



**Loopa & another (Suing as the Administrators of the Estate
of Stephen Ngolia - Deceased) v Technoplast Ltd (Civil Appeal
E016 of 2021) [2024] KEHC 7580 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E016 OF 2021
EM MURIITHI, J
JUNE 20, 2024**

BETWEEN

JACKSON LOOPA 1ST APPELLANT

FLORENCE KEBO 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF STEPHEN NGOLIA -
DECEASED**

AND

TECHNOPLAST LTD RESPONDENT

*(An appeal from the Judgment of Hon. E. Ngigi (P.M)
in Isiolo CMCC No.38 of 2019 delivered on 12/1/2021)*

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 8/11/2019, in which the Appellants herein (the Plaintiff in the trial court) sued the Respondent herein (the Defendant in the trial court) seeking General damages under the Fatal Accident Act and the *Law Reform Act*, Special damages of Ksh. 340,550/= plus costs of the suit and interest. The Appellants pleaded that on or about 30/8/2019, the deceased was lawfully riding a Motor Cycle Registration No. GKB 216 K along Isiolo-Archers Road at Nomads area when the Respondent's authorized driver, servant, agent and/or employee so carelessly, recklessly and/or negligently drove Motor Vehicle KCQ 065 Y that it collided with the motor cycle and knocked off the deceased thereby occasioning him fatal injuries. Prior to his death, the deceased, who was aged 53 years, was in good health, enjoying a normal happy life with prospects of a bright future. At the time of his death, the deceased was a Senior Chief earning Ksh. 83,110 per month, and as a result of his death, his family has lost the income which they depended on.



2. The Respondent denied the claim by its statement of defence dated 27/11/2019 and prayed for the Appellants' suit to be dismissed.
3. After conclusion of the trial, the trial court found the Respondent to have been 100% liable for the accident and awarded general damages of Ksh. 30,000 for pain and suffering, Ksh. 100,000 for loss of expectation of life, Ksh. 1,708,224 for loss of dependency and special damages of Ksh. 340,550 totaling to Ksh. 2,048,774 plus costs and interest.

The Appeal

4. On appeal, the Appellants filed their Memorandum of Appeal on 8/2/2021 listing 3 grounds as follows:
 1. The learned Magistrate erred in law and fact in applying a wrong multiplicand in the case therefore reaching an erroneous judgment.
 2. The learned Magistrate erred in law in failing to correctly compute the overall award in general damages.
 3. The learned Magistrate misdirected himself by failing to consider the submissions by the Appellant while arriving at the judgment.

Duty of the court

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123). A Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on no evidence or it was based on a misapprehension of the evidence or the judge was shown demonstrably to have acted on wrong legal principles in reaching the finding he did. (See *Sumaria & Anor v Allied Industrial Limited* (2007) 2 KLR 1).

The Evidence

6. PW1 CPL Nelson Kamama, currently stationed at Isiolo Police Station Traffic department testified that, "On 30/8/2019 an accident occurred along Isiolo – Archers Road. It was about 10.20 a.m. there was a fatal road traffic accident that occurred at Nomads area along Isiolo Archers Road involving a motor vehicle K.C.Q 065 Y Hino lorry driven by one Stephen Amogolla from Archers Post towards Isiolo Town and a motor cycle GKB 216 K Yamaha ridden by one Stephen Ngolia. The motor cycle was ahead of the lorry heading to same direction. Suddenly the driver of the lorry decided to overtake the motor cycle but before fully overtaking it he hit and knocked down the motor cycle. The driver fell on the road ahead of the lorry and the lorry crashed the rider and he died on the spot. A report was made at Isiolo, scene visited and sketched. Investigations were carried out. We managed to get three (3) eye witnesses who witnessed the accident. We recorded their statement. The motor vehicle and motorcycle were inspected by the motor vehicle inspector. On 2/9/2019 the driver of the lorry Stephen Amogola was charged before this court with the offence of causing death by dangerous driving. The case is still pending before court and coming for a mention on 24/9/2020 before court 1. We issued an abstract which I wish to produce in court. (PEX 1). I recorded the statement of three witnesses. The driver of the lorry K.C.Q 065 Y was to blame for the accident."
7. On cross examination, he stated that, "Initially I was not the investigating officer. I was not at the scene of the accident. The statement of the witnesses I have not produced in court. I have prepared the



