



Kathuni v Kinyari (Sued as the legal representative of the Estate of Kelvin Lugendi Gibendi (Deceased) (Civil Appeal E023 of 2022) [2024] KEHC 1458 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E023 OF 2022
LW GITARI, J
FEBRUARY 15, 2024**

BETWEEN

PATRICK MWENDA KATHUNI APPELLANT

AND

GRACE NJERI KINYARI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KELVIN LUGENDI GIBENDI (DECEASED) RESPONDENT

JUDGMENT

1. This is an appeal against the judgment delivered on 17th August, 2022 in Chuka CMCC No. E029 of 2022 as well as against the resulting decree. From the 8 (eight) grounds of appeal set out in the Memorandum of Appeal dated 12th August, 2022, this appeal challenges the decision of the trial court on the twin issues of liability and quantum.
2. The Appellant was the defendant in the suit before the trial court wherein the Respondent had sued the Appellant for a claim of general and special damages as well as costs and interest of the suit following a road traffic accident that occurred on or about 11th December, 2020 along Meru-Chuka highway at Kurugucha, which accident resulted in the death of one Kevin Lugendi Gibendi (deceased). The said accident involved motor cycle registration number KMCZ 376L Yamaha, in which the deceased was a rider, and motor vehicle registration number KCN 023L S. Wagon.
3. This being a first appeal, it is the duty of this Court to evaluate afresh the evidence recorded before the trial court in order for it to reach its own independent conclusion. The duty is provided under Section 78 of the *Civil Procedure Act* which provides:

“

- “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—



- (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

It is not for this court to review the findings of the trial court simply because it would have reached different results if it were hearing the matter for the first time. (See: *Selle v. Associated Motor Boat Co. Ltd* 1968] EA 123).

In *Ainu Shamsi Hauliers Limited v Moses Sakwa & Another* (Suing as the Administrators of the Estate of Ben Siguda Okach (deceased) [2021] eKLR as cited by the Appellant, the court held:-

“This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact, In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court states as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

In that regard, an appellate court will only interfere with the Judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkuba v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

Similarly, in *Butt v Khan* (supra) it was held-

“An appellate court will not disturb an award for damages unless it is 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 a figure which was either inordinately high or low.”[Emphasis ours]

4. These forms the principles which the first appellate court should bear in mind when dealing with an appeal from the sub-ordinate court.



The Respondent's case at the trial

5. At trial, the Respondent called three (3) witnesses in support of her claim against the Respondent. PW1 was CPL Ayub Munyoto, the investigating officer of the case. He produced the police abstract in respect of the accident (P. Exhibit 1) and testified that the deceased was the rider of motor cycle registration no. KMCL 376 and was carrying a pillion passenger named Vincent Alusi when the driver of motor vehicle registration no. KCN 023L hit the said motor cycle. According to PW1, the driver of the said motor vehicle was blamed for the accident for failing to keep a safe distance as the motor cycle was moving in the same direction as the vehicle. The said driver was actually charged with the offence of causing death by dangerous driving in Chuka Traffic Case No. E062 of 2020. However at the time he gave evidence the case was still pending in court and the outcome was unknown.
6. PW2 was Grace Njeri Kinyari, the Respondent herein and the mother of the deceased. She stated that her deceased son was 24 years old at the time of the accident that led to his untimely demise. It was further her testimony that the deceased had opened a restaurant called Buddy's Bizzerias near Chuka University which earned him a net of Kshs. 40,000/= per month. Further, that they spent a total of Kshs. 110,650/= for burial expenses. She then produced as exhibits her list of documents which included inter alia copies of the death certificate, police abstract, demand notice, limited grant ad litem, letter from the area chief, post-mortem report and a bundle of receipts.
7. PW3 was Samson Mutembei Njagi, who claimed to be an eyewitness of the accident. It was his testimony that he is the chairman of the Boda Boda Ndagani operations and that the deceased was known to him as he ran a hotel at Ndagani area where he used to sell pizza. PW3 recalled that on the material day, the deceased had delivered food in the slaughter area and was heading to Ndagani area when he saw a motor vehicle registration no. KCN 023L trying to overtake a lorry at a high speed. That the deceased was ahead of the lorry and that after the said motor vehicle had overtook the lorry, it failed to slow down thereby hitting the motor cycle being ridden by the deceased. According to PW3, the deceased was thrown off the road and the motor vehicle did not stop. PW3 further testified that motor cyclists gave the motor cycle a chase and finally stopped it at Maguna's Supermarket area where the driver was arrested.

