Abraham v Kuira (Civil Appeal 49 of 2022)
[2023] KEHC 1740 (KLR) (15 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1740 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL 49 OF 2022

LN MUGAMBI, J

MARCH 15, 2023

BETWEEN

JOHN MWENDA ABRAHAM ..... APPELLANT

AND

LINUS NGOROI KUIRA ..... RESPONDENT

(Being an appeal from the judgment of the Honourable J.W. Gichimu,SPM delivered on the 23rd August, 2022 in Runyenjes Magistrate's Court Civil Case Number 92 of 2021)

JUDGMENT

1. By a plaint dated 6th October 2021, the Respondent filed this suit against the Appellant in his capacity as the deceased's legal representative.

2. He averred that on 4th July 2021 the deceased was lawfully travelling as a passenger in motor vehicle registration number KCG 059H Honda Saloon along Meru/Embu road when at Kivwe area, the driver of motor vehicle registration number KCG 392C lorry drove so negligently that he caused the same to violently ram into motor vehicle KCG 059F Honda thereby causing an accident which occasioned the deceased serious bodily injuries from which she succumbed. The particulars of negligence are as particularized in paragraph 4 (a-h) of the plaint.

3. The Respondent prayed for:

    i. General damages under Law Reform and Fatal Accident Act.

    ii. Special damages Kshs. 70,000/=

    iii. Cost and interest of the suit.

4. In his statement of defence dated 14th February 2022, the appellant denied the occurrence of the accident. Alternatively, he outlined the particulars of negligence on the part of the deceased on paragraph 5(i-v) of the statement of defence.

5. The hearing of the case commenced on 9.6.2022 with two witnesses testifying on behalf of the respondent.

6. After the trial, the Lower Court found in favour of the Respondent and awarded damages as follows:

    a. General damages under the *Law Reform Act*

-pain and suffering .... Kshs. 10,000/=

-loss of expectation of life .... Kshs. 100,000/=

    b. Damages under the Fatal Accident Act

-loss of dependency ... (13,500x12x35x1/2)=2,835,000/-

c. Special damages .....Kshs. 62,150/=
All totalling to Kshs. 3,047,150/=.

d) The Respondent was awarded costs of the suit with interest at court rates.

7. The appellant was dissatisfied with the above judgement and thus filed this appeal. He outlined the following grounds of appeal in his memorandum of appeal dated 24th October, 2022.

    a. That the Learned Magistrate erred in law in awarding general damages for loss of dependency at Kshs. 2,835,000/= which amount is manifestly excessive and high considering the deceased was only 20 years old with no determinate income.

    b. That the Learned Magistrate erred in law and in fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case while arriving at the award in damages.

    c. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.

8. He prayed that the appeal be allowed and the judgment of the lower court be set aside. He also asked to be granted costs of the appeal.

9. Directions were issued that the hearing of the appeal be dispensed with by way of written submissions.

Appellant Submissions

10. The Appellant filed his submission on 28th November 2022. On the issue of loss of dependency, the appellant submitted that the deceased died aged 20 years and was survived by her parents. The deceased was set to join university in September 2021 and dependent on her father as she was not working. The deceased therefore had no quantifiable income and her parents were not dependent on her. He relied

on the decision in MARKO MWENDA V. BERNARD MUGAMBI & ANOTHER NAIROBI HCCC NO. 2343 OF 1993 where the Court held that:

> "In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

11. He asked this court to award loss of dependency at Kshs. 1,500,000/= using the global sum approach and cited the case of MAINGI CELINA V JOHN MITHIKA M'ITABARI suing as the administrator of the estate of ERASTUS KIRIMI MITHIKA (DECEASED) (2018) eKLR where the court awarded Kshs. 1,000,000/= where it had been proved that the deceased at the time of death was an 18-year-old who was about to be admitted to the University.

Respondent Submissions

12. The Respondent filed his submissions on 13th December 2022 and discussed two issues.

13. He preferred the multiplier approach and presented two precedents that disposed of the claim using the multiplier approach.

