



**Ng'ang'a & another (Legal Representatives to the Estate of Ndungu
Gichuhi Njoroge -Deceased) v Maina & another (Civil Appeal
E021 of 2021) [2023] KEHC 3343 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E021 OF 2021
FN MUCHEMI, J
APRIL 20, 2023**

BETWEEN

**JANE WANJIRU NG'ANG'A 1ST APPELLANT
SUSAN WAIRIMU NDUNGU 2ND APPELLANT
LEGAL REPRESENTATIVES TO THE ESTATE OF NDUNGU GICHUHI
NJOROGE -DECEASED**

AND

**DAVID MWANGI MAINA 1ST RESPONDENT
PETER MAINA NGETHA 2ND RESPONDENT**

*(Being an Appeal from the Judgement of Hon. V. S. Kosgei (RM)
delivered on 27th April 2021 in Karatina PMCC No. 66 of 2019)*

JUDGMENT

Brief Facts

1. This appeal arises from the judgment of Karatina Principal Magistrate in civil suit No 66 of 2019 delivered on April 27, 2021 where the appellant claimed general and special damages. The court found the respondents 100% liable and entered judgment in favour of the appellants for the sum of Kshs 2,731,126/-.
2. Dissatisfied with the judgement the appellants lodged the instant appeal citing 4 grounds of appeal in their memorandum of appeal which can be summarized as follows:-



- a. The learned trial magistrate erred both in law and in fact in finding that the net pay of the deceased was Kshs 28,724.25/- and not Kshs 82,179/- in making an award under dependency under the *Fatal accidents Act* consequently arriving at the wrong multiplicand;
 - b. The learned magistrate erred in law and in fact in failing to appreciate that the only deduction to be made for the gross pay are only statutory deductions namely NHIF, NSSF and PAYE.
 - c. The learned trial magistrate erred in law and in fact in failing to appreciate their submissions on the multiplier of 13 years whereas the respondents did not address it at all.
3. The respondents stated that they filed a cross appeal dated November 29, 2021. Such record was traced in this file. On December 23, 2021, the court made a note to the effect confirming that no cross-appeal had been filed by the respondents.
 4. By consent, parties put in written submissions for disposal of the appeal.

Appellant's Submissions

5. The appellants submit that the trial court omitted the earnings of the deceased as per his payslips which led to a glaring error in computing the damages under the loss of dependency. The appellants further submit that the multiplicand is reduced by over Kshs 50,000/- and the multiplier by at least 4 years whose financial implications are huge. The appellants cite the cases of *James Kinyua Gachoki (deceased) v John Ndiga Timothy & 2 others* [2015] eKLR and *John Mwanzia Mwilu v Gitthinji Wabinya* [2019] eKLR and submits that the award in damages was inordinately low and as such, it calls for interference by the instant court.
6. The appellants submit that the deceased's gross pay was Kshs 106,369/- as stipulated in the payslips for the month of August, September and October 2018. Thus, the appellants contend that the trial court erred by arriving at a multiplier of Kshs 28,724.25/- as net pay with gross pay at Kshs 62,524/-. Moreover, the appellants contend that the deductions to be made to determine the net pay are the statutory ones namely NHIF Kshs 1,700/- and PAYE Kshs 23,160/- which totals to Kshs 24,860/-. Thus a balance of Kshs 81,509/- ought to be the net pay and the appellants contend that the same ought to be the multiplicand.
7. The appellants rely on the cases of *Ernest Tuiga v Masinde University of Science and Technology* [2015] eKLR, *Elizabeth Ngina Muthoka (Suing as the administratrix of the estate of Prof Paul Muthoka Musau (Deceased) v Martin Musila Kombo & another* [2009] eKLR and *Sokoro Plywood Limited & another v Njenga Wainana* [2007] eKLR and submits that the trial court erred in finding that a multiplier of 9 years is applicable when they tendered evidence and relied on authorities showing that a multiplier of 13 years is applicable. The appellants submit that the deceased was a tutor at Dedan Kimathi University and produced pay slips to support the same. Moreover, the respondents never disputed the fact that the deceased was a tutor. As such, the appellants argue that the retirement age applicable ought to be 68 years and not 65 years as used by the trial court.
8. The appellants contend that the cross appeal is misplaced as there are no cross appeals in the High Court unlike the Court of Appeal. The respondents ought to have filed a separate appeal within the statutory time so that the two appeals would be consolidated before the hearing. Moreover, the appellants submit that the cross appeal was filed on December 1, 2021 which is 7 months after judgment and without leave of the court and therefore is of no effect. To support their contentions, the appellants cite the case of *Bulsbo Trading Company Ltd v Rosemary Likholo Mutakha & another* [2020] eKLR. Furthermore, the appellants contend that no directions were taken on the cross appeal.



The appellants argue that the respondents did not push for directions and neither have they mentioned it at all during mentions in the matter and therefore it ought to be disregarded.

