



**Samuel & Kabulu (Both Suing as the Administrators and Legal Representatives
of the Estate of Urbanus Kitheka-Deceased) v David (Civil Appeal
209 of 2019) [2022] KEHC 17077 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 17077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 209 OF 2019
MN MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

**HELLENA WANZA SAMUEL & ANNA MUENI KABULU APPELLANT
BOTH SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES
OF THE ESTATE OF URBANUS KITHEKA-DECEASED**

AND

WANJOHI DAVID RESPONDENT

*(An Appeal from the judgment and decree of Hon. Mr. Njagi, Senior
Principal Magistrate, delivered on 20th November, 2015 in Mombasa
Senior Resident Magistrate's Court Civil Case No. 510 of 2014)*

JUDGMENT

1. In the lower Court, the appellants sued the respondent through a plaint dated 8th August, 2012 on their own behalf and on behalf of the estate of the deceased, as the legal administrators of Urbanus Kitheka (deceased), seeking recovery of general damages under the [Fatal Accidents Act](#) and the [Law Reform Act](#). They also sought special damages, costs of the suit and interest. The respondent was sued as the registered and/or beneficial owner of motor vehicle registration number KAA 706Z, which at the time of the accident was being driven by either himself and/or his authorized driver, agent, servant and/or employee.
2. The appellants averred that on or about 28th August, 2009, the deceased was lawfully and carefully being driven (sic) as a pillion passenger aboard motor cycle registration number KMCS 941R from Mwingi towards Kithyoko Shopping Centre and upon reaching Mbodoni market, a motor vehicle registration number KAA 706Z driven by the respondent and/or his authorized driver, agent, servant and/or employee so carelessly, recklessly and/or negligently and/or without taking due care veered



off its side and as a result thereof the aforesaid motor vehicle hit the motor cycle registration number KMCS 941R and Urbanas Kitheka sustained fatal injuries.

3. In addition, they stated that the deceased was 32 years old, was employed as an Assistant Security Officer earning a gross salary of Kshs. 63,810.00 per month and was in good health. The appellants contended that as a result of the said accident, the deceased's estate and dependents had suffered loss and damage.
4. There was no memorandum of appearance and statement of defence filed by the respondent before the Trial Court. The respondent did not as such participate in the proceedings before the said Court.
5. Judgment was delivered on 20th November, 2015, where the Trial Court held that the respondent was wholly to blame for the death of the deceased and entered judgment on liability at 100% against the respondent. In regard to damages, judgment was entered for the sum of Kshs. 5,234,800/= in general damages and special damages of Kshs. 55,150.00. The appellants were also awarded costs of the suit and interest at Court rates.
6. The appellants were dissatisfied with part of the decision by the Trial Court and on 30th October, 2019, they filed a Memorandum of Appeal raising the following grounds of appeal-
 - i. That the learned Trial Magistrate erred in law and fact in delivering the judgment on a date indicated as 20th November (sic); without notice to the parties thus meting out an injustice;
 - ii. That the learned Trial Magistrate erred in law and fact, while on the one hand recording that Counsel for the plaintiff was present and on the other hand recorded that the parties were absent at the delivery of the judgment effectively amending the contents of his judgment unprocedurally thereby causing an injustice;
 - iii. That the learned Trial Magistrate erred in law and fact in exercise of his discretion on the aspect of the applicable multiplier by applying a multiplier of 10 years for a deceased who died aged 32 years thus arriving at an inordinately low award in the circumstances thereby meting out an injustice;
 - iv. That the learned Trial Magistrate erred in law and fact in failing to consider the authorities and submissions submitted by the appellant hence arriving at a manifestly unfair award; and
 - v. That the learned Trial Magistrate erred in law and fact in considering extraneous circumstances that constitute imponderables of life hence applying completely unreasonable factors in exercising his discretion on the aspect of multiplier.
7. The appellants' prayer is for this Court to allow the appeal with costs and set aside the judgment and decree of the Trial Court dated 20th November, 2017 on the aspect of multiplier and to re-assess the correct quantum of damages payable while applying a reasonable multiplier in the circumstances.
8. This appeal was canvassed by way of written submissions. The appellants' submissions were filed on 22nd February, 2021 by the law firm of Ameli Inyangu & Partners Advocates. The respondent did not participate in this appeal.
9. Mr. Adhoch, learned Counsel for the appellants submitted that the Trial Court held that the deceased died at the age of 32 years as per the death certificate that was produced before the said Court, and worked as a Security Officer. He stated that the Court held that although the deceased would have lived up to the age of 60 years, the lifespan of Kenyans had been reduced due to factors such as accidents as in the instant case, natural calamities like drought, floods and terrorism, hence the Court awarded a multiplier of 10 years.



