



**Anditi & another (Suing as the Legal Representatives of the Estate
of George Awili Anditi) v Foam Mattress Limited (Civil Appeal
E086 of 2021) [2022] KEHC 16961 (KLR) (29 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E086 OF 2021
RE ABURILI, J
DECEMBER 29, 2022**

BETWEEN

DORCAS JUMA ANDITI 1ST APPELLANT

SIMON OTIENO ANDITI 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GEORGE
AWILI ANDITI**

AND

FOAM MATTRESS LIMITED RESPONDENT

*(An appeal from the judgement and decree of Hon S.O Temu. S.P.M
in Nyando PMCC No. 10 of 2015 delivered on 24th June, 2021)*

JUDGMENT

1. The appellants (plaintiffs in the subordinate court) sued the respondent under the provisions of the [Fatal Accidents Act](#) and the [Law Reform Act](#) for damages accruing from a fatal road accident that claimed the deceased's life.
2. It was averred in the plaint that the deceased, while riding a motor cycle and carrying the 2nd plaintiff and another passenger, were knocked down by a truck belonging to the respondent which was trailing them. The deceased succumbed to the injuries sustained therein out of which the plaintiffs blamed the respondent for negligence and the particulars thereof itemized under paragraph 4 of the plaint.
3. The respondent filed his defence attributing negligence on the deceased's part and denied the allegation that the appellants were entitled to the damages under the [Law Reform Act](#) and the [Fatal Accidents Act](#).
4. Consequently, evidence was taken in the matter. Dorcas Anditi testified as PW-1 and stated that the deceased was her son. That she did not witness the accident but was informed by her son Simon, a



- pillion passenger. She stated that the deceased earned Kshs 1,000/= daily in profits from farming and business out of which the deceased used to give her Kshs 200/- and supported his siblings who were school going together with his wife and children.
5. PW-2 was Hellen Amollo Mbaja, a health records information officer from Jaramogi Oginga Odinga Teaching and Referral Hospital who testified that the deceased was brought in hospital dead and his body was preserved in the mortuary from where a post mortem was conducted by one Dr Rukia.
 6. The respondent's case subsequently closed without tendering any evidence.
 7. Upon considering the evidence adduced, the trial court made the following orders:
 - a. Liability 100%
 - b. Pain and suffering Kshs 30,000/=
 - c. Loss of expectation of life Kshs 100,0000/=
 - d. Loss of dependency Kshs 600,000/=
 - e. Special damages Kshs 31,800/=TOTAL Kshs 761, 800
 8. Aggrieved by the award, the appellants preferred this appeal raising the following grounds:
 - i. The learned trial magistrate erred in law and in fact by awarding damages for loss of dependency which is inordinately low and at variance with the pleadings, against the weight of evidence and contrary to the applicable principles as established by precedent.
 - ii. The learned trial magistrate erred in law by failing to appreciate the fact that the deceased died at the age of 31 years and was a self-employed bread winner providing for his dependents including a wife, 2 children (all minors of tender age) and both parents all of whom are listed as dependents within the meaning of the *fatal accidents act* of the laws of Kenya, in awarding an inordinately low global figure of Kshs 600,000/= in damages for loss of dependency instead of adopting a more scientific; multiplier,, multiplicand and dependency ratio principle to arrive at an appropriate award in damages for loss of dependency based on the evidence on record.
 - iii. The learned trial magistrate erred in law and fact by failing to appreciate the fact that most Kenyans do not have a formal employment with a pay slip or documentary proof of earnings but are nonetheless eking out a living and providing for their dependants thus setting a bad precedent that is discriminatory against the majority of Kenyans.
 9. The appeal was canvassed by way of written submissions.
 10. The appellant's counsel submitted on the 1st and 2nd grounds of appeal that the trial magistrate fell into error by making an award that was contrary to the principles established by precedent and against the weight of evidence adduced in court by making an inordinately low award in the circumstances.
 11. On the issue of multiplier, the appellant submitted that the deceased having died at the age of 31 and considering the vagaries of life and the attendant uncertainties, a multiplier of 25 years would be reasonable as was held in *Fredrick Njoroge & another v Samuel Marigah Thairu & another* (2019) eKLR where a multiplier of 25 years was adopted.
 12. On the multiplicand, the appellant's counsel submitted that the trial court should have adopted the minimum wage bill and adopt the figure for a general labourer given that the deceased was a resident



