



Mbugua & another v Chege (Suing as the legal representative of the Estate of Gachanja Muchiri Kamau (Deceased) (Civil Appeal 3 of 2021) [2023] KEHC 2011 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 3 OF 2021
DKN MAGARE, J
MARCH 3, 2023**

BETWEEN

ANTHONY MBUGUA 1ST APPELLANT

GEORGE KAMAU KANTUNGI 2ND APPELLANT

AND

**VICTORIA NJERI CHEGE (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF GACHANJA MUCHIRI KAMAU
(DECEASED) RESPONDENT**

JUDGMENT

1. This is an Appeal from the Ruling of Hon. J.B Kalo dismissing an application for Review dated 8/5/2020 delivered on 17/12/2020 in Nakuru CMCC NO. 1312 of 2018.
2. After the parties argued the application, the court gave a terse one-page Ruling, where he stated that there was no error apparent on the face of the record.
3. I am disturbed by the manner the Chief Magistrate handled the application for Review. He stated that he had considered submissions, various case law and reached at a conclusion that there was no error apparent on the face of the record. There is no case law considered on record for this Court and the parties to consider in order to determine whether the court fully considered case law.
4. This is not to say that the Court was not correct at the end of the day. It is advisable and thus recommended that the court should back its decisions, with Judicial precedents, legal and Philosophical reasoning. That could ward off unnecessary appeals and render substantive justice to the parties.



Issues

5. The appeal raises only one issue in the three grounds of Appeal, that is;-
 1. Whether the court erred in finding that there is no error apparent on the face of the record.

Analysis

6. What constitutes an error apparent on the face of the record will be discussed shortly. However, I note that the problem arises in conceptualising what damages under the Fatal Accident Act, what are the considerations and how does the court calculate these damages. This may have resulted in the confusion of mathematical precision expected by the parties. It is therefore useful to point out from the outset that law is not an exact science. We eschew mathematics, wherever occasion calls for the same. We cannot therefore found conception on pure mathematics.
7. The mathematicising damages has resulted in the protracted legal battle for the coins and shillings at the hands of the Appellant. I will therefore address what damages are before addressing the issue of an error apparent on the face of the record. This will answer the question of what the Respondents were bound to prove and what they ended up proving.
8. This then will elucidate with clarity whether there was an error apparent on the face of the record. Incidentally, this will also answer another question that has not been asked. What is the face of the record.
9. Justice R E Aburili has this to say in *Devki Steel Mills Ltd Versus Jared Osodo* (2014) eKLR, while quoting with approval the Court of Appeal in *George Kirianki Laichena Vs Michael Muturi* faced a task of expounding the science and art of assessment of damages. They poised as doth;

“It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found ultimately, the award will very much depend on the facts and circumstance of each case.”

and As Lord Morris stated in *H. West & Son Ltd vs Shepherd* (1964) AC 326 @353:-

“The difficult task of awarding compensation in a case of this kind is essentially a matter of opinion of a Judge due to experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong, the best that can be done is to pay regard to limits of current thought.

In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose to himself the question as to what award he himself could have made.”

10. The Aspect of the multiplier approach to assessment of damages is just one of the methods of assessment as age of the deceased, amount of annual dependency and expected length of dependency are known or knowable without undue specification. Where that is not possible, to insist on the multiplier approach is to sacrifice Justice on the altar of methodology something a Court of Justice should never do.



11. Indeed, the principle for assessing dependency is on “knowable income” which we then and is not based on any law of convention. In *Albert Odawa Vs Gichumu Githenji* (2007) eKLR, Justice Aaron Ringera, as then he was had this to say,

“The multiplier approach is just a method of assessing damages. It is not a principle or dogma. It can and must be abandoned, where the facts do not facilitate its application it is plain that it is useful and practical method whose factors apply the monthly dependency. Therefore, what is most useful is not the income but the known dependency.

12. The Court has absolutely no duty of knowing the income of a person vis-à-vis the *Fatal Accidents Act*. The duty of the court is to know amount of income which was or way presumed to be used on the dependants. That is why the age of the deceased, the age of the dependants and the loss of dependency are crucial is arising at a correct or proximate amount of loss of dependency.

