



**Nthiwa (suing as the Representative of the Estate of Salome Mateta Kaloki (Deceased)) v Kirima (Civil Appeal 139 of 2019) [2022] KEHC 13183 (KLR) (Civ) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 13183 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL APPEAL 139 OF 2019**  
**DO CHEPKWONY, J**  
**JULY 26, 2022**

**BETWEEN**

**ANNA MUENI NTHIWA ..... APPELLANT**

**SUING AS THE REPRESENTATIVE OF THE ESTATE OF SALOME MATETA  
KALOKI (DECEASED)**

**AND**

**DAVID MUGAMBI KIRIMA ..... RESPONDENT**

**RULING**

1. The Appellant instituted this Appeal vide a Memorandum of Appeal dated March 13, 2019 against the Judgment and Decree of Hon SG Gitonga dated February 20, 2019 on grounds that the trial Magistrate erred in law and fact;
  - a) In arbitrarily condemning the Appellant to bear 50% contributory negligence for the accident which was wholly occasioned by the negligence of the Respondent and in total disregard of the established legal principle of res ipsa loquitur;
  - b) In failing to appreciate that the Respondent did not adduce any evidence to defend himself and as such, a negative inference ought to have been drawn against the Respondent;
  - c) In arbitrarily and without any justification or basis in law awarded a sum of only Kshs 100,000 as loss of expectation of life and thereby unduly and unfairly diminished the value of the Appellant's life;
  - d) Arbitrarily and without any justification in law unfairly and oppressively adopted a multiplier of three (3) years, when the Appellant who was only 56 years old could have lived and worked in her business until the age of 65 years. That the median for life expectancy is 63 years;



- e) Without any basis and in a condescending manner devalued and debased the life of the Appellant due to her station in life as a peasant trader;
  - f) Taking all the circumstances in this matter into account, the learned magistrate gave a manifestly low award for damages for loss of the Appellant's life;
  - g) The learned magistrate took into account extraneous considerations and thereby arrived at the wrong conclusion.
2. The Appellant is asking this court for orders that;
- a) The learned magistrate's judgment delivered on February 20, 2019 be set aside and the Appeal be allowed;
  - b) The Honourable court do re-evaluate the evidence tendered and re-assess the Appellant's claim on liability and quantum;
  - c) The Honourable Magistrate's finding of 50% contributory negligence on the part of the Appellant be set aside and be substituted with a finding of a 100% liability on the part of the Respondent;
  - d) The Honourable Magistrate's finding of a multiplier of 3 years be set aside and be substituted with a multiplier of 9 years;
  - e) The Honourable Court do set aside the award of damages of Kshs 380,310 and substitute therefore with an award of Kshs 1,330,060 made up as follows:-
    - i. Pain and suffering Kshs 100,000
    - ii. Loss of expectation of life Kshs 200,000
    - iii. Loss of Dependency Kshs 704,160
    - iv. Special Damages Kshs 325,000TOTAL Kshs 1,330,060
3. The Appellant prays that he be awarded costs of this Appeal and of the suit before the subordinate court Nairobi vide CMCC No 6891 of 2016.
4. The Appellant sued the Respondent at the trial court in CMCC No 6891 of 2016 *vide* a Plaint dated October 3, 2016 for general and special damages for a fatal accident involving the Defendant and the deceased which is alleged to have occurred on July 17, 2013. The Defendant denied the averments in the Plaint and the claim in its entirety vide a Statement of Defence dated February 6, 2017.
5. The matter proceeded to full trial where the Plaintiff called one witness and the Defendant called none. After considering evidence before it, the trial court made a finding vide its Judgment dated and delivered on February 20, 2019 for an award of Kshs 760,620/= in favour of the Plaintiff less 50% contributory negligence. The Plaintiff is aggrieved by this determination hence the instant Appeal.
6. On February 17, 2022, the Appeal was admitted for hearing and parties directed to canvass the same by way of written submissions which were accordingly filed.



7. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. Reliance is placed on the case of *Selle vs Associated Motor Boat Co & Others* [1968] EA 123 where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)”.