14. He relied on Ponderosa Logistics Limited v Wesley Cheptoo Arap Chelagat and Alex Cheptoo (suing as the representative in the estate of Mark Too (deceased) 2020 eKLR, where the Court presented with rival arguments on the two approaches held as follows:

> "...These submissions left me with the choice between the multiplier method and the global award method. It is a discretion that I am obligated to exercise judiciously. In my mind both methods are fraught with misgivings. In the multiplier one the court has to form an opinion based on the facts before it that this person could have lived and worked for this no of years, this person would have earned so much money, and supported them to a certain extent. Similarly, with the global approach the court again is expected to form an opinion as to value placed on the life lost. In each the court has no way of knowing what vicissitudes that life would have been faced with. Neither is better that the other. It all depends on the facts.
>
> Hence in principle there was nothing wrong with the trial court choosing the multiplier approach..."

15. He submitted that the age of the deceased was known, the dependents are known and the income of the deceased was easily knowable by use of the minimum wage of her chosen profession whereas the

global sum method has no established principles of quantification and the only guidance is from other comparable cases which themselves were not determined on known principles.

16. On the second issue, he submitted that the formula for calculation of lost dependency is now established and cited the case of Mwita Nyamohanga & Another v. Mary Robi Moherai (suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & Another (2015) eKLR where it was held as follows:

'...The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature...'

17. He submitted that the appellant's argument that the deceased never demonstrated dependency as she was herself dependent upon the respondent is contrary to the long standing legal principle actually put forward by the appellant in the case of ZACHARY ABUSA MAGOMA V JULIUS OGENTOTO & JANE KERUBO ASIAGO (2020) eKLR, where the High Court referred approvingly to the case of KENYA BREWERIES LIMITED V. SARO (1991) eKLR, in which case the Court of Appeal held that a child is a valuable asset which the parents are entitled to keep intact, and that damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is evidence of pecuniary contribution which therefore means that any objection to a dependency ratio being applied in cases where the deceased was survived by parents is legally untenable and must be rejected.

Analysis and Determination

18. I have read and considered the submissions together with the memorandum and record of appeal and the law applicable, I opine that these are the issues that come up for determination of this appeal:

    i. Whether the trial court applied the correct legal principles in arriving at the quantum of damages for loss of dependency

    ii. Whether the Court considered the submissions by both parties

    iii. Whether the decision of the court on award is supported by evidence.

        i. Whether the trial Court applied the correct legal principles in arriving at quantum of damages for loss of dependency

19. The duty of an appellate court was well stated by the majority decision of the Court of Appeal in Mkube Vs. Nyamuro (1983) eKLR as follows:

> " ...A Court of Appeal will not normally interfere with a finding of fact by trial court unless it is based on no evidence, or on misapprehension of evidence, or the Judge is shown to have acted on wrong principles in reaching the findings he did..."

20. Further in Ken Odondi & 2 Others Vs. James Okoth Omburah t/a Okoth Omburah & Co. Advocates (2013) eKLR, the Court of Appeal held:

> "...We agree that this Court will not interfere with the findings of a trial Judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of trial Judge. To interfere this court must be persuaded that the trial Judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of damages to which the plaintiff is entitled..."

21. One of the key contentions by the Appellant was that his submissions before the lower Court on the best approach for determining the award was not considered by the trial Court. The Appellant had put forward the argument that because the income of the deceased was not known and there was no evidence of employment she would have pursued or how much she would have earned, then the global award approach was the most appropriate as it was difficult to ascertain the multiplicand and the multiplier. He cited the case of Marko Mwenda Vs. Benard Mugambi & Another NRB HCCC No. 2343 of 1993. This has also been its position in this appeal.

22. The Respondent on the other hand urged the Court to apply the multiplicand approach and relied on the case of Penderossa Logistics Limited Vs. Wesley Cheptoo Chelagat (2020) eKLR and still maintains that position in this Appeal.

