



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J)**

**CIVIL APPEAL. NO. 68 OF 2018**

**MATIGARI GENERAL MERCHANTS LTD.....1<sup>ST</sup> APPELLANT**

**PAUL MUCHINA KABIRA.....2<sup>ND</sup> APPELLANT**

**-VERSUS -**

**NELLY WAIRIMU MUTHONI & FRANCIS MUIRURI WAINAINA**

**(Suing as the administrators to the estate of the late**

**KENNEDY KIERUKA WAINAINA.....RESPONDENTS**

**AND**

**ROSE WAMUYU WANDAKA.....INTERESTED PARTY**

**(Being an appeal against the decree and judgment delivered on 15<sup>th</sup> May, 2018 by (Hon. M. Opanga S.R.M) at Kangundo, Civil Suit No. 134 of 2016)**

**JUDGEMENT**

1. The Respondents herein are legal representatives of the estate of **Kennedy Kieruka Wainaina** who died on the 3<sup>rd</sup> day of September, 2015 following injuries received in a road traffic accident on the 30<sup>th</sup> August, 2015 involving the appellant's motor vehicle registration no. KCA 115B. The suit was in respect of a claim for compensation under both the *Fatal Accidents Act* and the *Law Reform Act* in which the Respondents claimed General Damages, Special Damages, Costs and Interests.
2. On 19<sup>th</sup> September, 2017 a consent order on liability was recorded in which judgement was entered in favour of the Respondents against the Appellant in the ratio of 80:20 and the parties agreed to proceed with the hearing on the assessment of damages.
3. According to PW1, the widow of the deceased, on the day of the accident, she received a phone call from her husband's colleague who informed her that her husband the deceased had been involved in a road traffic accident and had been taken to Mama Lucy Kibaki Hospital. According to her, prior to his death, the deceased was referred to Kenyatta national Hospital for specialised treatment where he succumbed to the injuries sustained. They organised for the burial which cost more than Kshs 100,000.00. PW1 relied on her bundle of documents which were the police abstract, copy of the records for the said motor vehicle, demand letter, statutory notice, burial permit, death certificate, grant of letters of administration intestate, referral form/transfer summary from Mama Lucy Kibaki Hospital, letter from the chief, receipts for special damages amounting to Kshs 110,920.00.
4. It was her evidence that the deceased did not die on the spot and that he left behind two children aged 2 years and 8 months born in 2013 and 2015 respectively and that he earned Kshs 1,000/- per day.
5. In her judgement the learned trial magistrate found that the deceased's death was not instantaneous and awarded Kshs 100,000/- for pain and suffering. Under the loss of expectation of life, the court awarded Kshs 200,000.00. As for the loss of dependency it was noted that the deceased was 21 years and would have worked up to the age of 65 years. At the time of his death he was earning Kshs 1,000/- per day

making Kshs 31,000/- per month. In the absence of evidence of earning, the court adopted the minimum wage at the time which was Kshs 14,785 with a multiplier of 44 years and adopted dependency ratio of 2/3 and arrived at the figure of 5,204,566.40. She also awarded Kshs 110,920/- being special damages. In the end the total gross amount was Kshs 5,615,486.40 to which he deducted 20% being the agreed contribution and arrived at a net figure of Kshs 4,492,389.12. She also awarded costs and interests to the Respondent.

6. In this appeal, the appellant contends that the trial Court erred and made an inordinately high award under the head of pain and suffering in drawing the wrong conclusions from the evidence on record by finding the deceased died on 3<sup>rd</sup> September, 2015 and not 30<sup>th</sup> August, 2015; in ignoring evidence showing the deceased was unconscious after the accident and in relying on a precedent whose circumstances were different from the present case.

