Mary Mukami Mubea & Leah Mwer (suing as the Legal representatives of the Estate of the late Mungai Nginyo v Real Time Logistics Limited & another (Civil Appeal 55 of 2018) [2022] KEHC 11470 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11470 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 55 OF 2018

GWN MACHARIA, J

JULY 25, 2022

BETWEEN

MARY MUKAMI MUBEA & LEAH MWER (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE MUNGAI NGINYO) ..... APPELLANT

AND

REAL TIME LOGISTICS LIMITED ..... 1ST RESPONDENT

SUSAN WANGU ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrate's Court at Naivasha CMCC No. 303 of 2016 delivered by Hon. V. Chianda (SRM) on 10{{^th}} September 2016)

JUDGMENT

1. This is an appeal on quantum of damages. It arises from Naivasha CMCC No. 303 of 2016 in which the appellants sued the respondents for general and special damages arising out of a road traffic accident that led to the demise of their kin Mungai Nginyo (the deceased). According to the Plaint, the accident occurred on September 5, 2015at Mingotio River along Kinamba – Karangatha Road. The appellants pleaded that the accident involved motor vehicle registration number KBV 406X owned by the 2nd respondent and in which the deceased was lawfully travelling. They alleged that the respondents' agent and/or servant negligently drove, managed and/or controlled the said motor vehicle thereby causing an accident that resulted in the death of the deceased.

2. The 1st respondent filed a statement of defence in which it denied the appellants' claim and alleged contributory negligence on the part of the deceased.

3. Before trial, parties entered into a consent on liability in which it was agreed that the same be apportioned at 90:10 in favour of the appellants. Thereafter, the case proceeded to trial on quantum

only. Upon trial, the learned magistrate awarded the appellants Kshs. 10,000 on account of general damages for pain and suffering; Kshs. 100,000/- for loss of expectation of life; and Kshs. 782,400/- for loss of dependency, all subject to 10% contribution.

4. Being dissatisfied with the trial court's award on loss of dependency, the appellant lodged the instant appeal vide a Memorandum of Appeal dated October 8, 2018 and raised the following grounds:

    1. That the learned trial magistrate erred in law and in fact by adopting a multiplier that was too low despite the evidence on record.

    2. That the learned magistrate erred in law and in fact in failing to consider the evidence and submissions of the plaintiff, subsequently adopting a multiplicand that was too low in the circumstances.

    3. That the learned trial magistrate erred in law and in fact in failing to consider the plaintiffs' evidence on record and submissions hence awarding damages for loss of dependency that were too low in the circumstances.

5. The appellants are thus seeking the following orders from this court:

    a. That the appeal be allowed.

    b. That this honourable court do adopt a higher multiplier in the circumstances.

    c. That this honourable court do enhance the multiplicand to be used in the circumstances.

    d. That this honourable court does enhance damages for loss of dependency.

    e. That the costs of this Appeal be borne by the respondents.

6. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified See: *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123.

Appellants' submissions

7. The appeal was canvassed through written submissions. The appellants contended that the multiplier of 10 years adopted by the trial court was inordinately lower considering that the deceased was a businessman hence not curtailed by the normal retirement age. They submitted that the deceased was only 35 years old as at the time of his demise and urged this court to set aside the multiplier of 10 years awarded by the trial court and substitute it with 35 years. They relied on the case of *Violet Jeptum Rahedi v Albert Kubai Mbogori* [2013] eKLR, where the court held that a person running a private business cannot be limited by any formal retirement age.

8. Further, they faulted the trial court for adopting a multiplicand of Kshs. 9,780/- and submitted that the said figure was inordinately low bearing in mind their submissions before the court that the deceased was earning Kshs. 45,000/- monthly. Relying on the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR, they submitted that production of documents is not the only way to prove the earnings of a deceased person since many people do not keep such records yet they earn a livelihood. As such, they urged this court to set aside the multiplicand adopted by the trial magistrate and substitute it with Kshs. 45,000/-. In totality, they urged that the appeal be allowed and damages for loss of dependency be calculated as follows: 45,000 X 2/3 X 35 X12 = 12,600,000/-.

