



REPUBLIC OF KENYA



**Ruto v Chelangat & another (Civil Appeal E101 of 2021)
[2022] KEHC 14090 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E101 OF 2021
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

VINCENT KIBIWOTT RUTO APPELLANT

AND

**ABRAHAM BUNEI KORIR (REPRESENTATIVE TO THE ESTATE OF DAVID
KIMETO BUNEI (DECEASED) 1ST RESPONDENT**

AGNES CHELANGAT 2ND RESPONDENT

*(Being an appeal from the Judgment/Decree of the Honourable C. Kutwa
(SPM) delivered on 4th August, 2021 in Iten Civil Case No. 18 of 2019)*

JUDGMENT

1. The appeal is on quantum. In the trial court, the respondents had sued the appellant claiming general and special damages pursuant to the *Law Reform Act* and *Fatal Accidents Act*, arising from a fatal road accident which occurred on January 28, 2019 along Eldoret-Eldama Ravine Road at Maji Mazuri, involving the motor vehicle registration number KBG 035L owned by the Appellant and in which the deceased, David Kimeto Bunei was travelling as a lawful passenger.
2. The appellant filed a defence dated January 21, 2020 denying the respondents' claim and particulars of negligence. He blamed the accident on the deceased's contributory negligence.
3. After hearing the case, the trial court held the Appellant 100% liable for negligence. It awarded Kshs 70,000/= for pain and suffering, Kshs 100,000/= for loss of expectation of life and Kshs 1,634,619/= for loss of dependency. It also allowed special damages of Kshs 401,925/=, costs and interest.
4. The appellant was aggrieved with the decision on both liability and quantum. He filed a memorandum of appeal dated October 28, 2019 and raised three grounds thus:



1. That the learned trial magistrate erred in law and fact by failing to appreciate the applicable principles used in assessment of damages under the *Fatal Accidents Act*.
2. That the learned trial magistrate erred in law and fact by adopting a multiplier of six (6) without taking into account the vicissitudes and vagaries of life
3. That the learned trial magistrate erred in law and fact by adopting a multiplicand of Kshs 34,060.75 instead of adopting a multiplicand of Kshs 20,021.65/= which was the deceased's net pay as evidenced by the payslip produced as an exhibit in Court.
5. Parties filed written submissions and the appeal was disposed of through those submissions. The appellant submitted through his submissions dated July 12, 2022 and filed on July 27, 2022, that the trial court erred in its assessment of quantum of damages. The Appellant argued that the discretion in assessing the amount of general damages payable will be disturbed if the trial Court; took into account irrelevant factors or left out of account a relevant factor or the amount is so inordinately low or high that it must be a wholly erroneous estimate of damages.
6. The Appellant further submitted that the award given must take into account comparable injuries or similar injuries and awards. The Appellant cited the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd* [2013] eKLR and *Godfrey Wamalwa Wamba & another v Kyalo Wambua* [2018] eKLR.
7. On loss of dependency, the appellant faulted the trial magistrate for adopting a figure of Kshs 34,060.75 whereas the deceased earned a net salary of Kshs 20,021/= as per his payslip. The appellant relied on the finding in *Vincent Sululu & another v Rose Wanjiru* [2016] eKLR.
8. The appellant blamed the trial court for adopting the multiplier method instead of adopting a global sum. The appellant cited the case of *Dora Mwawandu Samuel (Suing on her behalf and on behalf of the Estate of Samuel Muweliani Jumamosi (Deceased))* in which the court adopted a global sum of Kshs 400,000/=. The appellant also relied on the case of *Moses Wetangula & another v Eunice Titika Rengekiang* [2018] in which the court adopted a global sum of Kshs 500,000/=
9. On loss of expectation of life, the Appellant submitted that the award of Kshs 100,000/= was excessive. The Appellants submitted that a conventional award of Kshs 10,000/= would have been sufficient in the circumstance. The Appellants placed reliance on the case of *Wachira Joseph & 2 others v Hannah Wangui Makumi & another* [2021] eKLR.
10. The Appellant argued that the appropriate multiplicand would be three years and a ratio of 1/3 as the deceased's children were all above the age of eighteen years and hence adults who could fend for themselves.
11. The Appellant argued that the appropriate award for loss of dependency would therefore be Kshs 240,259.8/=
12. The Respondents filed written submissions dated April 13, 2022 and filed in Court on the same date. On liability, the Respondents submitted that the trial Court found the Appellant and or his driver, agent, servant and or employee 100% liable for the accident as the said vehicle was being driven at a high speed whereas the deceased was only travelling as a lawful passenger in the said vehicle and did not in any way contribute to the accident.
13. On loss of dependency the Respondents submitted that the deceased herein was 54 years old and worked as an Assistant Chief and used to earn Kshs 38, 760/= per as evidenced by the payslips on record.



14. The Respondents argued that the deceased was the sole breadwinner for his family and had dependants including his wife, sons and daughters who suffered a great loss as result of his untimely death. The Respondent further argued that the dependency ration of 2/3 that was adopted by the trial Court was reasonable in the circumstances.
15. The Appellant further submitted that the deceased was a civil servant and would have worked up to the age of sixty (60) and hence the multiplier of 6 years was thus reasonable.
16. On loss of life expectation, the Respondents argued the award of Kshs100,000/= was appropriate in the circumstances. They submitted that the deceased was fifty-four (54) years and had prospects of living a long life.
17. On pain and suffering, the Respondents submitted that the deceased suffered a lot of pain before his demise and therefore the award of Kshs.70,000/= made by the trial Court was therefore reasonable.
18. On special damages, the Respondents submitted that the same were pleaded and supported by receipts.

