



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL APEAL NO. 49 OF 2016**

**MUTHIKE MUCIIMI NYAGA (Suing as the Administrator of the Estate of**

**James Githinji Muthike (DECEASED).....APPELLANT**

**VERSUS**

**DUBAI SUPERHARDWARE.....RESPONDENT**

*(Being an Appeal from the Ruling of Hon. P.M. Kiama Principal Magistrate Wang'uru delivered on 27<sup>th</sup> September, 2016 in Wang'uru PMCC No. 159 of 2015)*

**JUDGMENT**

1. In the judgment delivered on the 27.9.2016, the trial court awarded the Appellant (then plaintiff) Kshs.20,000/= general damages for pain and suffering, Kshs.150,000/= loss of expectation of life and Shs.960,000/= loss of dependency being compensation for loss of life of the deceased, following a traffic road accident that occurred on the 25.2.2012 along the Togonye-Difathas road. Judgment on liability was by consent recorded at 85% against the Respondent.

2. This appeal challenges the award of general damages in respect of loss of dependency and Nil award for funeral expenses as particularly stated in the Memorandum of Appeal dated 24.10.2016 and filed on even date.

3. The parties filed written submissions to urge the appeal. The deceased was 21 years old and single at time of his demise. He was a taxi driver, earning an income stated to have been Shs.15,000/= per month. In the judgement, the trial court applied the following to arrive at the sum of Kshs.960,000/= as loss of dependency.

- **Multiplier of 30 years.**
- **Multiplicand of 1/3.**
- **Income of Ksh.8,000/= per month.**
- **Nil damages for funeral expenses.**

4. It is the appellant's grievance that the above awards were not reasonable for being too low, and has urged for enhancement.

The respondent finds no fault in the judgment awards and has urged for dismissal of the appeal with costs.

**5. Issues of Determination:**

*(1) Whether the Learned trial court's awards in respect of loss of dependency are so inordinately low as to represent an entirely erroneous estimate, so as to invite this court's disturbance upwards.*

*(2) Whether the trial magistrate erred in dismissing the claim on funeral expenses not proved.*

**6. Loss of Dependency**

This is a claim under the **Fatal Accidents Act Cap 32, Laws of Kenya**. The court is obligated to consider the multiplicand, the multiplier and the dependency ratio to arrive at the loss. The extent of dependency is a question of fact to be established in each case.

The court in **Butt - vs - Khan (1977) I KAR** held that:

*“An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely represent an 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”*

7. The formula for assessment of the above loss was ably stated by Ringera J, in **Beatrice Wangui Thairu -vs- Hon. Ezekiel Bangetuny & Another Nairobi HCC No. 1638 of 1988 (UR)** – that;

*“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 called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply 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 of the dependants and the chances of life of the deceased and dependants.*

*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 lump sum and would if wisely invested yield returns of an income nature”.*

8. Other than the above formula, some courts have opted to apply the global awards. For purposes of this appeal, I shall apply the Ringera J formula that comprised of the income, the multiplicand and the multiplier.

### 9. **The Deceased's Income**

A sum of Kshs.12,000/= was pleaded in the plaint as the deceased's income per month. Evidence was tendered by PW1 – mother of deceased that the deceased used to earn between Shs.800/= to 1000/= per day and about 15,000/= per month. No proof was tendered to support the evidence.

10. In his judgment the trial magistrate, while stating that no documents were produced to prove income adopted Shs.8,000/= per month as the deceased income at time of death.

The appellant citing several decisions submitted that there was sufficient evidence that the deceased earned Shs.15,000/= per month, but could not pinpoint any such evidence and supports the income adopted by the court of Shs.8,000/=.

11. It is now trite that it is not always that proof of income must be by production of documents. Makau J in **David Kimathi Kaburu -vs- Gerald Mworobia Murungi (Suing as legal representative of the estate of James Mwenda Mworobia (deceased) (2004) eKLR** held that;

*“- The court is alive of the fact that in Kenya Society, that most of the individual's earnings need not be proved by production of documents such as banking statements or payment vouchers or pay slips. Further to the above with modern technology in whichever payments are to be offered through use of mobile phones or by cash without requirement of payments by cheques.....is not necessary to produce documentary proof.....”*

12. By the above, it is not always necessary to prove earnings by production of documents. **The sum adopted by the trial court of Shs.8,000/= per month in my view, is neither too low or too high to invite this court to disturb it.**

The best that the trial court could have done was to apply the Government Wages guidelines for the period, for the said trade, to arrive at a more reasonable earnings. None of the parties have in this appeal provided, or invoked the said wages guidelines to persuade the court to interfere with the trial court's findings – **Nyamira Tea Farmers Sacco Ltd. -vs- Wilfred Nyambati Keraita & Another (2011) eKLR.**

The appeal fails on this aspect.

