGMENT

1. Court Record

The suit was commenced by a Plaint dated 15th of December 2015. The cause of action arose on 19th of March 2015 when the deceased was a lawful pedestrian along Kangundo- Njiru road who was hit by Motor vehicle Registration Number KBJ 186S that was negligently driven, controlled and or managed by the defendant's driver, agent and or servant as a result of which the deceased sustained fatal injuries leading to his death on 20th of March 2015.

2. The deceased was 57years old, was in the business of selling goats and sheep at Garissa, earning Kshs. 40,000 per month, enjoying good health and was survived by seven dependents whom he provided for. The Plaintiff thus sought that judgement be entered in their favour for;

a. General damages under the Fatal Accident and [Law Reform Act](#)



- b. Special damages of Kshs 107,835/
- c. Costs of the suit
- d. Any other relief this court may deem fit and just to grant.

Defence

- 3. The Defendants jointly filed a Defence dated 10th of May 2016 in which they denied the contents of the Plaintiff and put the Plaintiff to strict proof and asked the court to dismiss the suit with costs. They also opined that the accident occurred as a result of the negligence of the Deceased and particularised the same in paragraph 7 of the Defence.

Reply to Defence

- 4. The Plaintiff filed a reply to defence in which they reiterated the contents of the Plaintiff.

Hearing

- 5. The Plaintiff called two witnesses while the Defendants called one witness.
- 6. Ismail Mohamed Aden, PW1, the son of the deceased stated that he obtained letters of administration and that his father had on 3rd of March 2015 gone to Nairobi to follow up on payment of money owed to him when he got involved in an accident along Kangundo road at 9.00pm. He said that his uncle, Musa Muhamed Adan informed them of the same and is the one that took the deceased to Mama Lucy Hospital where he died and was taken to City Mortuary by Police. He contended that he was told by the police that his father was hit by Motor vehicle registration number KBJ 186S as he was crossing the road. They hired a motor vehicle from Garissa and buried him at the Langata Cemetery together with relatives who had travelled from Garrisa and they incurred expenses amounting to Kshs. 107,825. He stated that his father sold cattle in Garrisa and Nairobi and earned Kshs 40,000 per month; that he left behind their mother and six children who were still in school. The police blamed the driver of the said motor vehicle for the accident as shown by the Police Abstract. He produced copy of records and receipts of the expenses of the special damages of Kshs.107,325/-. The proceedings were halted to avail Somali interpreter later.
- 7. Upon cross –examination, he stated that he is the first born in a family of six children and his father died following a road traffic accident along Kangundo road at Njiru. The driver of the accident motor vehicle was blamed according to the Police Abstract. He said he was not a witness to the accident and reiterated that they spent Kshs 107,325 or thereabouts for the burial. The burial included food and they slaughtered a camel in line with their Muslim faith. He could not recall the date of the burial.
- 8. In re-examination, he said that they booked lodging rooms for himself and their relatives who attended the burial. He also said that a camel costs at least Kshs 40,000.
- 9. With the assistance of an interpreter, Kaltuma Hared, PW2 testified that she has lived with the deceased for twenty seven years and she gave birth to seven children but two died at an early stage. She contended that her husband was involved in a traffic accident on 19th March, 2015 and received information that her husband had died on 20th March 2015 and she obtained a letter from the chief. She said that they incurred expenses for the funeral and burial amounting to Kshs 107,825.
- 10. She said her husband would bring home Kshs. 40,000 per month. She indicated that the children are in school and one had finished class eight and she as unable to pay fees. She blamed the driver of the motor vehicle that killed her husband for the accident. Her husband was the sole bread winner and



died while undergoing treatment at Mama Lucy Hospital. She produced the following documents as exhibit in Court;