7. The Appellant relied on both the evidence of PW1 as reduced into witness statement as read with the Notification of Death from Kenyatta National Hospital in which it is indicated that the deceased died on 30<sup>th</sup> August, 2015 at 4:48 Am on the way to KNH while being brought from Mama Lucy Hospital. From the foregoing, it was submitted that the learned trial magistrate fell into error when she found that the deceased herein died on 3.9.2015. She ignored the testimony of PW 1 that the deceased died on the fateful day (the day of the accident, that is 30<sup>th</sup> August, 2015) and the Notification of Death which is the primary record used to notify the police of the occurrence of a death which indicates the deceased died on 30<sup>th</sup> August, 2015 at 4:48 AM on the way to KNH from Mama Lucy Hospital. It was therefore submitted that the conclusion that the deceased died on 3<sup>rd</sup> September, 2015 and not 30<sup>th</sup> August, 2015 emanates from a misapprehension of the evidence on record and the same is a proper basis for this Court to interfere with the award for pain and suffering.

8. In addition to the foregoing, the Court erred in ignoring the evidence of PW 1 that the deceased was unconscious after the accident. Having been unconscious for the entire period, the deceased did not suffer a lot of pain. The appellants relied on **Violet Jeptum Rahedi versus Albert Kubai Mbogori Sospeter [2013] eKLR** where it was noted as follows:

**“(i) pain and suffering: The deceased was in hospital from 1<sup>st</sup> December, 2007 when he was shot to 26<sup>th</sup> January 2006 when he died, a period of 56 days. The evidence before the Court was that during this entire period the deceased was mainly comatose. He was not conscious. There will be no obvious suffering in a person who is unconscious”**

9. It was therefore submitted that in making the award for pain and suffering, the learned trial magistrate ignored material evidence that the deceased was unconscious after the accident and thereby arrived at an inordinately high award. The same is a proper basis for this Court to interfere with the award for pain and suffering. It was submitted that in awarding damages under this head, the trial Court was to be guided by the evidence tendered and precedents in the form of similar awards and relied on **L.G. Transporters Limited & another vs. Moses Theuri Ndumia [2018] eKLR** and **violet case (supra)**, where the deceased was awarded Kshs. 10,000.00. It was submitted that in making the award for pain and suffering, the learned trial magistrate proceeded on the wrong principles and thereby arrived at an inordinately high award. The same is a proper basis for this Court to interfere with the award for pain and suffering.

10. According to the appellant, given that the deceased died on the day of the accident, an award of Kshs. 20,000.00 would have been appropriate in the circumstances of the case based on **F M M & another vs. Joseph Njuguna Kuria & another [2016] eKLR** wherein the deceased died two (2) days after the accident and was awarded **Kshs. 50,000.00** for this proposition. The judgment in this case was entered in 2016. Similarly, in **D M M (Suing As The Administrator And Legal Representative Of The Estate Of L K M vs. Stephen Johana Njue & another [2016] eKLR**, the deceased died four (4) days after the accident and was awarded **Kshs. 50,000.00**. The judgment in this case was entered in 2016. In **Rose Wangui Machua & another vs. Japheth Mbiuki [2016] eKLR**, the deceased died on the day of the accident and was awarded Kshs. 10,000.00. The judgment in this case was entered in 2016.

11. According to the appellant, the trial Court erred and made an inordinately high award under the head of loss of expectation of life in failing to consider the vagaries of life, the fact that the deceased's income was not proved and the fact that the deceased occupation was a risky venture. In this regard, the appellant relied on the case of **Hassan Salat Gudow (Suing as Legal Representative of the Estate of Ali Hassan Salat) vs. Mohamed Adan & 2 others [2015] eKLR** where the Court noted as follows:

**“Loss of expectation of life is what, if the deceased survived but was in capacitated, would be loss of earning capacity. Again under this head the learned magistrate was not assisted by the evidence from the appellant to show what the appellant would have been earning for the rest of his life if he lived. Therefore, the court had to do the best it could in the circumstances. I find no better way of assessing this award with the facts and evidence which was before the trial court. I will thus not disturb this amount.”**

12. It was submitted that Respondents did not provide evidence of the alleged income of the deceased. Equally, no evidence was led to prove the high prospects of life/success that the deceased had or his educational background or other training. There was no evidence of what the deceased was earning or if he was earning anything at all. Therefore, the Respondents did not provide the trial Court with a means of determining the deceased's lost income. Furthermore, the evidence of PW 1 was that the deceased was a *boda boda* rider a risky employment in itself due to the regularity of accidents involved in the business. Furthermore, the deceased's regular travel habits and the usual imponderables of life would have effect on his expectation of life.

