



**Kibithu v Mbobua (Suing as the legal representative of the Estate of Daniel Micheni Kaburu– Deceased) (Civil Appeal E014 of 2021) [2023] KEHC 843 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CIVIL APPEAL E014 OF 2021  
LW GITARI, J  
FEBRUARY 7, 2023**

**BETWEEN**

**SIMON MUTUGI KIBITHU ..... APPELLANT**

**AND**

**KABURU MBOBUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL MICHENI KABURU–DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Appeal dated September 9, 2021, the Appellant is challenging the award on general damages from the judgment delivered in the Chief Magistrate’s Court in Chuka CMCC No E024 of 2021 dated August 11, 2021. The appeal is based on the following grounds:
  - a. That the trial magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
  - b. That the trial magistrate erred in fact and in law by awarding inordinately high general damages to Respondent.
  - c. The trial magistrate erred in fact and in law by awarding the plaintiff a dependency ratio of two thirds whereas there was sufficient evidence produced in court to prove that the deceased was not married and did not have children.
  - d. The trial magistrate erred in fact and in law by awarding the plaintiff a minimum wage of Kenya shillings ten thousand (10,000/=) instead of using the minimum wage of seven thousand two hundred and forty.
  - e. That the trial magistrate erred in fact and in law in failing to consider the appellant’s submissions and authorities on quantum and hence, arriving at an erroneous decision.



- f. That the trial magistrate erred in law and in fact by awarding damages that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
  - g. That the trial magistrate's judgments as a whole is not supported by the evidence that was tendered in court by the parties.
2. The appellant thus prayed for this appeal to be allowed by an order reducing the general damages awarded by the subordinate court and for costs of both this appeal and those incurred in the subordinate court.
  3. The appeal was canvassed by way of written submissions which I hereby briefly highlight.

### **The Appellant's Submissions**

4. It was the Appellant's argument that the trial magistrate's award on quantum was erroneous and excessive. That the trial magistrate did not subject the Respondent's evidence on quantum to any discernible standard of assessment and merely awarded compensation. That the fact the judgment of the trial court is a mere 3 pages and makes no reference to any legal authorities supporting the award warrants the setting aside of the judgment and a reassessment of the quantum by this court.
5. The Respondent further raised issued with the award of special damages by stating that the Respondent's claim of Kshs 50,880/= as special damages was awarded by the trial court yet the Respondent failed to produce original receipts for the sums claimed before the close of pleadings.
6. On the award under general damages, the Appellant conceded that the deceased died as a result of injuries sustained in the accident. It was his submission that an award of Kshs 10,000/= for pain and suffering would be sufficient considering the deceased dies one day after the accident and thus in their opinion, the deceased did not suffer pain.
7. On the award of general damages for loss of dependency, it was the Appellant's submission that since the deceased's profession and income was never proved beyond a mere allegations, the multiplicand should have been Kshs 7,240.95/= (round off to Kshs 7,241/=), the same being the minimum wage of a general labourer in the workforce in the year 2020, when the deceased died. It was further the appellant's submission that the trial court's adoption of a multiplier of 18 years fell below the expectation of reasonableness in judicial decisions and urged this Court to use a multiplier of 12 years. On the dependency ratio, the Appellant urged this court to use  $\frac{1}{4}$  in place of the  $\frac{2}{3}$  ratio adopted by the trial court as the alleged dependency by the Respondent was supposedly not proved. As such, the Appellant submitted that the tabulation under the loss of dependency should amount to a total of Kshs 260,676/= ( Kshs 7,241/= x 12 months x 12 years x  $\frac{1}{4}$ ).
8. The Appellant cited the case of *Beatrice Wangui Mairu v. Hon. Ezekiel Barng'etuny & another* (Nairobi HCCC No 1438 of 1990 (unreported)) quoted in the case of *Edner Gesare Ogega v. Aiko Kebiba (Suing as Father and Legal Representative of the Estate of Alice Bochere Aiko – Deceased)* [2015] eKLR and submitted that the court has a duty to offset the resulting loss of dependency award in consideration of the dependants receiving a lump sum award. He therefore urged this Court to reduce the award for loss of dependency by a ratio of  $\frac{1}{3}$  hence resulting with Kshs 86,892/= for loss of dependency.
9. The Appellant further cited the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited)* [2015] eKLR and submitted that the award for loss dependency should further be deducted as the Respondent is the father and only dependant of the deceased. He thus submitted that the award of loss of dependency should be deducted



from the award of loss expectation of life, that is, Kshs 100,000/= - Kshs 86,892/=, leaving a sum of Kshs 13,108/= for loss of dependency.

