



Gitee & another v Njeri (Suing as the Administrator of The Estate of James Kimulu Mwangi - Deceased) (Civil Appeal E003 of 2022) [2024] KEHC 4722 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E003 OF 2022**

GL NZIOKA, J

MAY 6, 2024

BETWEEN

KARIUKI GITEE 1ST APPELLANT

PRIME MATTRESS LIMITED 2ND APPELLANT

AND

JANET WANJIRU NJERI (SUIING AS THE ADMINISTRATOR OF THE ESTATE OF JAMES KIMULU MWANGI - DECEASED) RESPONDENT

(Being an appeal against the decision by Hon. E. Kelly, Senior Resident Magistrate (SRM) dated on 14th December 2021, delivered vide Civil Case No. E313 of 2021 at the Chief Magistrate's Court at Nakuru)

JUDGMENT

1. The appeal herein arises from the decision of the court in Chief Magistrate's court civil case No E313 of 2021 wherein the plaintiff sued the defendant seeking for:
 - a. General damages under the Law Reforms Act and Fatal Accident Act
 - b. Loss of consortium
 - c. Kshs 100,950
 - d. Costs of the suit
 - e. Interest at court rates on (a) and (b) above
2. The defendant filed a defence to the suit dated 14th June 2021,
3. The plaintiff's claim arose as a result of a road traffic accident that occurred on 5th February 2021, wherein one James Kimuhu Mwangi (herein the deceased) was hit by a motor vehicle registration No



- KBU 614X driven by the 1st defendant and owned by the 2nd defendant, and as a result the deceased suffered fatal injuries.
4. Subsequent to the close of pleadings and negotiation by the parties, judgment on liability was entered by consent in the ratio of 85:15% in favour of the plaintiff as against the defendants. The matter proceeded on the assessment of quantum, it was disposed off vide the filing of submission.
 5. At the conclusion of the matter the trial court rendered its decision and awarded the plaintiff judgment as follows:
 - a. Loss of dependency - Kshs 3,799,840
 - b. Pain and suffering- Kshs 20,000
 - c. Loss of expectation of life - Kshs 100,000
 - d. Loss of consortium - Kshs 100,000
 - e. Special damages - Kshs 75,950Total sum Kshs - Kshs 4,095,790
Less 15% of Kshs - Kshs 3,481,422
The plaintiff was awarded costs and interest from the date of judgment.
 6. However, the defendants are aggrieved by the award on quantum and have filed the appeal herein against it, on the grounds:
 - a. That the learned Magistrate erred in law and in fact in adopting a multiplicand which is unsupported by evidence.
 - b. That the learned Magistrate erred in law and in fact in adopting a multiplier that was excessive in the circumstances and against the weight of binding decisions of superior courts.
 - c. That the learned Magistrate erred in law and in fact in awarding damages under the heading of pain and suffering that were excessive and contrary to the evidence on record as to the deceased's death.
 - d. That the learned Magistrate erred in law and in fact in making duplicate awards of damages under the headings of loss of expectation of life and loss of dependency without discounting the former from the latter.
 - e. That the learned Magistrate erred in law and in fact in making an award for loss of consortium when no legal provision nor evidence supported such an award.
 7. The appellants pray that the appeal be allowed, and the judgment of the trial court dated 14th December 2021 and the consequent decree be reversed or set aside. That the respondent bears the costs of the appeal.
 8. The appeal was canvassed through filing of submission. The appellants submitted that the trial Magistrate erred by using Kshs 27,940 as the multiplicand to calculate damages for loss of dependency without a basis. That, the plaintiff alleged the deceased owned and worked in a quarry earning Kshs 60,000 a month but she only produced his Mpesa statement which showed the deceased had received Kshs 88,870 in nine (9) months. However, there was no proof that the source of money was from the quarry and in the circumstances, the trial court ought to have been guided by gazetted minimum wages of a general labourer as at 5th February 2021, being Kshs 9,874 as a multiplicand.



