



**Thuo v Ouma & another (Suing on their Own Behalf and on Behalf of the Estate of Shem Kokonya - DCD) (Civil Appeal E032 of 2022) [2024] KEHC 4657 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E032 OF 2022**

**WM MUSYOKA, J**

**MAY 6, 2024**

**BETWEEN**

**JOHN WAITHAKA THUO ..... APPELLANT**

**AND**

**JAPHETH OUMA ..... 1<sup>ST</sup> RESPONDENT**

**EVERLINE JERUSA AKONGO ..... 2<sup>ND</sup> RESPONDENT**

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE ESTATE OF  
SHEM KOKONYA - DCD**

*(An appeal arising from the judgment of Hon. Mrs. Lucy Ambasi, Chief  
Magistrate, CM, delivered on 31st August 2022, in Busia CMCCC No. 29 of 2019)*

**JUDGMENT**

1. The suit at the primary court was initiated by the respondents, against the appellant, for compensation, arising from the death of Shem Kokonya, the deceased, in a road traffic accident, which allegedly happened on 3<sup>rd</sup> June 2018, when the deceased, who was riding his bicycle, along the Busia-Mumias road, was knocked down at Mungatsi, by motor vehicle registration mark and number KCF 195A, allegedly belonging to the appellant. The respondents attributed negligence on the appellant, or his agents or servants. The appellant filed a defence, in which he denied everything pleaded against him, but also pleaded, in the alternative, that the deceased contributed to his own misfortune, by his own negligence.
2. A trial was conducted, wherein 4 witnesses testified for the respondents, while the appellant did not call any witness. A judgement was delivered on 31<sup>st</sup> August 2022. Liability was assessed at 100% against the appellant. Damages were awarded at Kshs. 2,503,500.00, broken down as follows: Kshs. 10,000.00, for pain and suffering; Kshs. 100,000.00, for loss of expectation of life; Kshs. 2,160,000.00, for loss of dependency; and Kshs. 233,500.00, for special damages.



3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 12<sup>th</sup> September 2022, revolve around the assessment of liability at 100%; failing to dismiss the suit in view of the evidence tendered; failing to consider his submissions; using the wrong principles to assess damages; adopting a multiplier without considering the vagaries and vicissitudes of life; and adopting an excessive multiplicand without basis.
4. Directions were given on 23<sup>rd</sup> October 2023, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions.
5. The appellant has submitted on both liability and quantum. On liability, he attacks the testimonies of PW1, PW3 and PW4. He argues that the police did not investigate the matter, and that the police witness was presented only for the purpose of producing the police abstract. It is submitted that the testimony by PW3 was contradictory on how the accident happened, and that the testimony of PW4 ought to have been disregarded totally. On quantum, it is submitted that the trial court merely indicated figures without saying anything to justify them. On the multiplicand, it is submitted that the alleged income of the deceased was not proved. It is argued that the trial court should have resorted to the Regulation of Wages (General) (Amendment) Order, 2015, and the deceased ought to have been treated as a general worker, and *Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita* (suing as the personal representative of *Mary Nyaboke Keraita, Deceased* [2011] eKLR (Makhandia, J)), is cited, to support that contention. On the multiplier, it is submitted that the deceased died at age 54, while the official retirement age is 60 years. It is argued that he was 6 years away from retirement age, and the vagaries and vicissitudes of life ought to have been considered, in working out the multiplier. It is suggested that a multiplier of 4 would have sufficed, and *Julius Maina Muthoni vs. Alfred Kinyanjui Wainaina & another* [2008] eKLR (Ang'awa, J) is cited.
6. On liability, the respondents submit that their witnesses witnessed the accident from different angles, and that their testimonies were not controverted by contrary evidence from the appellant. *Surgipharm Ltd vs. Medilife Pharmaceuticals Ltd* HCCC No. 624 of 1990 (unreported) and *Caleb Juma Nyabuto vs. Evans Otieno Mogaka & another* [2021] eKLR (Wendoh, J) are cited. On the multiplier, it is submitted that the Regulation of Wages (General) (Amendment) Order, applied only to government workers, and the deceased was not one such worker. On the multiplicand, it is submitted that the figure of Kshs. 18,845.55 was in line with the Regulation of Wages (General) (Amendment) Order, 2018, which was what was applicable at the time the accident happened. It is argued that in *Caleb Juma Nyabuto vs. Otieno Magaka & another* [2021] eKLR (Wendoh, J), a multiplicand of 15 years was adopted for a 50-year old; while in *MNM vs. Solomon Karanja Githinji* [2015] eKLR (Waweru, J) a lumpsum award was made of Kshs. 3,000,000.00 for a 46-year old.
7. On liability, the respondents presented 2 eyewitnesses: Jacqueline Wafula and Alloys Mungati. Both adopted their witness statements, were cross-examined. In Jacqueline Wafula written statement, she averred that the accident vehicle and the deceased were moving in the same direction. The deceased was on his side of the road, on the left lane, when the vehicle, which was at high speed, hit him, and it then swerved away to the right side before it stopped. I have not seen the witness statement of Alloys Mungati, in the record before me, but he testified that the deceased was riding on his lane, and was not zig-zagging on the road. The cross-examination was rather perfunctory, and nothing in it challenged the testimonies of the 2 witnesses. They were not shaken. I have not noted nor found any contradictions in the narratives by the 2 witnesses, as between the 2 of them, or within the individual narratives themselves. The appellant did not present a witness, and so these narratives were not contradicted. The statement filed on behalf of his proposed witness was not adopted by consent, and, therefore, no material of any kind, from the appellant, controverted that presented by the respondents. The only



