



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL APPEAL NO. 29 OF 2019**

**WACHIRA JOSEPH.....1<sup>ST</sup> APPELLANT**

**JOHN MBURU GECHE.....2<sup>ND</sup> APPELLANT**

**PETER KIMORIGOL RECHE.....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**HANNAH WANGUI MAKUMI & MICHAEL GACHIGO MAKUMI**

(Suing as the Legal Representatives of the estate of

**BENSON MAKUMI GACHIGO.....RESPONDENTS**

**JUDGMENT**

1. The Respondent/Respondents lodged suit seeking for judgment against the appellants/Defendants jointly and severally for:

*i. General damages under the Fatal Accidents Act Cap 32 Laws of Kenya.*

*ii. Special damages of Kshs.25,000/-*

*iii. Costs of the suit plus 16% VAT thereon.*

*iv. Any other or further relief that this Honorable Court may deem fit and just to grant.*

2. The respondent called two witnesses. **PW1 Hanna Wangui and PW2 No. 73175 PC Makokha**. Respondents/Respondents' case was that on the 10<sup>th</sup> December, 2011 at about 7.30pm, **PW1** heard screams close by and rushed to the scene only to find the deceased who was her husband lying on the ground dead. She learnt that he had been knocked by **KBM 402M Toyota Succeed** while walking home along the Nyahururu – Nyeri road.

3. **PW1** obtained letter of administration which she produced as evidence. She told the court that they had 5 children and that the husband was the sole breadwinner earning about Kshs.10,000/- a month or Kshs.800/- per day. He worked as a mason. She also produced a copy of the records for the motor vehicles, a receipt of Kshs.500/- and a police abstract.

4. **PW2** also produced a police abstract for their records but was unable to locate the police file as the previous investigating officer had been transferred. He was also unable to tell the court who was to blame for the accident although the abstract indicated the said **KBM 402M** as having knocked down the deceased.

5. **The defence** did not call any witness.

**LIABILITY:**

6. Respondents submit that **PW2** found the deceased on the left hand side of the road facing towards the direction of Nyeri and was about one meter from the road which is an indication that the impact was not on the road but on the side. **PW2**, the Respondents submits confirmed the authenticity of the police abstract. That there was no evidence from the defence to controvert the Respondents' evidence. Respondents also

produced letters of administration, copy of death certificate, search certificate for the motor vehicle, receipt thereof and a police abstract.

7. The defence on the other hand submitted that the case had not been proved on a balance of probabilities. They cited ***High Court at Nakuru HCCC 239 of 1998 Lucy Njeri Chege v James Macharia Kungu trading as Marsh Transporters & Another*** so as much as the Respondents alleged negligence against the Defendants, they submitted, they offered no such evidence to prove the same. Defendant also cited ***Eastern Produce (k) Ltd v Christopher Otiado Osino (2006)***.

8. From the evidence, the Respondents called the witness who testified that the deceased was lying off the road. That he had been hit by **KBM 402M Toyota Succeed** owned by **John Mburu Geche** and driven by **Peter Kimorigol Reche**. At that moment, in this court's opinion, the burden shifted to the Defendant rebut Respondents evidence. Especially with regard to the fact that the pedestrian's body was not lying on the road. They called no such witnesses, not even the driver. The evidence remained uncontroverted.

9. The trial court in its verdict held appellants 100% and awarded the estate of deceased damages thus provoking instant appeal where appellants set 6 grounds;

10. **Grounds:**

*i. That the learned Magistrate erred in law and in fact in finding the Appellant fully liable for the subject accident.*

*ii. That the learned Magistrate erred in law and in fact in holding that the deceased suffered pain and awarding Kshs.10,000/- for pain and suffering.*

*iii. That the learned Magistrate erred in law and in fact in awarding duplicated damages for loss of expectation of life and loss of dependency, and further erred in adopting a multiplicand of Kshs.10,000/- having found the same was unsupported.*

*iv. That the learned Magistrate erred in law and in fact in adopting a multiplier of 9 years and an erroneous multiplicand.*

*v. That the learned Magistrate erred in law and in applying a dependency ration of 2/3.*

*vi. That the learned Magistrate erred in law and in fact in failing to discount the award due to the accelerated payment.*

Directions were given that appeal be canvassed via submissions.

