



**Mugambi & another v JNN (Suing as the Legal Representative of the Estate of SMM - Deceased)  
(Civil Appeal E006 of 2020) [2023] KEHC 18271 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 18271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E006 OF 2020  
EM MURIITHI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**PETER MUGAMBI ..... 1<sup>ST</sup> APPELLANT**

**MUTUMA KENETH MUTURIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JNN (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SMM -  
DECEASED) ..... RESPONDENT**

*(An appeal from the Judgment of Hon. E. Tsimonjero (R.M)  
in Meru CMCC No.168 of 2019 delivered on 9/9/2020)*

**JUDGMENT**

1. Before the trial court was a claim commenced by a Plaintiff dated 12/6/2019, in which the Respondent herein (the Plaintiff in the trial court) sued the Appellants herein (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the trial court) seeking special damages of Ksh 132,625/= plus interest from the date hereof until payment in full, general damages under the Fatal Accident Act and Law Reform Act, costs of the suit and interest at court rates.
2. The Respondent pleaded that on or about 14/9/2018, the deceased was lawfully travelling as a fare paying passenger in motor vehicle registration No KCH 168 U Toyota Matatu along Meru-Chuka Road when the 2<sup>nd</sup> Appellant drove/managed and/or controlled motor vehicle Registration No KCQ 062 X Toyota Hilux (which was ferrying miraa) so negligently, carelessly and dangerously that an accident occurred involving KCH 168 U and KCQ 062 X occasioning the deceased severe and fatal injuries. She pleaded that the deceased, aged 36 years, sustained very severe bodily injuries from which he died, and his life was wrongfully cut short. She also pleaded that the deceased, who was a driver earning a net monthly income of Ksh 25,000/= was the main bread winner and supporter of the family, and by reason of his death, the Respondent and other dependants of his estate suffered loss and damage.



3. The Appellants denied the claim by their statement of defence dated on 4/7/2019 and prayed for the Respondent's suit to be dismissed.
4. After conclusion of the trial, the trial court found the Appellants to have been 100% liable for the accident and awarded general damages of Ksh 20,000 for pain and suffering, Ksh 100,000 for loss of expectation of life, Ksh 2,533,384 for loss of dependency and special damages of Ksh 132,625 totaling to Ksh 2,786,009 plus costs and interest.

### **The Appeal**

5. On appeal, the Appellants filed their Memorandum of Appeal on 8/10/2020 listing 5 grounds as follows:
  1. The trial magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
  2. The learned trial magistrate erred in law and fact by awarding inordinately high general damages to the Respondent.
  3. The learned trial magistrate erred in law and fact by failing to consider the Appellants' submissions and authorities on quantum and hence, arriving at an erroneous decision.
  4. The learned trial magistrate erred in law and fact by awarding damages that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
  5. The learned trial magistrate's judgment as a whole is not supported by the evidence that was tendered in court by the parties.

### **Duty of the court**

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123). A Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on no evidence or it was based on a misapprehension of the evidence or the judge was shown demonstrably to have acted on wrong legal principles in reaching the finding he did. (See *Sumaria & Anor v Allied Industrial Limited* (2007) 2 KLR 1).

### **The Evidence**

7. PW1 JN, the Respondent herein, produced the Demand Letter, Death Certificate, Post Mortem Report, Police Abstract, Limited Grant and Receipt for specials as exhibits in court. After adopting her statement dated 12/6/2019, she testified that:

“Shem Muchangi (deceased) is my husband. He died through a road accident. My husband was a driver. He was employed by one Elijah Kibwi. He used to earn Ksh 25,000/= per month. We had 2 children aged 17 years and 8 years respectively. The older is JM and the 2<sup>nd</sup> born is EM. The children are in school. The deceased used to support the family. He used to pay school fees, rent and maintain the family. After his death we incurred about Ksh 132,625/= as funeral expenses. I have the receipts. I pray that I be compensated for the loss of my husband and the funeral expenses.”



8. On cross examination, she stated that:

“The deceased was my husband. I have evidence. I do not have any document to prove the marriage. We have 2 children. I have the chief’s letter to prove that. It is not among the documents provided in court today. The deceased was a driver of motor vehicle KCA 821 M. The deceased used to earn Ksh 25,000/=. I knew the earning because I used to see the payment receipts. His employer also told me. The deceased was employed for over 6 years. The driving licence (P exhibit 7). I can’t remember the date it was issued. (dated 26/6/2018). The deceased died on 14/9/2018. The children attend school at [Particulars Withheld] girls High School Chuka and [Particulars Withheld] school Maua respectively. I have not provided any document. (bundle of receipts referred to – Invoice from Consolata Hospital Nkubu dated 20/9/2018. The receipt referred to is among the documents provided). I do not have the receipt for that invoice.”

9. On re-examination, she stated that:

“Invoice dated 20/9/2018) – this was for the food stuff for the funeral. That is what I was given. The driving licence (exhibit 7). I obtained it from NTSA office Meru. It is valid from 26/6/2018 to 25/6/2021. As at the time of the deceased’s death the licence was still valid. I’m the wife to the deceased. I obtained the limited grant vide P & A 19/19 of 2019. There was the chief’s letter which mentions me and the children as the deceased’s dependants. The children are in school. Am telling the court the truth.”

