



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 41 OF 2018**

**MAURURA GLADYS.....1<sup>ST</sup> APPELLANT**

**PETER NDITU GITAU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**EPHRIIM MURITHI GACHINA (Suing as the Legal Representative of the Estate of**

**Zipporah Njeru Murithi-deceased.....RESPONDENT**

**(Being an appeal from the judgement and Decree of the learned trial Magistrate Hon. E, Mbicha in Meru Cmcc No. 117 of 2015 dated and delivered on 7/4/2018)**

**JUDGMENT**

1. The appellant herein was the Defendant in the Trial Court whereas the Respondent was the plaintiff. The Respondent sued the Appellant for General damages under the Fatal Accidents Act and the Law Reform Act and special damages of Kshs. 60,200/= plus cost and interests.
2. The particulars of the suit were that on the 28<sup>th</sup> day of June 2012 the deceased, **Zipporah Njeri Muriithi**, was travelling as a passenger in the motor vehicle registration No. KBS 418D along Meru-Nanyuki Road when at Subutia Junction the 2<sup>nd</sup> Defendant so negligently drove the said motor vehicle thus causing an accident and as a result the deceased sustained fatal injuries.
3. The trial Court found in favour of the Respondent and awarded Special damages at Kshs. 47,500/=. Loss of Dependency Kshs. 2,674,000/=, Loss of expectation of life Kshs. 100,000/=, Pain and suffering Kshs. 10,000/=.
4. Being aggrieved by the aforesaid determination the appellant filed its memorandum of Appeal on 7<sup>th</sup> May 2018 raising five grounds of Appeal; all the grounds contest the multiplicand and multiplier adopted by the trial magistrate and the award of loss of dependency as being inordinately excessive and erroneous.

**Submissions**

5. The Appellants urged that a multiplier of 30 years was very high; a multiplier of 15 years would be sufficient. They proposed an award of Kshs 600,000/= for loss of dependency. They supported their proposal by citing **Charles Masoso Barasa & Anor. vs. Chepkoech Rotich & Anor [2014] eKLR**.
6. The Respondent urged the Court not to disturb the decision of the trial Court and distinguished the case of **Charles Masoso (supra)** for it relates to an army officer whose terms of recruitment are different from those of the deceased. They argued that the deceased herein also left a minor aged 1 yr. 7 months as compared to the case of **Charles Masoso (supra)** where the deceased left behind a minor aged 8 years. The Respondent asked this Court to rely on the cited case of **Mildred Aori Odunga (suing as the personal representative of Gilbert Silvano Morumbasi- Deceased) vs Hussein Diary Limited, Philip Musyoka Mutua v Veronica Mbuua Mutiso (2013) eKLR**.

**ANALYSIS AND DETERMINATION**

7. First appellate court should to re-evaluate the evidence, apply the applicable law and come to its own independent findings and conclusions. See the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**.
8. **PW1 Ephraim Murithi Gichana** testified that his daughter (the deceased herein) was unmarried at the time of her demise but had one son, D whom they lived with. That her daughter worked at G4s security as a guard and earned Kshs. 11,480 after the statutory deductions. It was his testimony that on the material date he was called by the director of G4s who informed him that the deceased had been involved in an

accident. That he went to Meru General Hospital where he found that the deceased had passed away. He later reported the matter to Meru Police Station. He testified that the son of the deceased, TM lived with his wife. The deceased used to send money for the minor's upkeep. He produced the following documents in support of his testimony; **Birth Certificate (P exh 1), Limited Grant (P exh 2), Charge Sheet (Pexh 3), Receipts for funeral Expenses (P exh 4), TM Birth Certificate (P exh 5), Letter from the chief (P exh 6), Letter from G4s proving employment (P exh 7) Copy of Payslips (P exh 8), Motor Vehicle Search (P exh 9) receipt (P exh 10).**

9. **Pw2 Leah Kimani**, a police constable attached to Meru Police station, traffic Department testified that the accident was self-involving. That the driver of the motor vehicle lost control of the vehicle and caused the motor vehicle to roll. She however told the court that at the time of filling the police abstract the accident was still under investigation.