**APPELLANTS' SUBMISSIONS:**

11. The appellants submitted that, the learned Magistrate erred in finding the Appellant's fully liable for the subject accident.

12. It was stated by **Mrs. Hannah Wangui PW1** in her testimony that there was no eye witness to the occurrence of the accident and that she had only heard screams from her homestead and rushed to the scene. She was thus not an eye witness and could only testify as to what she found out at the scene (**page 33 record of appeal**). Further, **PC Bernard Makokha PW2** stated that he was not conversant with the case and that he was not sure who was to blame for the subject accident (**page 36 record of appeal**). The police abstract **P-Exhibit 4** indicated that no one was charged with an offence in relation to the subject accident (**page 18 record of appeal**).

13. It is trite law that he who alleges must prove the same. In this case, the Respondents alleged negligence against the Appellants but never adduced any iota of evidence to prove the same. They rely on the case of ***Eastern Produce (k) Ltd v Christopher Otiado Osino (2006) eKLR***.

14. It is argued that the Respondents were required by law to prove that they were dependent on the deceased prior to his demise. Under cross – examination at pages 32 and 33 of the record, PW1 conceded that four out of the five children were self-sufficient with the only dependent being the youngest child **Carolyne Waithera Makumi**.

15. However, the Respondents did not provide her birth certificate to prove her age and that the deceased was her father. They rely on the case of ***Lucy Njoki Chege v James Macharia Kung'u T/A Marsh Transporters & Another [2005] eKLR*** where the court held that:

16. There was no proof of earnings of the deceased. According to PW1, the deceased was a self-taught mason and that the income was not steady as there were days he did not get work (**pages 33 record of appeal**).

17. It is submitted that dependency was not proven and hence, the Respondents are not entitled to damages of loss of dependency. However, if this Honorable Court is of a different opinion, it is submitted as follows.

18. The trial court in awarding damages under the ***Fatal Accidents Act***, should have been guided by ***Legal Notice 64 of 2011*** which was in operation at the time of the deceased's death. **Under column 4, the minimum wage in all areas other than Nairobi, Mombasa, Kisumu, Mavoko, Ruiru and Limuru towns was Kshs.4,676 per month** (emphasis ours), the court thus erred in adopting a multiplicand of Kshs.10,000/-.

19. It is submitted that this court do set aside the award of the trial court's finding on loss of dependency and substitute the same with a sum of Kshs.112,224/- made up as follows:

· Kshs.4,676 x 1/3 x 12 x 6 = Kshs.112,224/-

20. They rely on the case of *Christine Chamaiyek v Unister Transporters Ltd [2007] eKLR* where the court relied on a multiplier of 6 years for a deceased who was 51 years old at the time of death.
21. The learned Magistrate erred by failing to discount the award due to accelerated payment. The Court of Appeal in *Maina Kaniaru & Another v Josephat M. Wang'ondy [1995] eKLR*.
22. Further in the case of *Simon Kibet Langat & Another v Miriam Wairimu Nguqi (Suing as the Administrator of the Estate of Daniel Mwiruti Nguqi [2016] eKLR* where in deducting the award under loss of expectation of life from the award under loss of dependency.

