



James & another v Wambua (Suing as the Personal Representative of the Estate of Jane Munyiva Mutiso-Deceased) (Civil Appeal 662 of 2016) [2022] KEHC 16333 (KLR) (Civ) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 662 OF 2016

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

MBETHE JAMES 1ST APPELLANT

MARTIN KIMANI 2ND APPELLANT

AND

JEREMIAH MUTISO WAMBUA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JANE MUNYIVA MUTISO-DECEASED) RESPONDENT

(Being an appeal from the judgment of Hon. Usui SRM, dated and delivered on 12th October 2016 at the Chief Magistrate Milimani Commercial Courts in CMCC No.7749 of 2014)

JUDGMENT

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated December 1, 2014 pursuant to a road accident on March 17, 2014 at Muthurwa Bus Terminus along Jogoo Road and sought for reliefs against the appellants' in the nature of damages under the Law Reform Act and Fatal Accidents Act and special damages plus costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that on or about March 17, 2014 at around 8.00 pm the deceased was lawfully crossing Muthurwa bus terminus when the 2nd appellant suddenly drove motor vehicle KAP 601A so carelessly as the respondent was crossing thereby crushing her against motor vehicle number KAC 431V as a consequence of which the deceased incurred fatal injuries.



3. The appellants filed their statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent in the sum of Kshs 3,907,970/=.
4. The appellants being aggrieved preferred this appeal and put forward the following grounds:
 - a. That the learned trial magistrate erred in fact and in law in holding the appellant 100% liable when the respondent's witness gave evidence which was uncorroborated.
 - b. That the learned trial magistrate erred in both law and fact in finding that the respondent was entitled to damages of Kshs 3,744,000/= as loss of dependency Kshs 10,000/= for pain and suffering, Kshs 100,000/= as loss of expectation and Kshs 53,970/= as special damages plus costs and interest.
 - c. That the learned trial magistrate erred in both law and fact in finding that the respondent was entitled to an award for loss of earning capacity at a global award of Kshs 3,744,000/= as loss of dependency yet the same was not proved as no proof of earnings was adduced.
 - d. That the learned trial magistrate erred in both fact and law in failing to consider the appellant's submissions on both liability and quantum.
 - e. That the learned trial magistrate erred in both fact and law by awarding damages that were inordinately high in view of the circumstances of the case.
 - f. That the learned trial magistrate erred in law by failing to consider conventional awards for similar cases.
5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions. The only issue for determination put forward by both parties is the issue being whether the trial court erred in law and fact in awarding for loss of earning capacity at a global award of Kshs 3,744,000/= as loss of dependency .
6. The appellants submitted that the deceased died aged 25 years and was survived by her father and two siblings and that he was a volunteer/locum wit Feed the Children Kenya and her daily wage was Kshs 1,500/= .The standards procedures of operation which locums states as follows at paragraph 1

"Feed the Children as an organization will engage locums/part time staff to come in and offer short term services on request by specific departments in need who shall fill in a request form."
7. The appellant contends that it is clear from the foregoing that the work the deceased was engaged in was on a short term basis as a volunteer and was not a permanent salaried job. That the locum/volunteer requisition form stated that very clearly that the deceased was to be engaged from March 11, 2014 to April 11, 2014 a period of 31 days.
8. It is the appellants' submissions that the trial court erred by assuming that the deceased would earn Kshs 1,500/= for the rest of her life ,when it adopted a multiplicand of Kshs 1,500/= and this is because the deceased was not in a permanent employment and it was not guaranteed that the one month contract would be renewed for the rest of her life.
9. The appellant further submitted that since it was not clear which type of employment the deceased was engaged in and since the job at Feed the Children was not permanent, then the trial court ought



to have adopted the global award technique in awarding damages under the *Fatal Accidents Act* that is loss of dependency or use minimum wage applicable at the period when the deceased died.

10. The appellants relied on the Court of Appeal case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001 (2004) 2KLR 55 as quoted in *Mumbi Ngumbi Kasamu (Suing as the legal representative of the Estate of Boniface Mulinge Mbithe (deceased v Mutua Mulaa & another* (2019) eKLR stated as follows:

“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 different 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, As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”

11. The appellant also relied on the case of *Lim Pho Choo v Cam dem & Islington Area Health Authority* (1979) 1 All ER 332 cited in the case of *Nancy Oseko v Board of Governors Masai Girls High School* (2011) eKLR where the court said that:

“In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant at.”

