



Kuria & another (Suing as the personal representatives of the Late Peter Mwangi Kuria) v Mwangi (Civil Appeal E357 of 2021) [2024] KEHC 10545 (KLR) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E357 OF 2021
WM MUSYOKA, J
SEPTEMBER 3, 2024**

BETWEEN

MARGARET WANJIKU KAMAU 1ST APPELLANT

WILFRED KURIA MWANGI 2ND APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVES OF THE LATE PETER
MWANGI KURIA**

AND

EDWARD MWANGI RESPONDENT

*(Appeal from judgment and decree of Hon. SG Gitonga, Resident Magistrate,
RM, in Milimani CMCCC No. 3496 of 2017, delivered on 4th June 2021)*

JUDGMENT

1. The appellants had sued the respondent, at the primary court, for compensation, with respect to the death of Peter Mwangi Kuria, to be referred hereafter as the deceased, following a road traffic accident on 20th June 2014, along Heshima Road. The deceased was a pedestrian on the said road, and was knocked down by motor vehicle registration mark and number KAP XXXT, said to have belonged to the respondent, and liability was attributed to him on account of negligence. The respondent filed a defence, denying everything pleaded in the plaint, and, in the alternative, pleaded contribution on the part of the deceased.
2. A trial was conducted. Liability was settled by consent, on 28th November 2019, at 85:15, in favour of the appellants and against the respondent. 1 witness testified for the appellants, on the aspect of quantum. Judgment was delivered on 4th June 2021. The court awarded Kshs 50,000.00 for pain and suffering and Kshs 100,000.00 for loss of expectation of life; and Kshs 391,200.00 for loss of dependency; all totalling Kshs 541,200.00, subject, of course, to contribution.



3. The appellant was aggrieved, hence the instant appeal. The appeal has raised several grounds revolving around quantum.
4. On 18th March 2024, directions were given, for canvassing of the appeal by way of written submissions. From the record before me, I can only see written submissions by the appellants.
5. The appellants have argued on the multiplier and the multiplicand. On the multiplier used of 5, for someone aged 49 years, they submit that the same was on the lower side, and argue that, at the very least, a multiplier of 7 should have been considered, although they pitch for 15. They take issue with the trial court using 60 years as the retirement age, given that that was practical only for individuals in formal employment, and arguing that individuals outside formal employment can continue working gainfully up to 70 years and beyond. They cite *Millicent Teresa Anyango v Patrick Gombe* [2003] eKLR (Mbito, J), *Tessie Margaret Kariuki & another v Shakalaga Khwa Jirongo & another* [2014] eKLR (Waweru, J) and *Chania Shuttle v Mary Mumbi* [2017] eKLR (J. Kamau, J), where a point had been made that there was no retirement age for a businessman. On the multiplicand, they contest the figure used by the trial court, of Kshs 9,780.00, asserting that the evidence they adduced indicated that the deceased earned Kshs 30,000.00, per month, from his hustles as a mason.
6. The multiplier is about the length of time that the deceased would have continued working had he not died at the accident. What would be considered would be the actual age of the deceased, against the average mortality rate in the country and the age of retirement, for the sort of engagement the deceased was in. The so-called vagaries and vicissitudes of life are then brought to bear on these. The retirement age in Kenya is 60 years. The average mortality rate varies from time to time. The court works out the multiplier from a consideration of these factors. There is no scientific way of working out the multiplier, and the courts rely on past decisions as a guide.
7. I appreciate, the authorities cited with respect to not comparing engaging in business with employment. However, the issue is not employment as such, but the capacity of an individual to work. After all, employment is not restricted to formal employment. Engaging in business or related personal pursuits is still considered to be a form of gainful employment. The general presumption would be that a majority of individuals scale down on working, whether as formal employees or in personal/private pursuits, from around age 60. Some may go on working beyond 60 and 70 even. However, those would be exceptions. It is about aging, loss of the strength and capacity to engage gainfully in employment or otherwise to earn an income. The figure 60 is an average. It has worked well over the years, and I am not persuaded that there would be good reason to depart from it in this case. At least, no good reason has been presented for that in this case.
8. Let me now advert to past decisions to get guidance. I will start with the decisions relied on by the appellants. In *Millicent Teresa Anyango v Patrick Gombe* [2003] eKLR (Mbito, J), the court applied a multiplier of 14 for a 41-year-old deceased person. 15 was adopted as the multiplier, where the deceased died at 45 years, in *Tessie Margaret Kariuki & another v Shakalaga Khwa Jirongo & another* [2014] eKLR (Waweru, J). I have looked up other cases. In *Mutuku Mbithi v Coast Bus Safaris Limited & another* [2012] eKLR (Waweru, J), the court adopted 5 years for a 57-year-old. 11 years was adopted, in *Joyce Mumbi Mugi v Cooperative Bank of Kenya Limited & 2 others* [2004] eKLR (Maina, J), for a 51 year-old.
9. The survey above reveals a pattern which suggests that the multiplier adopted by the trial court was within the range. A multiplier of 5 would appear appropriate for a person dying in his 50s and above. A multiplier in the region of 15 would be sufficient for a person aged 40 and below; while an average of 10 would be adequate for individuals in their 40s. The age of the deceased was not altogether certain. It was pleaded in the plaint that he was 49, while PW1, his widow, the 1st appellant herein, testified, on



28th November 2019, that he died at 53 years old. A certificate of birth, or any other document for that matter, was not produced as proof of his age. In view of that I am not persuaded that the multiplier adopted was particularly off the range. I note too that in the plaint, the appellants did not list the alleged dependants of the deceased, even though they pleaded that he had a family. A letter from the Chief was produced at the trial, but that came too late, and amounted to trial by ambush.

10. On the multiplicand, the objection was with use of the formal employment to work out the same. The appellants are particularly unhappy with the figure of Kshs 9,780.00, and wonder where the trial court got it from, considering that they had led evidence on a monthly income of Kshs 30,000.00. It is a practice that has gained traction, that where there is inadequate proof of income, the court resorts to the Government regulation of wages subsidiary legislation, for guidance. In *Nyamira Tea Farmers Sacco v Wilfred Nyambati Kiraita* [2011] eKLR (Asike-Makhandia, J), the appellate court held that the trial court was justified in using the Regulation of Wages document to work out the multiplicand, where evidence on income was insufficient.
11. Did the appellants adduce adequate evidence on the income that the deceased was making prior to his death, from his endeavours? When the 1st appellant testified, on 28th November 2019, she stated that the deceased earned Kshs 30,000.00 from his work as a mason. She produced no documents which supported that, or, at the very least, that demonstrated that he was a mason. In the absence of such evidence, the trial court was justified to revert to the Regulation of Wages.
12. In their written submissions, the appellants vaguely suggest that a global award approach would have done more justice to the matter, and it was in that context that they cite *Daniel Mwangi Kimemia & 2 others v JGM & another (the personal representatives of the estate of NK (DCD))* [2016] eKLR (Gikonyo, J). Whether to use the multiplier/multiplicand approach or the global/lumpsum award approach is a matter at the discretion of the trial court. I am not persuaded that the trial court went wrong in adopting the multiplier/multiplicand approach. After all, at the trial, the appellants presented their case, going by the written submissions that they filed there, on the basis of the multiplier/multiplicand approach, and they only shifted gears after judgment was delivered, apparently after they failed to get what they expected.
13. In the end, I find no merit in the appeal, and I hereby disallow it. The effect shall be that the appeal herein is hereby dismissed. Each party shall bear their own costs.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 3rd DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Wandaka, instructed by Kinuthia Wandaka & Company, Advocates for the appellant.