10. PW2 Elijah Kibwi, a lorry transporter testified that:

“The deceased Shem Muchangi was my employee. He was my driver. I used to pay him Ksh 25,000 per month. He died while still my employee.”

11. On cross examination, he stated that:

“I have my Id card (shows it to the counsel). Am a businessman. (transporter). I have a lorry for transporting construction materials. I knew the deceased for about 10 years. He used to drive motor vehicle KCA 821 M. I had employed him for about 8 years. I have no documents. It was a monthly employment. I do not know about tax. I used to pay him his salary in cash. I have not any document to prove that I am the owner of the motor vehicle KCA 821 M and that the deceased was my employee. I have 2 employees. I do not have their records and I pay them in cash. I always paid him Ksh 25,000/=”

12. On re-examination, he stated that:

“My motor vehicle is KCA 821 M. I do not have the letter of employment. The driver can leave any time. It is not a must to write the letter of employment.”

### Submissions

13. The Appellants urge that the trial court’s award was erroneous and excessive, as the deceased profession and income were not proved, and rely on *Mwita Nyamohanga & Another v Mary Robi Moherai* (suing on behalf of the *estate of Joseph Tagare Mwita (Deceased) & Another* (2015)eKLR. They urge the court to adopt a multiplicand of Ksh 7,241 which is the applicable minimum wage for a general labourer in force in 2018 when the deceased was alive, or in the alternative to subject the deceased alleged income



- of Ksh 25,000 to statutory deductions, and cite [\*Tobias Odoyo Oburu v Jane Kerubo Miruka & Another \(suing as the legal representatives of John Onywoki Sanganyi \(Deceased\) & Another\*](#) (2018) eKLR and [\*Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 Others\*](#) (2014) eKLR.
14. The appellants further urge the court to adopt a multiplier of 13 years since the deceased was aged 36 years, and rely on [\*Edner Gesare Ogega v Aiko Kebiba \(Suing as father and legal representative of the Estate of Alice Bochere Aiko – Deceased\)\*](#) (2015) eKLR, [\*Ann Njoki Njenga v Umoja Floor Mills & Another\*](#) (2006) eKLR, [\*Asba Mohamed Swaleh v Kennedy Bindi Muriungi & Another\*](#) (2012) eKLR and [\*Kamau & 2 others v Mugamangi & another\*](#) (2004) eKLR. They urge that the Respondent failed to prove any dependency on the deceased, and the trial court’s adoption of a dependency ratio of  $2/3$  was unjustified, and rely on [\*Abdalla Rubeya Hemed v Kajumwa Mvurya & Another\*](#) (2017) eKLR. They urge the court to adopt a dependency ratio of  $1/3$ , and cite the Court of Appeal case of [\*Hellen Waruguru Waweru \(suing as the legal representative of Peter Waweru Mwenja \(Deceased\) v Kiarie Shoe Stores Limited\*](#) (2015) eKLR. They submit that the Respondent was not entitled to any amount under special damages and urge the court to set the same aside. They urge that the award for loss of expectation of life is exhausted and thus not awardable, and pray for the appeal to be allowed. They cite [\*David Bagine v Martin Bundi\*](#) (1997) eKLR and [\*Wakim Sodas Limited v Sammy Aritos\*](#) (2017) eKLR to support their submissions.
15. The Respondent submits that the trial court took into consideration the factors it ought to consider in arriving at the award of Ksh 2,533,384, and relies on [\*DKM \(Suing as legal representative to the estate of JMM - Deceased\) v Mehari K. Towolde\*](#) (2018) eKLR, [\*Nixon Asava Mukisa & Another v Michael Chomba Mburu\*](#) (2021) eKLR and [\*Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another\*](#) (2019) eKLR. She urges the court to find that the issue of double compensation does not arise to warrant reduction of the award of loss of expectation of life from that of loss of dependency, and relies on [\*Leonard Ochar Otieno v Mathews Mwanza Wanga \(Suing as the legal administrator of Kennedy Owino Wanga \(deceased\)\)\*](#) (2020) eKLR. She urges that she specifically pleaded and proved her claim for special damages, and prays for the appeal to be dismissed with costs.

### Analysis and determination

16. After considering the grounds of appeal as listed, the issues for determination are two-fold (a) whether the award made by the trial court was inordinately high; and (b) whether the Appellants’ submissions and authorities were considered.

### Excessive general damages

17. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as observed by the Court of Appeal in the case of [\*Catholic Diocese of Kisumu v Sophia Achieng Tete\*](#) [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high



or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470).”

### **Pain and Suffering**

18. The evidence on record is that the deceased was travelling together with his wife, the Respondent herein and their son when they were involved in an accident. Although the Respondent and her son survived, the deceased was not lucky enough to survive. This court finds that the sum of Ksh 20,000 for pain and suffering awarded by the trial court was justified, taking into account that although the deceased died on the spot, he must have undergone some agonizing pain.

