



Karimba (Suing as the legal representative of the Estate of Christopher Mutahi Mwangi – Deceased) v Murigu & another (Civil Appeal 38 of 2022) [2023] KEHC 20680 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 38 OF 2022
LM NJUGUNA, J
JULY 21, 2023**

BETWEEN

CATHERINE MWENDWA KARIMBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHRISTOPHER MUTAHI MWANGI – DECEASED) APPELLANT

AND

**JOE NJIRI MURIGU 1ST RESPONDENT
TAMBUZI LIMITED 2ND RESPONDENT**

JUDGMENT

1. The Appellant herein filed in this court a memorandum of appeal against the judgment of the learned trial magistrate Hon. V. S. Kosgei (RM) in Karatina PMCC No. 51 of 2021 delivered on 28.06.2022. The grounds upon which the appeal is based are as enumerated on the face of the memorandum of appeal dated 20.07.2022.
2. The appellant thus prayed that the appeal be allowed with costs and the judgment of the trial court be set aside and costs of the appeal and that of lower court be borne by the respondents.
3. In the plaint dated 5th July 2021 it was pleaded that on or about 20.09.2020 the husband to the appellant was lawfully riding his motor cycle registration number KMDP 645B when the driver and/or the owner of motor vehicle registration number KBP 004J Toyota Prado so negligently, recklessly and/or carelessly drove, managed and controlled the said motor vehicle thereby causing the said vehicle to collide /knock and/or hit the deceased's motor cycle at Gitunduti area occasioning him fatal injuries.
4. When the appeal came up for hearing, the court directed that the appeal be canvassed by way of written submissions and all the parties complied with the directions.



5. The appellant submitted in reference to the following heads to wit; whether the court erred in failing to award damages for loss of consortium; whether the learned magistrate erred in law and in fact in awarding an inordinately low award under loss of dependency whether the learned magistrate erred in law and in fact while assessing the quantum of damages owed to the deceased's estate and who should bear the costs of the appeal.
6. On loss of consortium, it was submitted that there is no doubt that the deceased had a wife and children at the time of his death. Equally, it is not in doubt that the wife and children lost love and affection from the deceased husband and father respectively. Reliance was placed on the case of *Jeremiah Njuguna & Another Vs Anagleta J. Yator & Edel J. Biwott* (suing as the administratrix of the estate of the late Paul K. Kiplangat. The appellant faulted the trial court for failing to award damages under this head.
7. On loss of dependency, it was submitted that the evidence on record shows that the deceased was a middle aged man with a wife and five children. That out of the five, three were still minors of tender years while the other two were adults aged 19 and 20 years but still school going and thus dependent on the deceased. It was submitted that the deceased was the sole bread winner in the family as the appellant was just a house wife. The appellant decried the fact that the trial magistrate used the global award in calculating loss of dependency instead of applying the multiplier approach. Reliance was placed on the case of *Caleb Juma Nyabuto Vs Evance Otieno Magaka & another* [2021] eKLR. It was therefore proposed that an award under loss of dependency ought to have been based on proved income and/or multiplicand and therefore an amount of Kes. 6,000,000/= was proposed. The appellant submitted that in as much as the trial court failed to agree that the letter from the employer proved the exact amount of earnings by the deceased, there is no doubt he used to eke a living out of his work. This court was therefore urged to set aside the award of Kes. 1000, 000/= and award an amount of Kes. 2,500,000/= as the same would be more appropriate considering the current economic situation and prevailing inflation.
8. In reference to cost, it was submitted that the same follows the event. That when a party drags another to court for a claim and the party gets successful, then that party having made a demand to the respondent and successfully prosecuted her claim, she then ought to be awarded cost of the suit. This court was therefore urged to allow the costs of this appeal and that of the trial court with interests at court rates.
9. While addressing the damages on loss of dependency, the respondent submitted that there was no proof of earning and therefore, the trial magistrate was right to use the global sum approach. That the letter written by the parish was not so much to prove the veracity of its contents but the same had the sole objective of ensuring that the plaintiff obtained damages of a particular amount; and that most importantly the letter amounted to an unsupported statement of the deceased's earnings. Further that, the term 'net income' implied that the author of the letter knew the significance of that term in the computation of damages. This court was therefore urged to uphold the finding of the trial court to wit that the most applicable method to determine the loss of dependency in the circumstances herein, was the global sum approach since there was no concrete proof of multiplicand and by adopting the multiplier method, the same would have led to speculation. The respondent relied inter alia on the cases of *Njiru Benson Murage Vs Peter Njue Zacharia* (suing as the administrator of the Estate of Justin Mukundi Njue [2019] eKLR and *Mary Khayesi Awalo & Another Vs Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR.
10. On damages for loss of consortium, the respondent argued that there was no basis for this claim under the *Fatal Accidents Act* or under the *Law Reform Act*. This court was urged to uphold the finding of the trial court for the reason that no evidence was adduced in support of the said claim as there was no



