



**Mahinda v Nyongesa & another (Suing as the Legal Representative of the Estate of Daniel Juma Nyongesa) (Civil Appeal E206 of 2020) [2024] KEHC 5841 (KLR) (Civ) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5841 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E206 OF 2020**

**WM MUSYOKA, J**

**MAY 23, 2024**

**BETWEEN**

**DAVID MURIUKI MAHINDA ..... APPELLANT**

**AND**

**CLEOPHAS BARASA NYONGESA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH WAFULA NYONGESA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL  
JUMA NYONGESA**

*(An appeal arising from the judgement of Hon. AN Makau, Principal Magistrate, PM, delivered on 21st August 2020, in Milimani CMCCC No. 5223 of 2019)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the respondents, against the appellant, for compensation, arising from the demise of the deceased in a road traffic accident, which allegedly happened on 18<sup>th</sup> October 2018, along Limuru Road, Nairobi, involving the said deceased person and motor vehicle registration mark and number KCL 688R, allegedly owned or controlled by the appellant at the material time. The case was that the deceased was a pedestrian, and was knocked down by the said motor vehicle, which was negligently handled or controlled by the appellant. The appellant filed a defence, in which he denied liability, and everything else pleaded in the plaint. In the alternative, he attributed negligence on the deceased.
2. No formal hearing was conducted. By a consent, recorded on 17<sup>th</sup> July 2020, the witnesses statements filed by the respondents were admitted as they were. Liability was apportioned by consent at 80%:20%



in favour of the respondents. Quantum was left to be assessed based on written submissions, to be filed by the parties. Written submissions were duly filed, and a judgement was delivered on 21<sup>st</sup> August 2020. Kshs. 10,000.00 was awarded for pain and suffering, and Kshs. 100,000.00 for loss of expectation of life, Kshs. 2,880,000.00 for loss of dependency, and costs.

3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 17<sup>th</sup> September 2020, revolve around the award for loss of dependency being inordinately high; the dependency ratio of 2/3 being high; ignoring the submissions and caselaw presented by the appellant; departing from the principles applied in assessment of damages; and costs.
4. Directions were given on 19<sup>th</sup> October 2023, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
5. The appellant has submitted on only 2 issues: loss of dependency, and on costs. On loss of dependency, the appellant argues on 2 points, dependency ratio and the multiplier. On dependency, it is submitted that no evidence was led, to support the claim that the family depended on the deceased at the rate of 2/3, and *Beatrice Wangui Thairu v Hon. Ezekiel Bargetuny & another* Nairobi HCCC No. 1438 of 1998 (Ringera, J)(unreported) and *Purity Karimi Njoroge & 2 others v. Alice Wangui Ndungu & 3 others* [2016] eKLR (Janet Mulwa, J), are cited, and it is submitted that, in view of paucity of evidence, the dependency ratio ought to have resolved at 1/3. On the multiplier, it is submitted that the trial court did not take into account the vagaries and vicissitudes of life, in arriving at the figure of 24, and it is proposed that the court should have worked with 18 instead. *Joseph Njuguna Njoroge Mwaura (suing in his capacity as the personal representative of Ann Nduta) v. Builders Den Limited & another* [2014] eKLR (Wendoh, J), *Elizabeth Chelagat Tanui & another v. Arthur Mwangi Kanyua* [2013] eKLR (Waweru, J) and *Purity Karimi Njoroge & 2 others v. Alice Wangui Ndungu & 3 others* [2016] eKLR (Janet Mulwa, J) are relied upon. On costs, it is submitted that the trial court should have subjected the costs to the contribution ratio agreed upon with respect to liability. *Peter Gatimu Mwangi v. Danford Ofori & another* [2018] eKLR (Mwongo, J) and *Paul Ngila and Wathe Mbenia v. Musili Malonza and Makasi Musili* Kitui HCCA No. 67 of 2019 (unreported) are cited.
6. The respondent has summarised the grounds of appeal into 1: whether the award on quantum was inordinately high. On the dependency ratio, it is argued that the appellants had supported the dependency ratio, of 2/3, on the basis that the deceased was married with 2 children, and, therefore, there was no justification for him to turnaround and appeal on that point. On the multiplier, it is submitted that the income of the deceased had been proved to be Kshs. 15,000.00 per month, and that the appellants had conceded to that at the trial. *David Kimathi Kaburu v. Gerald Mwobobia Murungi (suing as legal representative of the estate of James Mwenda Mwobobia(Deceased))* [2014] eKLR (JA Makau, J) is cited, to make the point that for deceased persons in private engagements, and not government employment, the court was not bound by the retirement age limit of 60 years; and *Board of Governors of Kangubiri Girls High School & another v. Jane Wanjiku & another* [2014] eKLR (Visram, Koome & Odek, JJA), to argue that the choice of a multiplier is a matter at the court's discretion, to be exercised judiciously, and the figure of 24 was arrived at in exercise of such discretion. Although *Commercial Transporters Limited v. Dorcas Adoyo Owiti & another* [2017] eKLR (PJ Otieno, J) is not mentioned in the written submissions, it was filed simultaneously with the said submissions, and I suppose that the respondents wanted me to have a look at it. It makes the same point as *David Kimathi Kaburu v. Gerald Mwobobia Murungi (suing as legal representative of the estate of James Mwenda Mwobobia(Deceased))* [2014] eKLR (JA Makau, J) and *Board of Governors of Kangubiri Girls High School & another v. Jane Wanjiku & another* [2014] eKLR (Visram, Koome & Odek, JJA).