10. On costs, the Appellant relied on Section 27 of the Civil Procedure Act and submitted that the costs follow the event. He further submitted that since he has allegedly successfully pleaded and justified this appeal, he ought to be awarded the costs of the appeal together with interests on the cost at court rates from the date of filing the suit until payment in full.
  11. In conclusion, it was the Appellant's submission that the following awards would sufficiently compensate the estate of the deceased:
    - a. Special damages – Nil
    - b. General damages for pain and suffering – Kshs 10,000/=
    - c. General damages for loss of expectation of life – Kshs 100,000/=
    - d. General damages for lost dependency – Kshs 13,108/=Sub Total – Kshs123,108/=
  - e. Less Deceased's 30% Contributory Negligence – ( Kshs 36,932.4/=)
- Total – Kshs 86,175.6/=

### **The Respondent's Submissions**

12. On his part, the Respondent cited the cases of Augustine v. Moffat Mwandiki [2019] eKLR and Mariga v. Musila [1984] eKLR and submitted that this Court, as an appellate court, ought not to disturb the award issued by the trial court unless it is inordinately high or low, or awarded based on wrong principles of law or misapprehension of facts, or any other reason that may lead to a wrong conclusion.
13. Under the pain and suffering head, it was the respondents submission that the award of Kshs 60,000/= awarded by the trial court should be substituted by an award of Kshs 100,000/=. In their view, the trial magistrate was quite conservative in awarding Kshs 60,000/= as authorities abound where higher awards have been issued and upheld.
14. On loss of expectation of life, it was the Appellant's submission that the trial court's award of Kshs 100,000/= should be upheld.
15. On loss of dependency, the Respondent relied on the case of Mwita Nyamobanga & Another v. Mary Robi Moherai (suing on behalf of the estate of Joseph Tagare Mwita (deceased) & Another [2015]eKLR. It was his submission that the court should determine the deceased's annual income (multiplicand) then multiply this by the deceased's work life expectation (multiplier) then multiply this by the level of dependency his survivors are projected to have enjoyed (dependency ratio).
16. On the deceased's annual income, the Respondent submitted that the sum of Kshs 10,000/= awarded by the lower court be maintained and adopted as the multiplicand. With regards to the deceased's work life expectation, the Respondent submitted that the court erred by adopting 18 years without giving any reason. They relied on the case of Augustine v Moffat [supra] and submitted that the multiplier should be substituted to 23 years. Regarding dependency ratio, the respondents submitted that the deceased was survived by the Respondent and that the deceased was the sole bread winner, catering for their food, housing, clothing, education, and medical costs. He thus prayed that the 2/3 ratio used by



the trial court be upheld as the dependency ratio. The Respondent thus submitted that the sum of Kshs 1,440,000/= awarded for loss of dependency could not be said to be excessive in the circumstances.

17. On special damages, it was the submission of the Respondent that the trial magistrate did not err in awarding the sum of Kshs 50,000/= under this head as it assessed the Respondent's receipt of Kshs 14,880/= for hospital expenses, Kshs 25,000/= for legal fees, and Kshs 11,000/= for morgue fees before making a finding that the costs were proved and merited recovery. The Respondent also urged this Court to note that the Appellant never raised any issue with the Respondent's receipts at the lower court hearing, whether at the hearing or final submissions. He thus urged this court to maintain the award of Kshs 50,880/= under the special damages head.
18. On the issue of double entitlement, the Respondent took the stand that the trial magistrate erroneously interpreted the application of Section 4(2) of the *Fatal Accidents Act* to Section 2(5) of the *Law Reform Act*. On this issue, the Respondents again opted to adopt the holding in *Augustine v Moffat* [supra] and submitted that there is no requirement in law or otherwise for the Court to engage in a mathematical deduction of the award for loss of expectation of life from the award under lost dependency. It was therefore the Respondent's prayer that the Court sets aside this aspect of the appealed judgment and tabulate all the awards without deductions.
19. On the final issue of costs of the suit and interest, the Respondent submitted that the Appellants have failed to make their case both at the lower court and at this appellate level. He thus prayed that the Court maintains the award of interest at the lower court and award them costs of the appeal.
20. In conclusion, it was the Respondent's submission that the Appellant has wholly failed to demonstrate merit in their arguments against the lower court award and as such, the appeal must fail. He therefore prayed for the dismissal of the appeal with costs and interest to the Respondent.