10. It was stated by Mr. Adhoch that according to PW1's testimony, the deceased worked as a Security Guard at the Kenya Ports Authority, a fact which was confirmed by a letter from Kenya Ports Authority. He submitted that PW1 stated that the deceased was not sick and did not suffer from any infirmity hence were it not for the accident, the deceased would have worked for an additional 28 years. He submitted that factoring in life's uncanny and unpredictable nature, a multiplier of 24 years was sufficient in the circumstances. Mr. Adhoch relied on the case of *Board of Governors of Kangubiri Girls High School & another v Jane Wanjiku Muriithi & another* [2014] eKLR, where the Court of Appeal upheld a multiplier of 24 years awarded by the Trial Court to a deceased aged 31 years at the time of death.
11. The appellant's Counsel submitted that inasmuch as they had taken cognizance of terror attacks, there was no evidence on record that prior to his death, the deceased was situated in an area prone to terrorism or to natural disasters. In addition, Mr. Adhoch submitted that the evidence on record remains unrebutted as the respondent failed to enter appearance and file any defence. In citing the case of *Acceller Global Logistics v BOO & another* [2020] eKLR, he submitted that the life expectancy of a Kenyan man as at the year 2009 when the deceased passed on was 60 years. He stated that the learned Trial Magistrate failed to consider this fact while applying a multiplier of 10 years, which was on the lower scale instead of the higher scale method, which would have placed the deceased at a statutory retirement age.

Analysis and Determination.

12. This being a first appeal, this Court is required to analyze afresh and re-assess the evidence adduced before the Trial Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. This was so held by the Court in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal 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 allowances in this respect”
13. The appeal herein is based on the issue of quantum of damages, and more specifically, the award on loss of dependency. This Court will only interfere with the lower Court's judgment if the same was based on wrong principles and/or on a misapprehension of the law. The instances in which an appellate Court can interfere with the decision of the lower Court was well articulated by the Court of Appeal in the case of *Bashir Ahmed Butt vs Uwais Ahmed Khan* [1982-88] KAR where it was held as follows-

“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. The appellant's Counsel submitted that the deceased died at the age of 32 years and that during his lifetime, he worked as a Security Guard at the Kenya Ports Authority. It was claimed that were it not for the accident, he would have worked for an additional 28 years up to the age of 60 years. It was proposed that a multiplier of 24 would be appropriate.



15. This Court has gone through the judgment by the Trial Magistrate and found that at page 7 of his judgment, he held that the life span of Kenyans has been shortened by other factors that are beyond our control. He stated that there are accidents like the one that caused the death of the deceased at the age 32 and that natural calamities like floods and drought are shortening the life span of Kenyans. The learned Magistrate further stated that there are ethnic wars and terrorism that have made our life (life cycle) unpredictable, thus the Court adopted a multiplier of ten years.
16. In *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR, Mativo J, (as he then was) held as follows on the issue of multiplier -
- “On the issue of the question of the multiplier, I find guidance in the case of in *Hannah Wangaturi Moche & Another vs. Nelson Muya* Nairobi HCCC No. 4533/1993 where it was held as follows-
- “In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum”
17. The death certificate that was produced before the Trial Court shows that the deceased died on 28th February, 2009 at the age of 32 years due to cardiorespiratory arrest due to severe head and chest injuries as a result of a road traffic accident. PW1 testified that during his lifetime, the deceased worked as a Security Officer at the Kenya Ports Authority earning a salary of Kshs. 63,810.00. The said averment was supported by a letter dated 18th April, 2012 from the Kenya Ports Authority that confirmed that the deceased was an employee of the said State Corporation. A salary advice from Kenya Ports Authority indicating that the deceased earned a salary of Kshs. 63,810.00 was also produced in evidence. It reveals that the deceased was expected to retire on 14th February, 2037.
18. As was correctly submitted by Counsel for the appellants, there was no evidence tendered before the Trial Court to the effect that the deceased lived in an area prone to terrorism or to natural disasters such as floods and drought, thus the holding by the Trial Magistrate that the life span of Kenyans had been shortened by other factors that are beyond our control is not supported by any evidence.
19. In the case of *Elizabeth Chelagat Tanui & another vs Arthur Mwangi Kanyua* [2013] eKLR, Judge H.P.G Waweru adopted a multiplier of 18 years where the deceased was 36 years old and in the case of *Pleasant View school Limited vs Rose Mutheu Kithopi & Another* [2017] eKLR, Judge J. Kamau affirmed a multiplier of 20 years which had been adopted by the Trial Court, for a 36 year old man.
20. In this appeal, this Court takes judicial notice of the fact that the life of a Security Guard when at work is fraught with many risks and that may have shortened the lifespan of the deceased herein, if an attack arising from a security breach had taken place at the Kenya Ports Authority. It is however my finding that the multiplier of 10 years applied by the Trial Court for the deceased herein who was 32 years old was too low despite the job he was doing. Bearing in mind the above two decisions, I set aside the said multiplier of 10 years adopted by the Trial Court and I substitute it with a multiplier of 23 years. The loss of dependency therefore works out as $63,810 \times 12 \times 23 \times 2/3 = 11,741,040.00$.
21. The upshot is that the appellant’s appeal is merited and it is hereby allowed in the following terms-
- i. That the award of Kshs. 5,104,800/= for loss of dependency under the *Fatal Accidents Act* is set aside and substituted with an award of Ksh. 11,741,040.00;
 - ii. That the award of Ksh. 130,000/= as damages under the *Law Reform Act* is affirmed;



- iii. That the award of special damages in the sum of Kshs. 55,150.00 is affirmed; and
 - iv. Costs of the appeal shall be borne by the respondent. The award of interest is also upheld.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of-

No attendance for the parties

Mr. Oliver Musundi – Court Assistant.

