



Kivuti & another v Mwai (Suing an Appeal against the Judgment Delivered by Hon DM Ileri on 19th April, 2023 in Baricho PMCC No 126 of 2022) (Civil Appeal 39 of 2023) [2024] KEHC 11707 (KLR) (1 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 39 OF 2023
RM MWONGO, J
OCTOBER 1, 2024**

BETWEEN

CATHERINE WANJIRU KIVUTI 1ST APPELLANT

JUNIUS MÜTEMBEI NJAGI 2ND APPELLANT

AND

MARY WANGUI MWAI RESPONDENT

SUING AN APPEAL AGAINST THE JUDGMENT DELIVERED BY HON DM IRERI ON 19TH APRIL, 2023 IN BARICHO PMCC NO 126 OF 2022

(Being an appeal against the judgment delivered by Hon. D. M. Ileri on 19th April, 2023 in Baricho PMCC No.126 of 2022.)

JUDGMENT

Background

1. Through a plaint dated 4th August, 2022, the plaintiff/respondent, as the personal representative of the estate of Benson Munene Mwai deceased, sued the appellants following a fatal accident on 5th June 2022. The plaintiff prayed for judgment in the lower court against the defendant for general and special damages.
2. The Plaintiff described herself as the mother of the deceased and a widow with two (2) daughters. The deceased was described as a mechanic who had trained through apprenticeship, as well as being a trader in motorcycle spare parts.
3. The defendants filed a joint statement of defence on 18th October, 2022, denying liability and seeking dismissal of the plaintiff's case with costs. On 19th January, 2023 parties recorded a consent on liability in favour of the plaintiff at a ratio of 90:10. Parties agreed that assessment of damages be done orally.



4. On 19th April, 2023, judgement was entered for the plaintiff against the defendants for Kshs 2,031,993.00.
5. Aggrieved, the defendants/appellants filed this appeal on 18th May, 2023, seeking the setting aside of the judgment on quantum. The Appeal challenges the award of a global sum of Kshs. 2,000,000.00 for loss of dependency. They assert that the amount is inordinately high and excessive in the circumstances thus occasioning miscarriage of justice, and is unsupported by law. They urge that the award is erroneous in the circumstances.
6. The Appellants also contend that the learned trial magistrate grossly misdirected himself by ignoring the applicable principles for award of damages, and the relevant authorities on loss of dependency cited in the written submissions presented and filed by the Appellant.
7. The accident occurred when the deceased was a lawful pillion passenger on a motorcycle, on 5th June, 2022. The 2nd defendant managed and/or controlled motor vehicle KDE 226 J, Isuzu FTR Lorry so carelessly and negligently that it caused an accident when the motor vehicle left its lawful lane and violently hit the motor cycle which was on its right lane as a result the deceased sustained fatal injuries.
8. Parties filed written submissions as directed by the court.

Appellants submissions

9. On whether the award of Kshs. 2,000,000.00 as loss of dependency was inordinately high: The appellants submit that the principles that guide an appellate court are those stated in *Kemfro Africa Limited v Lubia and Anor (No.2)1987 KLR 30*. There, Kneller JA identified the principles as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”
10. The appellants urge that the Respondent in their Pleint (pages 18-21 of the Record of Appeal), pleaded that the Deceased was a mechanic at Kagio town ; that he was well skilled and highly sought, and earned a salary of Kshs.35,000 per month. In light of this, the Respondent in their submissions before the trial court (at pages 62-85 of the Record of Appeal), proposed that the Court adopt the multiplier method with an income of Kshs. 35,000 as the multiplicand, a multiplier of 41 years and a dependency ratio of 1/3.
11. In the alternative, the Respondents asserted that should the court determine otherwise, a global award of Kshs.2,500,000.00 would be reasonable in the circumstances.
12. In his judgment at pages 139-144 of the Record of Appeal, particularly at page 145, the learned magistrate opined that there was no cogent evidence to prove the Deceased's income. He thus gave a global sum award of Kshs. 2,000,000 for loss of dependency.
13. The appellant submits that the crux of this appeal is whether the global sum award of Kshs. 2,000,000 for loss of dependency was appropriate and justifiable.
14. At the trial Court, the Appellants herein submitted that the Respondent did not adduce any documentary evidence proving the Deceased's occupation and/or net income and thus urge the court to adopt the multiplier method.



