



**Paul v Mutiso & Mutiso (Suing as the Legal Representatives of the Estate of Joshpat Kioko Mutiso - Deceased) & another (Civil Appeal E065 of 2021) [2024] KEHC 17215 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 17215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E065 OF 2021  
TM MATHEKA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**ALBANUS NZAU PAUL ..... APPELLANT**

**AND**

**WAYUA MUTISO & GEDION MWILU MUTISO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSHPAT KIOKO MUTISO - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTINE GATHONI KAMAU ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment or decree of 20/8/2021 in the PM'S Court Kilungu MCCC 101 of 2019 Hon. C.A Mayamba)*

**JUDGMENT**

1. The appeal before me is brought under Order 42 Rule 1 Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Rules Cap 21 Laws of Kenya. It is on the following grounds:

That the learned trial magistrate erred in law and fact in awarding the 1<sup>st</sup> respondent a global sum of Kshs.1,200,000/= on loss of dependency which sum was manifestly excessive in the circumstances of the case.

That the learned trial magistrate grossly misdirected himself when making the global award as he did not consider the evidence adduced on the deceased's income hence arriving at an award that was not representative of the income of the deceased.

That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the 1<sup>st</sup> respondent and failed to apply precedents and tenets of the law applicable thereby arriving at a figure which is manifestly excessive.



That the learned trial magistrate erred in law and in fact as he disregarded the appellant's submissions and cited authorities on record thereby arriving at a wrong decision on quantum which has occasioned miscarriage of justice.

That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

2. The appellant seeks the following orders: -

The appeal herein be allowed and the judgment and/or decree on the global award on the loss of dependency be set aside and be reassessed to a reasonable sum.

The costs of this appeal be borne by the respondent.

Any such further relief as this honourable court may deem necessary to grant.

3. What led to this appeal?

4. From the plaint, on 29/8/2017, Josphat Kioko Musau was travelling as a passenger in motor vehicle registration No. KBY 678T when motor vehicle registration No. KCB 239Y driven by the 1<sup>st</sup> defendant as driver or agent or servant of the 2<sup>nd</sup> defendant collided with the motor vehicle KBY 678T causing him fatal injuries.

5. As a result, the respondents filed suit vide plaint dated 27/4/2019 seeking:

General damages under the *Fatal Accidents Act* (Cap 32) and the *Law Reform Act* (Cap 26).

Special damages as pleaded in paragraph 5 of the plaint.

Cost of this suit

Interest in (a) and (b) above at court rates.

5. Any other or further relief as this honourable court may deem fit and proper to grant.

6. The 1<sup>st</sup> defendant/appellant filed defence dated 30/7/2019 denying all allegations of negligence and putting the blame on the driver of motor vehicle registration number KBY 678T and the plaintiff to strict proof of her case.

7. The 2<sup>nd</sup> defendant could not be traced to be served and vide an application dated 27/11/2020 the plaintiff sought to serve by way of substituted service. The application was allowed on 11/12/2020 and the matter fixed for hearing on 11/6/21.

8. On 23/7/2021 – counsel for the plaintiff and counsel for defendant entered a consent on liability at 80:20 in favour of the plaintiff. Parties also proceeded to assessment of general damages by way of written submissions.

9. Upon considering the pleadings and the submissions, the learned trial magistrate arrived at the following determination: -

Liability 80% to 20%

Pain and suffering Kshs.30,000/=

Loss of expectation of life Kshs.100,000/=

Loss of dependency Kshs.1,200,000



Special damages Kshs.17,400  
Less 20% (269,480) Kshs.1,077,920  
Costs and interest

10. It is the award of loss of dependency at Kshs.1.2 million that has provoked this appeal.
11. In arriving at the global award the trial court took guidance from *Albert Odawa vs Gichimu Githenji* NKR HCCA 15 of 2003 [2007] e KLR. He stated:

“It would be fair to adopt the global sum approach since this court could not rely on assumptions. The deceased at his age of 39, was clearly energetic and it could not be ruled out that he had a bright future ahead. It cannot also be ruled out that though this court was not able to gather his net worth, but still one could not assume that he had no economic activity going on for him.

I do, having considered all the facts herein and do find that Kshs.1,200,000 will be an adequate compensation for loss of dependency having taken into account that the deceased was 39 years old and at the prime of his life; thus, his loss was enormous and the award is commensurate.