- investigation report. In this matter it was not provided. I have not produced the sketch plan. The road had broken yellow lane and so he can overtake. I cannot confirm if he had a helmet.”
8. On re-examination, he stated that, “There is a traffic case before court 1 and we have 6 witnesses therein. 3 of this are eye witnesses. The driver of the motor vehicle caused the accident by overtaking improperly and charged for causing death by dangerous driving.”
 9. PW2 John Ekale testified that, “I am a boda boda operator. On 30/8/2020, I was coming from town to Ngaremara. At Nomads Area, at the last bumps there was a car behind me. It then overtook me and it went to overtake the chief. It then hit the chief’s Motor cycle on the right handle and then he fell down and the wheel ran him over. The helmet was crushed and his skull. He bled and the police who were nearby also came. I have recorded my statement which I pray to be adopted – (statement as examination in chief).”
 10. On cross examination, he stated that, “I am a witness in the accident. In the criminal case I have not given evidence. I was interrogated by the police and they recorded my statement. I have not recorded statement with police.”
 11. On re-examination, he stated that, “After the accident, we went to the police station and I recorded my statement with the police. The driver was to be charged. I am not sure if that case is concluded.”
 12. PW3 Jackson Loopa Ngolia and one of the Appellants herein produced the Death Certificate, Limited Grant, payslips for January 2019 and June 2019, post mortem report, copy of ID Card, copy of motor vehicle search and its receipt and the burial expenses receipt for Ksh. 340,000 as exhibits in court. He testified that, “I live in Ngaremara. I know why I am in court. I wrote my statement in this matter. This is my statement that I pray it be adopted as examination in chief. I pray that the court does justice to me. He was my father. I pray for compensation and costs of this suit.”
 13. On cross examination, he stated that, “I have my Identity Card number. I am 24 years old. Sorry 26 years. I am not working. I have a diploma in Electrical Electronics. I do not bring a birth certificate as it was not asked. I also have my identity card. We are 11 siblings. We did not bring their birth certificates. Florence is the first wife of the deceased and she is my mother. They did a traditional wedding so no certificate. My father was a Senior Chief 1. No well-wishers contributed for the burial. It is only the administration who contributed 50,000/=. We paid the funeral expenses as a family. We paid me, my mother and my siblings. We sold our cows and goats. We now have less animals. We were left with 10 goats. The monthly contribution of my father was through fees he would have paid for me to continue with my degree. When he passed on I had graduated. He was still paying my house rent, sometimes he would support me. My mother is a housewife. Pauline is also a house wife. I cannot tell how much he was supporting for each wife. Francis is not adult, Lilian, Priscilla is 15 years, Gabriella – 13 years, Jackson is 6 years, Marceline 4 years, Ivy one year.”
 14. On re-examination, he stated that, “This is a compensation cases. I was not asked for documents when filing for letters of administration. I have 11 siblings. The youngest is 1 year. It is my father who was supporting my young siblings.”
 15. PW4 Joseph Lokuno Ekiru testified that, “I work with Provisional Administration as a Senior Chief Attan Location. I know Stephen, he is now deceased. I used to know him even before his death as I grew up with him. I have a letter, I wrote. I have stated that the deceased had 13 dependants. I know this as I grew up with him. Went to primary, secondary school and attended colleges. I am also familiar with his marriage life and family, I know him from our work and as a family friend. He had 3 dependants. I wish to produce my letter (Letter dated 5/11/2019 produced PEX 6.”



16. On cross examination, he stated that, “I knew the deceased. He had two wives. I do not know if he had a marriage certificate. He had 11 children. I do not know why he did not take a birth certificate, they have a birth certificate.”

Submissions

17. The Appellants urge that the appropriate multiplicand should be the gross salary less statutory deductions only, and cite *Hellen Waruguru Waweru (Suing as the legal Representative of Peter Waweru Mwenja (DCD) v Kiarie Shoe Stores Ltd (2015) eKLR*. They fault the trial court for deducting the loan deductions as well thereby arriving at a wrong finding on loss of dependency. They urge the court to adopt a multiplicand of Ksh. 63,321 and allow the appeal with costs.
18. The Respondent submits that the trial court was justified in applying the multiplicand of Ksh. 30,504.50 provided in the payslip which is the net salary less the loan balances, and cites *Joshua Mulinge Itumo (suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) v Bash Hauliers Limited & another (2021) eKLR*. It faults the Appellants for failing to provide clear information as to how much loan amount was yet to be paid by the deceased and the period within which the same was to be paid, to guide the trial court on what multiplicand it would adopt, and urges the court to dismiss the appeal with costs.

Analysis and Determination

19. After considering the grounds of appeal as listed, the issues for determination are two fold whether the overall award of general damages was properly computed and whether the Appellants’ submissions were considered.

General Damages

20. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR* 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 have awarded a 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. (see *Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727* and *Kitavi v Coast Bottlers Limited [1985]KLR 470*).”

21. There is no much contestation with the awards made for pain and suffering and loss of expectation of life, and it is said that the deceased died on the spot. The special damages of Ksh. 340,550 were specifically pleaded and also strictly proved.
22. The gravamen of the Appellants’ appeal is the trial court’s adoption of a multiplicand of Ksh. 30,504. In arriving at that multiplicand, the trial court opined that, “The deceased was a Senior Chief earning a gross pay of Ksh. 82.110 and net of Ksh. 30,504. In assessing the multiplicand, the court opines that a true reflection of the deceased earning capacity is not determined by his gross pay but his net



pay and which is what he used to sustain himself and his family. As such the court adopts 30,504 as a multiplicand.”