#### **RESPONDENTS' SUBMISSIONS:**

23. It is submitted that, on liability, the trial magistrate directed himself well by holding the Appellants 100% liable for the accident. From the evidence on record, pw1 on the date of the accident heard screams and when she arrived at the scene, she found that it was her husband who had been hit by a motor vehicle registration number **KBM 402M** and he was laying on the ground 1 meter from the road.
24. Thus that fact can be inferred that the point of impact was not on the road. PW2 a traffic police officer confirmed occurrence of accident and the authenticity of the police abstract as the same as usually issued in triplicate and produced it as **P-Exhibit 4**.
25. As correctly analyzed by the trial court at **pg. 47** of the record of appeal, the defence did not bring any witness to controvert the Respondent's version of how the accident occurred. This left the trial court with no option other than holding the Appellants **100% liable** for the accident.
26. It is a well-established principle of law that an appellate court can only interfere with a trial court's assessment of damages where it is shown that the court applied wrong principles or where the damages awarded were so inordinately high or low. This was established in *Kitavi v Coastal Bottlers Ltd [1985] KLR 470*.
27. It is submitted that the award reached by the trial Magistrate was based on principles as set out in law.
28. The police abstract and the death certificate which were all produced in evidence confirmed the date of death to be the same day the accident occurred.
29. They relied on the case of *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No. 38 of 2015 [2016] eKLR* where the deceased had died immediately after the accident and the trial court had awarded Kshs.50,000/- for pain and suffering
30. Respondent died on the same day of the accident, it is submitted that the learned trial magistrate was correct in awarding Kshs.10,000/- and never erred or misdirected himself.
31. The Appellants were contending that the learned Magistrate erred in law and fact in awarding duplicated damages for loss of expectation of life and loss of dependency, and further erred in adopting a multiplicand of Kshs.10,000/- having found the same was unsupported and that the learned trial magistrate erred in law and fact in failing to discount the award due to accelerated payment.
32. It is clear that the Appellant's are not disputing the fact that the Respondent was entitled to an award under loss of expectation of life and loss of dependency. They are only challenging the amount that was awarded by the trial court. Furthermore, the appellants are in their submissions raising the issue that there was no proof of dependency and proof of earnings which issue was not raised as a ground in their memorandum of appeal.
33. The trial Magistrate correctly made an award under both heads loss of dependency having considered his award under loss of expectation of life. Therefore, it cannot be said that he made duplicated awards as he should not have been expected to engage in a mathematical deduction.
34. **Section 4 (2) of the Fatal Accidents Act** provides for what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the **Fatal Accidents Act**, the trial judge bore in mind or considered what he had awarded under the **Law Reform Act** for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction. They cite case of *Hellen Waruguru Waweru (Suing as the legal representative of Pete Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR*.
35. On the issue of the multiplicand Respondents submit that the trial court correctly adopted a multiplicand of Kshs.10,000/- and did not err in fact and law. During hearing of the Respondents' case, the Respondent testified that the deceased was the sole breadwinner and the family depended on him for everything. It was her testimony that the deceased earned Kshs.10,000/- monthly. In as much as the Respondent did not tender any records to prove earnings, Respondent refer this court to the case of *Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 o 2002 [2005] eKLR*.
36. The Appellants contended that the learned Magistrate erred in law and fact in adopting a multiplier of 9 years and an erroneous multiplicand.
37. At the time of death, the deceased was 51 years old and was a mason. As correctly analyzed by the trial court at **pg. 48** of the record of

appeal, the Respondent would have worked the 9 more years hence adopted a multiplier of 9.

38. In David Makau v Maua Mutie Ndunda [2014] eKLR, court awarded a multiplier of 10 years where a deceased was aged 51 years.

39. The Appellants contended that the learned Magistrate erred in law in applying a dependency ratio of 2/3rds.

40. The deceased herein was the sole breadwinner with a wife and five children. The deceased would spend a large portion of his income on his dependants. As such we submit that the trial court was right in adopting a dependency ratio of 2/3. Cited is case of Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another [2019] eKLR.

## **ANALYSIS AND DETERMINATION**

### **DUTY OF FIRST APPELLATE COURT**

41. This appeal is against both liability and damages. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:

*“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).*

4. The Court of Appeal for East Africa took the same position in Peters v Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

*It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484.*

*“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”*

5. From these cases, the appropriate standard of review to be established can be stated in three complementary principles:

i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

6. Thus, this court can only interfere with an award of damages if, as stated by Law J.A. in the case of Butt v Khan (1977) KAR 1, the aggrieved party satisfies one of two conditions:

1. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or

**2. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.”**

42. From the evidence on record, pw1 on the date of the accident heard screams and when she arrived at the scene, she found that it was her husband who had been hit by a motor vehicle registration number KBM 402M and he was laying on the ground 1 meter from the road.

43. Thus that fact can be inferred that the point of impact was not on the road. PW2 a traffic police officer confirmed occurrence of accident and the authenticity of the police abstract as the same as usually issued in triplicate and produced it as P-Exhibit 4.

44. As correctly analyzed by the trial court at pg. 47 of the record of appeal, the defence did not bring any witness to controvert the Respondent's version of how the accident occurred. This left the trial court with no option other than holding the Appellants 100% liable for the accident.