23. In its judgment the trial court observed that superior courts have approached the issue differently with some opting to apply the global award while others opted for the multiplier approach. It stated:

> "...I have gone through the decisions of the Superior Courts and find that the courts have approached this issue differently. Some Courts have applied the global award while others have adopted the multiplier approach...I find the multiplier approach reasonable in the circumstances of this case..."

24. Did the Magistrate err going the multiplicand way?

25. Njagi J, In Kakamega H.C.C.A. 10/2017 Chitabhadhiya Enterpreises & Another Vs. Gladys Butali stated as follows after analysing the two methods:

> "...A review of past High Court Judgments in Kenya indicated that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court Judges hold the view that both approaches are proper as exemplified by the following holding of Joel Ngugi J in Kenya Power & Lighting Company Limited Vs E.K.O & Another, Kiambu HCCA No. 169 of 2016 (2018) eKLR where he said that:
>
> "...It thus emerges that superior court are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned trial magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand..."

26. Clearly therefore, the reasoning by the trial magistrate was on point. There is no one fixed and definitive method that must be applied. She made a choice of one of the formulae and cannot be faulted as she could choose to go either way.

27. I also consider that indeed in making the choice, she in fact considered the submissions of the Appellant.

    c) Whether the decision of the court on award is supported by evidence.

28. In the making the choice of the multiplicand, the court was faced with a situation whereby there was no evidence before it of deceased earnings. The deceased was only twenty old and was scheduled to join Embu University.

29. The Appellant argued that this was a perfect case where the global award was the most reasonable method.

30. It is indeed correct that the deceased the deceased had no known income. Nevertheless, there was great potential in her. She had just been selected to join University for Bachelors of Education degree that was clear evidence that she was destined for a well-defined career path.

    In Roger Dainty v Mwinyi Omar Haji & another MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR, the Court to Appeal observed that;

    "...To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life..."

31. As is evident in above case, the Court is permitted in deciding the appropriate multiplicand to even consider 'income or prospective income of the deceased' which means, it can be either currently actual or futuristic (potential).

32. In the present case, the Court did not even consider what the deceased would have earned in her profession at the entry level as a graduate teacher which (going by the choice of career) is where evidence was pointing to, it instead adopted a conservative sum of Kshs. 13,500/- which it described as the subsisting minimum wage. Though I find this approach reasonable in the circumstances of this case, the amount quoted by the Magistrate as the minimum wage was incorrect. The appropriate legal notice that would have been applicable in the trial court was Labour Institution Act, the Regulation of Wages (General Amendment) Order 2019 which set the minimum wages at Kshs. 12522.70/=.

33. The Appellant contended that the deceased father testified that the daughter was dependent on him as she had no income. Does that mean the parent could not claim for damages under *Fatal Accidents Act* for loss of dependency?

34. It is common knowledge in this country and indeed most African societies that parents toil to see their children through in life but the cycle is reversed when children become of age and start earning., A child to a parent is a big social investment and the death of a daughter with such huge potential was an enormous blow to the parents whose turn to be supported by her was snatched away by her untimely death resulting from that accident. If she had an opportunity to complete her studies at the university, she would have been in a position to assist her father who said he worked for gain as a peasant farmer. I take judicial notice that we are products of this society and this is what ordinarily happens in our Kenyan society.

35. In a matter involving loss of dependency of a child tender years, probably the global award may be the way to go. However, it is my view that in case of a teenage child or a young adult who though he has not started earning had strongly shown indicators of the direction his life was taking can be approached differently in evaluating the damages under *Fatal Accidents Act*. To ask the question, 'what the deceased teenage child or young adult had in his/her hand at the time of death is to miss the point. (i.e. what he was earning or income he was making). It would not be helpful certainly because the answer is obvious, it is 'nothing' for he would have been totally dependent on the parent/guardian in most of the cases. The more reasonable approach is to ask, 'What was the child capable of having in his hand in a few years to come? From 'nothing' in the first question, it will definitely change to 'something' as an answer. The task of the court will then be to objectively evaluate the deceased proven potential from the evidence provided and determine if an appropriate multiplicand can be presumed. Consequently, some cases might fall for consideration using the minimum wage while others could attract higher amounts as may be justified by evidence on record. It is all a question of facts. That is my humble view.