15. In circumstances where there is no proof of income, courts have adopted the minimum wage and have been guided by the Regulation of Wages Orders which highlight various categories. The Appellants therefore submit that the Deceased should be treated as a general labourer.
16. They relied on the case of Caleb Juma Nyabuto v Evance Otieno Magaka & another [2021] eKLR, where the Deceased was a mechanic. The court stated:

“The appellant relied on the case of Multiple Hauliers (EA)Limited & Another vs Williman Abiero Ogeda (Suing as the representative of Christine Arglera Obiero (Deceased) & 2 Others (2016) eKLR, where the court held that since there was no evidence adduced that the deceased was a mechanic he was treated as a casual labourer.”
17. In light of the above, the Appellants submitted that the Court should rely on [Legal Notice No.125 of 2022](#) where the legal wage of a general labourer working under the category “all other areas” is Kshs 8,109.90 per month. The Appellants further submitted that the court should thus adopt a multiplicand of 8109.90, a multiplier of 30 years and a dependency ratio of 1/3. In that case, according to the appellants, an award of Kshs 973,188 made up as follows: $8109.90 \times 12 \times 30 \times 1/3 = 973,188$ would be just and appropriate.
18. The appellant prays that this court set aside the trial court finding on loss of dependency and substitute the same with of Kshs. 973.188
19. Reliance was placed on the case of Evanson Ndungu Mukunya v JNM &MWN (Suing as the Legal Representative of the Estate of JMN 2022] eKLR, where there was no proof of the deceased’s earnings. The High Court awarded Kshs.818,300 as damages for loss of dependency for a deceased aged 18 years. The Court adopted a multiplicand of Kshs.5.845, a multiplier of 35 years and a dependency ration of 1/3.
20. The appellants submitted, in the alternative, that there being no proof of the Deceased's occupation and/or earnings, this Honourable court adopts a global sum approach. They urge the court to award a global sum of Kshs. 1,000,000 would be an appropriate award for loss of Dependency.

Respondent submissions

21. On whether the award of Kshs.2,000,000.00 as loss of dependency was inordinately high: The Respondent submits that the award of Kshs.2,000,000 was sufficient and proportionate in the circumstances. He points out that in arriving at this sum, the trial court considered other comparable awards made in respect of similar cases by courts of similar jurisdiction.
22. The learned trial magistrate demonstrated that it had considered authorities in comparable and/or similar cases when it stated:

“I have considered the above authorities. The deceased herein died while aged 19 years old. Upon considering the current inflation rate, the age of the deceased at the time of death and taking into account damages awarded under the [Law Reform Act](#). it is my view that a global sum of Kshs.2,000,000 is reasonable and is hereby awarded for loss of dependency subject to the agreed ratio on liability.”
23. The authorities the learned trial magistrate relied on were;



JKK AND RK (Suing as legal Representatives of the Estate of LCK v Gilgil Hills Academy Limited [2019] eKLR, where the High Court awarded a global sum of Kshs.2.000.000 for fatal injuries suffered by a class five(5)pupil who had been negligently handled;

Mpaka Muriuki Japheth v HMM & another [2021] eKLR, the High Court awarded a global sum of Kshs.1,500,000 for a 13-year-old pupil who suffered fatal injuries from a road traffic accident.

24. The Respondent further urges the court to be persuaded by the case of AINU SHAMSI HAULIERS LIMITED v MOSES SAKWA & ANOTHER (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) [2021] eKLR where the High Court upheld a global sum award of Kshs. 2,000,000 by the lower court for compensation of a Tuk Tuk driver where the Plaintiff had neither produced proof of income nor work.

Issues for Determination

25. The only issue for determination is whether this court should interfere with the quantum of damages awarded as being inordinately high.

Analysis and Determination

26. The main issue for consideration in this appeal is:

Is the award of Kshs.2.000,000.00 as loss of dependency inordinately high?

27. The principles which guide an appellate court on whether to disturb an award of quantum of damages are found in the case of *Kemfro Africa Limited Versus Lubia and Anor No.2*)1987 KLR 30 where Kneller JA stated:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”

28. The appellants submit that the crux of this appeal is whether the global sum award of Kshs. 2.000.000 for loss of dependency was appropriate and justifiable.
29. In the Plaintiff's Plea, the Respondent pleaded that the deceased was a mechanic at Kagio town who was well skilled and highly sought, earning a salary of Kshs.35.000 per month. At the trial the Appellants submitted that the Respondent did not adduce any documentary evidence to prove the deceased's occupation and/or net income and urged the court to adopt the multiplier method.
30. Where there is no proof of income, courts have adopted the minimum wage and have been guided by the Regulations on Wages which highlight various categories. The Appellants therefore submitted that the Deceased should be treated as a general labourer.
31. Global Approach: The trial court held that there was no cogent evidence to prove the deceased's income and hence considered a global approach, instead of the multiplier approach, to assess damages for loss of dependency.



