



Kirimi & another (Suing as the Administrators and Legal Representatives of the Estate of Agnes Ntinyari Murungi - Deceased) v Kithinji & another (Civil Appeal E042 of 2021) [2023] KEHC 17732 (KLR) (23 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E042 OF 2021
EM MURIITHI, J
MAY 23, 2023**

BETWEEN

SAMSON KITHINJI KIRIMI 1ST APPELLANT

GEOFFREY KIRIMI M'RUGONGO 2ND APPELLANT

**SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES OF
THE ESTATE OF AGNES NTINYARI MURUNGI - DECEASED**

AND

MARTIN KITHINJI 1ST RESPONDENT

COUNTY GOVERNMENT OF MERU 2ND RESPONDENT

*(An appeal from the Judgment of Hon. Ndegwa E. W (R.M)
in Githongo SRMCC No.7 of 2019 delivered on 24/2/2021)*

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 20/2/2019, in which the Appellants herein (the Plaintiffs in the trial court) sued the Respondents herein (the Defendants in the trial court) seeking general damages under the Law Reform Act and the Fatal Accidents Act for pain, suffering and loss of amenities, special damages of Ksh. 62,725, costs of the suit at court rates and interest.
2. The Appellants pleaded that on or about 11/11/2017 at around 0930 hours, the deceased was travelling as a pillion passenger on motor cycle registration No. KMDA 372 T along Meru-Kithaku-Katheri Road when the 1st Respondent drove motor vehicle Registration No. KBY 668 C Toyota Double Cabin so negligently and carelessly that it left its lane and hit the motor cycle thereby fatally injuring the deceased while the rider sustained severe bodily injuries. By reasons of the 2nd Respondent's driver's negligence afore pleaded and the subsequent death of the deceased, her estate and other dependants



have suffered loss and damages and pray for special and general damages. It was pleaded that at the time of her death, the deceased, was aged 32 years old and enjoying good health. She was a business lady, a farmer and an employee of Mafuko Industries Limited where she earned a monthly income of Ksh. 17,041. She was earning a total monthly income of Ksh. 40,000 from her employment, business and farming and as a result of her death, her children and their father lost her support.

3. The Respondents denied the claim by their joint statement of defence dated 15/7/2019 and prayed for its dismissal with costs.
4. The parties recorded a consent judgment on liability at the ratio of 50:50 in favour of the Appellants against the Respondents and upon full hearing on quantum, the trial court awarded general damages for pain and suffering of Ksh. 40,000, Ksh. 150,000 for loss of expectation of life, Ksh. 900,000 for loss of dependency, special damages of Ksh. 61,875 less 50% contribution = Ksh. 575,938 together with costs and interest.

The Appeal

5. On appeal, the Appellants filed their Memorandum of Appeal on 22/3/2021 listing 4 grounds as follows:
 1. The learned trial magistrate erred in law and fact by adopting the wrong principles in assessing damages for loss of dependency under the *Fatal Accidents Act*.
 2. The learned trial magistrate erred in law and fact by failing to adopt a multiplier approach and award damages for loss of dependency by finding that no documents were produced as proof of the deceased earnings yet the deceased was working and also earning income from her farming and shop business hence the production of such documents was not mandatory in a case of this nature.
 3. The learned trial magistrate further erred in law and fact in that she awarded a global sum of Ksh. 900,000/= for loss of dependency when the deceased died at the age of 32 years in spite of the evidence on record which was in support of a comparable and fair figure with the resultant of a manifestly low and a wholly erroneous estimate of damages.
 4. The learned trial magistrate further erred in law and fact in that she disregarded the evidence on record and the judicial authorities which were tendered before the Honourable Court by the appellant's Advocates which supported the award of a comparable and a reasonable figure for damages for loss of dependency.

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).