45. It is a well-established principle of law that an appellate court can only interfere with a trial court's assessment of damages where it is shown that the court applied wrong principles or where the damages awarded were so inordinately high or low. This was established in *Kitavi v Coastal Bottlers Ltd [1985] KLR 470.*

46. The police abstract and the death certificate which were all produced in evidence confirmed the date of death to be the same day the accident occurred.

47. In *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No. 38 of 2015 [2016] eKLR* where the deceased had died immediately after the accident and the trial court had awarded Kshs.50,000/- for pain and suffering, Majanja J. held that:

***“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs.10,000/- to Kshs.100,000/- over the last 20 years hence I cannot say that that the sum of Kshs.50,000/- awarded under the head is unreasonable.”***

48. Respondent died on the same day of the accident, it is submitted that the learned trial magistrate was correct in awarding Kshs.10,000/- and never erred or misdirected himself. This court agrees with trial court finding and uphold the same.

49. The Appellants were contending that the learned Magistrate erred in law and fact in awarding duplicated damages for loss of expectation of life and loss of dependency, and further erred in adopting a multiplicand of Kshs.10,000/- having found the same was unsupported and that the learned trial magistrate erred in law and fact in failing to discount the award due to accelerated payment.

50. It is clear that the Appellant's are not disputing the fact that the Respondent was entitled to an award under loss of expectation of life and loss of dependency. They are only challenging the amount that was awarded by the trial court.

51. The trial Magistrate correctly made an award under both heads loss of dependency having considered his award under loss of expectation of life. Therefore, it cannot be said that he made duplicated awards as he should not have been expected to engage in a mathematical deduction.

52. **Section 4 (2) of the Fatal Accidents Act** provides for what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.

53. In the case of *Hellen Waruguru Waweru (Suing as the legal representative of Pete Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR* where the Court of Appeal held that:

***“This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issues of duplication does not arise. The words ‘to be taken account’ and ‘to deducted’ are two different things.”***

54. On the issue of the multiplicand Respondents submit that the trial court correctly adopted a multiplicand of Kshs.10,000/- and did not err in fact and law. During hearing of the Respondents' case, the Respondent testified that the deceased was the sole breadwinner and the family depended on him for everything. It was her testimony that the deceased earned Kshs.10,000/- monthly. In as much as the Respondent did not tender any records to prove earnings, Respondent refer this court to the case of Jacob *Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 o 2002 [2005] eKLR* where the Court of Appeal held that:

***“We do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and that earn their livelihood in various ways.***

**If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”**

55. The however since he was not on permanent employment, he cannot be said as a mason to have 24 /7 self-employment as some of the times he would be outside job thus court would adjust multiplicand to 7000 to take care of vicissitudes of life.

56. Appellants contended that the learned Magistrate erred in law and fact in adopting a multiplier of 9 years and an erroneous multiplicand.

57. At the time of death, the deceased was 51 years old and was a mason. As correctly analyzed by the trial court at pg. 48 of the record of appeal, the Respondent would have worked the 9 more years hence adopted a multiplier of 9. This court agree that masons can even work beyond 70 years and thus I uphold trial court findings.

58. In David Makau v Maua Mutie Ndunda [2014] eKLR, court awarded a multiplier of 10 years where a deceased was aged 51 years.

59. The Appellants contended that the learned Magistrate erred in law in applying a dependency ratio of 2/3rds.

60. The deceased herein was the sole breadwinner with a wife and five children. The deceased would spend a portion of his income on his dependents. He was married with wife and children thus the trial court was right in adopting a dependency ratio of 2/3.

61. In Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another [2019] eKLR, court stated as follows:

***“Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents. From the foregoing, I am persuaded that a dependency ratio of 2/3 is warranted.”***

62. Thus the appeal succeeds to the extent that the award is adjusted with a multiplicand of Kshs.7000/- per moth therefor calculation works out as follows;

***i. Kshs.7000 x 12 x 9 x 2 /3 = Kshs.504,000/-***

***ii. Other awards remain the same.***

***iii. Parties to bear their own costs***

***Dated, Signed and Delivered at NYAHURURU this 20<sup>th</sup> day of December, 2021.***

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**CHARLES KARIUKI**

**JUDGE**