Respondents' submissions

9. On the other hand, the 1st respondent argued that the appellants have not established any proper reason to warrant this court's interference with the trial court's assessment of damages for loss of dependency. It contended that there is no proof that the trial magistrate applied the wrong principles or misapprehended facts or arrived at an erroneous estimate.

10. It was the 1st respondent's submission that in fact, the multiplicand of Kshs. 9,780 adopted by the trial court as minimum wage was erroneous. It contended that pursuant to Legal Notice No. 197, *Regulation of Wages (General) (Amendment) Order* 2013, the proper multiplicand should have been Kshs. 9,024.15 which was the minimum wage payable to a general labourer working in a municipality as at the time of the deceased's death. Further, it was asserted that no evidence whatsoever was produced by the appellant to support the claim that the deceased was earning Kshs. 45,000/- as well as his employment and/or skill prior to his death. In the 1st respondent's view, the appellants should have produced either of the following as proof of earnings: a market or business permit; daily market receipts payable to the County as levy; income tax returns and/or business tax returns; bank/MPESA statements.

11. As regards the multiplier, the 1st respondent submitted that the trial magistrate applied the correct principle in arriving at the multiplier of 10 years. It contended that whereas the deceased died at the age of 35 years, life expectancy is 45 years and courts are always enjoined to take into account the uncertainties and vicissitudes of life as the trial court did. It relied on *Charity Mapenzi & another v National Water Conservation & Pipeline Corporation* [2005] eKLR in which the court adopted a multiplier of 10 years where the deceased was aged 41 years. Reliance was also placed on *Oshivji Kuvenji & another v James Mohamed Ongenge* [2012] eKLR in which a multiplier of 10 years was adopted for a deceased aged 40 years.

12. In the alternative, the 1st respondent urged that if this court is inclined to interfere with the lower court's finding on loss of dependency, then it should use the global lump sum approach in assessing the award given that some aspects of the deceased's life were not ascertainable. In this regard, the 1st respondent relied on the case of *D.M.M (suing as the administrator & legal representative of the Estate of LKM) v Stephen Johana Njue & another* [2016] eKLR and proposed a global award of Kshs. 500,000/-.

Analysis and determination

13. As a general principle, the assessment of damages is a matter of the exercise of court discretion and as such, an appellate court will normally be slow to interfere with such discretion unless it is very necessary. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR stated as follows in this regard:

> " An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely 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..."

14. There are two methods for calculating damages for loss of dependency which are normally awarded pursuant to the *Fatal Accidents Act*. Loss of dependency can be calculated using either a multiplier approach or a global lump-sum approach and the approach to be applied is entirely in the discretion of the trial court and depends on the circumstances of each case.

15. In the instant case, the trial court adopted the multiplier approach. The principles for this approach were set down in *Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and another* NRB HCC 1638 of 1998 (UR) where Ringera, J (as he then was) stated:

> " 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 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 dependents and the chances of life of the deceased and dependents. 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." (emphasis mine).

16. It is however important to point out that the multiplier approach is normally discouraged where certain aspects of the deceased's life are not ascertainable. In *Mwanzia v Ngalali Mutua Kenya Bus Ltd* as quoted in *Albert Odawa v Gichimu Githenji* [2007] eKLR, it was held: -

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma.
>
> It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of Justice should never do."

17. PW1, MM the 1st appellant herein was the deceased's wife. She testified that the deceased was aged 35 years at the time of his demise and they had one child known as EMungai. It was her testimony that the deceased was a farmer and a business man who used to sell shoes in the market. It was her further testimony that the deceased was farming in Kahunguru Village and earned Kshs. 45,000/- monthly. The deceased was paying their rent as well as her school fees and that of their child and used to give her Kshs. 20,000/- per month. She however confirmed that she did not have either bank statements or tax returns to prove the deceased's earnings.

