



Wambu v Kathyiki & another (Suing as the Administrators of the Estate of Mutheo Kathyiki) (Civil Appeal E51 of 2021) [2023] KEHC 17646 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E51 OF 2021**

RK LIMO, J

MAY 22, 2023

BETWEEN

BENSON GICHANGI WAMBU APPELLANT

AND

KATHYIKI & MUSYOKA KATHYIKI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF MUTHEO KATHYIKI) RESPONDENT

(An Appeal from the Judgement of Hon. Magistrate F. Nekesa, delivered on 14th July, 2021 in Civil Suit No. 108 of 2018)

JUDGMENT

1. This is an appeal that arose from the judgement of Hon. F. Nekesa delivered on 14th July, 2021 in Kitui CMCC No. 108 of 2018. That case related to a fatal accident involving motor vehicle Registration No. KCD 947R belonging to the Appellant and Mutheo Kathyiki (Deceased) who was a pedestrian.
2. The claim was filed by Kathyiki Nzioki & Musyoka Kathyiki who was the administrators of the estate of the late Mutheo Kathyiki (deceased). They blamed the appellants for negligence in driving or managing motor vehicle Registration No. KCD 947R and blamed him for causing the accident and the subsequent death of the deceased.
3. It was averred that as a result of the deceased's death, the dependants had been subjected to loss and damage. The Respondents claimed for loss of dependency under the *Fatal Accidents Act* and damages for pain, suffering, lost years and loss of expectation of life under the *Law Reform Act* as well as special damages.
4. In his statement of defence dated 22nd June 2018, the Appellant denied allegations levelled against him by the Respondents and claimed that the accident was caused by the negligence of the deceased who among other acts of negligence, failing to take any care or any adequate precaution for her safety, failing to heed to the traffic rules and regulations when travelling and failing to belt up while travelling



knowing it to be dangerous. The Appellant also contested that doctrine of res ipsa loquitur applied against in the circumstances.

5. The brief facts surrounding the accident was presented by the Respondent's witnesses as well as the appellant.

Below is a summary of the evidence tendered.

6. Musyoka Kathyiki (PW1), one of the administrators of the estate of the deceased testified that the deceased who was his mother was knocked down by motor vehicle Registration No. KCD 947R along Kitui-Machakos Road. He testified that they used Kshs. 150,000 in burial expenses to bury the deceased who was then aged 84 years old. He added that the deceased was a source of blessings and moral support to the family. He stated that he did not witness the accident.
7. Cosmas Ngolo Kithyiki (PW2) the other administrator and a son to the deceased testified and stated that he witnessed the accident as it occurred at Kwa Mathitu Stage where he was with his mother the deceased. He stated that the subject motor vehicle was driven at a high speed and lost control and headed towards them. He stated that he jumped out of the way but the deceased got knocked down. He blamed the driver for over speeding.
8. PC Charles Kiprotich (PW3) attached to Kitui Traffic Office, testified that there was a fatal accident on 7.12.2017 at about 7:30am at Mathitu Area along Kitui-Machakos Road. The Officer however stated that he was not the investigating officer and neither witnessed the accident. He also stated that he did not have the O.B which had details on how the accident occurred.
9. The appellant called one witness in his defence. Inspector Gilachi Abdikadir Dida (DW1), the Traffic Base testified and brought the OB No. 19/12/2017 with investigation Diary. According to the information in the OB and the Investigation Diary, the deceased who was aged, suddenly emerged from a bush with a donkey along Kitui-Machakos Road. He testified that, as motor vehicle Registration No. KCD 947R was passing, suddenly the donkey crossed the road pulling the old lady along leading to a collision and the death of both the donkey and the old lady who both died on the spot. He testified that, the driver fearing retaliation proceeded to Kwa Vonza and reported the accident. He stated that Police Officer who carried the investigation was PC Gachahi and had been transferred to Molo. He blamed the deceased for the accident.
10. The trial court evaluated the evidence tendered and dismissed the evidence tendered by DW1 as hearsay and faulted the Appellant for not availing an eye witness. It found that PW2 was the only eye witness and by his account, the appellant's motor vehicle was speeding and held that the appellant was 80% to blame while the deceased carried 30% contribution negligence.
11. On quantum, the trial court made the following awards: -
 - a. Damages and suffering Kshs. 10,000
 - b. Damages for loss of expectation of life Kshs. 100,000
 - c. Loss of Dependency Kshs. 1,500,000
 - d. Special Damages Kshs. 16,000Total in Kshs. 1,626,075
Less 20% Contribution Kshs. 325,215
Total Kshs. 1,300,860