9. The appellants relied on the case of *Isaack Kimani Kanyingi & another (suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga* [2020] eKLR where the court held the minimum wage ought to be adopted as the multiplicand where monthly income cannot be ascertained.
10. Further, the trial Magistrate erred in adopting a multiplier of seventeen (17) years in calculating the loss of dependency as it was excessive. That, the deceased was 43 years old and the nature of work was quite physically and risky and he would not have managed to work for that long. Reliance was placed on the case of *Crown Bus Services & 2 others v Jamilla Nyongesa and Amida Nyongesa (legal representatives of Alvin Nanjala (deceased))* [202] eKLR where the court stated that, a court is in a better place to adopt a multiplier that is reasonable and in tune with the realities of life.
11. The appellants submitted that, the trial Magistrate erred in awarding Kshs 20,000 as damages for pain and suffering taking into account that the deceased died immediately after the accident and therefore should have awarded damages of Kshs 10,000 as decided in the case of; *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] eKLR.
12. The appellants further submitted that, the trial Magistrate made a double compensation in favour of the respondent by awarding damages under both the *Law Reform Act* and the *Fatal Accidents Act* which will go to the same person. They relied on the case of; *Maina Kamau & another v Josephat Muriuki Wangondu* and another as cited in the case of; *Josephat Wachira Maina and another v Mohammed Hassan* Civil Appeal No 43 of 2003 where the Court of Appeal held that the damages for loss of dependency and loss of expectation of life should be deducted since the beneficiaries ordinarily would be the same and would amount to double compensation.
13. The appellants finally submitted that, there is no award of loss of consortium in instances of fatal accidents provided for under the law. They placed reliance on the case of *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another* [2015] eKLR where the court held that, no law provides damages to a widow of a deceased person for loss of consortium. That, the *Law Reform Act* and *Fatal Accidents Act* which govern an award of damages in fatal accidents claim only recognizes three heads of damages under being; pain and suffering, loss of expectation of life, and loss of dependency.
14. The court further stated that, loss of consortium can only be included in a claim for loss of amenities in a suit by a survivor of an accident owing to injuries sustained and is therefore incapable of enjoying consortium with his/her spouse and has diminished the quality of life
15. On its part the respondent submitted that, the appeal is purely based on quantum and cited the case of; *Bashir Ahmed Butt v Uwais Ahmend Khan* [1982-1988] KAR 5 where the Court of Appeal discussed the factors the appellate court should consider to consider before it can interfere with an award of damages. The factors were stated to be where the damages are inordinately high or low to represent an erroneous estimate, or the Judge misapprehends the evidence or acts on wrong principles and arrives at a figure that is inordinately high or low.
16. The respondent argued that, the deceased used to earn Kshs 2,000 per day from selling stone and ballast and produced the deceased Mpesa statement. That, trial court considered the Mpesa statement and took note of the amount of money the deceased received in the months of July, August and September, and did their average to arrive at the multiplicand fo Kshs 27,940.
17. Further, the deceased was also be paid in cash but due to the informal nature of his work records were an impossibility and/or non-existent. She relied on the case of *Bash Hauliers Limited v Judith Nabwire Wamalwa & another* [2020] eKLR where the court held that, documents and records go along way to assist in assessment of earnings and to make the claimant's case watertight but do not have to be



complicated and can include simple routine and easily accessible documents such as Mpesa and/or bank statements, or receipts for chama.

18. The respondent also relied on the case of; *Jacob Ayiga v Simon Obayo* (2005) eKLR where the Court of Appeal stated that it did not ascribe to the view that the only way to prove earnings is by the production of documents as it would a lot of injustice to many Kenyans who are illiterate or keep no record yet they earn a livelihood in various ways.
19. The respondent argued that, the submission by the appellants that the deceased earned Kshs 88,870 in nine (9) months was misleading as the respondent availed the Mpesa statement for only three months of July, August and September. Further, the appellants were attempting to impeach evidence in submissions after foregoing their right to cross-examine the respondent's evidence in the trial court.
20. On the issue of the multiplier, the respondent submitted that, the deceased was a businessman who sold ballast, sand and stones, but did not engage in the manual labour. As such, the deceased would have continued with his business past the normal retirement age. Further, the deceased was in good health. In the circumstances, the trial court considered the vicissitudes of life and adopted a multiplier of 17 years. That, the appellants have not justified the proposed multiplier of 15 years.
21. The respondent further submitted that, the award of Kshs 20,000 under the head of pain and suffering was within the trial Magistrate's discretion and which was within the normal range awarded under this head. Furthermore, the court should take judicial notice that the police abstract and post mortem reports are filled based on the information by the police officer who visited the scene after the accident.
22. The respondent argued that, there was no duplicity of awards by awarding damages under both the *Fatal Accidents Act* and the *Law Reform Act*. That, awards under the *Law Reform Act* are for the benefit of the estate of the deceased, while awards under the *Fatal Accidents Act* are for the benefit of the deceased's dependents. She relied on the case of; *Hellen Waruguru Wawereu (suing as the legal representative of the Estate of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015] eKLR
23. Lastly, the respondent submitted that, she was deserving of an award under the head loss of consortium as she lost her husband at the age of 36 years old and has never remarried. Further, they had five (5) children who also lost care and love of their father. Furthermore, there are a plethora of precedents that make an award of loss of consortium and make part of the Kenyan laws. She relied on the case of; *Salvatore De Luca v Abdullabi Hemed Khalil & another* [1994] eKLR where the Court of Appeal considered that, the appellant lost is wife's companionship and had not remarried
24. At the conclusion of the arguments of the parties, I note that the appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shah* (1968) EA and *Mkuba v Nyamuro* 1983 KLR 403.
25. In the same vein the Court of Appeal in *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 (unreported) stated that: -