9. The appellants submit that although the respondents raised an issue of the multiplier and the multiplicand in their cross appeal, they did not address these issues in their submissions in the trial court. They argued that earnings were not proved without stating what they took of the pay slips produced. Additionally, the appellants contend that the respondents did not carry out any cross examination on the documents they produced as exhibits. The appellants argue that they tendered sufficient evidence to prove their case however the respondents did not create doubt in cross examination or tender any evidence to prove allegations regarding negligence on the part of the deceased or the non-viability of their claim. The appellants rely on the cases of *Techarid Stream & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR and *Palace Investments Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR and submit that they have proved their case to the required standards and urge the court to find that the multiplier and the multiplicand used by the trial court were erroneous. The appellants pray that the court set aside the judgment on those two issues and adopt a multiplier of 13 years and multiplicand of Kshs 81,509/-.

The Respondents' Submissions

10. The respondents rely on the case of *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 (UR) and submit that the court ought not to interfere with an award of damages unless it is satisfied that the judge acted on the wrong principles of law or misapprehended the facts. The respondents argue that the award of Kshs 100,000/- for pain and suffering was high considering the deceased did not suffer for a long period of time before he succumbed to his injuries. To support their contentions they cite the cases of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR and *D.M.M (Suing as the Administrator and legal Representative of the Estate of L.K.M v Stephen Jobana Njue & another* [2016] eKLR.
11. On loss of expectation of life, the respondents submit that the award of Kshs 100,000/- is reasonable and in accordance with the law. They cite the cases of *Kenya Red Cross v IDS (Suing as the legal representative of the Estate of MDR (deceased))* [2020] eKLR and *Makario Makonye Monyancha v Hellen Nyangena* [2014] eKLR to support their contentions.
12. The respondents contend that the deceased worked under the Electricity and Electronic Department at Dedan Kimathi University and he earned a gross salary of Kshs 52,884/- which when subjected to statutory deductions came to Kshs 28,624.25/- which was the multiplicand used by the trial magistrate. Since the deceased was 55 years old, the trial court used a multiplier of 9 years as the retirement age in Kenya is 60 years for public servants. As such, the respondents argue that the multiplier adopted by the trial court was sufficient and adequate. They cite the case of *Midland Media Limited & another v Pauline Naukot Aule (Suing as the Legal Representative of the Estate of Esinyon Esokon Ekai)* [2020] eKLR to support their contentions.

Issue For Determination

13. The main issue for determination is whether the appeal has merit.



The Law

14. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

16. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

17. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether The Appeal Has Merit.

18. The respondents claim to have filed a cross appeal *vide* a memorandum of appeal dated July 21, 2019 and filed in court on July 25, 2019. This matter came up for hearing on the respondents application for stay of execution dated December 14, 2021 on December 23, 2021. In their application, the respondents state that they filed their cross appeal dated November 29, 2021 after they found out that the appellants had already lodged an appeal. The court on December 23, 2021 rendered its decision and held that there was no existence of an appeal on record. Notably, the respondents never made any mention of their appeal when the appeal was admitted for hearing. As such, there be no cross appeal on record and the since the same was not admitted to hearing, the court shall focus on the appeal dated May 21, 2021.

19. The appeal herein lies on quantum. Notably, assessment of damages are matters that are within the discretion of the trial court and the appellate court ought to respect that discretion if properly exercised. This was aptly expressed by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) v Kiarie Shore Stores Limited* [2015] eKLR thus:-

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. 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 high that it must be a wholly erroneous estimate of the damages.”

20. The appellants, argued that the trial court erred by applying the wrong multiplicand and multiplier thus the award of loss of dependency was inordinately low.
21. In the assessment of damages for loss of dependency, the trial court applied a multiplicand of Kshs 28,724.25/- as the deceased’s net pay based on the payslips. The trial court stated that the net salary is what would have been used by the deceased to manage his family and not the gross salary. The record of appeal shows that the appellants attached three pay slips for deceased’s salary for the months of August, September and October 2018.
22. A perusal of the said pay slips reveals that the deceased’s basic salary was Kshs 62,524/- .The statutory deductions as contained in the payslip are PAYE at Kshs 23,160/- NHIF at Kshs 1,700 which comes to a total of Kshs 24,860. The other deductions are Mwalimu Sacco Kshs 47,370, pension contribution Kshs 4,689/-, DeKUT benevolent welfare Kshs 100 and Kusu-Dekut chapter Kshs 625/-which total to Kshs 52,784.55/-. These deductions do not amount to compulsory statutory deductions as they are either in the form of savings or loan repayments, which ought not to be factored in when determining a multiplicand. This was enunciated by the Court of Appeal in the case of *Mary Osano (personal representative of Charles Otworu Ogechi (Deceased) v Simon Kimutai* [2020] eKLR where the Court of Appeal stated:-

This court is therefore tasked to consider whether the learned judge erred by using the figure of Kshs 40,000/- as the multiplicand instead of the Kshs 70,000/-. We appreciate the principle behind this finding is that courts must factor in statutory deductibles prior to arriving at the appropriate figure to use as a multiplicand. The same was held by this court in *Rosemary Mwasya v Steve Tito Mwasya & another* [2018] eKLR:-

The figure chosen of Kshs 118,546/- took into consideration yearly increments had the deceased followed her career. The only error we note the trial judge committed in arriving at the final figure was the failure to factor in the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as $Kshs\ 118,546/- \times 1/3 = 39,512/-$.