The Evidence

7. PW1 Samson Kithinji Kirimi, one of the Respondents herein and the husband to the deceased, adopted his statement filed on 20/1/2019 as part of his evidence in chief. He produced the certificate of death, Limited Grant issued in Githongo Misc Case No. 12/18, police abstract, copy of records, notice of intention to sue, receipts in support of special damages amounting to Ksh. 62,732, copy of daily newspaper, employment card, 3 pay slips and letter from area chief as exhibits in court. He went further



- to state that, “The deceased was my wife. She was working at Mafuko industries and was salaried getting Kshs. 17,000 per month. She was also a business lady. She was a farmer and had a general retail shop. She grew cabbages, tomatoes and kales. I have pleaded that in paragraph 7 of my plaint. We had 3 children. SKK - 1st born, TM - 2nd born, VM - 3rd born. My wife was our sole bread winner since I was a casual labourer. We have suffered following her demise since I had to transfer my children to public school. My wife died at 32 years. My 2nd born was in private school. I have birth certificates of the 3 children which I wish to produce – PEX 11(a) to (c). The chief also listed down their names. I wish that my children and I be compensated with damages as well as costs of the suit.”
8. On cross examination, he stated that, “I confirm that the deceased was under a renewable contract at Mafuko Industries – PEX 8 – staff card proves as such. I do not have contract document she had with Mafuko. We can only tell the terms of the contract only if I avail the contract. Agreement PEX 8 indicates its expiry date as per the contract. Deceased died on 11/11/17 on the date of the accident. She died on the spot. PEX – 9 (bundle of pay slips) shows that they are for January 2019, April 2016 and July 2016. I have provided payslips for the year 2016. I did not provide recent pay slips or any for the year 2017. I have no evidence to prove that the deceased was employed by Mafuko Industries as at 2017. Deceased was getting Kshs. 17,000 per month. The pay slips in court shows the next pay as 11,000/=, 12000/= and 13,000/= and I have no evidence such as a business permit to prove that deceased operated a business. I have no prove of how earnings form her business. I have no evidence to show that I transferred my children from private schools to public schools.”
9. On re-examination, he stated that, “Deceased died aged 32 years. Deceased was still employed at Mafuko as at the time of death. She had an employment card to prove. I have supplied the payslips that I got. She had no issues with Mafuko industries and had worked there since 2012. In addition she was a farmer and operated a shop. Our children are now enrolled in public schools since I could not afford to take them to private schools. I did not witness the accident. I do not know the exact time that she died.”

Submissions

10. The Appellants fault the trial court for failing to take into account the age of the deceased, her income and the level of dependency in its assessment of damages, and cite *Morris Mugambi & Silas Imanene (Jashid) v Isaiab Gitiru* (2004) eKLR, *Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini v A.M Lubia & Olive Lubia* (No. 2) (1985) eKLR and *Silas Muthuri Muraga & Anor v Margaret Mwengwa Munene* (2015) eKLR. They urge that their evidence that the deceased was self employed, a farmer and an employee at Mafuko Industries Ltd who had no health problems was not challenged, and rely on *Chunibhai J Patel & Anor v PF Hays & Others* (1957) EA 748 and *Vincent Silulu & Anor v Rose Wanjiru* (2016) eKLR. They urge that the global sum of Ksh. 900,000 for loss of dependency was manifestly low taking into account the deceased died at the age of 32 years, and cite *Jacob Maruja & Anor v Simeon Obayo* (2005) eKLR, *Isaack Kimani Kanyingi & Catherine Njeru Mugo v Hellena Wanjiru Rukanga* (2020)eKLR, *Kenya Breweries Ltd v Saro* (1991) eKLR and *David Mucheni v Stephen Johana Njue & Anor* Meru HCCA No. 21/2014.
11. The Respondents submit that the trial court adopted the correct legal principles in assessing damages for loss of dependency under the *Fatal Accidents Act*. They fault the Appellants for failing to prove that the deceased was employed at Mafuko Industries as at 2017, and the trial court’s pronouncement that there was no iota of evidence produced in proof of her earnings was accurate. They further accuse the Appellants of failing to prove that there was dependency upon the deceased, and cite *John Wamae & 2 Others v Jane Kituku Nziva & Anor* (2017) eKLR, *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* (1999) eKLR and *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* (2017) eKLR. In praying for the dismissal of the appeal with costs, they submit that the award of Ksh.900,000 was



well within the range of awards and thus neither inordinately high nor low, and cite *Stanwel Holdings Limited & Another v Rachael Haluku Emanuel & Another* (2020) eKLR and *Chen Wembo & 2 others v IKK & Another (Suing as legal representatives and administrators of the estate of CRK - Deceased)* (2017) eKLR.

