



Njagi v Ngugi & another (Suing as the personal representatives of the estate of Gedion Kamwe) (Civil Appeal E009 of 2020) [2023] KEHC 17682 (KLR) (23 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E009 OF 2020
RM MWONGO, J
MAY 23, 2023**

BETWEEN

PETER NJIRU NJAGI APPELLANT

AND

SUSAN WANJIRU MUGO 1ST RESPONDENT

DAVIS NGUGI 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
GEDION KAMWE**

*(Being an appeal against the judgment of Hon. E.O Wambo, SRM
delivered on 28th September, 2020 in Kerugoya CRMCC No 155 of 2019)*

JUDGMENT

Background

1. This appeal is against only the findings of the lower court on quantum in respect of an accident that occurred on July 1, 2019 along Sagana - Kenol Road between vehicle Reg No KCH 705Z and motorcycle Reg No KMDG 359. The motor cyclist died in the accident.
2. The lower court's award was as follows:
 - a. Liability was established at 80%: 20% in favour of the plaintiff
 - b. Damages for pain and suffering Kshs 100,000/-
 - c. Loss of expectation of life Kshs 100,000/-
 - d. Loss of dependency Kshs 2,500,000/-
 - e. Special damages Kshs 51,070/-



- f. Costs and interest of the suit 14% from September 28, 2020 to July 27, 2021
3. Dissatisfied with the award, the appellant appealed to this court on the following grounds:
 1. That the learned trial magistrate erred in law and fact in the manner that he assessed damages for loss of dependency in that he did not justify whether he used a multiplier approach or global sum for award of damages that were excessive.
 2. That the learned trial magistrate erred in law and fact in awarding an excessive sum on the head of pain and suffering.
 3. That the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions on loss of dependency.

Brief Facts

4. The plaintiff's case was that on July 1, 2019 the deceased was a lawful rider of motor cycle registration number KMDG 359Y along the Kenol-Sagana Road when the defendant negligently drove motor vehicle registration number KCH 705 Z and caused it to encroach on the deceased's lane and hit the deceased occasioning him injuries and eventually death.
5. The claim therein was for general damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages as well as costs and interests of the suit in respect of an accident which occurred on July 1, 2019.

Appellant's Submissions

6. On loss of dependency: The trial magistrate fell into error by failing to consider the parties' submissions and relate them to the facts of the case before him. The trial court did not show what similar cases it applied to arrive at the global award of Kshs 2,500,000 damages for loss of dependency thus made the award without any basis making it arbitrary which makes this court interfere with its finding.
7. The appellant submit that the trial court should have applied the well-known and established principles and practices of multiplicand, multiplier and the ratio, more so when both the plaintiff and defendant had submitted on that mode.
8. In the case of *Catholic Diocese of Machakos & another v Janet Munaa Mutua & another* [2021] eKLR the court held that global awards are generally suitable in cases involving minor, adolescents whose income cannot be ascertained.
9. The appellant submitted that an award under this head should be worked out as follows Kshs 12,522.70 (minimum wage legal notice No 2 of 2019) x 12 (months) x 18 years (multiplier) x | (dependency)= Kshs 1,803,268.80/-. The appellant argued that assuming the court was right in adopting the global approach, the amount of Kshs 2,500,000 was inordinately high given the occupation, age of the deceased and that the dependency on the deceased would only be to a certain extent (not more than 2/3).
10. The court in *Amazon Energy Limited v Josephine Martha Musyoka & another* (2019) eKLR paragraph 36 stated:

“In making a global award, the trial court should always ask itself whether the award made is close to an award that could have been made using the multiplier approach taking into account the age of the deceased, and using the minimum wage of a general worker, where



the earnings of the deceased cannot be ascertained. It will be unjust for the lump sum to be much higher than the award to the estate of a deceased whose earnings have been established and a multiplier approach used.”

11. Using the global approach method, the appellant submitted that Kshs 1,800,000 correctly fits the gap as a suitable replacement to the multiplier approach.
12. On pain and suffering: the appellant argued that in awarding Kshs 100,000, the trial court wrongly relied on the case of *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR. The authority cited by the honorable magistrate at paragraph 16 shows deceased died 4 months after the accident a clear indication that the pain and suffering was prolonged before death thus the award of Kshs 200,000.
13. In the present case, the deceased died instantly as confirmed by his wife and therefore was spared any pain and suffering. Thus, an award of Kshs 10,000 would suffice. the appellant relies on the case of *James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Gitthinji* [2015] eKLR where an award of Kshs 10,000 was assessed.

Respondent Submissions

14. On loss of dependency: the respondent submitted that it is settled law, that an appellate court will only interfere with an award in damages, if the award is so inordinately low or high as to represent an entirely erroneous estimate, as stated in the case of *Butt v Khan* civil appeal No 40 of 1997. There it was stated:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneousbased on some wrong principle or on a misappropriation of the evidence”
15. The respondent contends that the finding and assessment of damages were not excessive and the court considered all the relevant evidence, submissions and authorities. The damages awarded were realistic and reasonable.
16. On the first ground of appeal is that the trial court erred in not justifying whether they used a multiplier or global sum approach. The trial magistrate indicated that he was applying the lump sum approach as the respondents had not demonstrated the actual earnings of the deceased. The respondent urges the dismissal of the appeal on this point as it is in the discretion of the magistrate to decide as to whether to use the global sum approach or multiplier approach.
17. The appellant had submitted that an award of Kshs 1,803,268/= was sufficient compensation (page 58 record of appeal.) The respondents on their part submitted that an award of Kshs 10,000,000/= would have been sufficient compensation for loss of dependency. (page 53 record of appeal.) the respondent states that the Kshs 2,500,000/= awarded by the trial court was reasonable and close to what was submitted by the appellant.
18. Reliance was placed on the case of *Twokay Chemicals Limited v Patrick Makau Mutisya & another* [2019] eKLR where the court quoted with approval the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu civil appeal No 284 of 2001; (2004) e KLR. There the Court of Appeal asserted the discretionary nature of general damages awards, and observed that 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 in the first instance.