Counsel for the appellant submitted that the deceased’s net pay as evidenced by a copy of his payslip was Kshs 53,550/- per month, with house allowance of Kshs 45,000/- per month which totals to Kshs 98,550/-. The statutory deduction as contained in the payslip are: PAYE at Kshs 23,947/-, NHIF at Kshs 320 and NSSF at Kshs 3,748/- which totals to Kshs 28,015/-. The rest do not amount to statutory deductions as the learned judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.

23. As outlined, the total statutory deductions amount to Kshs 24,860/- which when deducted from the gross pay would amount to Kshs 69,509/-. Accordingly, the correct multiplicand is Kshs 69,509/-.
24. On the issue of the multiplier, the appellants have argued that the learned magistrate erred in law by adopting a multiplier of 9 years instead of 13 years. The appellants argue that the deceased was 55 years old and a tutor at Dedan Kimathi University. The appellants further contended that the deceased would have retired at the age of 70 years and therefore the court ought to have adopted a multiplier



- of 13 years. The respondents do not dispute the multiplier used by the court and submit that it is sufficient and adequate as the retirement age in Kenya is 60 years for public servants.
25. The trial court was of the view that since the deceased was working as a tutor in a private university, he would have worked beyond 60 years for another 5 years and thus adopted a multiplier of 9 years.
26. The issue of the applicable multiplier to adopt was discussed by Ringera J (as he then was) in the case of *Grace Kanini v Kenya Bus Services Nairobi HCCC No 4708 of 1989* which was relied upon in the case of *Joshua Mulinge Itumo (suing for and behalf of the Estate of Daamaris Nduku Musyimi (deceased) v Bash Hauliers Limited & another* [2021] eKLR where the court held:-
- When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependent such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in lump sum and if otherwise invested, good returns can be expected.
27. The deceased died at the age of 55 years. It was not in dispute that the deceased worked as a tutor in the Department of Electrical and Electronic Engineering at Kimathi University. There was no letter of appointment produced to show the deceased's retirement age. The payslips attached have no such information. I have looked at the *Universities Act* No 42 of 2012 which provides:-
- Section 12 – “The retirement age of those who shall join the university after the gazettelement of these statutes shall be sixty (60) years for administrative staff and seventy (70) years for academic staff or as shall be directed by the government from time to time.....”
- The deceased having been a tutor at the university would have retired at the age of seventy (70) years. As such, the court ought to have adopted the age of 70 as the retirement age. The multiplier therefore ought to have been higher than nine (9) years. Taking into consideration the uncertainties of live, I hereby adopt (13) years as the multiplier based on the fact that at the time of death, the deceased would have worked for another fifteen (15) years.
28. As for the multiplicand the court adopted the net pay of Kshs 28,724.25ct. The appellant argues that the multiplicand of Kshs 81,509/- ought to have been applied. The three payslips produced show that a number of deductions were made from the basic pay of Kshs 62,524/-. The net pay was the take home after the statutory and Sacco deductions as well as loan repayments. Using the net pay to compute loss of dependency was wrong in principle because the house allowance which was an entitlement was not factored in. The correct mode of computation is to remove the statutory deduction from the basic pay and add the house allowance. This formular gives a multiplicand of Kshs 69,509/- which in my view ought to be applied.
29. As for the monthly commuter allowance of Kshs 12,000/-, this benefit was provided to facilitate the deceased to travel to and from his work station. I am of the considered view that this allowance should not be included in computation of the loss of dependency.
30. The multiplicand adopted by the learned magistrate was based on the wrong principles and is hereby set aside and substituted with Kshs 69,509/-.



31. Consequently the damages for loss of dependency are computed thus:-

$$\text{Kshs } 69,509 \times 13 \times 12 \times 2/3 = 7,228,936/-.$$

32. The award on loss of dependency by the court of first instance is hereby set aside and substituted with Kshs 7,228,936/-. The other items of damages in the judgement of the learned magistrate remain undisturbed. The damages payable to the appellant by the respondents are summarised as follows:-

Ksh

- a. Loss of dependency 7,228,936
- b. Special damages 62,980
- c. Pain and suffering 500,000
- d. Loss of expectation of life 100,000

7,891,916

=====

33. The appeal is therefore partly successful.

34. The appellant is awarded the costs of this appeal

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF APRIL, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through videolink this 20th day of April, 2023