23. According to the information contained in the pay slip adduced in evidence, the deceased earned a gross salary of Ksh. 82,110 and the deductions made thereon were Ksh. 1,015.20 for WCPS Contribution, Ksh. 6,760 for Commercial Bank Loan Recovery, Ksh. 17,289.30 for PAYE, Ksh. 1,500 for NHIF, Ksh. 10,000 for SACCO Loan Interest, Ksh. 13,890 for SACCO Loan Recovery, Ksh. 1,000 for SACCO Share Contribution and Ksh. 150 for SACCO Risk Fund bringing the net pay to Ksh. 30,504.50.
24. The Appellants urge the court to apply a multiplicand of Ksh. 63,321 which is the gross salary less PAYE and NHIF only. On its part, the Respondent applauds the trial court for properly applying the net salary after all deductions of Ksh. 30,504 as the multiplicand.
25. The question that then begs is what multiplicand should be applied for a salaried deceased person? Is it the net salary after all deductions as shown in his pay slip or should it be the gross salary less statutory deductions only that is PAYE and NHIF?
26. The Court of Appeal in Maigwa (Suing as *Legal Representative of the Estate of Ezekiel Katupa*) v *British Council (Civil Appeal 178 of 2018)* [2023] KECA 157 (KLR) (17 February 2023) (Judgment) rendered thus;

“ 17. From the cited authorities, it is evidently clear that in arriving at a multiplicand, this Court has always adopted the formula proposed by the appellant. That is to say, the multiplicand should be a deceased person’s gross income less statutory deductions.

18. The learned judge, however, in his judgment deducted both statutory and other deductions. This can be clearly read out of the judgment. It is evident that even in the mind of the trial court, there were other deductions that did not qualify as statutory deductions. We find that it is erroneous for the trial judge to assume that other deductions such as loan repayments or contributions to a savings society are deductions that the deceased would pay for the rest of his life. Apart from not qualifying as statutory deductions, loan repayments are always deducted for a limited time and should not be construed as permanent deductions that will exist for the working life of the deceased. We therefore hold the view that this is a case that warrants this court’s intervention because a wrong principle was applied by the trial judge. In this case therefore, the deceased earned a total monthly income of kshs 39,292. From the payslip, the only statutory deduction was the PAYE which was deducted at the rate of kshs 2,629. In the circumstances, the right multiplicand to use was kshs 36,663 and not the kshs 9,960 which was relied on by the trial court.

19. Before we pen down on this issue, we have to deal with the proposal by the respondent that we should consider deducting the total amount of loan balances so as to avoid double compensation to the deceased’s estate. It is the respondent’s case that the loans were taken for the benefit of the dependants and they had already benefited from them. In our view, this argument sounds reasonable. Whatever the purpose of the loans, the same either benefitted the deceased or his dependants during his lifetime. The payslip also reflects an overpayment recovery meaning that the deceased had already used the money that was being recovered. We do not know where the respondent got the



figure of kshs 501,525.50 as the outstanding loan. Our own calculation, using the deceased's payslip of December, 2011 which was produced as an exhibit at the trial, shows that the outstanding loans and overpaid salary was kshs 418,295.50. This is the amount that will be deducted from the award for loss of dependency that will be made to the estate of the deceased." Underlining mine for emphasis.

27. This court finds that the trial court fell into error when it applied the multiplicand of 30,504.50 as opposed to Ksh. 63,321. It is accepted that the deceased would not be expected to service the loans advanced to him for the rest of his working life. In the words of Maigwa (Suing as Legal Representative of the Estate of Ezekiel Katupa) v British Council (Supra), loan repayments are always deducted for a limited time and should not be construed as permanent deductions that will exist for the working life of the deceased.
28. The award for loss of dependency will thus be Ksh. $63,321 \times 7 \times 12 \times \frac{2}{3} =$ Ksh. 3,545,976.
29. It is apparent from the pay slip that the deceased was servicing 2 loans from Platinum Credit Ltd for Ksh. 74,360 and a Sacco Loan of Ksh. 986,6110 totaling to Ksh. 1,060,470. That sum will be deducted from Ksh. 3,545,976 to bring the award for loss of dependency to Ksh. 2,485,506.

Consideration of the Appellant's Submissions

30. The trial court is faulted for failing to consider the Appellants' submissions. That fault is manifestly unfounded as the trial court duly considered the Appellants' submissions when it rendered thus; "The deceased was 53 years old and was approaching his retirement age. The plaintiff have relied on the authority of Philip Kiplimo Tuwei Vs Elikana Kipserem (2016) e.K.L.R where the High Court awarded Ksh. 100,000 for a deceased who was similarly aged 51 years old. The court therefore being bound by superior court decisions awards 100,000 under this head."

Orders

31. Accordingly, for the reasons set out above, the appeal is meritorious and it is hereby allowed in the following terms:
 1. The award of Ksh. 1,708,224 for loss of dependency is set aside and substituted with an award of Ksh. 2,485,506.
 2. The rest of the awards by the trial court remain unchanged.
 3. Being the successful parties, the Appellants shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 20TH DAY OF JUNE 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Muriuki for Mr. Opondo for the Appellant.

Mr. Sala for Mr. Kahara for the Respondent.