In cross-examination he affirmed that he saw what happened.

8. The Appellant, on the other hand, closed his case without adducing any evidence.
9. After considering the evidence adduced before her and the submissions by both parties, the learned trial magistrate found the Appellant wholly liable for the accident and proceeded to assess and award the Respondent damages in the sum of:
 - a. Kshs. 100,000/= for pain and suffering;
 - b. Kshs. 80,000/= for loss of expectation of life;
 - c. Kshs. 3,600,000/= for loss of dependency;
 - d. Kshs. 110,000/= as special damages;
 - e. Costs of the suit plus interest.

The Appeal

10. Aggrieved by the said decision of the trial court, the Appellant preferred this appeal citing the following grounds in support thereof:



- a. The Learned Magistrate erred in fact and in law in apportioning liability at 100% in favour of the Respondent as against the Appellant; Kshs. 100,000/= for pain & suffering; Kshs. 80,000/= for loss of expectation of life; and Kshs. 3,600,000/= for loss of dependency which amount was exorbitantly high in the circumstances and injuries suffered by the Respondent.
 - b. The Learned Magistrate erred in fact and in law in finding that the Respondent was entitled to Kshs. 3,600,000/= under Fatal Accident Act as the same was too high in view of the evidence tendered and thus the sum awarded was too high and the same is not justified.
 - c. The Learned Trial Magistrate erred in law and in fact by adopting a multiplicand of 15,000/= when the plaintiff alleged that the deceased had undertaken a course in bakery and confectionary and was a businessman earning Kshs. 40,000/= per month, assuming that was the profit that the deceased used to make despite acknowledging that there was no proof of earnings that was provided in court and not using the minimum wage.
 - d. The Learned Trial Magistrate erred in law and in fact by adopting a two third (2/3) dependency ratio in calculating loss of dependency yet the deceased was 24 years old, unmarried, without a child, and was survived by the mother and two siblings who did not proved to court how they relied on deceased.
 - e. The Learned Trial Magistrate erred in law and in fact by adopting a multiplicand of 15,000/= in awarding damages and ought to have adopted the minimum wage for a baker at 2019 being $13,975 * 30 * 1/3 * 12 = 1,677,000/=$.
 - f. The Learned Trial Magistrate ignored the Appellant's written submission and authorities cited with regard to the issue of dependency ratio.
 - g. The Learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - h. The Learned Trial Magistrate erred in law and in fact infailing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case she is deciding.
11. The Appellant thus urged this Court to allow the appeal by setting aside the trial magistrate's findings on quantum and replace it with its own assessment. Further and more specifically, that a ratio of 1/3 be used in place of 2/3 in the assessment of the award of damages for loss of dependency and that the costs of this appeal be provided for.
 12. The appeal was subsequently canvassed by way of written submissions.

The Submissions

13. While ground no. 1 of the grounds of appeal summarily mentions the issue of liability, counsel for the Appellant limited his submission to the issue of quantum only. It was their submission that the award of Kshs. 3,600,000/= for loss of dependency was inordinately high considering that the deceased was 24 years old and there was no proof that the deceased used to earn Kshs. 15,000/= as awarded by the trial court or that the deceased used to support his mother or siblings so as to justify the dependency ratio of 2/3. In view of that, it was their submission that the trial court erred in applying the multiplier approach instead of the global sum approach.