### **Issue for determination**

21. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."
22. It is therefore the duty of this court as a first appellate court to re-evaluate the evidence and arrive at its own conclusions. In so doing the court must take into account that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (See: *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968 (E.A. 123).
23. From a cursory look at the record of appeal, it is sufficient to conclude that indeed a road traffic accident involving motor vehicle registration number KBZ 677A Toyota S. Wagon occurred along Meru-Chuka road at Ndagani area resulting in the death of Daniel Micheni Kaburu who was riding his motor cycle



registration number KMEA 650Z Captain. This is a fact which was not in dispute in the lower court. Indeed the parties entered a consent on the issue of liability in the ration of 70:30 infavour of the plaintiff against the defendant.

24. From the grounds of appeal raised by the Appellant as well as the respective submissions by the parties, the main issue that arises for determination is whether the damages awarded as quantum by trial court were inordinately high in the circumstances of the case.
25. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
26. It is not in dispute that the victim herein sustained fatal injuries. The parties consented on liability at the ration of 70:30 in favour of the Respondent herein. After full trial, the learned magistrate awarded the Respondent the following:
  - a. Pain and suffering – Kshs 60,000/=
  - b. Loss of expectation of life – Kshs 100,000/=
  - c. Loss of dependency – Kshs 1,440,000/=
  - d. Special damages – Kshs 50,880/=
  - e. Deduction of double entitlement – Kshs 100,000/=Gross total – Kshs 1,550,880/=
  - f. Deduction of 30% Plaintiff’s contribution of Kshs 465,264/=Net Total – Kshs 1,085,616/=
27. In the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that: ‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’ (Emphasis added).
28. Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge



proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

29. By consent of the parties, the Respondent’s and Appellant’s witness statements and list of documents were admitted into evidence. I shall now consider the awards made under the following heads.

### **Pain and suffering**

30. In assessing the damages for pain and suffering head, the trial court noted that the deceased died after one day while undergoing treatment at Chuka General Hospital. That he must have undergone a lot of pain and anguish by the time he passed on. In their respective written submissions, the Respondent proposed an award of Kshs 200,000/= while the Appellant proposed an award of Kshs 10,000/=. In my view, the award of Kshs 60,000/= under this head was not inordinately high or low in the circumstances. The appellant had cited the persuasive decision in *Hynder Nthenya Musili & Another v Chiva Wuyi Ltd & Another* (2017 eKLR where it was stated that an award of Kshs10,000/- to 100,000/- is awarded under this head if the pain and suffering was prolonged before the death. Considering that the deceased died a day later while undergoing treatment, the award is reasonable. I would have no reason to interfere with award by the trial court.

### **Loss of expectation of life**

31. The parties were in agreement that the conventional amount of Kshs100,000/= should be awarded under this head. The trial court did award the said Kshs100,000/= and I therefore see no basis for disturbing that award. The appellant is bound by that proposal, the award is not erroneous nor is it excessive in the circumstances.

### **Loss of dependency**

32. The trial court used the multiplier approach which was correctly in his discretion. According to the Respondent, the deceased used to work as a farmer and would earn a salary of 15,000/= per month. There is however no documentary evidence to substantiate this allegation. The current authorities are in favour of using the minimum wage guidelines when there is absence of proof of a Deceased person’s earnings. However, as was held in the persuasive case of *Annalisa Muigai & another v Beatrice Waitibera Gitiri & another* [2020] eKLR:

“There is no iron-clad rule that if there is no documentary evidence of earnings the Court must resort to the minimum wage where there is alternative evidence by which the Court can approximate the earnings of the Deceased. As the Court of Appeal pointed out in the Jacob Ayiga Maruja Case, such a rule would be too rigid and would work much injustice.”