13. In view of the foregoing, it was submitted that the trial Court awarded an inordinately high award under this head. To the appellant, the sum of Kshs. 100,000.00 based on the case of **Rose Wangui Machua & another vs. Japheth Mbiuki [2016] eKLR**, and **Siyaram Enterprises & another v Samuel Nyachani Nyachani Suing on behalf of the estate of Vincent Ngwacho Nyachani [2015] eKLR**.

14. As regards the award for Loss of dependency, it was submitted that the trial Court erred and made an inordinately high award under the head of loss of dependency in adopting the multiplicand of Kshs. 14,785.70, in adopting a multiplier of 44 years, adopting a dependency ratio of 2/3 and in failing to consider the principles applicable in making an award for loss of dependency when taking the multiplier approach. According to the appellant, in the case of **Kenya Breweries Limited vs. Saro [1991] eKLR** the Court of Appeal noted that damages under this head must be kept relatively low. According to the appellant, the minimum wage approach is usually taken where the

income of the deceased is not proved. In this case, the deceased's income was not proved. As such, the trial court was correct in taking this approach based on **Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR**. According to the appellant having found he was operating a *boda boda*, the Court could not at the same time state that the deceased was a driver as the two are distinct. It was observed that the learned trial magistrate noted that this was the occupation of the deceased from the death certificate. From the evidence on record and on a balance of probabilities, the deceased was a rider and not a driver as found by the trial magistrate.

15. According to the appellant the **Regulation of Wages (General) (Amendment) Order, 2015** does not provide the income of a rider. As such, they fall under the category of general workers within Nairobi being Kshs. 10,954.70. This also is in tandem with the finding of the Court in **Philip Mutua vs. Veronicah Mule Mutiso** (supra) that where income is not proved, the income of an unskilled worker ought to apply. It was therefore submitted that the adopted multiplicand of Kshs. 14,785.70 was an error as the applicable multiplicand was Kshs. 10,954.70.

16. On the multiplier, the trial Court adopted 44 years, it was submitted based on the case of **Leonard O. Ekisa & another vs. Major K. Birgen [ 2005] eKLR** that the Court failed to consider that the youngest dependant of the deceased was aged two (2) months and would therefore be expected to depend on the deceased for the next 18 years which is the age of majority. It also failed to consider that the deceased being a *boda boda* rider, a very risky business, could be reasonably expected to work until the age of 50 years and life expectancy in Kenya now stands at 62 years. The trial Court also failed to factor in the fact that the amount was being paid in lump sum and would if wisely invested yield returns of an income nature.

17. The appellant therefore proposed that a multiplier of 12 years is appropriate in the circumstances based on **Kenya Power & Lighting Company Ltd vs. Bernard Kilonzo [2012] eKLR** and **Samwel Kimutai vs. Nyanchwa Adventist Secondary School & Another [2016] eKLR** where the Courts adopted a multiplier of 25 years for deceased persons aged 21 years. In **Rose Wangui Machua & Another vs. Japheth Mbiuki [2016] eKLR**, the court adopted a multiplier of 20 years for a deceased who died aged 23 years.

18. It was submitted that the learned trial magistrate also fell into error on this issue by ignoring precedents on cases involving similar circumstances as the present case.

19. It was further submitted based on **Leonard O. Ekisa & another vs. Major K. Birgen [ 2005] eKLR** in this case, the deceased was shown to have had two minors aged 2 years and 2 months. The minors were not of school going age and as such, not much of the deceased's income was expected to be expended on them. The deceased was resident in Nairobi. As such, it is expected that the Deceased's expended majority of his income on himself. As such, a dependency ration of 1/3 is appropriate in the circumstances of this case.