19. In considering the multiplier approach the deceased would have been awarded a higher amount of general damages. He was running a hotel earning Kshs 50,000 running a hotel business.
20. Under multiplier approach, the deceased was aged 37 years and he left a young family. The hotel business has no retirement age. We propose a multiplier of 20 years will be sufficient. We refer the court to the case of *Kimunya Abednego v Zipporah S Musyoka & Anor* where the court adopted a multiplier of 20 years in a case where the deceased was aged 41 years.
21. Under the multiplier approach, the deceased would have been awarded 10,000,000/= (50,000 x 12 x 25x2/3).
22. On pain and suffering, the respondent submits that in awarding Kshs 100,000/=:, the trial magistrate considered previous decided case law and made fair award. In particular, in the case of *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another* [2021] eKLR the court awarded Kshs 100, 000/= for pain and suffering where the deceased died on the same day.

Analysis And Determination

23. This court's role in an appeal is captured in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* civil appeal No 21 of 1984 |1985| eKLR :

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

Loss Of Dependency

24. The appellant submits that the trial court should have applied the well-known and established principles and practices of multiplicand, multiplier and the ratio, more so when both the plaintiff and defendant had submitted on that mode.
25. In the case of *Catholic Diocese of Machakos & another v Janet Munaa Mutua & another* [2021] eKLR the court held that global awards are generally suitable in cases involving minors and adolescents whose income cannot be ascertained.
26. The appellant submits that an award under this head should be worked out as follows Kshs 12,522.70 (minimum wage legal notice No 2 of 2019) x 12 (months) x 18 years (multiplier) x | (dependency)= Kshs 1,803,268.80/-. The respondents on their part submitted that an award of Kshs 10,000,000/= would have been sufficient compensation for loss of dependency. They submit that the Kshs 2,500,000/= awarded by the trial court was reasonable and close to what was submitted by the appellant.
27. Under the multiplier approach, the deceased was aged 37 years and he left a young family. The hotel business has no retirement age. We propose a multiplier of 20 years will be sufficient.
28. In the plaint, the plaintiff pleaded that deceased was aged 37 years, he had a wife and two children. He worked as a businessman and a farmer earning 50,000. in addition, PW3- Susan Wanjiru Mugo testified that her deceased husband was a businessman earning Kshs 50,000. He operated a restaurant.



29. The trial court gave a lump sum of Kshs 2,500,000 damages for loss of dependency as the plaintiff was not able to prove the actual income of the deceased. The court was guided by the case of Ayub Ayiga Murusa where the court rejected the contention that an award of damages can only be supported if there is documentary evidence to prove earnings as that would do injustice to a lot of Kenyans who do not maintain records and many are even illiterate.
30. The trial court also relied on *Mary Khayesi Awalo & another v Mwilu Malungu & another* [1999] eKLR where it was held:
- “As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books.”
31. Accordingly, I see no reason to interfere with the trial court’s determination in this regard, and find that an award of Kshs 2,500,000 was reasonable.

Pain and Suffering

32. In awarding Kshs 100,000 under this head, the trial court did not indicate the case relied upon.
33. In this case the trial Magistrate clearly stated he was guided by the case of *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR. There, the award of Kshs 200,000/- was made where the deceased died 4 months after the accident a clear indication that the pain and suffering was prolonged before death.
34. The trial court noted that in this case the deceased died instantly as confirmed by his wife and therefore was spared any pain and suffering, thus an award of Kshs 100,000 would suffice.
35. However, the appellant pointed to the case of *James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji* [2015] eKLR. There, an award of Kshs 10,000 was assessed where it was not clear how long after the accident the deceased died.
36. The respondents submitted that an award of Kshs 100,000 was reasonable in the circumstances and relied on the decision in *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another* [2021] eKLR where the court awarded Kshs 100, 000/= for pain and suffering where the deceased died within thirty minutes of the accident and stated that Kshs 10,000/- was an award of the ‘90s.
37. Similarly, in *David Kaburuka Gitau & another v Nancy Ann Wathithi Gitau* [2016] eKLR the court gave an award of Kshs 100,000 for pain and suffering for a person who died 30 minutes after the accident.
38. Thus, the award of Kshs 100,000 was reasonable, and I see no reason to interfere.
39. Accordingly, the appeal is dismissed with costs and the award of the lower court is confirmed.

DATED AT KERUGOYA THIS 23RD DAY OF MAY 2023

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RICHARD MWONGO

JUDGE



Delivered in the presence of:

Mr. Musundi - holding brief for Jayo for Appellant

Mwangi - holding brief for Wagiita Theuri for Respondent

Mr. Murage, Court Assistant