18. In adopting the multiplier of 10 years, the learned magistrate pronounce herself as follows:

> " The deceased died at 35 years and was sound and in good health. He was said to be a business man and was survived by a wife and a 6 year old child. Being self-employed no proof of his earnings was availed. The court should adopt a dependency ration of 2/3. Had the deceased been a legitimate businessman, the wife should have at least availed bank or other financial records e.g. MPESA which would have provided a guide or at least cash flow. In the absence of zero proof about his earnings, the court shall adopt the wage for a general labourer/ worker as per the minimum wages general amendment regulations order 2013 at Kshs. 9,780/-. Given the requisites (sic) of life (for obvious reasons given the deceased's cause of death) the court shall adopt a multiplier of 10 years herein, individual notice of expectancy. The figures thereby add up as follows: 12 x 2/3 x 9,780 x 10 = 782,400."

19. Did the trial magistrate err in adopting the minimum wage as the multiplicand in this case? The answer to this question is in the negative. PW1 testified that the deceased was a shoe seller and farmer but provided no proof of such occupation. This court cannot therefore fault the trial magistrate for adopting the multiplicand used. See: *Philip Wanjera & another v Ahmed Liban & Shukri Ahmed Liban (suing for and on behalf of the Estate of Habiba Liban)* [2016] eKLR, where Sergon, J. used the minimum wage to ascertain the earnings of the deceased in similar circumstances.

20. Be that as it may, I agree with the respondent's submission that the figure used was incorrect. The *Regulation of Wages (General) (Amendment) Order*, 2013 provides for Kshs. 9,024.15 for general labourers in municipalities and Kshs. 9,780.95 for those in cities. The Appellant lived in Kihunguru, Nyandarua South at the time of his death according to the burial permit adduced in evidence. The trial court should have used a multiplicand of Kshs. 9,024.15.

21. As regards the multiplier, the death certificate adduced in evidence confirms that he was 35 years at the time of his death. The trial court adopted a multiplier of 10 years which is quite low in my view particularly bearing in mind that the deceased was in good health prior to his passing on. Further, the fact that he was not formally employed means he was not bound by the usual retirement age of 55 to 60 years. However, considering the vicissitudes of life, it is possible that he could have worked for another 20-25 years. In so holding, I rely on *Re Estate of Jackson Milia Limu (Deceased)* [2011] eKLR, *Mary Wanjiru Watheka & another v Alice Wangui Ndungu & another* [2015] eKLR, and *Jackline Ndulu Musyoka & 2 others (Suing as Legal Reps of the Estate of Andrew Musyoka Mutua v Delmonte Kenya Ltd* [2018] eKLR, the courts adopted a multiplier of 20 years for deceased persons who were aged 35 years at the time of their demise.

22. In the premises, I hereby set aside the multiplier of 10 years used by the trial court and substitute it with 20 years. Damages for loss of dependency shall therefore be calculated as follows:

    9,024.15 x 2/3 x 20 X12 = Total Kshs. 1,443,864/-.

23. Consequently, the appeal has merit and is hereby allowed. I therefore enter judgment for the appellants as follows:

    a. Liability 90:10 as agreed

    b. Quantum

        i. Pain and suffering Kshs. 10,000.00

        ii. Loss of dependency Kshs 1,443,864.00

        iii. Loss of expectation of life Kshs 100,000.00

        Sub Total Kshs. 1,543,864.00

        Less 10% contributory negligence

        Net Total Kshs. 1,389,477.60

24. Each party to bear its own costs of the appeal.

25. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF JULY, 2022.

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G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Ms.Sitati h/b for Ms. Kiberenge for the Appellants.

Mr.Kairu h/b for Ms.Chelule for the Respondents.