# Wilson v Mutegi (Suing as the legal representative and Administrator of the Estate of Joseph Mutegi Mwenga - Deceased) (Civil Appeal E140 of 2021) [2024] KEHC 455 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEHC 455 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**CIVIL APPEAL E140 OF 2021**

**EM MURIITHI, J**

**JANUARY 23, 2024**

**BETWEEN**

**GERALD MARANGU WILSON ........................................................... APPELLANT**

**AND**

**ERIC MWITI MUTEGI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JOSEPH MUTEGI MWENGA - DECEASED) ................................................................................. RESPONDENT**

***(An appeal from the Judgment and Decree of Hon. J. Irura (P.M) in Nkubu PMCC No. 107 of 2019 delivered on 15/9/2021)***

## JUDGMENT

1. By a Plaint dated 1/12/2019, the Respondent sued the Appellant seeking General damages both under the *Law Reform Act* Cap 26 and the *Fatal Accident Act* for pain and suffering and loss of life, Special damages and costs of the suit plus interest. The gist of the claim was that on 25/2/2019, the deceased was lawfully driving motor vehicle reg. KMCQ xxxC along Nkubu Mikumbune route at Kwa Ngwene area or there around at around 3.30 pm when the Appellant or his driver, agent, servant or employee negligently/carelessly drove and/or managed Motor Vehicle Registration No. KBE xxxE that it sped and crashed into the deceased's vehicle fatally injuring him. At the time of the accident the deceased enjoyed good health and was a hardworking man aged 55 years whose family to a large extent depended on him for subsistence.

2. The Appellant denied the claim by his defence dated 16/6/2020 and prayed for the Respondent's suit to be dismissed.

3. The parties recorded a consent on liability at the ratio of 70:30 in favour of the Respondent against the Appellant and the Respondent produced his documents without calling their makers.

4. Upon full hearing of the case, the trial court found that the Respondent had proved his case on a balance of probabilities and awarded Ksh. 30,000 for pain and suffering, Ksh. 100,000 for loss of expectation of life, Ksh. 1,500,000 for loss of dependency, special damages of Ksh. 28,700 less 30% contribution = Ksh.1,161,090.

**Appeal**

5. On appeal, the Appellant filed his memorandum of appeal on 14/10/2021 raising 6 grounds as follows:

    a. The Learned Principal Magistrate erred in law and fact in awarding damages of Kshs.1,500,000 under loss of life which is unknown in law.

    b. The Learned Principal Magistrate erred in law and fact in holding that the multiplier approach is inappropriate for a person whose occupation is not proved while ignoring 5 authorities relied on by the Appellant and listed in the judgment on that issue.

    c. The Learned Principal Magistrate erred in law and fact in awarding a global figure of Kshs.1,500,000 ostensibly for loss of dependency for a 55 year old man and failing to be guided by the minimum gazetted wages.

    d. The Learned Principal Magistrate erred in law and fact in treating a 55 year old man as a child whose future career or occupation is uncertain and for whom global awards are applicable due to that uncertainty.

    e. The Learned Principal Magistrate erred in law and fact in analysing the Appellant's computation of the reasonable damages awardable for loss of dependency but failing to agree with the same or to dismiss the proposed computation despite being backed by authorities as recent as the year 2021 and 2020.

    f. The Learned Principal Magistrate erred in law and fact in applying the wrong principles of assessment of damages for loss of dependency in adults thereby arriving at a wholly erroneous estimate of the damages payable for loss of dependency; and which was inordinately high an award.

**Duty of the Court**

6. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] EA 123).

**Evidence**

7. PW1 Eric Mwiti Mutegi, the Respondent herein and a mason by profession adopted his witness statement dated 15.12.2019 together with the list of documents filed therewith as exhibits 1 to 9. He went on to state that, "My father was working as a mason and was a fore man. He could earn about Ksh. 2500 per day which money he was using to sustain the family. Am seeking for compensation as has been sought in the plaint."

8. The witness was not cross examined.

9. The Appellant closed his case without calling any witnesses.

**Submissions**

10. The Appellant has abandoned ground 1 of his appeal. He faults the trial court for ignoring the multiplier method proposed by both parties and awarding a global figure of Ksh.1,500,000 for loss of dependency. He submits that the trial court applied the wrong principle in awarding damages and urges the court to interfere with it. He urges that where the income of a deceased is not ascertained or proved, the court established procedure is to rely on the minimum gazette wages for unskilled workers to assess the damages for loss of dependency and not to award a global figure. He urges the court to re-assess the damages payable for loss of dependency by adopting Ksh. 6,415.55 as the multiplicand, a multiplier of 5 years and a dependency ration of $^2/3$.

11. The Respondent urges that he proved on a balance of probabilities by unchallenged evidence that the deceased was a mason earning Ksh.2,500 daily, and cites *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR and *Guyo Jillo & Anor v Lilian Kanyua* (2019) eKLR. He urges that the trial court in arriving at its decision relied on the material before it together with the authorities cited.

**Analysis and Determination**

12. From the grounds of appeal as framed, the twin issues for determination are whether the trial court fell into error when it adopted a global figure as opposed to the multiplier approach in awarding damages for loss of dependency and whether the award therein was excessive and inordinately high.

13. In *Mwanzia v Ngalali Mutua Kenya Bus Ltd* as quoted by (Koome J as she then was) in *Albert Odawa v Gichumu Githenji* (2007) eKLR, the court (Ringera J as he then was) made the following observation:

> "The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known 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."