14. It was thus their final submission of the Appellant that this Court should adopt the global sum approach and award the sum of Kshs. 800,000/= in place of Kshs. 3,600,000/= under the head of loss of dependency. Further that the award of Kshs. 100,000/= be substituted with Kshs. 10,000/= for pain and suffering.

While relying on the case of *Loise Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (UR)* which was cited in the case of *Francis Odhiambo Njunja & 2 Others- v-Josphine Malala Owinji* (suing as the legal representative of the Estate of Kevin Osoro (deceased) [2020] eKLR he submits that the award of damages is a discretion vested on the courts in conformity with the guiding principles highlighted in the case.

In the case it was held:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257).”

The appellant submits that the award of Kshs.100,000/- for pain and suffering was high considering that the deceased did suffer for a long period of time before he succumbed to the injuries. He relies on the case of *Francis Odhiambo Njunja & 2 Others* (supra) where the court stated that nominal damages will be awarded on this end for death occurring immediately after the accident and high damages if pain was prolonged before death.

15. On behalf of the Respondent, her counsel submitted that the Respondent’s evidence was overwhelming that the deceased suffered a prolonged and painful death and that as such, the award of Kshs. 100,000/= as general damages for pain and suffering was reasonable and actually modest and should thus be upheld. Further, that the award of Kshs. 80,000/= as general damages for loss of expectation of life should be upheld or alternatively enhanced to the conventional sum of Kshs. 100,000/=.
16. On the award of general damages for loss of dependency, it was submitted by counsel for the Respondent that the court has the discretion to use either the multiplier method or the global sum award. Further, that the court did not err in selecting to use the multiplier approach as the requisite factors used in the multiplier method were proved. That is, the deceased’s annual income (multiplicand), the deceased’s work life expectation (multiplier), and the projected level of dependency of the deceased’s survivors (dependency ratio). The respondent has urged the court to rely on the case of *Hyder Nthenya Musili & Another –v- China Wu Yi Limited* (2017) eKLR cited by the appellant.
17. It was further submitted by counsel of the Respondent that for proof of income, the deceased was a sole proprietor without separate legal identity from his business and that as such, his bank statement was legal proof of income earned from his business. To this end, it was submitted that the Respondent adduced proof of business income through the bank statements which supported their proposal to adopt Kshs. 40,000/= as the deceased’s income. Further, and in the alternative to that proposal, it was submitted that should this Court find that there was no sufficient proof of income, then it should adopt a monthly wage of Kshs. 16,295.95/= as the deceased’s minimum monthly wage the same being the minimum monthly income of a baker or oven man in all other areas as per the Regulations of Wages (General) Amendment Order, 2018. In the final alternative, it was submitted that the court should uphold the income of Kshs. 15,000/= adopted by the trial court.



18. With regards to the multiplier, counsel for the Respondent submitted that the 30 years adopted by the trial court means that the deceased would have worked up to 54 years, which was below the retirement age for civil servants. It was thus submitted that the multiplier of 30 years should be upheld.
19. On the dependency ratio, counsel submitted that the trial court's use of 2/3 as the dependency ratio should be upheld as the deceased had siblings and a mother who depended on him. In further support of this, it was submitted that the Appellant has an opportunity at hearing to oppose the Respondent's testimony on dependency but they squandered the same.
20. In view of the above submissions, it thus the Respondent's counsel's submission that under the head of loss of dependency, the award can be calculated as follows:
 Option 1: Kshs. $40,000 \times 12 \times 30 \times \frac{2}{3} = 9,600,000/=$; or
 Option 2: Kshs. $16,295.95 \times 12 \times 30 \times \frac{2}{3} = 3,911,028/=$
21. It was finally submitted by counsel for the Respondent that the present appeal is not founded on any legal fault made by the trial magistrate and that as such, the same should be dismissed with costs to the Respondent.