8. From the pleadings in the instant case that what is in issue for consideration by this court is liability and quantum.
9. On liability, the trial court found that the occurrence of the accident is not denied and observed that it was difficult to pinpoint who among the parties was to blame for the accident based on the evidence produced and thus apportioned the liability equally on the parties. The Plaintiff testified before the trial court that she was not at the scene of the accident hence did not witness the accident. In her testimony, she believes that the deceased was lawfully walking along Mombasa road when the Defendant drove his motor vehicle and carelessly hitting the deceased.
10. I have perused the Police Abstract produced as Plaintiff’s Exhibit 1 and find it inconclusive for the reason that it does not tell us who is to blame for the accident. It is indicated that investigations are still ongoing. No eye witness was called by either party. The Investigating Officer was not called to shed light on the investigations and neither did he provide a sketch map to guide this court in its findings on who could have been blamed for the accident.
11. In my view, the Plaintiff did not prove her case on who was to blame for the occurrence of the accident even though the Defendant failed to testify or call any witness having been the only eye witness. I therefore find, as the trial court did that in the circumstances of the case, it is not possible to hold either party negligent and liable for the accident and find it fair to hold both parties equally liable. I thus find no reason has been advanced before this court to warrant it interfere with the trial court’s finding under this head.
12. On quantum, I need not over-emphasize the duty of a first appellate court. As a first appellate court, it cannot easily interfere with the trial courts’ discretion on this issue unless it is found that the trial court applied wrong principles in arriving at the finding as was stated by the Court of Appeal in the case of *Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini vs A M Lubia and Olive Lubia* 91985) 1 KAR 727:
- “....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....”
13. The Appellant does not have an issue with the award on pain and suffering. However, on loss of expectation of life, the trial court made an award of Kshs 100,000/=. The Respondent/Plaintiff prayed



for Kshs 200,000 under this head while the Appellant/Defendant proposed a sum of Kshs 80,000/= . The trial Magistrate observed that there was no evidence adduced to show that the deceased had been suffering from any other ailment that would have shortened her life. And in consideration of the finding in the case relied on by the Respondent/Plaintiff at trial “An older life is not thus valuable than a younger one”, I find Kshs 100,000/= low and proceed to substitute the same with Kshs 200,000/= (See case of *Samuel Opot Omondi & National Environment Authority*, Nairobi HCCC No 574 of 2010).

14. On loss of dependency, the Plaintiff testified that she was the only child to the deceased and that she used to receive Kshs. 5,000 per week, and hence Kshs 20,000/= per month. She however did not produce any evidence to this effect. She also testified that the deceased was a business lady earning an income of Kshs 60,000/=. Although not controverted, there was no evidence to support this. The trial court then proceeded to adopt a multiplicand of Kshs 9,780/= which was the minimum wage in place at the time of the deceased’s demise. Owing to lack of evidence on the deceased’s earnings, I find this justifiable and uphold the same.
15. On the multiplier, the trial court adopted three (3) years although the Plaintiff had proposed 9 years because the deceased died at the age of 56 years. The Court of Appeal in the case of *Hannah Wambui vs Kagwe Tea Factory & Another* [2010] eKLR, adopted a multiplier of 4 years for a 56 year old man. In the case of *Allan Owiti Awuor & Another vs Tabitha Micere Mathu (Suing as Personal Representative of The Estate Of Peter Math Ng’ang’a)* [2021] eKLR, the court adopted a multiplier of 8 years for a deceased who died at 57 years. There was no evidence that the deceased had been ailing from any sickness that would have shortened her life. It therefore goes that the deceased would have worked in her business up to about 70 years.
16. In this case, I find the trial court’s multiplier of three (3) years low as compared to similar decisions of this court. I therefore set aside the same and adopt a multiplier of 6 years. The dependency ratio was not disputed by either party. The award will therefore be;  $Kshs\ 9,790/= \times 6 \times 12 \times 2/3 = 469,920/=$
17. The Award of Kshs 325,900/= as special damages awarded by the trial court was also not in dispute and therefore remains undisturbed.
18. In the upshot, the Appeal partially succeeds for the Plaintiff in the following terms:-
  - a) Pain and suffering .....Kshs 100,000/=
  - b) Loss of Expectation of life ..... Kshs 200,000/=  
 $9790 \times 6 \times 12 \times 2/3$  .....Kshs 469,920/=  
Gross Total .....Kshs 769,920/=  
Less 50% contribution.....Kshs 384,960/=
  - c) Special damaged .....Kshs 325,900/=  
Net Total .....Kshs 547,910/=
19. Since the Appeal has partially succeeded, each party shall bear own costs of the Appeal.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY 2022.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**



Mr. Masese for Appellant

Susan Njoroge holding brief for Mr. Ombati for Respondent

**Court Assistant - Kevin**