General damages

13. Damages under the *Fatal Accidents act* are of the nature of General damages and not special damages. The General damages are thus not necessarily pleaded specifically and proved. Justice D.S Majanja in *Nyambate Nyaswabu Eric Vs Toyota Kenya & 2 others* (2019) eKLR, has thus to say;

“General damages are damages at large, and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be the comparable injuries shown as far as possible be compensated by comparable awards; recalled that no two cases are the same...”

14. I therefore dare say, that even in *Fatal Accidents Act* awards should be commensurable with the dependency on a deceased person and with awards for similarly situated deceased persons being in the same range.

15. In this cause the Responded pleaded that; -

“The deceased was earning a net monthly salary of Kshs.54, 681.70/= per month. By the said death the estate of the deceased was lost maintainance and support of the deceased.”

16. At item 19 of the List of documents the Respondent attached the payslip for June, 2018. The pay slip has a NET PAY of Kshs. 54, 681.70/= as pleaded. However, the said consisted of a basic pay of Kshs. 81,900/= and other allowances all totalling to a gross pay of Kshs.157, 120/= out of the gross pay these are total deductions of Kshs.102,438/= out of the deductions there are statutory deducted.

NHIF – Kshs1,700/=

NSSF – Kshs.200/=

PAYE – Kshs.37,275/=

Total Kshs.38,975/=

17. This means out of his net deductions of Kshs.102, 438/= only Kshs.38,975/= constitute income that cannot be spent on dependants and the deceased herself.

18. This is his earnings and are available to him when added back to the net pay, that is when the Actual earnings are arrived at, that is Kshs.118,114.70/=. The Court founded this amount to Kshs.118,145/=.



19. There is no requirement for specifically proving General damages since they are at large. The Respondent in pleading net salary as that was indeed the net salary, that is, Ksh. 54,6681.70. the same amount can be known differently. Within the net income, there is necessity that basic pay must be the starting point. In this case it was a sum of Ksh. 81,900. Basic pay plus allowances and other incomes brings about gross profit (Ksh 157,120/=).
20. Therefore I do not see what wrong happened when the court accepted net profits and added back deductions that are still income to the deceased. This is the very same way, has the Respondent pleaded gross income, no court could give him such an amount. Deductions must be made to find correct income available to beneficiaries.
21. The pleading of net-pay and filing of the of the payslip, put the parties on notice that he had employment and his income will be used. In any case damages are calculated differently. It is based on the income of the deceased and no net pay.
22. Another point that has escaped the parties to that the decision on damages are discretionally. The exercise of that decision is a matter of Judicial discretion.

“The Court of Appeal should not interfere with the exercise of discretion of a Judge unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice.”

23. The wrongful exercise of discretion of use of a wrong multiplier of multiplier is an issue of law. It is not an error of fact. It is an issue that one cannot see on the go. It is an issue requiring great analysis and legal argument. The same can only be a province of Appeal not review.
24. The other aspect is the face of the record. The error should come out without argument. An issue of law is never an issue that is apparent on the face of the record. It has to be cognitively determined by legal nuances and hyperbole.
25. An error that has to be established by a long drawn process of reasoning on points where there may be conceivably two points of view can hardly be an error apparent face of the record. In the supreme court of India decision of *Satyanarayan Laxminarayan Hedge Versus Malikarjun Bhavanappa Tirumule* AIR 1960 SC 137, court stated:-

“The error apparent on the face of the record must be such an error which must strike one on mere looking at the record, and would not require any long drawn process of reasoning on points where conceivably be two opinions”

26. If the error is established through lengthy complicated arguments arguments then it is not an error on the face of the record. Any error regarding pleadings and their congruence in arriving at damages under the *Fatal Accidents act*, is definitely an error of law, which is appealable. It cannot be subject of review.
27. In short I am not satisfied that these was an error apparent on the face of the record.
28. The Appeal lacks merit and it therefore for dismissal.

Determination

- a. The Appeal herein is hereby dismissed with costs for lack of merit.



- b. Exercising my jurisdiction under section 27 of the *Civil Procedure Act*, I award the costs of Ksh. 135,000/= to the Respondent, payable within 30 days from the date of Judgment hereof.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA ON THIS 3RD DAY OF MARCH, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of

No Appearance for the Appellant

No appearance for the Respondent