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

19. It is settled that the conventional figure awardable under this head is Ksh 100,000, which is what the trial court awarded, after considering the fact that the deceased was only 36 years and in good health with no history of terminal illnesses.

### **Loss of dependency**

20. In considering the question of dependency, the Court respectfully notes the decision of the court in *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* [2017] eKLR (P.J.O. Otieno J.) as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

21. PW1 affirmed on cross examination that the deceased, who was her husband:

“...was a driver of motor vehicle KCA 821 M. The deceased used to earn Ksh 25,000/=. I knew the earning because I used to see the payment receipts. His employer also told me. The deceased was employed for over 6 years. The driving licence (P exhibit 7)... The children attend school at [Particulars Withheld] girls High School Chuka and [Particulars Withheld] school Maua respectively.”

22. The employer of the deceased testified as PW2 and after confirming that indeed the deceased was his employee, he stated that he used to pay him Ksh 25,000 per month in cash. That was proof on a balance of probabilities that the deceased, a married man with 2 children, was gainfully employed as a driver by PW2. Even though the Respondent did not produce any document to prove the said earnings of the deceased, it must be taken that the deceased, like every family man, was engaged in some income generating venture to support his wife and 2 children. The trial court, in addressing the uncertainty of the earnings of the deceased, adopted a multiplicand of Ksh 16,667 which had been proposed by the Appellants in their submissions.
23. This Court associates itself with the sentiments of the Court of Appeal in *Jacob Ayiga Maruja & anor v Simeon Obayo* (2005) eKLR that the absence of proof of the deceased earnings in form of receipts cannot be construed to mean he was not working for gain, in the context of the prevalent reality of informal employment in Kenya.
24. It is clear that the deceased, who was a married man with 2 school going children, was aged 36 years, and enjoying good health. The deceased would have been expected to have worked until the age of 60 years, had his life not been shortened by the negligence of the Appellants. This court thus finds that



the application of a dependency ratio of  $\frac{2}{3}$  and a multiplier of 19 years by the trial court were proper. There is still 5 years short of the actual difference between the retirement age and age at death, which caters for any vicissitudes of life that could shorten his full working life.

### Special damages

25. It is trite law that special damages should not only be specifically pleaded, but also strictly proved. The court notes the receipts for special damages totaling to Ksh 70,120. There is an invoice for Ksh 14,855 and 2 receipts from Gakwegori Funeral Home Ltd for Ksh 15,000 and Ksh 2,750 respectively. It is trite law that an invoice is not a receipt. The trial court, even after stating that, “the receipts in support of funeral expenses do not appear to be authentic” went ahead to award the same, because when a person dies, a reasonable sum of money must be expended towards having the body interred and the guests entertained and most importantly fed.
26. This court respectfully agrees with the commonsensical position observed in *Peter Ngari Njeru v Alchanger Njue Kitbogo & Josphat Njue (Suing as Legal Representatives of Eugenio Muchori Njue – Deceased)* [2019] eKLR where (F. Muchemi J.) held that:
- “It is trite law that funeral expenses may be awarded where a claim has been made based on the fact that burials attract certain expenses born by the relatives of the deceased.”
27. This court finds that the award of special damages of Ksh 132,625 was justified in the circumstances.

### Consideration of the appellants’ submissions and authorities

28. The trial court duly considered the Appellants’ submissions and authorities when it ruled as follows:
- “...The defendants on their part proposed a multiplicand of Ksh 16,667/=. They argued that the deceased’s employer stated that he did not know whether the deceased paid taxes as he did not deduct them. They therefore observed that the deceased’s income of Ksh 25,000/= should be subjected to statutory deductions. They relied on the cases of *Simeon Kiplimo Murey & 3 Others V Kenya Bus Services Limited & 4 Others* (2014) EKLK. They also proposed a multiplier of 13 years and relied on the case of *Jane Wangui Kamau & 2 Others V Alice Atandi & Another* (2004) Eklr where a multiplier of 13 years was adopted for a deceased aged 37 years, *Asha Mohammed Swaleh V Kennedy Bindi Muriungi & Another* (2012) Eklr where the court adopted a multiplier of 15 years for a deceased aged 35 years and *Ann Njoki Njenga V Umoja Flour Mills & Another* (2006) Eklr where the court adopted a multiplier of 14 years for a deceased aged 36 years. They proposed a dependency ratio of  $\frac{1}{3}$  arguing that there was no evidence to prove that the deceased had children. There was however no evidence adduced by the defendants to controvert that of the plaintiff. Having considered the circumstances of this case, the rival submissions and the cited authorities I adopt a multiplicand of Ksh 16,667/= as the deceased’s net income, a multiplier of 19 years and a dependency ratio of  $\frac{2}{3}$ .”

### Orders

29. Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.
30. The Respondent shall have the Costs of the Appeal to be paid by the Appellants.
- Order accordingly.



**DATED AND DELIVERED ON THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

Ms. Oteko Advocate for the Appellants

Mr. Mutuma Advocate for the Respondent