20. In the appellant's view, given the foregoing, the award for loss of dependency works out as follows:

$$\text{Kshs. } 10,954.70 * 12 * 12 * 1/3 = 525,825.60$$

21. According to the appellant, it should be noted that in law and practice as per the decision of **Kemfro v A.M. Lubia & Another, [1982-1988] KAR 727** that where a claimant gets awards for loss of life both under the **Law Reform Act** and the **Fatal Accidents Act**, the former should be deducted from the latter to avoid a situation where the same estate benefits twice. It was submitted that the learned trial magistrate erred in failing to follow this practice and deduct the award for pain and suffering and loss of expectation of life from the award for loss of dependency so as to ensure that the deceased's estate does not benefit twice. The court was urged to correct this error and deduct the award for pain and suffering and loss of expectation of life from the award for loss of dependency.

22. It was therefore argued that the Appellants' Appeal is meritorious and should be allowed as prayed.

23. On the part of the respondents, it was submitted that in her testimony before trial court PW1 stated that her late husband did not die at the spot. He was rushed to Mama Lucy Kibaki Hospital and then later to Kenyatta National Hospital for treatment. On cross examination, PW1 clarified that the accident occurred on 30<sup>th</sup> August, 2015 and her husband died on 03<sup>rd</sup> September, 2015. Her testimony on this regard was corroborated by death certificate produced before trial court. According to the Respondent, no evidence, in terms of witness, documents and/or object was ever produced by the defendant to refute this testimony by PW1. In her judgment, the learned trial magistrate considered both rival submissions. He noted that the deceased did not die on the spot. The late was rushed to different hospitals within the city and died on 03<sup>rd</sup> September, 2015, after four (4) days of pain and suffering. As per the transfer summary from Mama Lucy Kibaki Hospital, it is clear that the deceased had sustained several severe fracture injuries. It was submitted that damages under this heading are determined by the length of time that the deceased had to endure pain before death and the respondent relied on the case of **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR**. From the above analysis and the cited authorities, it was submitted that the learned trial magistrate did not err in law and/or in any fact by awarding the respondents Kshs. 100,000/= on this subheading and as such the appellants appeal on this head must fail.

24. On award on Loss of Expectation of life it was submitted that it is not in dispute that the deceased was in good health before he met his death. He was at the prime of his life. Everything being held constant, he had many more productive years ahead of him. He was a young man with a young family. He was full of ambitions, energetic and doing all he could to make it in life. The late was a qualified driver, owned a motor cycle and was doing his businesses just like most of the active Kenyans. As a family man he had great ambitions for himself and his family. From the above analysis and the cited authorities, it is clear that the learned trial magistrate did not err in law and/or in any fact by awarding the respondents Kshs. 200,000/= on this subheading and as such the appellants appeal on this head must fail based on **Peter Namu Njeru vs. Philemone Mwangoti [2016] eKLR**.

25. Regarding loss of dependency award, it was submitted that PW1 testified under oath, that the late was aged 21 years at the time he met his death and that they were happily married since the year 2013, blessed with 2 children, **Monica Wambui** and **Paul Wainaina**, aged 2 years and 8 months respectively. She testified that her late husband was a driver and that he operated a *boda boda* business earning an income of Kshs. 30,000/= per month. To support her testimony on this head PW1 produced death certificate which clearly indicate the occupation of the late and a letter from the area chief which identifies the beneficiaries to the estate of the deceased. It is clear that the

defendants neither challenged PW1 testimony on this regard nor did they produce any document or witness to controvert the plaintiff's claim on this head. According to the Respondent, there is no error in the trial magistrate Judgment by adopting a minimum wage of Kshs. 14, 785.70/= and the court should uphold the same in the interest of justice.

