



**Mungai (Suing as the legal Administrator of the Estate of Samuel Mungai Munyao - Deceased) v Kinyanjui & another (Civil Appeal E041 of 2021) [2023] KEHC 3838 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E041 OF 2021  
GL NZIOKA, J  
MAY 4, 2023**

**BETWEEN**

**MIRIAM WANJIRU MUNGAI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF SAMUEL MUNGAI MUNYAO - DECEASED) ..... APPELLANT**

**AND**

**ISAAC NJENGA KINYANJUI ..... 1<sup>ST</sup> RESPONDENT**

**NJEKI TRANSPORTERS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appellant filed a suit at the Chief Magistrate's court at Naivasha being civil case no 384 of 2020; claiming for general and special damages as a result of injuries the deceased suffered in a road traffic accident on or about February 3, 2020, caused by the negligence of the Respondents.
2. Subsequently following negotiation out of court, the parties agreed on settlement of liability at 85:15% in favour of the appellant as against the Respondents. The matter proceeded on the assessment of Quantum. By a judgment delivered on July 28, 2021, the learned trial magistrate Hon K Bidali awarded the Appellant damages as follows
  - a. Pain and suffering - Kshs 50,000
  - b. Loss of expectation of life - Kshs 200,000
  - c. Loss of dependency - Kshs 1,100,000
  - d. Special damages - Kshs 64,165



3. However the Appellant is aggrieved with the award and seeks that, the subject judgment be reviewed and/or set aside and the court re-assess damages payable to the appellant and respondent be ordered to pay the costs of the appeal. The appeal is based on the grounds that
  - a. That, the learned trial magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions on quantum payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant.
  - b. That, the learned trial magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before him.
4. The appeal was disposed of by filing of submission. The appellant submitted that, though the trial magistrate analyzed the law properly on the applicable principles, he failed to consider the parties' submissions on record. That both parties in their submissions had agreed that on a dependency ratio of 2/3 the only variation being the multiplier. However, the trial magistrate used a dependency ratio of 1/3 and 20 years as the multiplier, both being below what the parties had suggested.
5. It was argued that there was no justification for the trial magistrate to revise the proposals downwards and he had misdirected himself and therefore arrived at the wrong decision. That in Privy Council In *Nance vs British Colombia Electric Railway Co Ltd* (1951) AC 601, 613 and *Mbogo vs Shab* (1968) EA 93 the court lay the principles applicable for an appellate court to interfere with an award of damages and stated that it applied where the court had misdirected itself on some matters and as a result arrived at a wrong decision.
6. Further, the appellant submitted that section 4 of the *Fatal Accidents Act* recognizes the parents and children of the deceased as dependents. That the deceased was single but was taking care of his mother and his child. That in such cases, courts tend to adopt a dependency ratio of 2/3 and relied on the case of *Abdimana Abdulwahab & Another vs Janet Njeri Wambui & Another (Suing as the legal representative for and on behalf of the Estate of Jane Wambui Kiragu (deceased))* 2021 eKLR where it was held that the dependency ratio for a man who maintains his family household is 2/3 of his income.
7. Furthermore, the appellant urged the court to use 31 years as multiplicand stating that it would be reasonable in the circumstances. That, there was no issue with the adoption of the minimum wage by the trial court. That in the circumstances, the court should set aside the award on loss of dependency and substitute it with Ksh 3,410,000/-
8. The appellant also prayed for costs and interest from the date of the lower court's judgment.
9. However, the Respondent in response submitted that the subject of appeal being assessment of damages for loss of dependency under the *Fatal Accident Act*, the court must take into account the principles for assessment of damages set out in the case of *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another* HCCC No 1638 of 1998 where Ringera J (as he then was) stated that the court must find out the multiplicand from the net earnings of the deceased, which shall be multiplied by the multiplier considering the expectation of earning life of the deceased, the expectation of life and the dependency of the dependents and chances of life of the deceased and dependents. That the sum arrived at must then be discounted to allow for legitimate considerations such as the award being received in lump sum and if wisely invested would yield returns of an income nature.
10. The respondents argued that the taking into consideration that the deceased a casual labourer, that he had separated with his wife and was not living with his daughter, the dependency ration adopted