- a. police abstract
 - b. letter from the chief
 - c. death certificate
 - d. advocate instruction note
 - e. letters of administration ad litem
 - f. certificate of literacy
 - g. statement recorded
 - h. copy of records
11. Upon Cross examination, she stated that the names on the chief's letter were the first names of the children and the birth certificates were available. She stated that she could count and her husband used to bring Kshs.40,000 per month though she did not know how much he earned as Somali men do not share the information with the wives.
 12. In re-examination she indicated that she incurred expenses even with contributions made by well-wishers and borrowing from people.
 13. The Defence called PC Jodhua Nyarangi of Kayole base who came to court on behalf of PC Otieno who was not feeling well. He stated that the accident involved a matatu and a male adult who was crossing the road along Kangundo near Njiru bridge from left to right. He was taken to Mama Lucy Hospital and died and no one was blamed for the accident. He also said that that area is not a designated area for crossing.
 14. When cross examined, he stated that the accident occurred near Njiru bridge and Choka shopping centre where there is a depression. He did not have a sketch map, he said the driver was detained for further action and NTSA has issued public awareness about people not crossing there.
 15. In re-examination, he stated that the case is still open for investigation.
 16. From the record, only the Plaintiff filed submissions which the trial court took into consideration when writing its judgement.

Judgement

17. The Trial court in its judgement stated that there was no eye witness and found that no one could be blamed for the accident and apportioned liability at 50:50 stating that the point of impact was in the middle of the road, meaning that the deceased partly contributed to the accident or either the motor vehicle was moving at a high speed that the deceased was not able to cross safely to the other side. The court gave an award of Kshs 100,000 for pain and suffering as the deceased did not die instantly. Reliance was placed on the case of Sospeter Ndung'u Kamau suing as the legal representative of the late Arthur Nderiti Ndung'u versus Charles Mageto and another HCCC No. 404 of 1998 unreported.
18. The Trial court awarded Kshs 150,000 as loss of expectation of life. The trial court relied on the case of *Jacob Ayiga Maruja and another vs Simeon Obayo* [2005] eKLR, *Alphia Plus (program for Appropriate Technology health) v Cephas Owuoth Najuna and another* [2015] eKLR and a multiplier of 12 years



and dependency ration of 2/3 awarded Kshs. 3,840,000 for loss of dependency. In the end, judgement in favour of the Plaintiff was entered as follows;

- i. Pain and suffering Kshs.100,000
 - ii. Loss of Expectation Kshs. 150,000
 - iii. Loss of Dependency Kshs 3,840,000
 - iv. Special Damages Kshs. 107,825
- Total Kshs 4,197,825
- Less 50%contribution Kshs 2,098,912.50
- Together with Costs and interest

The Appeal

19. The Appellants dissatisfied with the judgement and decree on quantum filed a Memorandum of Appeal dated 20th July 2019 seeking the following orders;
 - i. The Appeal be allowed
 - ii. The Whole judgement of the Honourable Senior Resident Magistrate Martha Opanga (SRM) delivered in Kangundo SPMCC NO. 174 OF 2015 ON 7th October 2018 be set aside and/or varied
 - iii. The costs of this Appeal be awarded to the Appellants
 - iv. Such further orders as this Honourable Court may deem fit to grant
20. The same is founded on the following grounds , THAT:
 - a. The learned trial Magistrate erred in law and in fact when she failed to consider the Applicants' submissions on points of law and facts on damages payable as quantum to the Respondents.
 - b. The learned trial Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice on award of damages under *Fatal Accidents Act* and *Law Reform Act*.
 - c. The learned trial Magistrate erred in law and in fact in using an erroneous multiplicand of 40,000 without proof and 12 years as multiplier when the deceased was 57years.
 - d. The learned trial Magistrate erred in law and in fact in unduly disregarding the Appellants evidence on loss of expectation of life and dependency in the circumstances.
 - e. The learned trial Magistrate erred in law and in fact in unduly disregarding the submissions and judicial authorities cited by the Appellants and by instead relying on the authorities cited by the Respondents which were excessive in the circumstances.
21. The appeal was dispensed with by way of written submissions.