- of Kisumu in the absence of formal records of earnings which is Kshs 10,954.70 in Kisumu in the year 2015.
13. On the dependency ratio, it was submitted that the deceased having been survived by a child, wife and parents who depended on him, the ratio of 2/3 ought to be adopted.
 14. On the third ground of appeal, it was submitted that the trial magistrate erred by holding that in the absence of formal records of earnings, the deceased's income was unknown. That in the circumstances, the court should have been guided by Section 3 of Cap 405 on what constitutes earnings and supported by the authorities in *Jacob Ayiga maruja v Simeon Obayo* (2005) eKLR, *Isaack Kimani Kanyingi & another (suing as the legal representative of the estate of Loise Gathoni Mugo) (deceased) v Hellena Wanjiru Rukanga* (2020) eKLR and *Chania Shuttle v Mary Mumbi* (2017) eKLR.
 15. It was further submitted that even if the court was to adopt the global approach, the court should have awarded between Kshs 2,000,000- 2,500,000/- given the circumstances of the case. This submission was supported with authorities in *Stephen Murathi Vs Brenda Makena (suing as the legal representative of the estate of Andrew Muthuri) (deceased)* (2021) eKLR, *David Mbuba & another Vs Victoria Mwangeli Kimwalu & another* (2018) eKLR and *Eston Muirigi Ndege & another Vs Patrick Gitonga Mbavu* (2018) eKLR.
 16. The respondent on its part submitted through its counsel that the trial magistrate adopted the global sum under the head of loss of dependency due to the fact that the deceased's earnings could not be ascertained. That the principles guiding the interference of awards on appeal was stated in *Beatrice Wangui Thairu v Hon Ezekiel Barngetuny & anor*, Nrb HCC 638 of 1988.
 17. The respondent applauded the trial magistrate for adopting the global sum as opposed to multiplier approach as was stated in *Marko Mwenda v Bernard Mugambi & anor*-Nrb HCC 2343 of 1993.
 18. In sum total, the respondent submitted that the trial magistrate exercised discretion judiciously in awarding the damages.

Analysis and determination

19. The duty of a first appellate court is to scrutinize the evidence afresh with a view of arriving at its own conclusion but of course giving due allowance to the fact that the appellate court did not see or hear the witness testify. This is the principle running through several decisions from our jurisdiction and as was stated in *Peters v Sunday Post Ltd* (1958) EA 424, where the Court held that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

20. I have carefully reviewed the evidence adduced before the trial court, the grounds of appeal and the rival submissions. The issue in contest in this appeal is on quantum awarded on loss of dependency. I am minded to set out the principles underpinning the assessment of damages by an appellate court. In *Catholic Diocese of Kisumu vs Tete* (2004) eKLR, it was held that:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried



the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.”

21. In arriving at the sum of Kshs 600,000/-, the trial court adopted a global sum of Kshs 600,000/- since the deceased’s earning capacity could not be established.
22. Having perused the record, I am satisfied that the deceased was aged 31 years and survived by 2 children, wife and parents. The level of dependency of each could not also be established in the absence of formal records though his mother stated in her testimony that she used to get Kshs 200/- daily from the deceased.
23. As established by the case of Jacob Ayiga (supra), documentary proof is not the only way to proof one’s income. Such a stand could do injustice to those that do not keep records as the deceased herein. It cannot be said that in the absence of formal documents, the deceased made no income.
24. In the submissions before the subordinate court, the plaintiff (now appellant) urged the court to adopt the minimum wage of a general labourer while the defendant urged the court to adopt the global sum. The trial court ultimately awarded Kshs 600,000/-
25. Case law has established that the multiplier approach is applicable where it is practicable to so adopt. The circumstances of adopting the multiplier approach was explained by Ringera J in *Albert Odawa -Vs- Gichimu Gitbenji* (2007) eKLR where the learned judge expressed himself thus:

“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.”
26. A similar position was arrived at in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* (1999) eKLR where it was held that:

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court’s opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”
27. Other than the oral testimony that the deceased was running a shop and both a commercial and subsistence farmer, no evidence was tendered in support of this fact. Running a shop could be evidenced by a trade license or even evidence of purchases of items for sale. Commercial farmers too keep records of what they sell and buy. In the instant case, no such evidence was availed.
28. I have given the matter the due consideration with a view of arriving at my own conclusion and I am satisfied that in the circumstances of the case, the multiplier approach was not practical for want of proof of the deceased’s earnings and the level of dependence by the dependents.
29. In my final analysis therefore, I find no fault in the trial magistrate’s approach and award and I therefore proceed to dismiss the appeal with an order that each party do bear their own costs of the appeal.
30. This file is closed.



Dated, Signed and Delivered at Kisumu this 29th Day of December, 2022

R.E. ABURILI

JUDGE