“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 the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257).”

26. I shall now evaluate the evidence tendered at the trial court in respect each limb of the awards. As regards loss of dependence, the plaintiff proposed a multiplicand of Kshs 35,417 based on the Mpesa statement produce. The plaintiff also proposed a multiplier of 17 years, on the basis that the deceased was 43 years old. Finally, the plaintiff proposed a dependency ratio of 2/3 as the deceased had a wife and children as supported by the birth certificate and chief’s letter. As a result the plaintiff calculated the resultant figure as follows:

$$35,417 \times 12 \times 17 \times 2/3 = \text{Kshs } 4,816,712$$

12. However, the defendants submitted that, the total amount supported by Mpesa statement was Kshs 88,870 in nine (9) months as such an average the deceased earned Kshs 9,874 per month. The multiplication should be Kshs 9,874. As regards multiplier, the defendant proposed 15 years, and a ratio of 2/3 as the deceased was survived by six dependents. The defendants thus proposed the sum payable as follows:

$$9,814 \times 2/3 \times 12 \times 15 = \text{Kshs } 1,184,880$$

27. In the judgment rendered by the trial court adopted in a multiplicand of Kshs 27,940 being an average of the three Mpesa statements for the months of July, August and September 2020. On the multiplier the court adopted the 17 years proposed by the plaintiff and a ratio of 2/3 as agreed by the parties. The resultant figure awarded is as follows:

$$\text{Kshs } 27,940 \times 12 \times 17 \times 2/3 = \text{Kshs } 3,799,840$$

28. In the grounds of appeal the appellants argues that, the multiplicand was not supported by evidence, that the multiplier was excessive.

29. I have perused the court record and note that, when the plaintiffs witness Jane Wanjiru Njeri testified she adopted her witness statement. In the subject statement, she stated that, her husband earned is an average of Kshs 2,000 per day and would give her Kshs 800 daily. If that evidence is admitted then the average monthly income of the deceased would be Kshs 2,000 per day for 24 days, taking into account no business is usually transacted on Sundays. Hence a total sum of Kshs 48,000. However, there was no evidence to support that figure. In her oral evidence she relied on Mpesa statement to support her claim. In cross examination the witness responded as follows to all questions put to her

“I filed several statements as proof that my deceased husband was supporting the children. He was working at a quarry. There are Mpesa statement to show how he was often paid. I have no certificate of quarry of permit. He died on the spot”

30. Pursuant to the afore cross-examination there is no indication that, the defendants contested the production of the Mpesa statement. In deed in their own submissions the defendants submitted that, the total sum proved was Kshs 88,870 for a period of nine (9) months.

31. The issue in this matter as regards multiplicand is the figures of Kshs 47,950 in September 2020, Kshs 33,870 in August and Kshs 2,000 in July 2020. The question is why those three month when the statement produced covered a period of 1st January 2020 to 30th September 2020. To the contrary the plaintiff submitted as follows

“The plaintiff has proved earnings of the deceased by producing his Mpesa statement. From the statement, it is a fact that the deceased received Kshs 24,000 through Mpesa in July 2020.



He received Kshs 32,000 in August 2020, and Kshs 50,000 in September 2020. The average received in the three months is Kshs 35,417.”