26. As for the multiplier of 44 years, it was submitted that it is not in dispute that the deceased was aged 21 years at the time he met his death. The learned trial magistrate adopted a multiplier of 44 years. In the **Violet's case [supra]** the court rightly noted that employment in the private business cannot be limited by the formal retirement age. In the instant case the Deceased was in a private business. Taking into the nature of his employment the Deceased would have continued working in such capacity up to the age of 70 years and to this regard a multiplier of 44 years was fair and reasonable and as such it is our humble submission that the learned trial magistrate based his finding on the evidence available before court and the appropriate principles of law hence his finding cannot be termed as erroneous.

27. Regarding the dependency ratio, it was submitted that it is not in dispute that the deceased was a married man, with a wife and 2 children. PW1 did testify before trial magistrate court on oath that they depended on the late husband, who provided for their daily needs as a father. In an African family and more so in Kenya, there are responsibilities shouldered by every father in a family. A father with 2 children is expected to provide for their food, clothing, health care and day to day running of the family. It is clear from the above analysis that the learned trial magistrate did not err in any law or in fact and as such the appellants appeal on the above grounds cannot be sustained and must fail.

28. As for double compensation the Respondent relied on **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR** and submitted that there is no reason for this honourable court to interfere with the learned trial magistrate judgment.

29. Your lordship, in the upshot, we urge this honourable court to dismiss the Appellant's appeal as the same is not sustainable and uphold the learned trial magistrate's decision as the same remains sacrosanct and takes its way.

### **Determinations**

30. In this appeal, the appellant is only challenging the quantum of damages. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

**“It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

31. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

**“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”**

32. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

**“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”**

33. As regards the claim for loss of dependency, the oral evidence was that the deceased was a *boda boda* operator earning Kshs 1,000/0 per month. That the deceased was a *boda boda* operator was not disputed. Kshs 1,000/- per month for a *boda boda* operator in my view is not unreasonable in this country. However, the learned trial magistrate adopted the minimum wage approach and ended up with a sum which was lower than the amount claimed. I am not prepared to interfere with the multiplicand adopted by the learned trial magistrate. I therefore associate myself with the opinion of the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** that:

**“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.”**

34. , As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No.**

2343 of 1993 held that:

**“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.”**

35. I appreciate the views expressed in Marko Mwenda vs. Bernard Mugambi & Another (supra) that:

**“Like in every African child, the deceased child is expected to continue assisting her parents financially many years into the unknown future.”**

36. However, in this case account must be taken of the fact that the deceased was married with a young family. It is therefore expected that most of his earnings would go towards the upkeep of his aid young family. Accordingly, the dependency ratio of 2/3rds cannot be said to be unreasonable. As regards the multiplier, I am of the view that considering the vicissitudes of life 30 years would have been more appropriate.

37. As regards the award for pain and suffering I find that since the deceased was unconscious and there is no evidence that he regained consciousness before he passed away an award of Kshs 50,000.00 would have been adequate.

38. It is therefore my view the award for loss of dependency any ought to have been as hereunder:

**Kshs. 14, 785.70 x 30 x 2/3 x 12 = 3,548,568.00**

39. I would award Kshs 150,000.00 under the head of loss of expectation of life.

40. As regards the double award, as stated in Marko Mwenda vs. Bernard Mugambi & Another (supra) 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. Similarly, the Court of Appeal in Eliphas Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004 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/-.”**

41. 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 leaving a balance of Kshs 3,448,568.00. plus costs and interests.

42. In the result, I allow the appeal and substitute the award given with the following:

**Pain and Suffering Kshs. 50,000/-**

**Loss of expectation of life Kshs. 150,000/-**

**Loss of dependency Kshs 3,448,568.00.**

**Special damages Kshs. 110,920/-**

43. The gross amount is therefore Kshs 3,659,488.00 which is to be discounted by 20% leading the net sum due to the Appellant as Kshs 2,927,590.40. The costs of the proceedings before the trial court are awarded to the Appellant. The award on general damages will attract interest from the date of the judgement in the trial suit at court rates till payment in full while the interest on special damages will accrue from the date of filing the suit till payment in full at court rates.

44. Each party will bear own costs of the appeal.

45. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 17<sup>th</sup> day of December, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Musila for Mr Kaminza for the Appellants**

**CA Geoffrey**