



Nganga & another (Suing on Their Own Behalf and as the Administratixes of the Estate of the Late Bernard Karura Kibe alias Berard Karura) v Ileve (Civil Appeal E198 of 2021) [2024] KEHC 8273 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E198 OF 2021
RC RUTTO, J
JULY 12, 2024**

BETWEEN

TERESA WANGARI NGANGA 1ST APPELLANT

GRACE WANJIRU KIBE 2ND APPELLANT

**SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATIXES OF THE
ESTATE OF THE LATE BERNARD KARURA KIBE ALIAS BERARD KARURA**

AND

GEORGE KIMOTHE ILEVE RESPONDENT

((Being an appeal from the judgment of delivered by Hon. Ms. V. Kachuodho (SRM) on 30th September, 2021 in Thika CMCC No. 978 of 2018))

JUDGMENT

Introduction

1. This is an appeal on quantum against the decision of the of the trial court in Thika CMCC No 978 of 2018. In that suit the appellants filed a plaint seeking compensation for damages under the Fatal Accident Act for the benefit of the dependants of the deceased; damages under *Law Reform Act* for the benefit of the Estate of the deceased for pain and suffering before death and for loss of expectation of life; special damages of kshs 283,400/- costs of the suit as well as interest on all the above at court rates.
2. The trial court in its determination held that the liability had been determined in Thika CMCC No 948 of 2018 which held the respondent wholly liable for the accident. The trial court then proceeded to asses and awarded the appellant as follows;
 - i. *Fatal Accidents Act*, (Loss of Dependency) 1, 000, 000/=



- ii. Less Loss of Expectation of Life 100, 000/=
 - Sub total 900, 000/=
 - iii. Law Reform Act
 - a. Pain and Suffering 10, 000. 00/=
 - b. Special Damages 283, 400. 00/=

GRAND TOTAL KSHS 1, 193, 400/=
 - iv. Costs of the suit to the Plaintiffs plus interest at Court Rates from the date of judgment until payment in full.
3. It is the award of quantum on loss of dependency as set out above that aggrieved the appellants necessitating them to file a memorandum of appeal dated 22nd October, 2021. The appeal is premised on five (5) grounds as follows
- i. That the learned trial magistrate misdirected herself in law and in fact by awarding damages for loss of dependency which were inordinately low in the circumstances.
 - ii. That the learned trial magistrate erred in law and in fact in failing to consider and correctly apply the applicable principles on assessment of damages for loss of dependency.
 - iii. That the learned magistrate misdirected herself in law and in fact by failing to consider the uncontroverted evidence that the deceased was an electrician.
 - iv. That the learned magistrate misdirected herself in law and fact by failing to award a global sum commensurate to the stature of the Deceased, bearing in mind the evidence adduced.
 - v. That the learned magistrate erred in law and in fact by deducting the award on loss of expectation of life from the award made on loss of dependency.
4. The appellants seeks that this appeal be allowed and the trial court's award on loss of dependency and loss of expectation of life be set aside and substitute with the award of damages with such higher in sum as it deems fair, just and reasonable in the circumstances.
5. The appellants are also seeking that the costs of this appeal and of Thika CMCC No. 978 be borne by the Respondent.

Background

- 6. The appellants herein moved court by way of a plaint dated 18th December, 2018 where, they sued George Kimothe Ileve, Flower tents and Décor Limited and Peris Wanjiku Gakui as 1st to 3rd defendants respectively.
- 7. They stated that on 17th December, 2017 the deceased was a lawful travelling as a fare paying passenger in Motor Vehicle Registration Number KCG 851L Toyota Hiace along Thika-Matuu road at Kilimambogo Area, when the driver/agent of the motor vehicle so negligently drove the Motor Vehicle in a manner that caused the said vehicle to collide with Motor Vehicle Registration Number KAR 343S as a result of which the deceased sustained fatal injuries. The particulars of negligence were particularized.
- 8. In response to the claim, the respondent filed a defence dated 24th January 2019 in which he denied the occurrence of the alleged accident, the particulars of negligence as set out in the plaint and that the



deceased was in gainful employment earning kshs.30,000/= as at the time of his demise. In addition, the respondent stated that the said collision was contributed by the negligence of the driver of motor vehicle registration No. KAR 343 S and proceeded to set out the particulars of the negligence.