It is therefore clear that, the figures relied on by the trial court are not supported by evidence and the submissions by even the plaintiff herself and therefore cannot be upheld.

32. On the other part, the figure of Kshs 88,870 by the dependents is not supported in evidence. I have looked at the Mpesa statement produced by the plaintiff and it does have a column for moneys in and moneys out. There is no such sum indicated. Thus unless one takes the painstaking exercise to add all the entries to arrive at that figure it remains unsubstantiated. The defendant did not prove that they carried out such exercise. Therefore that figure cannot be relied on.
33. In the given circumstances, the court can only apply a global figure approach of a minimum wage regulation for unskilled worker. In this case the accident occurred on 5th February 2021, the relevant Gazette Notice is Regulation of Wages (General) (Amendment) order 2018 which came into force on 1st May 2018, under the heading of miner, stone cutter, is Kshs 14,658.85. In that case the multiplicand should have been Kshs 14,658. 85 which I hereby adopt.
34. As regards the multiplier the court adopted 17 years against the 15 years, the appellants do not indicate how excessive that figure is against their own. I find the 17 years for the deceased who was 43 years gives him 60 years, which is reasonable and I decline to interfere with the same. In that case, the final figure for loss of dependence shall be:

$$\text{Kshs } 14,658.85 \times 12 \times 17 \times 2/3 = \text{Kshs } 1,993,603.60$$

35. The other award appealed against as per grounds of appeal is pain and suffering. The plaintiff sought for Kshs 50,000 on the basis, the deceased died on the same date of the accident. The defendants proposed a figure of Kshs 10,000. The trial court in its judgment awarded Kshs 20,000. I note from the police abstract that the accident was at 5.00pm and although it is indicated that the victim died on the same date, no time indication is given. Even then I do not find Kshs 20,000 excessive taking into account, the proposal of the parties on the issue.
36. The third issue in the ground of appeal is duplication in awards. First and foremost the defendants did vide their own submissions make proposal for awards under both the loss of expectation of life and loss of dependency. They proposed sum of Kshs 100,000 for loss of expectation of life and Kshs 1,184,880 for loss of expectation of life. There is nowhere in their submission, they invited the court to discount the former from the latter. Therefore they cannot raise view issues at the stage of appeal. The court awarded Kshs 100,000 for loss of expectation of life as per their proposal. I therefore dismiss that ground of appeal.
37. The final ground relates to loss of consortium. The plaintiff sought for a sum of Kshs 150,000. However, the defendants contested it on the ground that it is not founded in law and neither did the plaintiff prove that she was married to the deceased. In awarding the sum of Kshs 100,000 for loss of consortium, the trial court relied on several legal authorities. However, the court also observed that there are several other cases where the courts have declined to make an award for the same.
38. Be that as it were, for one to be awarded loss of consortium evidence has to be availed to the nature of the relationship between the spouses. A mere prescription of marriage will not suffice. I say so, because there are cases where though the parties may be legally married this claim will not arise if at the time of death, they were estranged or separated. Apart from pleading for loss of consortium, there was no evidence to support the same. In the entire statement of the plaintiff statement dated 13th February 2020, the only statement that speaks to this claim is a statement that “I have also lost a



companion”. At the hearing of the case, the plaintiff adopted her statement as recorded and therefore the single statement as above. As rightfully argued by the defendant, bearing in mind it is the plaintiff to prove these case, the plaintiff had to prove spousal relationship and rights attendant thereto. I don’t find the statement “I have lost companion” adequate as proof of the claim for loss of consortium and in particular a sum of Kshs 100,000 awarded for it. I therefore set it aside. Special damages are not contested.

39. In summation I enter judgment for the plaintiff as against the defendant as follows:-

- a. Loss of dependency.....Kshs 1,993,603.60
- b. Pain and suffering.....Kshs 20,000.00
- c. Loss of expectation of life.....Kshs 100,000.00
- d. Special damages.....Kshs 75,950.00

Total amount.....Ksh2,189,563.60

Less 15%.....Kshs 328,4,344.04

Total amount payable.....Kshs 1,861,120.56

Costs to the appellants and interest from judgment in the lower court.

37. It is so ordered...

DATED, DELIVERED AND SIGNED THIS 6TH DAY OF MAY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Opondo for the appellant

Mr. Irungu Maina for the respondent

Ms. Ogutu: Court Assistant