indication of whether the appellant had since remarried or not; or whether at the very least, there was someone in the plaintiff's life that plays the role of her deceased's husband. Reliance to support this head was placed on the cases of *Acceller Global Logistics Vs Gladys Nasambu Waswa & another* [2020] eKLR, Court of Appeal in Nairobi Civil Appeal No. 4 of 1984; *Chege Kimotho & Others Vs Maria Vesters & Another* [1988] eKLR and *Miriam Jeptoo Saina & Another Vs Spencer Kipruto Kimeli & Another* [2018] eKLR. In the end, this court was urged to dismiss the appeal herein and instead uphold the trial court's finding as the same was well reasoned.

11. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, re-evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. Vs Associated Motor Boat Co. Ltd* [1968] EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni Vs Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga Vs Kiruga & Another* (1988) KLR 348). These authorities echo section 78 of the [Civil Procedure Act](#) and by dint of the same, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.
12. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in *Uganda Breweries Ltd Vs Uganda Railways Corporation* [2002] 2 EA 634 and *Odongo and Another Vs Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR).
13. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties herein. The court thus forms the view that it has been called upon to determine whether the appeal herein has merits.
14. The court has noted that the appeal herein is on quantum in relation to the loss of consortium and loss of dependency.
15. The appellant submitted that there is no doubt that the deceased had a wife and children at the time of his death. Further that, the wife and children lost love and affection from their deceased husband and father respectively; the respondent on the other hand stated that there was no basis for this claim under the [Fatal Accidents Act](#) or under the [Law Reform Act](#). This court was urged to uphold the finding of the trial court for the reason that no evidence was adduced in support of the said claim as there was no indication of whether the appellant had since remarried or not; or whether at the very least, there was someone in the plaintiff's life that played the role of her deceased's husband.
16. In its attempt to address the issue of loss of consortium, our courts have struggled to find a clear stand on the same. I say so for the reason that in the case of *Innocent Keti Makaya Denge Vs Peter Kipkore Cheserek & another* [2015] eKLR, Githua, J. was of the view that:

“With respect to the award of KShs. 150,000/- for loss of consortium, I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law. There is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. The [Law Reform Act](#) and the [Fatal Accidents Act](#) which are the two statutes which govern the award of damages in fatal accident claims recognize



only three heads of general damages and loss of consortium is not one of them. These are damages for pain and suffering, damages for loss of expectation of life and damages for loss of dependency.

In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own.

In light of the foregoing, the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law by the trial magistrate. The award was obviously made contrary to the law and cannot be allowed to stand. It is consequently set aside..."