9. To support its case, the appellants invited one witness, while the defence closed his case without calling any witness. It is also to be noted that during the proceedings in the lower court, the case against the 2nd and 3rd Defendant were withdrawn thus leaving the 1st Defendant as the only Defendant.

The Appeal

10. This appeal proceeded by way of submissions. Notably the appellant filed their submissions dated 17th March, 2023 in support of the appeal while the respondent did not file submissions despite numerous mentions to accord them an opportunity to file their submissions.

Appellant's submissions

11. The appellants urged the court to reconsider and re-evaluate the evidence that was placed before the trial court and to reach its own decision. To support this, they relied upon the case *Selle vs Associated Motor Boat Company Limited* (1986) E.A 123.
12. The appellant's contention is on the award for loss of dependency and the deduction of the award for loss of expectation of life. They submitted that they had sought damages under the *Fatal Accidents Act* (Cap 32) and the *Law Reform Act* (Cap 26) but the court made an award that was manifestly low and against the weight of evidence. Further that the trial court erred in deducting the award for loss of expectation from the award for loss of dependency.
13. The Appellants further argued that as much the trial court was perfectly entitled to make a global award, what she made was manifestly low noting that there was sufficient evidence to warrant the application of the multiplier/multiplicand approach.
14. The appellant urged the court to find that the trial court misapprehended the evidence adduced, applied wrong principles and reached an erroneous decision.
15. On proof of earning the appellants faulted the trial court holding that the appellant had not produced any document to show the deceased earnings.
16. The Appellants submitted that the trial court failed to appreciate misdirected herself in stating that the deceased income had not been proved yet there was uncontroverted evidence adduced that deceased was an electrician. According to them this included the deceased leaving certificate showing he studied electrical installation at Machakos Technical Training Institute dated 23rd July 1999 and a letter from Electel Web Kenya dated 3rd September 2001 showing that the deceased attended training.
17. Further, that the aforementioned documents were not challenged hence the trial court ought to have taken them into account and applied the minimum wage as per the Regulation of Wages (General) (Amendment) Order, 2017 providing a minimum wage for an Artisan Grade 1 at Kshs 29, 169/=. To buttress this assertion reliance was placed in the following authorities of Vincent Kipkorir Tanui (Suing as the Administrator and/or personal representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & Another (2018) eKLR, Wilson Ondicho Mboga v Nicholas Maina Arisi & Another (Suing as Legal Administrators of the Estate of Alice Kwamboka (Deceased) (2022) eKLR, *Paul Ouma v Sarah Akinyi & Another HCCA No. 7 of 2016* and Nzioka Leah & Another v Patrick Muindi Kisai & Another (2021) eKLR



18. They urged court to find that they had established a sufficient basis for the application of the multiplicand/multiplier approach. They submitted that the deceased was aged 44 years and in good health at the time of his death. He would have continued to work even after the statutory retirement age of 60 years.
19. They urged court to adopt a multiplier of 21 years since he could have engaged in active work as he was working in the private sector. They prayed for a sum of Kshs 5,040,000 for loss of dependency being made up as follows $30,000 \times 12 \times 21 \times \frac{2}{3}$. Reliance was placed in the case of *Cornellia Elaine Wamba v Shreeji Enterprises Ltd & Others* (2012) eKLR and *Commercial Transporters Limited v Dorcas Adoyo Owiti & Another* (2017) eKLR.
20. It was the appellant submission that this court sets aside the trial court's decision of deducting Kshs 100,000/= for loss of expectation noting that the Fatal Accident Act requires a court to take into account the award under the Law Reforms Act and not deduct. Reliance was placed in the case of *Kemfro Africa t/a Meru Express Services (1976) & Another v Lubia & Another (No. 2)* (1987) KLR 30 and *Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v Kiarie Show Stores Limited* (2015) eKLR.