Appellant's Submissions Dated 1.11.2021

22. While Relying on the case of *Mary Njeri Murigi v Peter Macharia & another* [2016] eKIR and *Muasya Mburi Kiselu v Martin Mutisya Kiiyo & another* [2010] eKLR the Appellants submitted that the trial court erred in applying a figure of Kshs. 40,000 as the deceased income without proof of the same and therefore feels that the award was inordinately high. They opined that the deceased



should be treated as a stockman with a minimum wage of Kshs 6,278 as per Legal Notice number 116, Regulation of wages (Agricultural Industry) (Amendment) order 2015 and while citing the case of *Mutuku Mbiti vs Coast Bus Safaris Limited & another* (Machakos HCCA 124 of 2008) contended that a multiplier of 5years would be sufficient.

23. On dependency, they opined that the Respondents did not demonstrate how they depended on the deceased and no birth certificates were supplied to prove that they were the deceased's children. The Appellants asked the court to use a multiplier of 1/3. The case of *Dismas Mubami Wainarua vs Spoon Kasirimo Maranta (Suing as administrator and personal representative of the estate of Partnini Supon (Deceased))* [2011] eKLR.
24. While referring to the case of *Seremo Korir & Another vs SS (Suing as the legal representative of the estate of MS, Deceased)* [2019] eKLR. Appellants submitted that there was a double award under the [Law Reform Act](#) and the *Fatal Accidents Act* and opines that a deduction between the two Acts should be taken to remedy the double award. The Appellants also asked for costs citing section 27(1) of the [Civil Procedure Act](#).

Respondent Submissions Dated 3.12.2021

25. Counsel submitted that there was no issue of liability and failure of the Appellant to file submissions in the trial court to guide the court which ended up exercising its discretion judicially in arriving at the conclusion it did. Citing the case of *Francis Karani and Simeon Obayo* [2005] eKLR and *Program for Appropriate Technology Health and Cephas Owuoth Najuma & Another* [2015] eKLR, submitted that there are many people who engage in productive activities without having to keep receipts like the deceased herein. Counsel submitted that there was no contrary evidence about the deceased earning Kshs.40,000/-
26. On the multiplier, the Respondent opined that 12 years was discretionary and nothing stopped the deceased from working even up to 80 years. Further, that the Appellant had not given an alternative multiplier and should not be allowed now as the Appellant had an opportunity to raise this issue in the trial court.
27. The Respondent refuted there being double compensation as the award under the [Law Reform Act](#) was for the benefit of the estate of the deceased and can even be claimed by creditors while that under the *Fatal Accident Act* goes to the Dependents. The Appellant asked the court to dismiss the Appeal.

Analysis and Determination

28. I have considered the Memorandum of Appeal, the lower court record and the submissions of the parties and find the following as issues for determination;
 - a. Whether the Applicants' submissions on damages payable as quantum to the Respondents.
 - b. Whether there was miscarriage of justice on award of damages under *Fatal Accidents Act* and [Law Reform Act](#).
 - c. Whether a wrong multiplicand was used.
 - d. Whether the Appellants evidence on loss of expectation of life and dependency was considered.
 - e. Who should bear the costs of the Appeal?