Issues for Determination

22. I have considered the ground of appeal raised by the Appellant, the evidence on record as well as the respective submissions by the parties. The only issue that arises for determination by this Court are:
 - a. Whether the trial court erred in not adopting the global sum approach instead of the multiplier approach; and if not,
 - b. Whether the damages awarded by the trial court were excessive or unjustified.

Analysis

a. Whether the trial court erred in adopting the multiplier approach

23. It is trite that an appellate court will only interfere with the award of the trial court if it is inordinately so high or low as to represent an entirely erroneous estimate or it is based on some wrong legal principle or on a misapprehension of the evidence. (See: *Kemfro Africa Limited t/a "Meru Express Services [1976]" another v Lubia & another (NO.2) [1985] eKLR*)
24. The same position was held by the Court of Appeal in *Mkube v Nyamuro [1983] LLR at 403*, where Kneller JA & Hancox Ag JJA held that-
 "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."
25. Similarly, in *Butt v Khan (supra)* it was held -
 "An appellate court will not disturb an award for damages unless it is 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 was either inordinately high or low."



26. The Appellant faulted the trial magistrate for adopting the multiplier approach instead of the global award approach in assessment of the damages awarded to the Respondent.
27. In *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* which was quoted with approval in *Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007]* eKLR Justice Ringera was of the following view:-

“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.”

28. From the proceedings in the lower court, the Respondent testified that the deceased was 24 years old at the time of his death and was earning a net of Kshs. 40,000/= from operating a restaurant called Buddy’s Bizzierias near Chuka University. The Respondent adopted her witness statement dated 15th February, 2021 as her evidence in which she stated that the deceased provided for his family and fully took responsibility by educating his siblings.
29. The claim that the deceased was a running a pizza business was not controverted by the Appellant before the trial court. The trial court found that there was a registration certificate for the business that the deceased ran but no accounts to prove the income. The Respondent has however attempted to prove the earnings of the deceased through his personal bank statements. But in my view, the same could not be ascertained through such proof. All factors considered, it was in the trial court’s discretion to adopt either the multiplier approach or the global approach and she chose to adopt the latter approach.

The trial magistrate had however to base her preferred mode of assessment on some facts. It is clear the trial magistrate just plucked a figure of Kshs.15,000/- which was not pleaded or proved. There is absolutely no evidence to show how she arrived at the figure of 15,000/- as the multiplicand. The amount that is used as multiplicand must be based on evidence but not on whims and caprice. In the absence of proof as to what the deceased’s income was, it was erroneous for the trial magistrate to imagine the profit the deceased used to make. The courts have held that the appellate court will interfere with a finding of fact in award of damages if it based on no evidence or on misapprehension of the evidence or acted on wrong principles, see *Mkube v Nyamungo (supra)*. In *Butt v Khan (supra)* the court held that the appellate court will interfere with the exercise of discretion if it is when that the Judge, ‘misapprehended the evidence in some material respect.’

See also the case of *Francis Odhiambo Nyunja & 2 Others –v- Josphine Malala Owingi (supra)*.

I must agree with the respondent that the two proposed modes of assessment general damages have historically been chosen based on the factors of the deceased proven to the court. The mode of adopted by the court must be supported by the evidence. The learned trial magistrate had no discretion to determine the profits made by the deceased. The respondent set out to prove that the deceased used to earn a net income of Kshs.40,000/- per month. The respondent relied on a bank statement but the learned trial magistrate found that there were no accounts to prove the income. The trial magistrate ran into error by making a guess work as to what the deceased used to earn. I find that by so doing the learned trial magistrate ran into error by holding that his profit was Kshs.15,000/-. The multiplicand of Kshs.15,000/- was without basis. In the absence of evidence of actual earnings of the deceased, the



correct approach would have been to assess the income by applying the minimum wage for unskilled workers or to apply the global award. The considerations to guide the court include the age, average earning and the length of dependency. The trial magistrate had the discretion to decide the approach to make, however the approach adopted by the trial magistrate was erroneous as the sum of Kshs.15,000/- was not provided and was therefore without basis. Based on the principles enumerated above I find that the finding by the learned trial magistrate cannot be upheld. There are basis to interfere with the award of damages for loss of dependency.

