



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 190 OF 2016**

- 1. HAMISI SAID NJENGA**
- 2. MT. SINAI HOSPITAL**
- 3. MUTURI PETER..... APPELLANTS**

**VERSUS**

**PETER NGIGI NDAUWA &**

**MARY WANJIKU NGIGI (Suing as the legal representatives of the**

**estate of ALICE NJAMBI NGIGI (deceased).....RESPONDENTS**

**(Being an appeal from a judgement delivered by Ndeda PM in Thika Civil Suit No. 1238 of 2010 Chief Magistrate's Court)**

**JUDGMENT**

1. This appeal emanates from the judgment of **Ndeda, PM** in **Thika Chief Magistrate's Civil Court No.1238 of 2010**. The suit was filed by **Peter Ngigi Ndaauwa and Mary Wanjiku Ngigi** (the Plaintiffs) in their capacity as the legal representatives of the estate of **Alice Njambi Ngigi**, seeking to recover damages from **Hamisi Said Njenga, Mt. Sinai Hospital** and **Muturi Peter** (the Defendants ) in respect of the death of **Alice Njambi Ngigi** following road traffic accident which occurred on 1<sup>st</sup> January 2010 near Mt. Sinai Hospital.

2. In the plaint filed on 30<sup>th</sup> December 2010, the Plaintiffs (now Respondents) averred that the accident involved the motor vehicle registration number **KBK 859 Z** Nissan Matatu, driven by 1<sup>st</sup> Defendant and owned by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (now respective Appellants). It was alleged that the said vehicle was driven in such a negligent manner that it lost control, veered off the road and hit the deceased **Alice Njambi Ngigi** who was at the time lawfully walking "*besides the road along Mt. Sinai Hospital.*" She died instantly. In a statement of defence filed on 8<sup>th</sup> August 2011 the 1<sup>st</sup> Defendant denied negligence and liability. It was averred in the alternative in the said defence that the deceased was guilty of contributory negligence. I do not see on record a defence by either the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants, nor memorandum of entry of default judgment against them.

3. As well, there is no evidence that the said 2<sup>nd</sup> and 3<sup>rd</sup> Defendants participated in the trial. Nonetheless, following a trial in which the Respondents and the 1<sup>st</sup> Appellant testified, judgment was entered at 60:40% in favor of the Respondents and damages awarded as follows:

Pain and suffering –

- a) KShs.10,000/=
- b) Loss of expectation of life – KShs.200,000/=
- c) Loss of dependency - KShs.1,480,000/=

4. The decree extracted after judgment relates to all the three Defendants in the lower court suit. Aggrieved with this outcome, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants filed the instant appeal. The amended Memorandum of appeal filed on 19<sup>th</sup> July 2013 raises 7 grounds. Grounds 1, 2, 3, 4, 5 and 7 attack the quantum of damages awarded as excessive, while ground 6 states that the trial court erred in law and fact by failing to give adequate consideration to the evidence and submissions by the Appellants. On 19/9/18 the court directed that the appeal be canvassed by way of written submissions.

5. The Appellants opened their submissions by declaring that they were not challenging the finding on liability at 60:40 but asserted, regarding the award for lost dependency, that neither the income of the deceased nor dependency was proved. In particular, the Appellants assert that a global award was more suited to this case. On the multiplier approach employed by the trial court, the Appellants attack the multiplier and multiplicand applied as well as the dependency ratio of 2/3. Two authorities were cited in support of this submission, namely, **Charles Mukumi Njoroge v Asaph W. Kiberenge NBI HCCC No. 339 of 1990** and **James Kihara Gitari and Anor. v Moses Kiiru Kamau and Anor. NBI HCCC No.2954 of 1991**. The Appellants propose that a “reasonable“ multiplier would be between 15 – 20 years, and ? dependency ratio.

6.The Respondent defended the award in respect of lost dependency in their submissions. They also defended the award of KShs.200,000/= as damages for loss of expectation of life citing the case of **Silas Mugendi Nguru v Nairobi Womens’s Hospital [2014] e KLR**. Regarding the multiplier and multiplicand used , the Respondents assert that these were reasonable and based on evidence; and with regard to the dependency ratio, it was submitted that the Respondents had established that apart from her parents, the deceased had a young child who was dependent on her. The Respondents argue that the appellate court ought not to disturb an award unless it is excessive. – See **Butt v Khan [1977] I KAR**.

7. In support of the dependency award, several authorities including **Eliud Mwale Lewa and Anor. V Paka Tours Ltd and Anor. [2009] e KLR** were cited. However , save the case of **Silas Mugendi** none of the other authorities were supplied with submissions.

8. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. That duty of this court as first appellate court is to re-evaluate the evidence and draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI**.

9. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

**“A court of Appeal 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 demonstrably to have altered on wrong principles in reaching the findings he did”**

10. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately high by Appellants. The court, in determining the matter will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30**.

11. It was held in that case that:

**“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”** see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR**.

12. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that **“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 in the first instance”**.

13. As I see it, the chief complaint by the Appellants relates to the award made in respect of lost dependency. What was the evidence of the Respondents at the trial in that regard? **Mary Wanjiku Ngigi** the second Respondent testified that her co-Respondent had passed on, presumably subsequent to the filing of the suit . She testified that at the time of her death, the deceased was 23 years old and had a child by the name **Mary Wanjiku**; that prior to her death the deceased worked at a flower farm at Juja where she earned KShs.6000/= per month; that she and her husband were dependents of the deceased alongside the deceased’s own child. During cross-examination she admitted that she had no records to support the claim that the deceased had an income. She tendered a document (**Exh.7**) being a letter from the Chief Maria- ini sublocation Kandara, dated 19/5/10 which named the persons surviving the deceased as her two parents (Respondents) and a “sibling” **Esther Wairimu Njambi** aged 3 years.