- by the trial magistrate was reasonable and should be upheld. That dependency was a matter of fact pegged on evidence.
11. They relied on Kisumu Court of Appeal Civil Appeal No 86 of 2016 *Dickson Taabu Ogutu (suing as the legal representative of the estate of Wilberforce Ouma Wanyama) and Festus Akolo & Another* where the court upheld a dependency ration of 1/3 stating that the onus was on the appellant to prove that his aged parents were dependants of the deceased and the extent of loss they suffered considering that the appellant being their son had a job.
  12. The respondents further cited the case of *Kenya Bus Services & Another v Fredrick Mayende* (1988-92) 2 KAR, 232 where the court stated that in an action for damages plaintiff must prove particulars of loss.
  13. The respondents submitted parties' submissions are persuasive tools that a court can consider. That the trial magistrate was not bound by their submissions but by law and evidence before it. That in reaching his decision to give dependency ration of 1/3 the trial magistrate took into account that the deceased had only one dependant, his daughter, who he was not living with and therefore only a small portion of his earnings would go to her upkeep.
  14. That the appellant failed to demonstrate the extent to which she was depending on the deceased and therefore shoe should not be factored.
  15. Further, the respondents urged the court to uphold the multiplier of 20 years used by the trial court considering the vicissitudes of life age of the deceased, the balance of earning life, age of dependents and length of dependency as stated in *FMM and another vs Joseph Njuguna Kuria* (2016) Eklr.
  16. It was argued that the cause of action having arose on the February 3, 2020, the *Regulation of Wages (General) (Amendment) Order, 2018* was applicable and therefore the applicable rate of income at the time was Ksh 7,241/-. That, the court sets aside the multiplicand of Kshs 13,750 and substitute it with a multiplicand of Ksh 7,241 and award loss of dependency of Ksh 579,280/-. That the award will be subject to liability as consented.
  17. Having considered the material before the court I find that, the role of the 1<sup>st</sup> appellate court as stated in the case of *Selle & Another -vs- Associated Motor Boat Co Ltd & Others* (1968) EA 123, is to re-evaluate the evidence adduced in the trial court and arrive at its own finding taking into account that, it did not have the benefit of the demeanour of the witnesses.
  18. Based on the arguments of the parties herein, the only issue for consideration is the assessment of damages awarded for loss of dependency. The main borne of contention is that, the trial court, erred by applying the ratio of 1:3 instead of 2/3. The appellant is not contesting any other part of the judgment.
  19. However, the Respondents are opposed to the review of the ratio, but concede on a without prejudice basis that, if the court were to review the damages awarded for loss of dependency, then it should review the figure of Kshs 13,750 applied as the minimum wage to Kshs 7,241.
  20. Pursuant to the aforesaid, the issues to be considered are two told, whether to review the minimum wage amount awarded, and the ratio applied. As regards the minimum wage, I find that from the statement of Miriam Wanjiru Mungai, she stated the deceased who was her son, and used to work as a casual labourer. The averments in the plaint at paragraph 6, the accident occurred along Moi South Lake road at Orpower area. The accident was reported at Kongoni police station within Naivasha Sub-county. Finally, the letter dated 10/2/2020 written by Godfrey Chege, an Assistant Chief of Olkaria Sub-location, indicates, the deceased was a resident of his area of jurisdiction. It is therefore clear that, the deceased was resident within Naivasha Sub-county.



21. The minimum wage payable depends on the locality of the claimant. The Respondents have provided the court with a Legal Notice No 2 of the Labour Institution Act No 12 of 20027, wherein the schedule thereto provides the care of basic minimum monthly wages (exclusive of house allowance). The rates for Nairobi, Mombasa and Kisumu cities is Kshs 13,572.90. All other areas is Kshs 7,240.95. The Naivasha Sub-county falls under “all other areas” and therefore the rate that should have been applied was Kshs 7,240.95 and not Kshs 13,572.90. I therefore review the judgment in that regard, and set aside the rate of Kshs 13,572.90 and substitute it with a sum of Kshs 7,241.95.
22. As regards ratio applicable, I note from the submissions of both parties, they were in agreement as supported by their submissions that, the ratio of 2/3, therefore the trial court had no legal right to alter the ratio which the parties had conceded to. I therefore set aside the ratio of 1/3 applied and substitute it with the ratio of 2/3. Furthermore the Respondent had conceded to a period of 25 years. For the trial court to alter that period of 20 years on the argument that, “due to the vicissitudes of life” was erroneous. I therefore set aside the 20 years and substitute it with a period of 25 years. In that regard I make an award on the limb of general damages in relation to loss of dependency as follows:-
- Kshs  $7,241 \times 12 \times 25 \times \frac{2}{3} = 1,448,200$
- The resultant award in the entire suit will be
- Loss of dependency - 1,448,200
  - Pain and suffering - 50,000
  - Loss of expectation of life - 200,000
  - Special damaged - 64,165
- Total amount 1,762,365.00
23. The above sum will attract interest at court rates from date of judgment in the lower court to payment in full. The costs are awarded in relation to the suit in Chief Magistrate’s court. No costs are awarded herein.
24. The total amount awarded shall be subject to reduction by 15% liability borne by the appellant.
25. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 4<sup>TH</sup> DAY OF MAY 2023**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:-**

Mr. Safari for the Respondent

Mr. Owuor for the Appellant

**Ms Ogutu- Court assistant**