32. To demonstrate that he had actually considered comparable and/or similar authorities, the learned trial magistrate pronounced himself as follows;
- “I have considered the above authorities. The deceased herein died while aged 19 years old. Upon considering the current inflation rate, the age of the deceased at the time of death and taking into account damages awarded under the Law Reform Act, it is my view that a global sum of Kshs. 2,000,000 is reasonable and is hereby awarded for loss of dependency subject to the agreed ratio on liability.”
33. The learned trial magistrate relied on two authorities: They were, first, JKK AND RK (Suing as legal Representatives of the Estate of LCK v Gilgil Hills Academy Limited [2019] eKLR. There the High Court awarded a global sum of Kshs.2.000.000 for fatal injuries suffered by a class five(5)pupil who had been negligently handled. Second, the trial magistrate relied on the case of Mpaka Muriuki Japheth v HMM & another [2021] eKLR, where the High Court awarded a global sum of Kshs.1,500,000 for a 13-year-old pupil who suffered fatal injuries from a road traffic accident.
34. Multiplier Approach: The Appellants submitted that the Court should rely on Legal Notice No.125 of 2022 in which the legal wage of a General Labourer working under the “all other areas” category is Kshs. 8,109.90 per month.
35. The Appellants further submitted that the court should therefore adopt a multiplicand of 8,109.90, a multiplier of 30 years and a dependency ratio of 1/3; This would result in an award of Kshs. 973, 188 and would be justifiable and appropriate in the circumstances. Thus, the appellant prays that this court set aside the trial court finding on loss of dependency, and substitute the same with an award of Kshs. 973.188 made out as follows: $8109.90 \times 12 \times 30 \times 1/3 = \text{Kshs } 973,188$.
36. Alternatively, the appellant urged that in absence of proof of the Deceased's occupation and/or earnings, the appellants propose that this Honourable court should adopt a global sum approach, and award a sum of Kshs 1,000,000.
37. As earlier noted, the Respondent in their Complaint dated 4th August, 2022, pleaded that the deceased was a mechanic at Kagio town who was skilled and highly sought. He earned a salary of Kshs.35.000 per month, shown by the fact that he financially supported his widowed mother and sisters.
38. It is clear from the pleadings in the complaint that the deceased was earning an income. The income was clearly above the minimum wage since it is evident that he could support his mother and siblings.
39. At trial, PW1 Mary Wambui Mwai told the court that the deceased:
- “used to help me with rent and with school fees for the other siblings. [He] also used to take me to hospital and also maintained his sisters.
- Deceased had a shop for spare parts and used to repair motor cycles.”
40. The cross examination, disclosed that the deceased had no document showing he was trained in garage work; but confirmed he was self-employed.
41. The appellants did not testify, and there was no evidence to contradict the testimony of PW1.
42. The respondent thus submitted at the trial that the deceased used to directly support the Plaintiff who is his mother with rent and hospital bills as well as school fees and maintenance for his siblings which fact was not disputed hence the award is reasonable or should have been increased to Kshs.2,500,000 as had been prayed by the Plaintiff, now Respondent.



Conclusion and disposal

43. Ultimately, there was no evidence to contradict the evidence to the fact that the deceased was self employed as a mechanic, and that he was supporting his mother and two siblings financially. The absence of documentation to prove the amounts earned, does not amount to evidence that he was not earning such amounts. It is for the party disputing the earnings to avail evidence to dispute the testimony given of earnings made. The Defendant did not testify.
44. Having carefully considered the positions of both parties, I am not persuaded that this is an appeal in which the trial court's award can be justifiably disturbed, in terms of the principles under the Kemfro case wherein the court:
- “must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”
45. This is not such a case.
46. Accordingly, I hereby dismiss the appeal in its entirety with costs.
47. Orders accordingly

DATED AT KERUGOYA THIS 1ST DAY OF OCTOBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Kosgey - for Applicant

Otuke - for Respondent.

Murage, Court Assistant