7. On the multiplier, the court takes into account the age of the deceased at the time of his death, and assesses the period that he would have continued working, up to retirement, having regard to the nature of his engagement. For government employees, the age of retirement is 60. In the private sector it may depend on the contract of employment. For those gainfully employed in their own personal pursuits, it may depend on various factors. I agree that although 60 years, the age of retirement for most government employees, is used as a standard, it is not mandatory in all cases, and the court has discretion, depending on the circumstances of each case. Whatever is considered to be the age when the deceased would have slowed down, or retired, the so-called vagaries and vicissitudes of life would be factored, whose effect is usually to reduce the multiplier. If the age of retirement is taken to be 60, it would mean, for example, that a 45 year-old would have another 15 years to go, consideration of the vagaries and vicissitudes of life may work to reduce the figure 15 to 10 or so, for such a person.
8. In this case, the deceased was 36 years of age. If he retired at age 60, he would have continued to work for another 24 years. He worked as a guard, with KK Security. No documents were produced from his employer on retirement age. In view of that, adopting the retirement age in the public sector could be useful and helpful. The vagaries and vicissitudes of life ought to have been factored, for, in life, there was no guarantee that he would have remained in employment till retirement at 60. Anything could happen at any time, just the way it happened that he died at age 36. It would be on that basis that there would be a reduction on the figure of 24. I would agree that the figure of 18 would have been more suitable, based on *Joseph Njuguna Njoroge Mwaura (suing in his capacity as the personal representative of Ann Nduta) v. Builders Den Limited & another* [2014] eKLR (Wendoh, J), *Elizabeth Chelagat Tanui & another v. Arthur Mwangi Kanyua* [2013] eKLR (Waweru, J) and *Purity Karimi Njoroge & 2 others v. Alice Wangui Ndungu & 3 others* [2016] eKLR (Janet Mulwa, J).
9. I have also reviewed a number of other decisions, and noted quite a variation in the adoption of a multiplier for someone aged 36 or thereabouts. In *Kenya Power & Lighting Company Limited v. James Muli Kyalo & another* [2020] eKLR (Mwita, J), the appellate court reduced a multiplier adopted at 25 to 20 for a 29 year-old. *Sidi Kazungu Gobu & another (legal representative of the estate of George Yongo Katana (Deceased)) v. Fatuma Abdi Mohamed & another* [2021] eKLR (Nyakundi, J), the court adopted a multiplier of 24 for a 34 year-old. *In Melbrimo Investment Company Limited v. Dinah Kemunto & Francis Sese (suing as personal representative of the estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR (J. Kamau, J), the court adopted 20 years as a multiplier, where the deceased died at 35 years.
10. On the dependency ratio, I doubt that this should be made an issue in this appeal, as the appellant proposed adoption of a dependency ratio of 2/3, at the trial, and the trial court adopted it. I see no reason why he should turnaround to say that the trial court was wrong when it adopted his submissions on it. To that extent, he is approbating and reprobating on that point. For avoidance of doubt, he submitted at the trial court, as follows, in his written submissions, dated 21<sup>st</sup> July 2020:
 

“ We also submit that a dependency ratio of 2/3 to the dependants of the deceased be adopted since he died with a family of his own comprising of his wife and two children ...”
11. On whether the consent on liability should affect costs, so that the costs to be borne by the defendant are to be reduced commensurate to or in line with the contribution by the plaintiff, there is no general principle, and different courts adopt different approaches. That in the cases cited by the appellant, such as *Peter Gatimu Mwangi v. Danford Ofori & another* [2018] eKLR (Mwongo, J), is one such approach, where costs are subjected to contribution . The other approach, in such cases as *Joseph Munyoki Kalonzo v. Kenya Wildlife Services* [2015] eKLR (Dulu, J), is the other, that a contribution has no consequence on costs, and they are borne by the defendant. The logic is that costs follow the



event, and the party who ultimately proves successful should be entitled to costs, and, conversely, the party that loses bears the costs. Where the liability is borne more heavily by one party, then that party ought to bear the costs in full. According to *Orix (K) Limited v. Paul Kabeu & 2 others* [2014] eKLR (Gikonyo, J), costs could be denied to a party, if its conduct is such that it should be denied costs, or the successful issue was not attracting costs.

12. Of course, costs are awarded, according to section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, at the discretion of the court. See *Morgan Air Cargo Limited v. Everest Enterprises Limited* [2014] eKLR (Gikonyo, J). However, the principle that costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. That would then mean that despite the plaintiff conceding some contribution on liability, it would still be entitled to full costs for prosecuting the case. Taking away a portion of the costs, on account of contributory negligence, could be punitive. To that extent, therefore, it cannot be said that the trial court, in the instant case, erred in not subjecting the costs to contribution on liability. There was discretion, and it has not been demonstrated that the same was not exercised properly or judicially. See *Party of Independent Candidates of Kenya v. Mutula Kilonzo & 2 others* (2013) eKLR (Mutende, J), *Cecilia Karuru Ngayu v. Barclays Bank of Kenya & another* [2016] eKLR (Mativo, J) and *DGM v. EWG* [2021] eKLR (C. Kariuki, J).
13. The appeal herein succeeds only to the extent of adoption of a multiplier. The multiplier adopted was on the higher scale, given that the court did not consider the vagaries and vicissitudes of life. After reviewing the authorities, I find and hold that the more reasonable figure should have been 18. I, accordingly, reduce the multiplier to 18, from 24. Loss of dependency shall, subsequently, work out to:  $18 \times 12 \times 2 / 3 \times 15000 - 30\% = 1,512,000$ . The award on loss of dependency should stand at Kshs. 1,512,000.00. The appeal is disposed of in those terms. Each party to bear its own costs.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 23<sup>RD</sup> DAY OF MAY 2024**

**W MUSYOKA**

**JUDGE**

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Tambo, instructed by Kibatia & Company, Advocates for the appellant.

Mr. Kulecho, instructed by Kulecho & Company, Advocates for the respondent.