14. In his judgment, the trial magistrate noted correctly, that no evidence was tendered in respect of the deceased’s income as the claim that she earned KShs.6000/= per month was unsupported. He then stated that in absence of such proof he would adopt a figure below a casual’s wage, and that since the deceased’s mother and child were dependent on her, a 2/3 dependency ratio applied. Moreover, the Learned Magistrate in his own words made the assumption that the deceased would have been involved in gainful employment until the age of 60 years. Thus the multiplier of 37 years was applied.

15. Reviewing the evidence, as well as related submissions, this court notes that while no documentary evidence of income of the deceased was tendered, the trial court was nevertheless entitled to do the best possible in the circumstances to determine some level of income in assessing damages for lost dependency. As held in **Kenya Breweries Ltd v Saro [1991] e KLR**, damages were payable to parents of a deceased child irrespective of whether there is or there is no evidence of pecuniary contribution. In this instance the court assumed what it referred to as a casual’s wage of KShs.5000/-.

16. The Court of Appeal in **Civil Appeal No. 203 of 2001 Kimatu Mbuvi v Augustine Munyao Kioko [2001] eKLR** stated inter alia:

**“But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult ... 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 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.”**

17. In **Wambua v Patel [1986] KLR 336** cited in Kimatu’s case, the Court grappled with the quantification of loss of earnings of a cattle trader who had sustained injuries in a road traffic accident. Even though the Court found the Plaintiff’s earnings rather low, and that he kept no records the Court (**Apaloo J** (as he then was) stated:

**“Nevertheless. I am satisfied that he was in the cattle trade and earned his livelihood from that business, a wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop a more sophisticated business method ... But a victim does not lose his remedy in damages because the quantification is difficult.”**

18. The trial court in this case did not indicate the source of the figure of KShs.5000/= the supposed casual’s wage that was applied. The evidence by the 2<sup>nd</sup> Respondent was that the deceased worked at a flower farm at Juja. In the absence of documentary evidence of her income, the trial court need not have plucked a figure from the air in assessing her income. In such situations the Regulation of Wages Orders which have legal force come in handy. In this instance, the Labour Institutions Act (Regulations of Wages (Agricultural Industry) (Amendment) Order which came into force on 1<sup>st</sup> May 2010 provided that the basic wage of an unskilled employee was KShs.3,347/= per month or KShs.140.55 per day in a locality such as Juja. There is no evidence that the deceased possessed any skills and in my view, the trial court ought to have applied the monthly wage under the 2010 Regulation of Wages Order even if adjusting it slightly.

19. In my own opinion an estimate of about Kshs.4000/= would approximate more to the minimum wage in the Regulation Order of 2010. In my considered view, the trial court erred by plucking a figure from the air that appears to be almost double the minimum wage in the relevant period and applying it. Indeed it seemed that the trial magistrate introduced without any evidence, what he considered the wage of a casual. That was a misdirection on the part of the court and resulted in an assessment of damages that was too high in the circumstances.

20. Secondly, it was pleaded that the deceased was survived by a young child by the name **Esther Wairimu Njambi**. This averment was denied in the defence and the onus was on the Respondents to prove the dependency or indeed existence of the alleged child. In her evidence the 2<sup>nd</sup> Respondent named the said child as **Mary Wanjiku**. The chief’s letter Exhibit 8 referred to a sibling named **Esther Wairimu Njambi**.

21. The 2<sup>nd</sup> Respondent ought to have adduced evidence to clarify this confusion by producing a birth certificate or some other evidence in this regard. In my considered view, the evidence tendered in respect of the alleged child dependent of the deceased was unsatisfactory and ought not to have been the basis for the application of a 2/3 dependency ratio. The dependency of the alleged minor child of the deceased not having been established the correct dependency ratio was ?. See **Charles Mukumi Njoroge v Asaph W. Kiberenge** (supra).

22. I see no reason to fault the trial magistrate’s use of a multiplier of 37 years as there was no dispute that the deceased was aged 23 years at death. Barring the vicissitudes of life, she could well have lived and been gainfully employed for another 37 years. Thus, this court will only interfere with and set aside the award in respect of loss of dependency and substitute therefor an award worked out as follows: **KShs.4000 x 12 x 37 x ? = KShs.592,000**. Other awards remain as before, i.e. KShs.200,00/= for loss of expectation of life, and **KShs.10,000** for pain and suffering.

23. Judgment will therefore be entered for the Respondents against the Appellants jointly and severally in the total sum of **KShs.802,000 /-(Eight Hundred and Two Thousand only)**, but subject, to the apportionment ratio of 60:40 in favor of the Respondents. The appeal having partially succeeded, the Appellants are awarded half the costs of the appeal.

**DELIVERED AND SIGNED AT KIAMBU THIS 25<sup>TH</sup> DAY OF JULY 2019**

.....

**C. MEOLI**

**JUDGE**

**In the presence of**

Mr. Mwangi holding brief for Mr. Kebongo for Respondent

Appellant – No appearance

Court Assistant - Kevin