Analysis and Determination

21. Section 78(2) of *Civil procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and in *Selle & Anor -Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.
22. From the analysis of the pleadings and submissions by parties, it is deduced that this is a claim under the *Fatal Accidents Act* cap 32, Laws of Kenya that provides for compensation for pain and suffering; Loss of expectation of life; and Loss of dependency/lost years. Notably the appellants herein are challenging the award for loss of dependency which they allege was inordinately low in the circumstance and that the trial court erred by deducting the award on loss of expectation of life from the award on loss of dependency. Thus, I will address the issues under the following heads;
 - a. Whether the trial court erred by failing to use a multiplier/multiplicand when determining loss of dependency.
 - b. Whether the trial court erred by deducting the award on loss of expectation of life from the award made on loss of dependency.

Whether the trial court erred by failing to use a multiplier/multiplicand when determining loss of dependency

23. The Appellants submitted that the trial court erroneously adopted the global sum approach to calculate the general damages awarded for loss of dependency instead of the multiplier approach. Their argument was based on the fact that the deceased studied Electrical Installation Craft at Machakos Technical Training Institute and attended training at Electel Web Kenya. The Appellants contended that as an electrician, the deceased earned an approximate amount of Kshs 30,000/= per month.
24. The Appellants argued that the trial court should have therefore adopted a multiplicand of Kshs 30,000/= and a multiplier of 21 years as the years that the deceased could have actively worked being



that he was not employed but was in the private sector where he would have worked up to the age of 70 years. The Deceased was 44 years at the time of his demise.

25. In determining the issue of loss of dependance the trial court was guided by the case of Moses Mairua Muchiri V Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) 2016 eKLR that held that; It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.
26. The court thus proceeded to hold that, the appellant did not have any document to show that the deceased earnings and proceeded to grant a global amount of kshs 1,000,000/-
27. From the evidence on record, this court takes note of the Appellant's witness, PW1 stated that the deceased was earning Kshs 30,000/- per month as an electrician. Reliance has been placed on a leaving certificate from Machakos Technical Training Institute dated 23rd July 1999 to show that he was a trained electrician and a letter from Electel Web Kenya dated 3rd September 2001 to show that he was earning. On cross-examination, the appellant stated that the deceased would give her money when he got it in the evening, on other times he could not be paid as his job depended on request and at times he could not go to work. She confirmed that she did not have any documents to prove earnings.
28. In the case of Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another which was quoted with approval in [Albert Odawa v Gichimu Gichenji NKUHCCA No. 15 of 2003](#)[2007] eKLR it was observed that:-“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”
29. Further in the case of Michael Rimiri M'ingetha & another v Zipporah Mukomua M'ituri [2020] eKLR the court when dealing with a situation where proof of income was not presented to court stated as follows;

All that documentary evidence does is to give the Court an estimation of the actual income a person derives from his economic activities. Where there is no such documentary evidence, the Court should then resort to the principle of lump sum”.

The Court further stated that;

In assessing damages for loss of dependency, the court can either use the multiplier approach or the global sum format. In using the multiplier approach, the court is obligated to consider the multiplicand, the multiplier and the dependency ratio to arrive at the loss. The extent of dependency is a question of fact to be established in each case.

30. From the record in this instance case, PW1 stated that the deceased used to support his family and would give her money every evening. While this may be the case, the appellant never adduced any evidence to show the same. Further, as has been shown through the leaving certificate that the deceased was trained as an electrician, there was equally no evidence or documentation provided to prove his earnings since as stated his job depended on request and at times he could not go to work.