33. On the multiplicand, the trial court used a minimum wage of Kshs 10,000/=. Under the *Regulation of Wages (General) Amendment Order, 2018*, which was in force in 2020 when the deceased lived) general labourers in all areas were accorded the sum of Kshs 7,240.95/=. It follows that if the trial magistrate chose to rely on the minimum wage, he should have applied the minimum wage in force at the time and had no jurisdiction to craft a figure as a minimum wage. See *Tobias Omoyo Oburu v Jane Kerubo Muruka & Another* (2018) eKLR where the Judge stated that where there was no evidence of actual income, the magistrate ought to have reverted to the minimum wage to determine the multiplicand. There was no prove before the trial court as to the income of the deceased. The trial magistrate erred in awarding Kshs10,000/- as a multiplicand. A minimum wage approach should have been adopted. This was done but a wrong figure which was not justified was applied.



34. On the multiplier, it is notable that the deceased was 41 years old at the time of his death. The Respondent had proposed that a multiplier of 24 years be adopted. On the other hand, the Appellant relied on the case of *Milicent Teresa Anyango v Patrick Juma Gombe* [2003] eKLR where the Court awarded a multiplier of 12 years where the deceased was a civil servant forest grader aged 41 years. The Appellant thus proposed a multiplier of 12 years. Considering the aforesaid authority cited by the Appellant, it is my view that the trial court ought to have been guided by the same and used a multiplier of 12 years. Considering the contingencies of life which reduce the life expectation, the multiplier of twelve (12) years is reasonable. The age of the deceased is also a factor to be considered.
35. Finally, on the issue of dependency ratio it is my view that the use of the 2/3 ratio was proper given that the deceased was the sole bread winner and the Respondent was dependent on him.
36. Thus, the total for the loss of dependency amounts to  $Kshs\ 7,240.95 \times 12 \times 2/3 = Kshs\ 695,131.20/ =$

### Special damages

37. The trial court stated that the Respondent did produce receipts totaling to Kshs 50,880/= comprising of hospital expenses of Kshs 14,880/=, funeral expenses of Kshs 11,000/- and legal fees for filing the succession cause No E001/2021 of Kshs 25,000/=. In my view, the copies of the receipts produced sufficed for an award under this head as the said receipts were produced in evidence by the consent. The special damages pleaded were therefore specifically proved.
38. The respondent raised the issue of double entitlement which he opined that the learned trial magistrate erroneously interpreted the Section 4(2) of the *Fatal Accidents Act* to Section 2(5) of the *Law Reform Act*. He cited the case of,

*David Kaburuka Gitau & Another v Nancy Ann Wathithi Gitaru & Another* [2016] eKLR. Mativo J, had this to say about Section 15(5) of the Law of Reform (Miscellaneous Provisions) 1934 Act and Section 2(5) of the *Law Reform Act*:

“ I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation and understanding of Section 2 (5) of the *Law Reform Act*. My natural and logical interpretation and understand of Section 2(5) of the *Law Reform Act* cited above is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the *Fatal Accidents Act*

The Court of Appeal in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR held:

“ The 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.”

In *Kefro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another* (No2) [1987] KLR30



“ 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”. This 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 deductions.”

I am well guided by these authorities and I find that it was erroneous for the trial magistrate to deduct the awards of loss of expectation of life from the award of loss of dependant.

### **Conclusion**

39. The upshot of the foregoing is that the appeal should succeed in part by substituting the award under the loss of dependency to Kshs 695,131.20/=.
40. This will then result in award of damages as follows:-
  - i. Pain and suffering - Ksh.60,000
  - ii. Loss of expectation of life - Ksh.100,000.00
  - iii. Loss of dependency - Kshs695,131.20
  - iv. Special damages - Kshs 50,880.00
  - v. Less 30% Plaintiff contribution- Kshs214803.30Total Kshs 704,116.00

I award the appellant half the costs of the appeal.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2022.**

**L.W. GITARI**

**JUDGE**

**7/2/2023**

The Judgment has been read out in open court.