17. However, in the Ruth Chepngeno Mutai Case (supra), Hon. Visram, J. was of the view that:

"As a result of the death of the Deceased, the Plaintiff lost a husband. She told this court that she had no intention to remarry. Taking into account the cited authorities and the circumstances of the Plaintiff in particular, I award her Kshs. 100,000/= for loss of consortium."
18. Similarly, in Paul Kioko Vs Samuel G. Karinga & 2 Others [2012] eKLR, Kshs. 100,000/= was awarded to a widower for loss of consortium and servitium; while in Rose Adisa Odari Vs Wilberforce Egesa Magoba [2009] eKLR, an award of Kshs. 50,000/= was made to the widow for loss of consortium in a case where the deceased was aged 35 years at the time of his death.
19. In the case of Micah Nyolei & Stanley Kiplagat Milgo Vs Bonventure Anthony Okumu & Another, an award of Kshs. 200,000/= was awarded on 22 July 2016 for loss of consortium by the High Court at Eldoret (Hon. Ngenye-Macharia, J.) while P B S & Another Vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016] eKLR, the Plaintiff was awarded Kshs. 800,000/= for loss of consortium by Hon. Aburili, J.
20. Clearly, therefore, there is sound basis for the claim and award of damages for loss of consortium in fatal accident matters. Indeed, in the Court of Appeal case of Salvadore De Luca Vs Abdullahi Hemedi Khalil & Another [1994] eKLR, held that:

"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."
21. In the case herein, the appellant pleaded for damages for loss of consortium and further submitted that there is no doubt that the deceased had a wife and children at the time of his death. Equally, that it was not in doubt that the wife and children lost love and affection from the deceased husband and father respectively. In my considered view, I am persuaded as Judge Githua was, that a claim of loss of consortium in a case where a husband or wife dies in a road accident is not provided for in the



law. However, in cases where a person is injured in an accident and is incapable of performing his/her conjugal duties, then a good case for an award on loss of consortium is made and damages can be awarded.

22. In regards to loss of dependency, the appellant submitted that the trial magistrate erred by using a global sum approach instead of using the multiplier method thus the same was inordinately low. The Court of Appeal in *Catholic Diocese of Kisumu Vs Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*, in appreciating that the assessment of damages is a discretion of the trial court held that:-

“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.”

23. Dependency is a matter of fact and must be proved by evidence as was held in *Abdalla Rubeya Hemed Vs Kayuma Mvurya & Another [2017] eKLR* as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

24. The appellant submitted that the deceased was a middle aged man with a wife and five children. That out of the five, three were still minors of tender years while the other two, though adults aged 19 and 20 years, were still school going and were dependent on the deceased. It was reiterated that the deceased was the sole bread winner in the family as the appellant was just a house wife. The appellant decried the fact that the trial magistrate used the global sum award in calculating loss of dependency instead of using the multiplier approach. The respondent on the other hand submitted that the trial magistrate was right in applying the global sum approach as there was no concrete proof of multiplicand and by adopting the multiplier method, the same would have led to speculation.

25. From the record, PW1 testified that the husband was a caretaker and a farmer; further, he was a rider when not at work. That he would get Kes. 1,000/= per day on top of Kes. 50,000/= per month. A perusal of the plaint dated 05.07.2021 at paragraph 8, the plaintiff/appellant stated that the deceased was a farmer and a caretaker earning at least Kes. 50,000.00. The respondents in my view, do not dispute the existence of the dependants of the deceased but were only skeptical of his earnings.

26. The trial court in its judgment noted that no evidence was adduced to support the proof of earnings as the plaintiff/appellant did not specify as to how the deceased operated the business or how he used the motor cycle to earn him some income. The trial court noted that the proof of earnings was merely speculative as no proper evidence was adduced by the appellant to support the claim. [See Section 109 *Evidence Act*]. This court shares the same observation as was noted by the trial court for the reason that it was not clear from the evidence before the court what exactly the deceased was doing prior to his death. This is so since according to the plaint, it was indicated that the deceased was a farmer and a caretaker earning at least Kes. 50,000/= while during the hearing, the appellant stated that the deceased was a caretaker and a farmer and that he could work as rider when not at work.