31. This court takes note that the leaving certificate provided and the letter of training provided dates back to the year 1999 and 2001 approximately 16 years before the deceased was fatally injured. Notably, if the deceased was a trained electrician as alleged, he ought to have attained certification to confirm his qualification. A leaving certificate and a letter of training does not show or confirm that the deceased was a qualified electrician. Infact the leaving certificate is to the effect that the deceased completed the approved period of the course and not that he was a qualified electrician. PW1 did not also produce any evidence to show that he was practicing as an electrician.
32. The appellant herein had a duty to present material evidence to show that the deceased was indeed an electrician earning kshs 30,000/= per month. They had a duty to show where and who the deceased worked for and how much he earned in the course of his employment.
33. Consequently, guided by the Albert Odawa's Case (supra) the global award approach adopted by the trial court was the best approach in the circumstance since the deceased income could not be ascertained.
34. Was the award of Kshs 1, 000, 000/= loss of dependency inordinately low? In the case of *Ndatho v Kireu ((Suing as the Legal Representative of The Estate of Mark Murimi Marigu)) (Civil Appeal 7 of 2020)* [2022] KEHC 3133 (KLR) (16 March 2022) (Judgment) while dealing with the lump sum approach the court observed that;

It is trite that in resorting to using the lump sum approach of awarding damages, the court should be guided by the age of the deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages [See the persuasive case of Michael Rimiri M'ingetha & another v Zipporah Mukomua M'ituri [2020] eKLR.

35. Further, the Court of Appeal in Odinga Jacktone Ouma vs Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".
36. This court is guided by the above authorities makes reference to the case of MNM & Another v Solomon Karanja Githinji (2015) EKLR where the Deceased aged 46 years was a business man and was survived by a widow and 4 children and earning Kshs 2, 000/= per day, the court adopted a global sum of Kshs 3, 000, 000/=.
37. Also, in the case of Samuel Kabuthia Ndana v Jeniffer Wawire Njeru & Another (2019) eKLR, the court awarded a global sum of Kshs. 1,300,000/=, where the deceased died aged 47 and was said to engage in informal employment which earned him an estimated income of Kshs. 90,000/= per month.
38. Having looked at the material presented to this court, considering the deceased's age, skilled work, and dependents, I find that the amount of Kshs 1,000,000/= was relatively low. Therefore, I will substitute the trial court's award with an award of Kshs 1,500,000/= for loss of dependency.

Whether the trial court erred by deducting the award on loss of expectation of life from the award made on loss of dependency.

39. The appellant asserts that the trial court erred in law and fact by deducting the award on loss of expectation of life from the award made on loss of dependency. I have noted the authorities referred to by the appellants.



40. I am fully guided by the Court of Appeal's decision in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR where the court stated on this issue that: -

- “19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.
20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.
21. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-
- “6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform*



Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

41. I do not wish to be get it wrong as suggested by the Court of Appeal in the above case. Further as I am bound by the Court of Appeal decision, I will not belabor much on it. In that regard and considering that the Appellants have rights to claim under both the Fatal Accidents Act and Law Reform Act, I am of the opinion that the deduction made by the Trial court was erroneous.

42. The upshot of the above is that this appeal succeeds to the extent that the Judgement delivered on the 30TH September, 2021 in Thika CMCC No. 978 of 2018 on quantum of damages under the Fatal Accidents Act is hereby set aside and substituted with the following judgment and award:-

General Damages

- i. Fatal Accidents Act
 - (a.) Loss of Dependency kshs. 1, 500, 000/=
 - (b.) Less Loss of Expectation of Life kshs 100, 000/=Subtotal 1, 600, 000/=
- ii. Law Reform Act
 - (a.) Pain and Suffering kshs 10, 000. 00/=
 - (b.) Special Damages kshs 283, 400. 00/=Grand Total Kshs 1, 893, 400/=
- iii. Costs of the lower court suit to the Plaintiffs plus interest at Court Rates from the date of judgment in the lower court until payment in full.

43. In the interest of justice, each party shall bear their own cost of this appeal.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 12TH DAY OF JULY 2024

For Appellants: Mr. Ndugu H/b For Mr. Mutua For The Appellant

For Respondent: Ms. Ayiera H/b For Ms. Ongwenyi For The Respondent.

Court Assistant: Peter Wabwire

