



Jyoti Structures Limited & another v Kimani (Suing as the Legal & Personal Rep of the Estate of David Njenga - Deceased) (Civil Appeal 67 of 2023) [2024] KEHC 3439 (KLR) (Civ) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA**

CIVIL

CIVIL APPEAL 67 OF 2023

CM KARIUKI, J

APRIL 11, 2024

(FORMERLY NYAHURURU CIVIL APPEAL NO. 23 OF 2021)

BETWEEN

JYOTI STRUCTURES LIMITED 1ST APPELLANT

STEPHEN KAMAU NJAMBI 2ND APPELLANT

AND

TERESIA NJAMBI KIMANI RESPONDENT

**SUING AS THE LEGAL & PERSONAL REP OF THE ESTATE OF DAVID
NJENGA - DECEASED**

(Being an Appeal from the Judgement/Decree of Hon. Obulutsa, Chief Magistrate delivered on 23rd September 2021 in Nyahururu CMCC No. 102 of 2018)

JUDGMENT

1. The Appellants being aggrieved by the Judgement/Decree of Hon. Obulutsa, Chief Magistrate delivered on 23rd September 2021 in Nyahururu CMCC No. 102 of 2018, appealed the same vide their memorandum of appeal dated 27th September 2021 on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in adopting a multiplicand of Kshs. 30,000/- as the deceased's monthly income without a factual or legal basis for arriving at the said multiplicand.



- ii. That the learned trial magistrate erred in law and fact in adopting a multiplicand of Kshs. 30,000 as the deceased's earnings without any evidence before him, supporting such earnings and without taking into account the deceased's statutory and tax obligations.
 - iii. That the learned trial magistrate erred in law and fact in adopting a sum of Kshs. 30,000 as the deceased's earnings solely based on Mpesa and bank statements without ascertaining the source of such funds and without ascertaining the deceased's occupation and foundation of such deposits.
 - iv. That the learned trial magistrate erred in law and fact by failing to properly consider and analyze the defendants' submissions and hence arrived at the wrong termination on quantum.
 - v. That the learned trial magistrate erred in law and misdirected herself in her assessment of special damages awardable to the Respondent which was manifestly excessive.
2. Reasons wherefore, they pray that:-
- i. The judgment/decree of the honorable court dated 23rd September 2021 be reviewed and/or set aside.
 - ii. The honorable court be pleased to make an appropriate award in tandem with the pleadings, evidence, law, and decided authorities.
 - iii. That costs of this appeal be borne by the Respondent.
3. Appellants' Written Submissions
4. The Appellant submitted that the deceased's earnings were not strictly proven as required under law. The legal burden proof was on the plaintiff/Respondent to prove the said earnings according to Section 107 (1), 109, and 112 of the *Evidence Act*. This court should not entertain the allegation that the deceased was earning Kshs. 30,000/- per month.
 5. It was contended that the Respondent's allegation that her deceased son was earning Kshs. 1000/- per day and he used to send her Kshs. 5000/- per month was not proven because of a scrutiny of the money to PW1 that is on 7th September 2024 where the deceased sent Kshs. 150 and on 4th April 2014 where the deceased sent Kshs. 2070. At no point was Kshs. 5000 sent to PW1 by the deceased between 2014 April to January 2015. Further reliance was placed on *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*.
 6. The Appellants argued that the Mpesa statement does not prove dependency on the part of the plaintiff. Furthermore, every substantial amount deposited was transferred a moment later and thus it cannot be said to prove the income of the deceased. It is therefore prudent to state that the Mpesa statements have nothing to suggest the income earned by the deceased.
 7. Further, it was averred that the banking statements from SMEP Microfinance Bank Limited were not certified and sealed by the bank. The wire transfers were also not certified, filled in by the bank official, and signed and sealed by the bank that released the documents. It was submitted that there is no cover letter to show that they emanated from the bank and that the plaintiff could have availed a bank official from SMEP to testify as to the contents of the bank statements. Reliance was placed on *Joseph Kipkemboi Tanui vs. Defence Forces & 2 Others [2019] eKLR*.
 8. The Appellants asserted that the Respondent's bank statements are inadmissible and do not prove the deceased's earnings. That the applicable multiplicand should be the statutory minimum wage prevailing at the time of death. The Appellants urge the honorable court to adopt the minimum wage



of Kshs. 5844 as the multiplicand and calculated damages as follows: $Kshs\ 5218 \times \frac{1}{3} \times 25 \times 12 = Kshs\ 319,350/-$