Analysis and Determination

12. After considering the grounds of appeal as listed, the issues for determination are two fold whether the award made by the trial court for loss of dependency was inordinately low; and whether the Appellants' evidence and authorities were considered.
13. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled 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).”

Loss of dependency

14. Dependency is a matter of fact and must be proved by evidence. PW1 testified that, “The deceased was my wife. She was working at Mafuko industries and was salaried getting Kshs. 17,000 per month. She was also a business lady. She was a farmer and had a general retail shop. She grew cabbages, tomatoes and kales...We had 3 children. SKK - 1st born, TM - 2nd born, VM - 3rd born. My wife was our sole bread winner since I was a casual labourer. We have suffered following her demise since I had to transfer my children to public school. My wife died at 32 years.” On cross examination, he stated that, “I confirm that the deceased was under a renewable contract at Mafuko Industries – PEX 8 – staff card proves as such. I do not have contract document she had with Mafuko. We can only tell the terms of the contract only if I avail the contract...Deceased died on 11/11/17 on the date of the accident. She died on the spot. PEX – 9 (bundle of pay slips) shows that they are for January 2019, April 2016 and July 2016. I have provided payslips for the year 2016. I did not provide recent pay slips or any for the year 2017. I have no evidence to prove that the deceased was employed by Mafuko Industries as at 2017. Deceased was getting Kshs. 17,000 per month. The pay slips in court shows the next pay as 11,000/=, 12000/= and 13,000/= and I have no evidence such as a business permit to prove that deceased operated a business... I have no evidence to show that I transferred my children from private schools to public schools.”
15. According to the Staff Identification Card produced in court, the deceased was indeed a contract employee at Mafuko Industries Limited. It is indicated in the said Staff I.D that the deceased had been “Employed under the Terms and Conditions as per your Employment Contract.” It was therefore incumbent upon the Appellants to produce the said employment contract which contained the terms of employment and duration.
16. This court concurs with the trial court's award of a global sum for loss of dependency, because the Appellants only proved that the deceased was an employee at Mafuko Industries Limited on contract



basis, but they did not prove that she was still in employment at the time of her death in 2017 as the 3 pay slips they produced were for 2016 and the contract document was not produced to show the terms of employment and the duration.

Consideration of the Appellants' evidence and authorities

17. The trial court duly analyzed the evidence on record and properly found that the Appellants had not proved that the deceased was still an employee of Mafuko Industries Limited at the time of her death, to justify the adoption of a multiplier approach. The cases cited by the Appellants were thus inapplicable as they supported the adoption of a multiplier approach as opposed to a global approach.
18. However, the global sum of ksh.900,000/- loss of dependency is on the lower side having regard to the principle of comparable awards in comparable cases. A sum of Ksh.2,000,000/- is reasonable.
19. In *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased))* [2021] eKLR, the court (Njoki Mwangi J) upheld the trial court's global award of Ksh. 2,000,000 for loss of dependency for a 40 year old deceased who was married with 2 school going children.
20. This court in *H. Khalif v Isaac M'imaria M'kirea and Zipporah Mukomene Ntundu (Suing as the legal representative of the estate of JMM (deceased))* (Meru HCCA No. E127 of 2021) upheld the trial court's global award of Ksh. 2,000,000 for loss of dependency for 35 year old deceased who left behind 2 minors under the care of his parents.

Orders

21. Accordingly, for the reasons set out above, the appeal is allowed and judgment of trial court set aside to the extent only the sum awarded for loss of dependency substituting for the sum of Ksh.900,000/-, an award of Ksh.2,000,000/-. The other awards remain unaffected.
22. As the appeal has only partially succeeded, there shall be no order as to costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Kiogora Arithi & Associates Advocates for the Appellants.

M/S Mithega Kariuki Advocates for the respondents.