27. In the case of Francis Righa Vs Mary Njeri (Suing as the Legal Representative of the estate of James Kariuki Nganga (2021) eKLR, the Court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages for loss of dependency;
- “...on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of Roger Dainty v Mwinyi Omar Haji & Another 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life.”
28. But all said and done, there was evidence presented before the court that the deceased was earning a living as rider and as a caretaker. In my considered view the court ought to have applied the multiplier method but using the minimum wages applicable at the time given the fact that income of KShs. 50,000/= was not well demonstrated by evidence.
29. According to The Regulation of Wages (General) (Amendment) Order, 2018 the deceased falls in the category of a General Clerk earning a minimum wage of Kshs. 16,295.95/= per month. There are instances where the courts have relied on the minimum wage where the income of the deceased is not clear or was unascertainable. In the case of Nyamai Petronila & another Vs Monica Usyoki & another [2020] eKLR:
- “ 8. In this appeal, the appellant contends on the loss of dependency that though the certificate of death shows that the deceased was aged 49 years old and was a plumber, there were no records to show previously his monthly earnings. On multiplicand, it was submitted that the court erred as it used a multiplicand of Kshs. 10,000/- since there was no evidence of the deceased’s earnings and there was no evidence of the deceased’s employment. The court was urged to use the Multiplier approach in assessing damages which is a useful and practical method where factors such as age of the deceased, amount of annual monthly dependency are known. The Court was urged to assess the deceased income using the minimum wage of Kshs. 4,854/- which was the applicable minimum wage at the time of his death as published under Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013. In this regard, the Appellant relied on HCCA No. 108 of 2008 – Machakos Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR where it was noted that “... in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate is usually like a wage of an unskilled employee.””
30. Basing on the above, the multiplier method is hereby applied as follows: I find that the dependency ratio of 2/3 is reasonable considering that the deceased died at the age of 49 years and left behind 3 children out of 5 who were minors of tender ages. The multiplicand has been established to be Kshs. 16,295.95/= per month according to the minimum wage in application at the time of death of the deceased. The multiplier is the number of years that the deceased would have gainfully worked until retirement. In this case, I find it prudent to apply a multiplier of 11 years assuming that the deceased would have worked until the retirement age of 60 years. In the case of Isaack Abdikarim Abdile & another v Rose Kinanu Muchai (Legal Representative of the Estate of Paul Rufus Muguongo [2016] eKLR the court held:
- “The Deceased was aged 49 years when he met his untimely death. Therefore, the dependency would be for all the expected useful working life of the deceased. Some of the



dependants were minors at the time of his death. I will also consider other vicissitudes of life and life expected. Taking all these into account, I am persuaded to expect that the deceased would have worked up to 60 years- this would be the expected useful working age and is also the ordinary retirement age. I will, therefore, apply a multiplier of 11 years. “

In another case of John Simon Ashers & another Vs Nelson Okello Onjao [2020] eKLR the court held:

“ 18. In the absence of evidence of the deceased’s earning, I find that in calculating loss of dependency, the trial court rightly applied the multiplicand of Kshs. 7,000/-which was the minimum wage for an unskilled worker and a multiplier of 10 years since the deceased died at the age of 45 years. The dependency ratio of 2/3 is normally applied in a case where the deceased has dependents such as the deceased in this case and I find that the same was correctly applied.”

31. Therefore, the computation based on the multiplier method will be $2/3 \times 11 \times 16,295.95 \times 12 = 1,434,043.60/=$

32. Towards that end, I enter judgment as follows;

- a. Liability at 100%;
- b. Pain and suffering Kshs. 50,000/=
- c. Loss of expectation of life Kshs. 100,000/=
- d. Damages under *Fatal Accidents Act* Kshs. 1,434,043.60/=
- e. Special Damages Kshs. 200,930/=
- f. Costs of the trial court suit, this appeal and interest at court rates from the date of this judgment to full settlement to be borne by the respondents.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