Determination

19. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reassess, re-evaluate and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and give due allowance for that.
20. In the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, the Court of Appeal stated;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
21. The facts speak for themselves that an accident indeed occurred on January 28, 2019 along Eldoret-Eldama Ravine Road at Maji Mazuri, involving the motor vehicle registration number KBG 035L owned by the Appellant and in which the deceased, David Kimeto Bunei was travelling as a lawful passenger.
22. As assessment of damages is at the discretion of the trial court, this court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd v Gathogo Kanini v AMM Lubia & another* as follows: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



23. In *Ezekiel Barnge'entuny v Beatrice Thairu* HCC No 1638 of 1988 where Justice Ringera (as he then was) held thus; -

“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 the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature.”

24. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

25. The main contention in this appeal is the adoption of Kshs 34,060.75/=, as the deceased's monthly earnings. The appellant has faulted the trial Magistrate for using Kshs 34,060.75/= as the deceased's earnings as he was earning Kshs 20,021.65/=. The Appellant has also faulted the Magistrate for awarding Kshs 100,000/= for loss of expectation of life but instead the award of Kshs.10,000/= would be appropriate. The Appellant has also faulted the trial Magistrate for adopting a multiplicand of 6 years and a dependency ratio of 2/3.

26. In this case, there was proof that the deceased worked as an Assistant- Chief before his untimely death. This, fact was not disputed. From the payslip produced in court as exhibit PEXh6 it is clear that the deceased's gross salary was Kshs 38,760/= whereas his net pay was Kshs 20,021.65/=. But the trial court adopted the sum of Kshs 34,060/=. In light of the evidence adduced, the trial Court applied the wrong principle in assessing the multiplicand applicable in loss of dependency in this case. As such, the discretion thereto is amenable to interference by this court. I will therefore set aside the sum of Kshs 34,060/= adopted by the trial court and replace it with a sum of Kshs 20,021.65/= being the deceased's net pay.

27. The appellant has also argued that the multiplier of six (6) years adopted by the trial Magistrate failed to take into account the vicissitudes of life and life expectancy. The evidence on record from the materials placed before Court indicates that the deceased was 54 years at the time of his death and that he worked as an Assistant- Chief for Keiyo/Iten Location. There is no doubt that the deceased was a civil servant and would have naturally worked up to the age of sixty. No evidence has been produced before this honourable court to indicate that the deceased was perhaps in bad health. Having said so, the court finds no reason whatsoever for adopting the multiplier of three (3) as submitted by the appellant.

28. The appellant has also faulted the trial magistrate for adopting the dependency ratio of 2/3. In any case, he argued, a dependency ratio of 1/3 would have been appropriate. The appellant argued that the deceased's children are all above the age of eighteen (18) years and can therefore fend for themselves. Section 4(1) of the *Fatal Accidents Act*, defines a dependant as wife, husband, parent and child of the deceased. I do not agree with the appellant's argument that the deceased's children being eighteen (18) years and above could fend for themselves and hence were not dependant on the deceased. The



appellant has not tabled any evidence to support the said assertion and to my mind being 18 years above does not necessarily mean that one is able to fend for themselves. I have also perused the proceeding in the trial court and I note that Agnes Chelangat, the deceased's widow told the court that she is a house wife and wholly depended of the deceased to pay all the family's expenses. I do note also that the Respondents were listed as the deceased's dependants in the Chief's dated August 19, 2019. I therefore find no basis of interfering with the 2/3 ratio as decreed by the trial Court.

29. The evidence shows that the deceased earned a gross salary of Kshs 38,760/=. The net income for our purposes is therefore Kshs 20,021.65/=. In the upshot, the appropriate multiplicand is Kshs 20,021.65/=. Accordingly, loss of dependency is calculated thus: -

$$\text{Kshs } 20,021.65 \times 12 \times 6 \times 2/3 = \text{Kshs } 961,039.2/=$$

30. For loss of expectation of life, as held in the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the administrator of the late Robert Mwangi)* [2019] eKLR referred to in the trial court's judgment, nominal damages should be awarded if death followed immediately after the accident. In the present case the trial Magistrate awarded Kshs 100,000/= for loss of expectation. This court finds no good ground adduced to disturb the award made under the loss of expectation of life.

31. The appellant did not challenge the trial court's award on pain and suffering and special damages and therefore see no reason to disturb the same.

32. In conclusion, the appeal herein is allowed partially and judgment entered for the respondent in the following terms:

- a. Liability – 100%
 - b. Loss of dependency -Kshs. 961,039.20/=
 - c. Pain and suffering - Kshs 70,000/=
 - d. Loss of expectation of life - Kshs 100,000/=
 - e. Special damages - Kshs 401, 925/=
- Total - Kshs 1,532,964.20/=

Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

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R NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

M/S Kimondo Gachoka & CO. Adv for appellant

M/S Mwinamo Lugonzo & CO. Adv for respondent