12. The Appellant felt aggrieved and filed this appeal raising the following grounds namely: -
- i. The Learned Magistrate erred in law and in fact by disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum.
 - ii. The Learned Magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.
 - iii. The Learned Magistrate erred in law and in fact in awarding judgment on general damages of Kshs 1, 626,075. - for fatal injuries without showing how she arrived at that figure and in total disregard of the submissions of the defendant on the issue of quantum.
13. In his written submissions through Counsel, the appellant's faults the trial court's award on dependency citing that the same was too high given that the deceased was 84 years old and was survived by adult children. He has contrasted the court's award in respect to this appeal to an award of a global figure of Kshs 2,000,000 which was awarded in the case of AINU SHAMSI HAULIERS VS MOSES SAKWA & ANOR (suing as the administrators of the estate of Ben Siguda Okach (deceased) (2021) eKLR. The deceased in the matter was 40 years old at the time of his death. He was survived by his wife aged 29 years old and his children aged 6 and 4 years old.
14. The Appellant has relied on the cases of Dora Mwawandu Samuel (suing on behalf of the Estate of Samuel Muweliani Jumamosi (deceased) vs Shabir M. Hassan (2021) eKLR where the deceased was aged 59 years old at the time of his death and was working as a horticultural farmer earning Kshs. 20,000/= per month and it was said that he used to contribute substantially to the maintenance of his dependants. The Court awarded a global figure of Kshs. 400,000/-.
15. The appellant also submits that there was double compensation as there was no indication that the trial court took into consideration the award given under the Fatal Accident's Act as well as the Law Reform Act. He has cited a court of appeal decision in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) vs Kiarie Shoe Stores Limited (2015) eKLR. In that case however, the Court of Appeal stated as follows on this issue;
- “Finally, on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.
- This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”
16. The Appellant submits that the trial court ought to have deducted the award under the Law Reform Act from the Award made under the Fatal Accidents as the beneficiary under both Acts was one and the same. He has cited the case of Seremo Korir & another v SS (suing as the legal representative of the estate of MS, Deceased) [2019] eKLR to support this contention.



17. The Respondents has opposed to this appeal and has filed written submissions through Counsel and justified the global award approach adopted by the trial court. He relies on the decision of Esther Kitonyi & Another (Suing as Administrator for the estate of the Late Joshua Mwathya versus Nicholas Maina & Another (No Citation given) where they claim a Court awarded Kshs. 1,500,000 for loss of dependency for a victim aged 69 years old.
18. The Respondent has also cited the case of Mary Njeri Murigi (personal representative of the estate of the deceased James Murigi Kungu) vs Peter Macharia & Anor (2016) eKLR where the court awarded a global figure of Kshs 4,000,000 for loss of dependency. The deceased was 60 years old at the time of his death in 2011, and worked as a contractor and a matatu operator.
19. They submit that prove of earning is not just proved by production of certificates and other documents as doing so, would disadvantage illiterate victims. They rely on the case of Jacob Ayiga Maruga & Another versus Simeon Obayo [2005] eKLR to buttress their contention.
20. They urge this court not to interfere with the discretion used by the trial court insisting that there are no reasons advanced for such interference. They rely on the case of Peter Namu Njeru versus Philemone Mwangoti [2016] eKLR.
21. This Court has considered this appeal and the response made. This appeal is basically on quantum but having gone through the record of proceedings, this Court has noted issues related to liability but in view of the fact that the issues were not raised and are not the subject of this appeal, this court will not address it because of the limitations placed on this court by the provisions of Order 42 Rule 4 of the Civil Procedure Rule.
22. The appellant is only challenging the quantum of damages. This Court is being called upon to reassess the quantum of damages payable. In Francis K. Righa v Mary Njeri (Suing as the Legal Representative of the Estate of James Kariuki Nganga (2021) eKLR, the court of appeal re-stated the role of an appellate court when it observed as follows;

“...that assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge’s findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision...”
23. The issues for determination in this appeal therefore, are;
 - i. Whether the award on loss of dependency was correct.
 - ii. Whether there was double award under *Law Reform Act* & Fatal Accident Act.
24. The evidence placed before the trial court showed that the deceased was 84 years old at the time of her death and that she worked as a farmer. There was however no concrete evidence on the deceased’s earnings and for this reason, the trial court took the approach of awarding a global figure. Both parties are in agreement with that approach. The only contention by the Appellant is that the award of Kshs 1,500,000/- was too high. The appellant has relied on several authorities where the courts made awards ranging between Kshs. 400,000/- and Kshs. 500,000/- while the respondent relied on an authority where an award of Ksh. 4,000,000/- was made.