30. As for dependency ratio, the trial magistrate used 2/3. Section 4 (1) of the *Fatal Accidents Act* (Cap 32 Laws of Kenya) provides:-

“(1)	<p>Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:</p> <p>Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”</p>
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It follows that the Act recognizes a parent as a dependant for the purposes of the Act. The appellant submits that the respondent failed to proof dependency ratio and urges the court to find the 2/3 ratio applied by the trial court was speculative.

31. For the respondent, the court was urged to uphold the dependency ratio of 2/3 as the respondent was a single mother and the deceased was the main provider in the family. The learned trial magistrate while applying the dependency ration of 2/3 held that the deceased had siblings and a mother who depended on him.

I find that the trial magistrate misapprehended the law and the evidence and applied wrong principles in assessing the dependency ration .

Section 4 of the *Fatal Accidents Act* (supra) recognizes children and parents as the only dependants for the purposes of the Act. It was therefore erroneous for the trial court to rely on ‘dependants’ who are not envisaged under the Act. The deceased was unmarried and the respondent was the only dependant. I find that a dependency ratio of 1/3 is appropriate.



32. I find that for general damages for loss of dependency, it was not in dispute that the deceased was operating a business of a baker and selling pizzas, in the absence of prove of his income, the trial court should have adopted a global sum or be guided by the Regulation of Wages Order and apply a ratio of 1/3. The applicable regulation is the 'Regulation of Wages (General) Amendment Order 2018' which provides for a monthly pay of Kshs.16,295.95. I find that should interfere with award on loss of dependency. I will adopt the applicable regulation of wages.

b. Whether the damages awarded by the trial court were excessive or unjustified

33. Under the *Law Reform Act*, it is provided that damages for pain and suffering are recoverable if the deceased suffered pain as a result of his injuries in the period before his death. Damages for loss of expectation of life can also be recovered on behalf of the estate of the deceased.

34. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering ranges from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering prolonged before the death. See Hyder Nthenya Musili & Another v China Wu Yi Limited & Another (supra).

35. In present case, the Appellant in his submissions has proposed that for pain and suffering, the Respondent should be awarded Kshs. 20,000/= (as per paragraph 10 of their submissions) or is it Kshs. 10,000/= (as per paragraphs 12 and 13 of their submissions) in place of the Kshs. 100,000/= awarded by the trial court. The deceased in this case did not succumb to his injuries at the scene of the accident. He was rushed to Chuka District Hospital and later succumbed to the injuries.

36. In light of this and considering that the award of damages requires an exercise of discretion, I agree with the submission of the Respondent that the award of Kshs. 100,000/= and Kshs. 80,000/= under the heads of pain and suffering and loss of expectation of life respectively was within the conventional range of recent authorities and it was therefore not unreasonable or arbitrary to warrant interference by this Court.

37. On the multiplier, it is not in dispute that the deceased was 24 years old at the time of his demise. The trial court adopted a multiplier of 30 years. In view of the fact the life expectation is 60 years, I find that the adoption by the learned magistrate of 30 years as the multiplier was not unreasonable.

Conclusions

38. I set aside the Judgment of the learned trial magistrate on the award of general damages for loss of dependency.

In the end the award of damages will be as follows:-

1. Loss of dependency: $16295.95 \times 12 \times 30 \times 1/3 = 1,955,514.00$.
2. Pain suffering - 100,000.00
3. Loss of expectation of life -80,000.00
Total Kshs.2,135,514.00
4. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF FEBRUARY 2024.

L.W. GITARI



JUDGE

15/2/2024

Ms Hymo for Appellant

Judgment has been read out in open court.

L.W. GITARI

JUDGE