evidence on liability came from the respondents, and, without a contrary narrative from the appellant, the trial court was justified to conclude that the appellant was liable 100% for the accident.

8. On the multiplier, the trial court adopted one of 30 years. That was odd, given that the deceased was 54 years old at the time. Retirement age at the time was 60 years, and if he were in paid employment, whether in public service or private sector, he would have, for public service, continued working for 6 years, and in the private sector for 10 or so years. 30 years was exaggerated. Such a multiplier would apply for a person dying in his 20s! I note that the figure of 30 was not based on any authority. It was apparently plucked from the air. Normally, the multiplier is reduced, when the court considers that there could be factors that could cut short the life of the person, or his employment, the so-called vagaries or vicissitudes of life. See *Petrocity Enterprizes (U) Ltd vs. Roseline Sikudi suing as legal representative of the estate of Pascal Ngadi (deceased) & 2 others* [2017] eKLR (W. Korir, J) and *John Muchiri Njoroge & another vs. Prisca Mmbone & another* [2019] eKLR (J Kamau, J.) The figure proposed, of 4 years, sounds reasonable, in the circumstances; but even the maximum of 6 would not be too high.
9. On the multiplicand, the widow of the deceased claimed that he was a preacher with the Church of Christ, but she presented no document to prove that. She also presented no material as proof of what he earned from that endeavour. She equally presented no material to support his income from any other economic activity. It was in that context that the Regulation of Wages (General) (Amendment) Order was brought into the picture, to guide the court in assessing loss of dependency. In its judgement, the trial court adopted a multiplicand of 75,000. The judgement is silent on where the figure came from, or the basis upon which it was arrived at. There is no reference, whatsoever, to the Regulation of Wages (General) (Amendment) Order in the said judgement. In their written submissions, the respondents suggested adoption of a multiplicand of 18,000, based on the Regulation of Wages (General) (Amendment) Order, 2018, which worked out to Kshs. 2,160,000.00. That is the figure in the judgement under the haed of loss of dependency. Curiously, when one works out the multiplicand adopted by the court, of 75,000, the total would not be Kshs. 2,160,000.00, but Kshs. 18,000,000.00. The calculation, in the judgement, that  $75,000 \times 12 \times 30 \times 2/3$  makes 2,160,000.00 was wholly erroneous and misleading. The appellant suggested a multiplicand of 5,844, without providing basis for how he arrived at that figure. It is not based on the Regulation of Wages (General) (Amendment) Order, or anything concrete. It was plucked from the air.
10. The position of pastors is not captured in the Regulation of Wages (General) (Amendment) Order, and, therefore, the Regulation of Wages (General) (Amendment) Order may not be useful in assessment of the appropriate multiplicand to be adopted. In the circumstances, it would have been more reasonable to deploy the global figure approach. See *Stanwel Holdings Limited & another vs. Racheal Haluku Emanuel & another* [2020] eKLR (Nyakundi, J). Given the age of the deceased, and his alleged occupation, and in the absence of any evidence of his academic attainment, a global award of Kshs. 900,000.00 would have sufficed.
11. In view of the above, the award of Kshs. 2,160,000.00, for loss of dependency, is hereby set aside, and is substituted with an award of Kshs. 900,000.00. The total award of damages should stand at Kshs. 1,240,000.00. There shall be no order on costs. The appeal herein is disposed of in those terms. Orders accordingly.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 6<sup>TH</sup> DAY OF MAY 2024**

**WM MUSYOKA**

**JUDGE**



Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Wesonga, instructed by Kimondo Gachoka & Company, Advocates for the appellant.

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the respondents.