25. In making the award, the trial court indicated that it was guided by the Senior Resident Magistrate's decision in the case of *Esther Kitonyi & Anor (suing as administrators for the estate of the late Joshua Mwathia) vs Nicholas Maina & Anor* where the court awarded a global figure of Kshs 1,200,000/- to a 69-year-old victim.
26. The adoption of a global figure or lump sum is an accepted method of assessment of damages which has been adopted by various courts. *Mabeya J in Michael Rimiri M'ingetha & another v Zipporah Mukomua M'ituri [2020] eKLR* stated as follows on dealing with situations where proof of income is not presented to the court;
- “..... All that documentary evidence does is to give the Court an estimation of the actual income a person derives from his economic activities. Where there is no such documentary evidence, the Court should then resort to the principle of lump sum.”
27. In *Albert Odawa v. Gichimu Githenji [2007] eKLR*, Koome J(as she then was) quoted *Ringera J in Mwanzia v. Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another* where he stated that;
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.
- Because of the inexactitude in ascertaining the income of the deceased, the trial Court was right in resorting to the lump sum principle.
- However, in resorting to the lump sum principle, a trial Court should be guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages.”
28. The determination of an award on loss of dependency depends on a number of factors like age of the dependants, level of dependency, age of the deceased and earning capacity.
29. In the case of *China Civil Engineering & Construction Company (K) Limited vs Mwanyoha Kazungu Mweni & Mweni Kazungu Mweni (Both suing on behalf of the Estate of Ndegwa Mzungu Mweni (Deceased) (2019) eKLR* where the court, upheld a lump sum award of Ksh. 700,000/- for loss of dependency made to a deceased who was a 79-year-old farmer.
30. In the case of *Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR*, the court set aside a global award of Ksh 2,000,000/- for loss of dependency and substituted it with the award of Kshs 800,000/- The deceased in the matter was a farmer and a businessman. He died at the age of 68 years and left behind a wife and adult children. The court held that the wife of the deceased was the only dependant as there was no evidence presented that the adult children depended on him.
31. The case relied upon by the Respondent of *Mary Njeri Murigi (personal representative of the estate of the deceased James Murigi Kungu) vs Peter Macharia & Anor (Supra)* is not the best comparative decision in my view. The court awarded Kshs 4,000,000/- for loss of dependency. Evidence adduced in the matter however was that the deceased was a businessman running matatu business and saving at least Kshs 2000/- with NTK Sacco and taking home Kshs 4000/- per day. Further, that he was a



building contractor and one of his sons was his foreman. Bank statements and NTK Sacco statements were produced to show the income received from the businesses estimated at Kshs 200,000/- per month.

32. In this matter the deceased was aged 84 years and that it is an advanced age by any standard. The children left behind are between 36 and 56 years old. PW1 testified that they only depended on the deceased for blessings and moral support therefore, from the foregoing, an award of Kshs. 1,500,000 for an 84-year-old was excessively high as to represent a wrong estimate. This court finds that there is the basis for this court to interfere with the award made by the trial which I hereby do. A lump sum award of Kshs. 600,000 in the circumstances is fair.
33. On the question of double compensation, this court takes the position whereas a trial court ought to bear in mind and therefore, take into account an award given under *Law Reform Act* when giving an award under Fatal Accident Act, there is no legal obligation that it should state that it has made the deduction. In this instance, the trial court awarded Kshs. 100,000 for loss of expectation of life and Kshs. 1,500,000 for loss of dependency under Fatal Accident's Act.
34. The question of double compensation was well illustrated by the Court of Appeal in *Hellen Waruguru (Suing as the Legal Representative of Peter Waweru Mwenja (deceased) versus Kiarie Shoe Stores Ltd [2015] eKLR* when it stated;

“An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2(5) provides that the rights conferred by or for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words “to be taken into account” and “to be deducted” are two different things. The words in section 4(2) of the *Fatal Accidents Act* are “taken into account”. The section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

35. In sum, this Court allows this appeal. The award of Kshs. 1,500,000 for loss of dependency is set aside and in its place, an award of Kshs. 600,000 is given.

The other awards are upheld. The Respondents are therefore, awarded as follows: -

- a. Pain and suffering Kshs. 10,000
- b. Loss of expectation of life Kshs. 100,000
- c. Loss of dependency Kshs. 600,000
- d. Special damages Kshs. 16,075
Kshs. 726,075
Less: the award under *Law Reform Act* (b) Kshs. 100,000
Kshs. 626,075



Less 20% Contribution Kshs. 125,215

Kshs. 500,860

The Respondents will have costs and interests of that sum in the Lower Court from the date of Judgement but the Appellant shall have costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