10. **Pw3 Vincent Ogawa** testified that he was in the motor vehicle on the material date and that they were heading to Lewa Marathon. That he sat on the front seat with the driver. The motor vehicle rolled as it was trying to avoid another motor vehicle. In cross-examination he testified that the deceased was seated beside the driver and him. That the 2<sup>nd</sup> motor vehicle was on the wrong side of the road.

11. I have considered the evidence on record and the submission of the parties. The Appellant has not made any submission on liability but mainly submitted on the multiplicand used by the Trial Court.

12. In a claim for lost years (loss of dependency), the manner of assessment of damages under the Fatal Accident's Act was set out in **Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749** as cited in **James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR** by the Court of Appeal as follows:-

**“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants.”**

13. Ringera J (as he then was) in **Mwanzia Vs Ngalali Mutua and Kenya Bus Services (Msa) Limited & another** discussed application of the multiplier approach; it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation.

14. The trial court in making its decision on the multiplier and dependency ratio considered that the deceased was at the time 28 years of age and that she left a son who fully depended on her. She also supported her parents. She was also employed and her salary was known. This is a perfect case to adopt a multiplier. But in what proportion?

15. In **James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR** where the deceased was unmarried and did not have any children the court used a multiplier of 25 years. The court also took 60 years to be the common retirement age. And that there was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life. The Court also cited the case of **Simon Kiplimo Murey & 3 Others v Kenya Bus Service Management Services Ltd & 4 Others (2014) e KLR** where the deceased died aged 28 years working for Kenya Power and Lighting Co. Ltd and earning Kshs. 40,000/- per month the court awarded a multiplier of 25 years.

16. In **Mildred Aori Odunga (suing as the personal representative of Gilbert Silvano Morumbasi- Deceased) vs Hussein Diary Limited**, cited by the Respondents the Court considered that the retirement age was 60 years for public servants hence the deceased could have worked for 32 years and therefore in the circumstance a multiplier 32 years was reasonable. The Court relied on the cited court of appeal decision in **Joyce Mumbi Mugi vs Cooperative Bank of Kenya Ltd & 2 Others** where the deceased aged 51 years at the time of death, the court of appeal approved a multiplier of 11 years.

17. According to **Butt vs. Khan (1977) KAR 1, per Law JA:**

**‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 as either inordinately high or low.’**

18. See also the Court of Appeal in **Gitobu Imanyara & 2 others v Attorney-General [2016] eKLR**, citing the case of **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. AM Lubia and Olive Lubia (1982 –88) 1 KAR 727** at p. 730 as per Kneller JA that: -

**‘The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage.**

19. The above cited cases were also relied upon by Musyoka J. in **Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased) [2019] eKLR** where he was not persuaded that he should disturb the decision of the trial Court where the deceased was aged 33 years and the court awarded a multiplier of 22 years and a dependency ratio of 2/3.

20. The above cited cases offer important guide. The facts of the case also lay bare the following important considerations: The deceased was aged 28 years. She would have worked for another 32 years taking into account that the retirement age is now accepted to be 60 years. She also had a young boy of below 2 years who fully depended on her. Dependency was proved. In light of these factors, I find no justifiable reason to disturb the decision of the trial Court. The same was arrived at after taking into account all the relevant factors including vicissitudes of life. Therefore, multiplier of 30 years was appropriate and the figure worked out thereto was a fair compensation for loss of dependency; not inordinately high or low.

21. I therefore find that the appeal herein lacks merit and is hereby dismissed.

22. Each party shall bear their own Costs.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of November, 2019**

**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

Kariuki for appellant

Gitonga for Kiarie for respondent

**F. GIKONYO**

**JUDGE**