9. In the alternative, the Appellants averred that in the instance the bank takes into consideration the bank statements, it should not skip the attention of the court that the said bank statements do not prove the income of Kshs. 30000/- but rather they show the money going in and out of the deceased's account. The Appellants propose that the total earnings of the deceased should be tabulated as follows:-
10. Month Earnings 2014 Kshs. August 26,815 September 8,220 October 16,600 (and withdrew Kshs. 50,000) November 5,608 (and withdrew Kshs. 5,100) December 303.20 2015 January 25,380 (and withdrew Kshs. 2,600) February 11,300 (and withdrew Kshs. 4100) March 59,500 (and withdrew Kshs. 93,300) (the earnings of March 2015, were, therefore, less Kshs. 55,000/- received a loan on 16/3/2015; thus, net earnings were Kshs. 4,055/-)
11. The Appellants submitted that taking into consideration the earnings by the deceased for the eight months the average should be calculated as follows:
12. $26,815 + 8,220 + 16,600 + 5,608 + 3,303 + 25,380 + 11,300 + 4,055 = 101,282$
13. The Appellants further stated that the honorable court would adopt the bank statements as evidence of the income of the deceased, then the average of Kshs. 12,660.125 per month should be the adopted income of the deceased and multiplicand. Hence the damage should be calculated as follows:-
14. $Kshs\ 12,660.125 \times \frac{1}{3} \times 25 \times 12 = Kshs\ 1,266,012.50/-$
15. In conclusion, the Appellants submitted that the amount of dependency that should be awarded to the Respondent should not exceed Kshs.5000 per month.
16. Respondent's Submissions
17. The Respondent submitted that in the lower court, the parties entered a consent concerning various aspects of the case in particular on liability, pain and suffering, loss of expectation, 1/3 dependency ratio, and the multiplier. The only issue that was left for determination was the issue of the multiplier to be adopted in determining the award under the *Fatal Accidents Act*.
18. The Respondent testified in the lower court that evidence was not controverted nor contested that the deceased was operating as a boda boda operator and that he used to approximately Kshs. 1000/-. To prove the same, they produced documents to show that the deceased had purchased a motorbike which he was operating before his demise. He produced a sale agreement as well as copies of the logbook and receipts for purchase.
19. The Respondent contended that the issue of what the deceased would give to her was not for determination noting as it were that vide the consent was recorded between the parties the dependency ratio was placed at a 1/3 of the deceased's earnings. The Respondent produced mpesa statements as well as bank statements from SMEP Microfinance Bank Ltd which statements were duly certified by the issuing entity and signed.
20. It was stated that the said documents formed part of the plaintiff's documents as filed in the list of documents and were indeed produced without any objection from the Appellants' counsel who participated in the proceedings. Indeed, on page 53 of the record of appeal, the Appellant's counsel did cross-examine the witness on the statements. They never objected to the production or raised any issue as to their authenticity at the trial and they are estopped from raising issues regarding their statements.



21. The Respondent contended that the said statements as produced proceeded to show bankings made in various days and months which ultimately led the trial court to conclude that it was satisfied as to the deceased's earnings at Kshs. 30,000/- per month. They stated that the Appellants are blowing hot and cold at the same time by urging the court to use the multiplier of the minimum wage and in another breath to use the bank statements which they admit that from their earnings were Kshs. 12660.15.
22. In conclusion, they asserted that if the court is to find that the trial court erred in assessing the monthly earnings then it should adopt the figure ascertained from the bank statement and proposed by the Appellants as monthly earnings of Kshs. 12660.15 to assess the general damages under this head.

23. Analysis and Determination

24. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.
25. This Appeal being on quantum only, the Court of Appeal has pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another v Lubia & Another (No 2)* [1985] eKLR as follows:-

"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."
26. The parties by consent apportioned liability at 25% against the Respondent and 75% against the defendant. For pain and suffering Kshs. 20,000/- , Kshs. 100,000/- for loss of expectation of life a dependency ratio of 1/3 and a multiplier of 25 years. What was left for the trial court to decide is what the deceased's income was and therefore how much damages are payable to his estate.
27. In the trial court, the Respondent, the plaintiff then testified that the deceased was her last born and was working as a motorcycle operator at the time of the accident. She asserted that the income in his savings statement was from the motorcycle business which he had done for more than one year after getting a loan to buy the motorcycle.
28. On the other hand, the Appellants stated that the deceased's income was not strictly proved and that the court should go by the minimum wage of Kshs. 5,128/- and in the alternative Kshs. 12,660/- was proposed going by the average from the income statement. The Appellants reiterated the same in the instant appeal.
29. Accordingly, I agree with the trial magistrate that the Appellants are estopped from claiming that the statement from the Sacco was not certified yet they did not raise any objections when the documents were produced during the hearing. However, having analyzed the income statements, I disagree that the statements proved that the deceased earned 30,000/- per month. The savings were not made daily and having calculated the earnings per month they do not amount to Kshs. 30,000/- as held by the trial magistrate.



30. In place of the same, I concur with the average proposed by the Appellant as an accurate assessment of the deceased's monthly income. However, factoring in the vicissitudes of life, I am of the considered view that a sum of Kshs. 16,000 would be an accurate representation of the deceased's monthly income.

31. In the upshot, the appeal succeeds in the following terms:-

32. The total award will be as follows:-

- i. Pain and suffering Kshs.....Kshs. 20,000/-
- ii. Loss of expectation of lifeKshs. 100,000/-
- iii. Loss of dependency ($16,000 \times 25 \times 1/3 \times 12$).....Kshs. 1,600,000
- iv. Special damages Kshs. 70,100/-
Subtotal Kshs. 1,790,100/-
Less 25% (Kshs.447, 525/-)
Net Kshs.1,342,575/-
- v. Half ($1/2$)Costs to the appellant.

DATED AND DELIVERED IN NYANDARUA THIS 11TH DAY OF APRIL 2024

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CHARLES KARIUKI

JUDGE