12. As a first appellate court my duty is to review, re-assess the record and draw my own conclusions on the award.
13. In this case there was no witness evidence as parties relied on the pleadings and the written submissions. The trial court used the submissions of counsel to arrive at its decision.
14. I have looked at the plaintiff/respondent submissions in the subordinate court – counsel submitted that the plaintiff was earning Ksh 14,000/= per month, and multiplier of 11 years with a dependency ratio of 2/3. He relied on *Monica Njeri Kamau v Peter Monari Onkoba* [2019] e KLR and *Hyder Nthenya Musili and Another v China Wuyi Ltd & Another* [2017] e KLR.
15. For the defendant counsel submitted at kshs.6896/15 as the minimum wage of a general labourer for a resident of Matuu – at 15 years with a dependency ratio of 1/3 – relying on *Margaret Wangu Kioko v Muua Kenya ltd* [2004] e KLR, *Tobias Odoyo Oburu v Ruth Moraa Oigo & Another* [2018] e KLR.
16. The respondent relying on *Kigaragara v Agripiana Mary Aya* [1982 -1988] KAR 168 was submitted that the appellate court could interfere if the award was demonstrably wrong.
17. It was argued that this case, that even if the deceased was in civil service and the court was to adopt to the 14,000/= multiplier of 21 years at 1/3 dependency ratio – the award would still have been reasonable at 1,176,000 – lower than 1,200,000/=. That the trial court had no reason to go the global sum way.
18. For the respondent it was submitted that the appellant did not challenge the pleadings regarding the sum of Ksh. 14,000/= being the income of the deceased and the court was urged to maintain it.
19. That as a businessman he would have worked up to 70 years and lived to an old age hence a multiplicand of 11 years was too low; that 14,000 was not an excessive sum – hence the global award of 1.2 million



was not excessive. Respondent relied on:- Joseph Gatone Karanja –vs- Michael Ouma Okutoyi & 2 Others (2022) e KLR High Court of Kenya – Eldoret where the court stated’

“The deceased was 39 year old male ... The trial court adopted a Multiplicand of Kshs. 20,000/= and a multiplier of 21 years. There was evidence tendered to show that the deceased earned Ksh.

30,000/=. However, in his jua kali practice, it was possible for the deceased to occasionally exceed kshs. 35,000/=. I will therefore not interfere with this figure.

...“I find that the award for loss of dependency was not excessive. In the premises the appeal succeeds to the extent that the multiplicand and the dependency ratio are varied to Kshs.15,000/= and a dependency ratio of 1/3, the judgment sum is varied to the extent that the loss of dependency is calculated a 25,000/= x  $21 \times 12 \times 13 = 1,680,000/=$  the court wards accordingly.

20. Having considered the record and the submissions by counsel both here and in the subordinate court, the memorandum of appeal, the only issue for determination is whether the trial court was in error in the award it made.
22. I have perused the submissions in the subordinate court – none of the parties submitted on the global sum approach and each party submitted on a known/estimate some of income. The respondent – Ksh 14,000 and the appellant Ksh 6896/15. Evidently none expected the court to go the global sum way. To that extent, the court was in error.
23. Though the respondent stayed with Ksh 14000 as the income of the deceased, he also thorough the authorities cited suggested to court that that the minimum wage approach would be applicable only that the figure was different from that proposed by the appellant.
24. I have looked up the minimum wage vide [Legal Notice No. 112 of 2017](#) and the minimum wage for a general laborer from former municipalities was ksh. 11,926. That is the multiplicand I will adopt – with regard to multiplier the deceased could have worked for up to 60years. a multiplier of 21 is not unreasonable – and since he was unmarried – dependency ratio of 1/3 –

$$11,926 \times 21 \times 12 \times 1/3 = 1,001,784$$

24. The award on loss of dependency is set aside and substituted with the sum of Kshs.1,001,784 So – judgment is entered for the respondent against the appellant at

Liability 80:20

Pain and suffering Ksh 30,000

Loss of Expectancy of Life Ksh 100,000 Loss of dependency Ksh 1,001,784 Special damages Ksh 17,400

1,149,184

Less 20% (total award) Ksh 919,347.20

Plus costs and interests at court rates here and below The appellant will have 1/3 of the costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON 20/9/2024**

**MUMBUA T. MATHEKA**



**JUDGE**

Ms Elizabeth/Ms Nelima Court Assistants Mugambi HB fo Njogu for the Respondents N/A for TindiMunayasi for the Appellants

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2024-09-23 08:58:00**