### 13. **The Multiplier**

The deceased was 21 years old. He would have worked to beyond government age limit for civil servants of 60 years, taking into account health and other life uncertainties.

The trial court adopted 30 years as the balance of the deceased productive working life, being the multiplier. While the appellant submits that the trial court erred in adopting the said multiplier, no proposal was put forth or cited authorities to support the submissions.

14. Admittedly, it is trite, as observed by the court in **David Kimathi Kaburu -vs- Gerald Mworobia (Supra)** that a deceased in private business, would work past the 60 years retirement age in the Government Sector. This however would depend on the nature of work/business and health of the individual and vagaries of life.

15. In the case **Board of Governors of Kangubiri Girls High School & Another - Jane Wanjiku & Another (2014) eKLR.**

The court held that:-

***“The choice of a multiplier is a matter of court’s discretion which discretion has to be exercised judiciously with reason”.***

In the case, the deceased was 27 years old. A multiplier of 25 years was applied.

16. In **Xh White Water Ltd -vs- Joseph Kimani Kamau & Another (2017) eKLR**, for a deceased, a nurse who died at 21 years the court adopted a multiplier of 30 years upon considering vagaries of life.

17. In **Ruth Wangechi Gichuhi -vs- Nairobi City County (2013) eKLR**, the court applied a multiplier of 30 years for the deceased aged 22 years at time of death.

Based on the above cited cases among others, it appears that a multiplier of 30 years is applied across the board for deceased persons of the age 21 to 22 years old at time of death.

18. The principle enunciated by the Court of Appeal in numerous decisions, and in particular **Ephantus Mwangi & Another -vs- Duncan Mwangi Wambugu (1982 – 88) I KLR 278**, is that the court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

19. The appellant has not stated in what manner the trial court may have misapprehended the evidence or in what way he faults the said court. **The multiplier of 30 years is thus upheld as fair and reasonable.**

#### 20. **Multiplicand**

The deceased was not married. His only dependants were his father and mother as stated in the plaint.

The application of 1/3 dependency ratio is not challenged. It is upheld. Thus, the award of damages for loss of dependency shall remain undisturbed. It is upheld.

#### 21. **Funeral Expenses**

This expense is a special damage. It is trite that special damages must not only be pleaded but also strictly proved.

A sum of Kshs. 50,000/= was pleaded in the plaint as funeral expenses. There is a long list of authorities to that effect.

22. However, with hardships and difficulties faced by deceased’s mourning families, it has now become necessary and trite to allow, without strict prove, reasonable funeral expenses.

The Court of Appeal in **Jacob Ayiga Maruja & another -v- Simeon Obayo (2005) eKLR**, rendered that;

***“We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses”.*** and proceeded to allow an expense of Sh.60,000/= towards funeral expenses in the case.

23. In **Premier Dairy Limited -vs - Amrit Singh Sago & Another, C.A No. 312/2009**, the Court of Appeal took judicial notice of the fact that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern of the bereaved family is that a close relative has died and the body needs to be interred according to the custom of a particular community involved.

24. **Guided by the above pronouncements, I set aside the trial court’s Nil award on funeral expenses, and substitute the same with an award of Kshs.50,000/= as funeral expenses.**

25. **Accordingly, the appeal is dismissed on the matter of general damages, particularly on the issue of loss of dependency. The appeal is however allowed in respect of funeral expenses. The appellant shall be paid a sum of Kshs.50,000/= being funeral expenses, with interest at court rates from the date of filing of the suit at the trial court, on the 14.12.2015, in addition to the awards ordered by the trial court.**

26. As the appeal has succeeded in part, each party shall bear own costs.

**Delivered, dated and signed at Kerugoya this 23<sup>rd</sup> Day of February, 2021.**

**J. N. MULWA**

**JUDGE**