36. I thus find the submission by the Appellant that because the father to the deceased had testified that she was totally dependent on him, then an appropriate multiplicand could not be determined to be misconceived.

37. The trial Magistrate used a multiplier of 35 years which the appellant faulted due to the uncertainties of life as we were then in the midst of a pandemic plus the dwindling economic status of the country stating that no one knew how the future would look like. The retirement age in Kenya is 60 years and the trial court used the multiplier of 35 years which means that it projected the deceased would have lived up to the age of 55 years. The fact that we were in a pandemic did not cause a policy change to review the age of retirement age nor was there official policy declaring that life expectancy in Kenya had been reviewed downwards due to the pandemic.

38. I find that the multiplier applied by the Court was well thought out and in order.

39. The trial court found that the deceased would have used half of her income on her dependants. Justice Ringera in Grace Kanini Vs. Kenya Bus Service Nairobi HCCC 4708 of 1989 held as follows in regard to the determination of the extent of what would have been used on the dependants.

> " ...There is no conventional fraction to be applied as each case must depend on its own facts. When a Court adopts any fraction that must be taken as its findings in the particular case..."

40. The one-half was a discretional finding by the trial court to which I was not provided with any reason to disturb nor do I see any that should cause me to disturb the same.

41. Having found that the minimum wage used by the trial court was wrong, my finding on dependency would thus slightly reduce as the multiplicand has changed and will thus be computed as follows:

Kshs. 12522 x 12 x 35 x ½ = 2,629,240.

42. Nevertheless, there is an established principle that because damages under the *Fatal Accidents Act* and damages awarded under the *Law Reform Act* are received by the same beneficiaries, there is need to guard against twin recompense by discounting the awards made under the *Fatal Accidents Act* from the *Law Reform Act*.

43. In Mutegi Njeri & Anor Vs. Stanley M'Mwari M'Atiri Civil Appeal Number 237 of 2004,

44. The Court of Appeal explained:

> "...As regards failure of Superior Court to take into consideration the award under *Fatal Accidents Act* when arriving at the award under the *Law Reform Act*, the principle is that the award under *Law Reform Act* has to be taken into account when considering awards under *Law Reform Act* for simple reason that the dependants under *Law Reform Act* are same beneficiaries of the estate of the deceased in the later Act..."

45. Applying the above principle, I note that the damages the trial Court awarded under the *Law Reform Act* and which the Appellants have not contested in this appeal were as follows:

    a. Pain & Suffering- Kshs. 10,000/-

    b. Loss of expectation of life Kshs. 100,000

46. Discounted from the award made under the *Fatal Accidents Act*, the amount available will be as follows: (2,629,240-110,000) Kshs. 2,519,240/-

47. From the foregoing analysis, I find that the appeal partly succeeds.

48. The upshot is that the award of general damages for loss of dependency in the judgment delivered on 25th August 2022 the trial court is hereby set aside and substituted with an award of Kshs. 2,519,240.

49. Special Damages were not challenged hence they remain as awarded by the trial court- Kshs. 62,150.

50. The estate of the deceased is thus awarded a total sum of Kshs. 2,581,390.

51. Each Party will bear its own costs of this appeal.

JUDGMENT READ, SIGNED and DELIVERED virtually at BUSIA this 15th day of March, 2023.

L.N. MUGAMBI

JUDGE

In presence of:

CORAM (ON-LINE)

Before L.N. Mugambi, Judge

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent-absent

Court Assistant- Brian

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N. MUGAMBI

JUDGE