



**Mwiti & another v Kanyua (Suing as legal representative of the estate of Joseph Kirya Mburi (Deceased)) (Civil Appeal E106 of 2021) [2022] KEHC 10924 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10924 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E106 OF 2021  
TW CHERERE, J  
JUNE 23, 2022**

**BETWEEN**

**RAPHAEL MUTWIRI MWITI ..... 1<sup>ST</sup> APPELLANT**

**EUSTACE M'MUGAMBI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ROSE KANYUA ..... RESPONDENT**

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH KIRYA MBURI (DECEASED)**

*(Being an Appeal from the Judgment and Decree in Chuka PMCC No. 50 of 2020 by Hon. E.M.Ayuka (SRM) on 06th July, 2021)*

**JUDGMENT**

1. By a plaint dated May 14, 2018 filed on May 16, 2018, Rose Kanyua (Respondent) pleaded that on July 1, 2016, Joseph Kirya Mburi (Deceased) was cycling along Tunyai-Mitunguu-Nkubu Road when he was knocked down by motor vehicle KBN 672H ISUZU (accident motor vehicle) owned by Elijah Mugambi (1<sup>st</sup> respondent) which was negligently driven by Raphael Mutwiri Mwiti (1<sup>st</sup> appellant) and which was being driven by Eustace M'Mugambi (2<sup>nd</sup> appellant) as a result of which deceased suffered fatal injuries.
2. The defendants/appellants by their statement of Defence dated and filed on February 19, 2019 denied the claim and blamed deceased for causing the accident.

**The trial**

3. PW1 Joseph Kiura Karigi testified that driver of the accident motor vehicle was in the process of overtaking another vehicle when he drove on the lawful lane of the deceased causing the collision.



Eustace M’Mugambi Mwiti (2<sup>nd</sup> appellant) who was driving the accident motor vehicle blamed the deceased for cycling from a feeder road directly onto the path of the accident motor vehicle causing the accident. The scene of the accident was visited and the police not blaming either the deceased nor the 2<sup>nd</sup> Respondent for the accident.

4. At the conclusion of the trial, the learned trial magistrate entered judgment on liability at 100% against the Appellants jointly and severally and proceeded to award damages as follows:
  1. Pain and suffering Kshs. 50,000/-
  2. Loss of expectation of life Kshs. 100,000/-
  3. Loss of dependency Kshs. 2,400,000/-
  4. Special damages Kshs. 45,500/-

### **The Appeal**

5. The appellants being dissatisfied with the lower court’s decision on both liability and quantum preferred this appeal.

### **Submissions by the parties**

#### **Appellant’s submissions**

6. Concerning liability, it was submitted that there was no evidence that 2<sup>nd</sup> Respondent was negligent and that since he had been acquitted of the offence of causing death by dangerous driving, liability ought to have been apportioned at 50:50%. In support thereof counsel cited the case of *Michael Muingu Wambura (Suing As The Personal Representative and Administrator of the Estate of Patrick Mutua (Deceased) v Daniel Mwangi Mbogo* [2020] eKLR where the court apportioned liability at 50:50% in a case that was still pending under investigations.
7. Appellant contends that an award of Kshs. 10,000/- is sufficient since deceased died instantly and cited *Joan Gacheri v Sabina Mwomburi* [2018] eKLR and *Michael Muingu Wambura (supra)* where a similar sum was awarded.
8. On the basis that deceased was married, appellants urged the court to adopt a dependency ratio of 2/3rds. On multiplicand, the appellants urged the court to find that a letter dated July 26, 2017 that deceased was employed and was earning Kshs. 25,000/- was not in the absence of actual earnings not sufficient prove that deceased was salaried. The court was urged to apply the minimum wage prevailing as at 2016. On multiplier, the court was urged to find that 7 years was applicable since deceased died at the age of 53 years.

#### **Respondents’ submissions**

9. Respondent urged the court to find Kshs. 50,000/- for pain and suffering is reasonable and in support thereof cited *Sukari Industries Limited vs Clyde Machimbo Jumba* (2016) eKLR where the court found that any sum between Kshs. 10,000/- to Kshs. 50,000/- is adequate for a deceased that dies instantly. Concerning multiplicand, Respondent submitted that the sum of Kshs. 25,000/- was proved and urged court to hold that deceased died at 53 years and that a multiplier of 12 years was well founded.



## Analysis and Determination

10. I have considered the evidence at the trial and the submissions and the authorities cited by counsel on behalf the parties.
11. On liability, I have considered *Hussein Omar Farah v Lento Agencies* [2006] eKLR, where the Court of Appeal faced with a similar situation as the one subsisting in this case held as follows:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”
12. Applying the same principle to this case, I have come to the conclusion that the learned trial magistrate fell into error when in the absence of any other evidence chose to believe PW1 and disbelieve. Accordingly, I apportion liability at 50:50 % as between the appellants and respondent.
13. Concerning assessment of damages, Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & anor v Lubia & anor, No 2* [1987] KLR}} at page 35 stated as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
14. Concerning the award for pain and suffering and the dependency ratio, I find that the same were well founded on similar cases and see no reason to interfere with the same.
15. Concerning multiplier, the evidence on record reveals that the deceased died at the age of 53 years. Bearing in mind the vicissitudes and uncertainties of life, I find that a multiplier of 7 years is reasonable in the circumstances of this case
16. With regard to loss of dependency, the court in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another* Nairobi HCCC No. 1638 of 1988 (UR) set out the guidelines applicable in assessment of damages under the Fatal Accident’s Act as follows:

The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand 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 and dependency 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 a lump sum and would if wisely invested yield returns of an income nature.
17. Whereas a letter to the effect that the deceased was employed and was earning Kshs. 25,000/- per month was tendered, no evidence of his actual net earnings in the form of either payslip, register of employees’ earning or bank statement was tendered.



18. The general rule is that in the absence of prove of actual earnings, courts have adopted the minimum wages guidelines in calculating the award for loss of dependency. (See *Beatrice W Murage v Consumer Transport Ltd & another* [2014] eKLR; *Monica Njeri Kamau v Peter Monari Onkoba* [2019] eKLR and *Patrick Barasa v Serah Wambui Karumba (Suing as the legal representative to the estate of the late ALBERT CHEBAYA)* [2019] eKLR).
19. The *Regulation of Wages (General) (Amendment) Order, 2015* which was in force in 2017 when the accident occurred provides for wages for a general worker at Kshs. 10,107/- which ought to have been applied as the multiplicand.
20. In the final analysis, this appeal has merit and it is allowed in the following terms:
  1. Liability at 100% against the appellants is set aside and substituted with 50:50% with appellants jointly and severally bearing 50% and Respondent the other 50%
  2. The award of Kshs. 50,000/- for pain and suffering is upheld
  3. The award of Kshs. 100,000/- for loss of expectation of life is similarly upheld
  4. Dependency ratio of 2/3 is equally upheld
  5. The multiplier of 12 years is set aside and substituted with 7 years
  6. The multiplicand of Kshs. 25,000/- is set aside and substituted with Kshs. 10,107/-
  7. Since appellants have only partially succeeded, each party shall bear its own costs

**DATED AT MERU THIS 23<sup>RD</sup> DAY OF JUNE 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Morris Kinoti

For Appellants - Mr. Kiranga for Simiyu, Opondo Kiranga & Co. Advocates

For Respondent - Mrs Muia for Muia Mwanzia & Co. Advocates