12. The appellants contend that the trial court ought to have adopted the global award technique in awarding damages under the *Fatal Accidents Act* that is loss of dependency or use the minimum wage applicable at the period when the deceased died which was Kshs 9,780/=, this is as per the *Regulation of wages (General)(Amendment) Order, 2013* that came into operation on May 1, 2013.
13. It is the appellant’s submissions that the trial court could have adopted the global award technique, the general damages under loss of dependency ought to have been in the range of Kshs 1,200,000/= and on this the appellant relied on the case of *Across Africa Safaris & another v John Wangombe (Sued as legal representative of the Estate of Jane Kamene –deceased) & another* (2020)eKLR where an award of Kshs 1,200,000/= for loss of dependency was deemed as reasonable for the estate of a deceased who had died aged 25 years like the deceased in this case.
14. It is the appellant’s humble prayer that this court substitute the trial court award on loss of dependency with Kshs 1,017,120/=.
15. In response, the respondent submitted that the learned trial magistrate considered all relevant factors including the very young age of the deceased, the amount of annual or monthly dependency, and the expected length of dependency without undue speculation and its decision on loss of dependency cannot be faulted.
16. The respondent relied on the case of *Anthony Maina Mwaniki v Munyara Estate*, Civil Appeal No 493 of 1999, DKS Aganyanya J stated that the principle on which an appellant court will interfere with the lower court’s assessment of damages are now well settled in Kenya. Kneller JA as he was then, said in *Robert Msioki Kitavi v Coastal Bottlers Ltd* (1985) 1KAR 981 at 895 (1982-88) 1 KAR 891 at page 895)

“The Court of Appeal in Kenya, then should as its fore runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken



into account or failed to take into account something he ought to have taken into account or the award is so low or so high that it amounts to an erroneous estimate.”

17. This is a first appeal and this court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another vs Associated Motor Boat Co Ltd & others* (1968) EA 123). Sir Kenneth O’Connor of the Court of Appeal for Eastern Africa in *Peters vs Sunday Post Limited* [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

18. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In *Butt –vs Khan* (1977)1KAR.

19. The appellants in faulting the trial court on the award of Kshs 3,744,000/= for loss of dependency, contend that the trial court ought to have used a minimum wage of Kshs 9,780/=, 1/3 being dependency ratio and 26 years being the multiplier and Kshs 9,780 as the multiplicand thus its calculations ought to have been $1/3 \times 26 \times 12 \times 9,780 = 1,017,120/=$.

20. The law is that where there is no evidence of income the court is free to resort to the minimum wage and it matters not that the work is informal or menial (*Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu* (2021) eKLR).

21. In this case the respondent submitted that the deceased was in gainful employment where she was earning a daily wage of Kshs 1,500/= and were it not for the accident the deceased would have continued enjoying gainful contract with the said organization.

22. According to the respondent the deceased would work from Monday to Saturday at daily wages of Kshs 1,500/= and therefore in a month she would earn Kshs 1500×26 working days which is equivalent to Kshs 36,000/= in a month.

23. In my view there was sufficient evidence to conclude that the deceased earned an income from her employment as a volunteer/locum with an NGO Feed the Children Kenya and earned Kshs 1,500/=. It is only when there is absence of income that the trial magistrate will apply the *Regulations of Wages Order* as held by Asike-Makhandia J in *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and another* Kisii Civil Appeal No 68 of 2005 [2011] eKLR.

24. In the case of *Francis Rigba v Mary Njeri (Suing as the Legal Representative of the estate of James Kariuki Nganga)* (2021) eKLR, the Court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages for loss of dependency;

“...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of *Roger Dainty versus Mwinyi Omar Haji & another* 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”

25. I find that the trial court properly took into consideration the age, good health and physical wellness of the deceased in adopting the multiplier, multiplicand and dependency ration before computing and awarding the sum of Kshs 3,744,000/= for loss of dependency.



26. The upshot and conclusion from the foregoing analysis and findings is that the appeal is devoid of merit and it is dismissed with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent

