



Kanyi v Kariuki (Suing as the Administrator and Legal Representative of the Estate of Dominic Macharia Ndungu - Deceased) (Civil Appeal 291 of 2023) [2024] KEHC 5822 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 291 OF 2023
FN MUCHEMI, J
MAY 23, 2024**

BETWEEN

JAMES KANYI APPELLANT

AND

MARY NGENDO KARIUKI (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF DOMINIC MACHARIA NDUNGU - DECEASED) RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. M. W. Kurumbu (PM) delivered on 1st December 2022 in Thika CMCC No. 539 of 2017)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 539 of 2017 in a claim for damages for injuries sustained in a road traffic accident. The Magistrate apportioned liability at the ratio of 70 : 30 with the appellant bearing 70%. The respondent was awarded damages for pain and suffering Kshs. 50,000/-; loss of expectation of life Kshs. 120,000/-; loss of dependency Kshs. 4,480,000/- and special damages at Kshs. 92,800/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in fact and law and reached a verdict that is wholly against the weight of the law and the evidence presented before the court;
 - b. The learned trial magistrate erred in law and in fact in awarding damages for loss of dependency at Kshs. 4,480,000/- which amount is manifestly excessive;



- c. The learned trial magistrate erred in law and in fact by adopting a multiplier of 28 years for the deceased without taking into consideration the prevailing range of comparable awards;
 - d. The learned trial magistrate erred in law and in fact in applying a multiplicand of Kshs. 40,000/- where there was no documentary evidence adduced as proof of earnings.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the deceased at the time of death was a student and was not in employment. Further the only dependant as per the plaint was the respondent's mother and the issue of the other two dependants came up only during oral testimony which the appellant contends that the trial court ought not to have considered. The appellant submits that loss of dependency ought to be assessed at Kshs. 326,160/-.
5. The appellant submits that the alleged dependants' dependency on the deceased was not pleaded and neither was their age indicated to prove dependency. Further, the alleged dependants never testified to prove the loss of dependency occasioned to the deceased's estate by his death as there was nothing tendered by the plaintiff to prove the alleged dependency on the deceased. Further, no witness tendered any credible evidence nor did any witness produce any documents to prove that the deceased was a graphic designer. The appellant contends that the certificate of attendance tendered as an exhibit did not show that the deceased was qualified as a graphic designer earning Kshs. 80,000/- It was not proved that the deceased was earning Kshs. 40,000/- per project and therefore the trial magistrate applied the wrong principles in adopting a multiplicand of Kshs. 40,000/- per project in computing loss of dependency.
6. The appellant further submits that a party is bound by his pleadings and it was incumbent upon the plaintiff to prove her pleadings on the issue of whether the deceased was a graphic designer and earning a monthly salary of Kshs. 80,000/- to arrive at the conclusion that he was working and supporting his parent and siblings at the time of death. The appellant further contends that the trial magistrate took into consideration irrelevant factors by comparing the daily earnings of a mason with those of a graphic designer to come up with an exorbitant award under loss off dependency.
7. The appellant contends that the trial magistrate did not take into consideration the authorities tendered by the parties to come up with the said award. There is no legal reasoning advanced in the trial court's judgment why the court failed to appreciate both parties submissions and authorities to come up with the award on loss of dependency which is excessive.
8. The appellant relies on the case of *Benedeta Wanjiku Kimani (Suing as the administrator of the estate of Samuel Njenga (Deceased) v Chanwon Cheboi & Another* [2013] eKLR and submits that the awards under the *Law Reform Act* ought to have been the barest minimal practicable and urge the court to scale them down.

The Respondent's Submissions

9. The respondent relies on the cases of *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & Another* [1997] eKLR and *CMC Aviation Ltd v Kenya Airways Ltd (Cruiser Ltd)* [1978] eKLR and submits that the appellant did not call any witness to controvert the evidence tendered by herself on liability and therefore the learned magistrate was fair to apportion liability at the rate of 70 : 30 against the appellant.



10. The respondent submits that the deceased was 27 years old when he died and during the hearing, she testified that the deceased was a graphic designer earning Kshs. 80,000/- per month and was providing for the family. The respondent further states that she produced a certificate from Zetech College showing that the deceased completed a course in adobe page maker, adobe design, adobe illustrator, adobe photoshop, corel and Ms. Publisher. The trial magistrate exercised her discretion and adopted a multiplicand of Kshs. 40,000/-. The respondent further submits that the trial magistrate correctly argued that a mason was earning a minimum of Kshs. 1,000/- per day and a graphic designer would earn more than a mason per day. Additionally, the respondent submits that the trial magistrate was not obliged under the law to rely on Regulation of Wages (General Amendment) Order to determine the multiplicand where she testified that the deceased used to earn Kshs. 80,000/- per month. To support her contentions, the respondent relies on the case of *Mwita Nyamohanga & Another v Mary Robi Moberai (Suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & Another* [2015] eKLR.
11. The respondent further relies on the case of *P.N.M & Another (Suing as the legal representative of the estate of L.M.M) v Telkom Kenya Limited & 2 Others* [2015] eKLR and submits that the age of the deceased was not disputed and since he was a graphic designer in the private sector, he would have worked well up to the age of retirement which is 65 years. As such the deceased would have worked for a further 38 years before retirement. The respondent states that there was no evidence adduced to the effect that the deceased was of ill health or was impaired in any way. Thus, the respondent contends that the trial court correctly exercised its discretion and adopted a multiplier of 28 years.
12. The respondent further argued that the appellant did not plead on the dependency ratio of 1/3 adopted by the trial court in his memorandum of appeal and thus the court is not bound to address the same as parties are bound by their pleadings.
13. The respondent states that in assessing damages, the trial court took into consideration the limits set out by decided cases and went ahead and quoted the comparable decided cases in her judgment.

