



**REPUBLIC OF KENYA**

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

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 71 OF 2010**

**PATRICK NJOGU NYIHI.....APPELLANT**

**VERSUS**

**JACOB MUTHEGI.....1<sup>ST</sup> RESPONDENT**

**PETER KILONZO.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgement and decree of the Honourable S. M. Mungai, Senior Resident Magistrate in Machakos CMCC 1113 of 2008 delivered on 14<sup>th</sup> day of May, 2010)**

**BETWEEN**

**PATRICK NJOGU NYIHI (Suing as the legal representative**

**of the estate of Mary Wangari Ndahi (Deceased).....PLAINTIFF**

**VERSUS**

**JACOB MUTHEGI.....1<sup>ST</sup> DEFENDANT**

**PETER KILONZO.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The appellant herein, by way of a plaint filed in the lower court dated 28<sup>th</sup> October, 2008 claimed general and special damages as well as the costs of the suit against the Respondents herein.
2. According to the Appellant, the 1<sup>st</sup> Respondent was the legal owner of motor vehicle registration number KBA 169F Toyota *matatu* (hereinafter referred to as “the *matatu*”) while the 2<sup>nd</sup> Respondent was the legal owner of motor vehicle registration number KAW 632J Toyota Station Wagon (hereinafter referred to as “the saloon”).
3. It was pleaded that on or about 7<sup>th</sup> April, 2008, the deceased was a lawful passenger in the said *matatu* along Machakos/Kitui Road when at Mbaikini Secondary School, the 1<sup>st</sup> Respondent, his driver, servant and/or agent so negligently drove, managed and controlled the said vehicle that he caused the same to violently collide with the said saloon which similarly was at the material time being negligently driven by the 2<sup>nd</sup> Respondent, his driver, servant and/or agent. As a result of the said accident, the deceased sustained serious injuries and later succumbed on 11th Apr<sup>il</sup>, 2008 and lost the normal expectation of a happy and healthy life and her estate has suffered great loss and damages.
4. The Appellant then pleaded the particulars of negligence of both drivers and also relied on the doctrine of *res ipsa loquitur*. He also pleaded particulars pursuant to statute and averred that at the time of her death the deceased was 43 years old and in good health and at that time was working as a business lady earning Kshs 30,000/= per month and left behind her husband aged 51 years and two children, a daughter and a son, aged 19 and 18 years respectively.

5. Interlocutory judgement having been entered the matter proceeded to formal proof during which the Appellant testified that the deceased was his wife and died on 11<sup>th</sup> April, 2008 following a road traffic accident. On 7<sup>th</sup> April, 2008 he obtained grant of representation which he exhibited. According to him, he had been called by his wife's who relayed to him the information of the deceased's death. However, on 8<sup>th</sup> April, 2008 when he went to Machakos General Hospital, he found the deceased in the Hospital and she was taken to the ICU while unconscious and died on 11<sup>th</sup> April, 2008. He exhibited the death certificate. According to him the deceased was 43 years old. During the funeral he incurred expenses amounting to Kshs 73,292/= whose receipts he produced.

6. It was his evidence that the deceased was running a shop at Kitui where she was selling vegetables and materials. She also had a *simu ya jamii* business and in support of this he exhibited applications and albums. It was his evidence that the deceased was earning Kshs 30,000.00 per month. Their marriage was blessed with two children **Joan Rose Wanjiru** aged 21 and **Sammy Njogu** aged 19. He produced their certificates of birth as exhibits and also exhibited the marriage certificate and prayed for damages.

7. In support of his case the appellant called **Hellen Wambui Musyoka** as PW2 whose evidence was mainly on liability.

8. In his judgement, the learned trial magistrate found the defendants 100% liable and entered judgement against them. He had no difficulty in finding that the deceased was 43 years old. He however found that there was no evidence that the deceased was getting any profit amounting the sum pleaded. It was his view that bank statements or copies of records would have gone a long way in assisting the court on the issue. It was the learned trial magistrate's finding that the appellant did not explain why he could not take over the lucrative business that was being operated by the deceased or rent it out to keep generating income and proceeded to find that the loss of dependency was unproved.

9. As regards the funeral expenses he found that since none was pleaded the same was not awardable. He awarded the Appellant Kshs 30,000.00 being pain and suffering, Kshs 100,000.00 loss of expectation of life plus costs and interests.

10. In this appeal the same is only directed at the finding by the learned trial magistrate that the appellant was not entitled to an award under the head of loss of dependency.

### **Determination**

11. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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.”**

12. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

13. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:-

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has 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 really is 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 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 the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

14. It was therefore held by the Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

15. In the case before the trial court, there was evidence that the deceased was doing some business. It is true that the exact amount that she was earning was not proved. However, there was a receipt from Kitui Municipal Council in her name showing that she had applied for a space for *simu ya jamii* and application which was approved. Her evidence that she was operating the said business was not challenged. While I agree that the sum claimed of Kshs 30,000.00 per month was not proved, there was evidence that the deceased was not an idle person but was supplementing the family’s income through her business. To therefore dismiss the claim for loss of dependency simply due to lack of accounts was erroneous. The Court of Appeal in Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR had this to say on the issue:

**“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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 yet 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”**

16. In Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR it was held that where income is not proved, the income of an unskilled worker ought to apply. According to the *Regulation of Wages (General) (Amendment) Order, 2015* the deceased would fall under the category of general workers whose minimum wage was be Kshs. 10,954.70.

17. It is therefore my view that instead of dismissing an award under that head the learned trial magistrate ought to have adopted the amount prescribed by the *Regulation of Wages (General) (Amendment) Order*. The learned trial magistrate seemed not to have had any problem with the multiplier of 15 and dependency ratio of 2/3rds which I hereby adopt. In the circumstances, the award under the said head ought to have been:

$$10,954.70. \times 15 \times 12 \times 2/3 = 1,314,564.00$$

18. However, as held by Ringera, J (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993:

**“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”**

19. Therefore, the capital sum arrived at by applying the multiplicand to the multiplier is to be discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. The Court of Appeal in Eliphias Mutegi Njeri & Another vs. Stanley M’mwari M’atiri Civil Appeal No. 237 of 2004 therefore held that:

**“As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards...Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-.”**

20. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. Following in the footsteps of the Court of Appeal I would similarly discount Kshs 100,000.00 from the total award of Kshs 1,314,564.00 leaving a balance of Kshs 1,214,564.00 as loss of dependency. To that extent only does the appeal succeed.

21. As both parties did not comply with this court’s directions to furnish soft copies, there will be no order as to the costs of this appeal.

22. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 28<sup>th</sup> day of January, 2020.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Muthama for Mr Mutua for the 2<sup>nd</sup> Respondent**

**CA Geoffrey**