29. The issue for liability is not in dispute, neither is that of the award of special damages, the only issue that the Appellant takes issue with is that of quantum and costs.
30. This being a first appellate court, I am guided by the principles set out in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:
- “The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
31. See also, *Peters vs. Sunday Post Limited* [1958] EA 424, where it was held that;
- “Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.”
32. On the issue of award of damages, the House of Lords in the case of *Bonham Carter v Hydrie Park Home Ltd* [1948] 64 TLR 177 where Lord Goddard CJ stated that;
- “Plaintiffs must understand that if they bring actions for damage, it is for them to prove damage, it is not enough to write down the particulars and, so to speak them then at the head of the court saying “This is what I have lost, I ask to give me these damages.”
33. The Appellant seeks to have the dependency ratio reduced to a multiplier of 5 years, 1/3 instead of 2/3 and the earnings of the deceased reduced to Kshs 6,278 based on the minimum consolidated basic minimum wage.
34. The Court of Appeal in *Joyce Mumbi Mugi v Co-operative Bank of Kenya Ltd & 2 others* where the deceased was 51 years old used a multiplier of 11 years while a multiplier of 5 years was used for a 57 years old in the case of *Mutuku Mbithi v Coast Bus Safaris Ltd & another* [2012] eKLR where the deceased was 57 year old In the case of *Midland Media Limited & another v Pauline Naukot Aule (Suing as the Legal Representative of the Estate of the Late Esinyon Esokon Ekai)* [2020] eKLR, The court used a multiplier of 10 years for a 57 year old.
35. Guided by the above cases on average, I find that a multiplier of 12 years is reasonable in the circumstances.



36. With regard to the deceased's earnings, the Appellant contends that no evidence has been adduced to support the amount of Kshs.40,000/- a month save for the testimonies of the witnesses, however no evidence has been tendered to controvert the same nor prove that he was earning more or less than that. The letter of 25th May, 2015 from the Chief of Hulugho Sub- location indicates that he was the breadwinner and has 5 children and his mother.
37. In the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR, the Court of Appeal stated that;
- “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.”
38. The Respondent was a businessman selling goats and sheep. It appears he kept no record and could have been earning more as he only gave the wife Kshs. 40,000. In line with the above case cited suit it was not controverted that the deceased sold goats and sheep – and could have earned at least half of the amount of Kshs.20,000/-. The basic minimum wage as at 2015 Kshs 6,278.80 in the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2015 is not applicable as the deceased was not employed but was in a business of selling livestock.
39. On the issue of double compensation, the Court of Appeal in *Hellen Waruguru Waweru* in Nyeri Civil Appeal No. 22 of 2014 [2015] eKLR stated that;
- “An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.” The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction.”
40. There is no evidence on record to show that the Trial Court failed to take into account beneficiaries of the deceased estate are dependents of the deceased in assessment of claims under *Law Reforms Act*



§ *Fatal Accidents Act*. In view of the foregoing, I find that the trial court did not fall into any error by failing to deduct the award under the *Law Reform Act* from the *Fatal Accidents Act* as considered in the above case law.

41. On the multiplicand, in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR, Ngaah J. held that :-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case 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.”

42. In the circumstances I find that a multiplicand of 2/3 for the deceased who was supporting his family as sole bread winner is sufficient.

43. The Court considers the evidence of PW.2 widow of the deceased that the deceased gave her for the family expenses Kshs.40,000/-. The fact that there was no documentary evidence to confirm the same, the Court finds the deceased gave money for family support. In the absence of documentary proof the amount will be reduced to ½ amount Kshs.20,000/-.

44. The consequence of our intervention in the various awards boils down to the following final assessment of damages:-

- a. Pain and suffering Kshs. 100,000/-
- b. Loss of life expectation Kshs. 150,000/-
- c. Loss of dependency Kshs. 20,000 x 12 x 12 x 2/3) 1,920,000/-
- d. Special damages Kshs. 107,825/-

Total 2,277,825/

Less 50% contribution 1,138,912.50 Balance 1,138,912.50

45. The order on interest and costs made by the trial court shall remain in force. There shall, however, be no order as to the costs of the appeal in this court as both parties have partially succeeded in their respective contentions.

Order accordingly.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH 2022. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Omangi H/b Mr. Theuri For The Appellant - Present

Mr. Ouko For The Respondent

Geoffrey – Court Assistant

Mr. Ouko: – We seek 45 days for stay of execution.



Mr. Omangi : We ask for 30 days

COURT : The stay of execution for 30 days granted.

M.W. MUIGAI

JUDGE