Issues for determination

14. The main issues for determination are:-
 - a. Whether the damages under the *Law Reform Act* were manifestly excessive.
 - b. Whether the trial court awarded an inordinately high award for loss of dependency.

The Law

15. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
16. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this



court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

17. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the damages under the Law Reform Act are manifestly excessive.

18. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR the court stated:-

As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...The generally accepted principle therefore 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 the awards range from Kshs. 10,000/- to Kshs. 100,000/- with the higher damages being awarded if the pain and suffering was prolonged before death.

19. In the instant case, it is not disputed that the deceased died on the spot. The trial magistrate awarded a sum of Kshs. 50,000/-relying the case of *Ngitarious Mwangi v Washington Odhiambo Wanyang* [2017] eKLR. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, the sum of Kshs. 50,000/- awarded by the trial court was reasonable and hence this court has no reason to interfere with it.
20. On the issue of loss of expectation of life, the trial magistrate awarded Kshs. 120,000/- which in my view was reasonable and does not present an erroneous estimate as claimed by the appellant. This award will not be disturbed and it is upheld.

Whether the trial court erred in awarding an inordinately high award for loss of dependency.

21. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tele* 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 awarded 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.”

22. Similarly in *Sbeikh Mustaq Hassan v 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.”

23. The Court of Appeal in *Chunibhai J. Patel & Another v P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the Fatal Accidents Act and held:-

The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

24. In the instant case, the appellant is faulting the trial court for adopting a multiplicand of Kshs. 40,000/- and multiplier of 28 years. The appellant further raised an issue of proof of dependency in his submissions which was unprocedural. The Court of Appeal was confronted with a similar scenario in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex parte Tom Mbaluto* [2018] eKLR in interpreting Rule 104 of the *Court of Appeal Rules* which is equivalent to Order 42 Rule 4 of the *Rules* stated:-

Rule 104 of the *Court of Appeal Rules*, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground on appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.

25. The appellant argues that the trial court erred by using a multiplicand of Kshs. 40,000/- as the deceased's monthly income yet the same was not proved by documentary evidence.

26. In *Jacob Ayiga Maruja & Another v Simeon Obayo* (2005) eKLR this court dealing with a similar situation in which a plaintiff had no documentary proof of the deceased's earnings, stated as follows:-

In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Kshs. 4,000/- per month. 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.

We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.

27. According to the plaint dated 3rd June 2017, the respondent pleaded that the deceased was 27 years and he was a graphic designer earning Kshs. 80,000/- per month under the employment of Top Image Company Ltd but produced no documents to prove that the deceased was employed. However, the respondent produced a certificate from Zetech College to show that the deceased completed a course in Adobe Page Maker, Adobe Design, Adobe Illustrator, Adobe Photoshop, Corel Draw and Ms. Publisher. In my view, the certificate of Zetech College established that the deceased had attended courses that qualified him as a graphic designer.
28. Accordingly, the trial magistrate exercised his discretion and found that the *Regulation of Wages (General) (Amendment) Order* did not apply because the respondent proved that the deceased was a graphic designer and was not in the level of informal Sector Workers. It is therefore my considered view that the sum of Kshs. 40,000/- as adopted by the magistrate as basis of the multiplier, was reasonable. The respondent produced evidence of certificates to support her evidence that the deceased was a graphic designer. As such, the sum of Kshs. 40,000/- was based on evidence tendered by the respondent and ought not to be disturbed.
29. The appellant contends that the multiplier of 28 years adopted by the trial court is on the higher side as the learned magistrate failed to appreciate and be guided by the prevailing range of comparable authorities in making the award. The respondent submitted that the deceased was 27 years at the time of his demise and he was in good health. Furthermore, the deceased was a graphic designer working in the private sector and thus he would have worked for a further 38 years as the retirement age was 65 years in the said sector. It is my considered view that the multiplier of 28 years was reasonable.
30. The trial court in adopting the multiplier of 28 years was guided by the authorities in *David Kimanthi Kaburu v Gerald Mwobobia Murungi* (2004) eKLR where the court adopted a multiplier of 30 years in a case where the deceased met his death at the age of 28 years. Further in the case of *Rosemary K. Kasina v Kenblest Limited* (2004) eKLR and *Lucy M. Njeri v Fredrick Mbutia & Another* (2006) eKLR where the court held that in informal sectors, the deceased would have worked till the age of 50-55 years.
31. The deceased was 27 years old at the time of his demise. Save for the accident that cut short his life the deceased was healthy and did not have any health complications. It is therefore my considered opinion that the multiplier of 28 years was reasonable.
32. In the premises, it is my considered view that the sum of Kshs. 4,480,000/- awarded by the magistrate for loss of dependency was not inordinately high in the circumstances of the case to warrant interference by this court.



Conclusion

33. In view of the foregoing, I find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

34. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF MAY 2024.

F. MUCHEMI

JUDGE