14. That position is reiterated in *Kenya Power & Lighting Company Limited v E.K.O & Another* (2018) eKLR where the court (Joel Ngugi J as he then was) said that:

> "It thus emerges that superior courts are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the "global assessment method" advocated by other High Court decisions. The learned trial magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand."

15. In settling for the global figure, the trial court said as follows:

> "I have considered the arguments in the parties submissions and there is no dispute that the deceased died at the age of 55 years as proved by his burial permit though his profession therein was not indicated. The retirement age in this country is sixty years for those in public service although other factors such unpredictable life and vagaries of nature must be taken

into account. In this case, there was no proof as to the deceased's occupation and so using the multiplier approach will not be appropriate in this case. The defendant never challenged the fact that the child's birth certificate proved that the deceased had children dependent on him. In the circumstances, I do award the plaintiff the global sum of Kshs. 1,500,000/=."

16. The Respondent pleaded that the deceased was survived by 2 wives and children, one of whom was still in school at the time of the accident. This court notes the Respondent's testimony, which must be taken to be proof on a balance of probabilities, since it was not subjected to any cross examination, that the deceased was a mason and a foreman earning Ksh.2,500 daily. There would be no occasion to adopt minimum wage under Legal Notice No. 111 of 2017 as submitted by the Appellant. Supposing the court were to adopt the multiplier approach as urged by Appellant, the award of damages for loss of dependency with a multiplier of 5 for the years to retirement and a dependency ratio of 2/3 for the married man with family to provide for would be (Ksh. 2,500 × 5 days a week × 4) = Ksh.50,000 as the multiplicand × a multiplier of 5 years × $^{2}/3$ ×12 = Ksh. 2,000,000.

17. It is this court's finding that the trial court did not err in opting to award a global figure of Ksh.1,500,000 for loss of dependency for a deceased who, although aged 55 years, had a high school student and 2 wives who depended on him. It does appear to have been a modest award in the circumstances, but there being no cross-appeal by the respondent, the court will leave the matter there.

18. As regards the court award's head of "loss of life", this court would refer to the confusion which sometimes occurs in usage of reference to lost years to mean loss of dependency, which error was discussed by this court in *Nyota Tissue Products v Benjamin Obonyo Mukati & 4 others* [2020] eKLR, as follows:

> " 24. In view of the trial court's apparently innocent mistake in using, for the case herein of an eighteen old un-employed student, the general method for assessment of damages under *Fatal Accidents Act* for damages for what she called lost years [properly recoverable under *Law Reform Act*], I think it is convenient to discuss the correct position as regards award of damages for lost years and related loss of dependency. Other courts, with respect, have labored under the same misconception. (See Bosire, J (as he then was) in *Kakiki v Abdo & 2 Others* (1990) KLR 327 cited below.) As I understand the terms, lost years refers to damages for loss of prospective earnings recoverable by a person who is injured in such a way as to shorten his earning capacity, recoverable by the person during his shortened life and, upon his death, by the Estate under the *Law Reform Act* as damages for lost years. Damages for loss of dependency is a right under the *Fatal Accidents Act* for benefit of the dependants of the deceased injured person. See the separate discussion of each head of damages in *Asal v Muge & Another* (2001) KLR 202, 206-206 where the requirement to take into account damages award in the one while considering the other is given effect...."

19. The Court of Appeal in *Hellen Wanguru Waweru (Suing as the legal representative of Peter Waweru Mwenga (deceased) v Kiarie Shoes Stores Limited* (2015) eKLR, the Court of Appeal (Waki, Nambuye & Kiage JJA.) also lamented the similar mix up of claims under the *Law Reform Act* and the *Fatal*

*Accidents Act* leading to erroneous deduction of awards for lost years from the award for dependency and explained the principle of double compensation under the two Acts as follows:

> " 18. Turning to the multiplier on the farming income, both courts used a multiplier of 1 year which coincided with the retirement of the deceased from salaried employment. Hellen however argues, and we think she is right, that the retirement of the deceased from his teaching job at 55 did not mean he would have retired from farming too. If anything, he would have been more useful to the dependants, as he would have had more time to concentrate on the farming business. In the premises a multiplier of 1 is manifestly on the low side and we revise it to 5 years.
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> 19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the *LRA* and *FAA* because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the *LRA* from the amount awarded under the *FAA*. With respect, that approach was erroneous in law.
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> 20. 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 issue of duplication does not arise."

20. However, nothing turns on the misdescription of the loss of dependency as loss of life or lost years. And it is clear from the judgment that the award was in respect of the global sum for loss of dependency where the court held that "In this case, there was no proof as to the deceased's occupation and so using the multiplier approach will not be appropriate in this case", as shown above.

21. Moreover, section 79A of the *Civil Procedure Act* cures the defect in the misdescription, as follows:

> " No decree to be altered for error not affecting merits or jurisdiction
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> 79A. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.
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> [Act No. 10 of 1969, Sch.]"

**Orders**

22. Accordingly, for the reasons set out above, the appeal is without merit and it is dismissed.

23. The appellant will pay to the Respondent the costs of the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

M/S Mwenda Mwarania, Akwalu & Co. Advocates for Appellant.

M/S Otieno C. & Co. Advocates for the Respondent.