



REPUBLIC OF KENYA



KENYA LAW
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Kimani (Suing on behalf of the Estate of Angela Wangu Kimani) v Somoire (Civil Appeal 123 of 2022) [2023] KEHC 21490 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 123 OF 2022
RPV WENDOH, J
JULY 18, 2023**

BETWEEN

RUTH WANJIKU KIMANI (SUING ON BEHALF OF THE ESTATE OF ANGELA WANGU KIMANI) APPELLANT

AND

KELVIN SAITOTI SOMOIRE RESPONDENT

(An Appeal from the Judgement and Decree of Hon. Peter Areri Principal Magistrate (PM) dated and delivered on 27/9/2022 in Migori CMCC No. 37 of 2022)

JUDGMENT

1. This is an appeal by Ruth Wanjiku Kimani on behalf of the estate of Angela Wangu Kimani (Deceased). The appellant is represented by the firm of Brian Mboya & Co. Advocates.
2. The appellant's claim was commenced via a plaint dated 28/3/2022. The appellant pleaded that on or about 26/9/2020, the deceased was travelling as a lawful passenger in motor vehicle registration number KCU 492V along the Migori - Sori road; that at Osiri junction, the respondent, his authorized driver or servant negligently drove motor vehicle registration number KAH 551N that he caused it to violently ram into the motor vehicle that the deceased was travelling in, thereby occasioning her fatal injuries.
3. The appellant pleaded the particulars of negligence on the part of the respondent, particulars of loss pursuant to the *Fatal Accidents Act* Cap 32 and the *Law Reform Act* and particulars of special damages. The appellant prayed for general and special damages, costs of the suit, interest and any other relief the court deemed fit.
4. The respondent did not participate in the proceedings before the trial court and interlocutory judgement was entered against him on 10/5/2022. The suit proceeded for hearing 2/8/2022 and the



appellant testified on behalf of the estate of the deceased and produced various documents marked as PEXH 1 - 8 in support of her case.

5. The trial court entered judgement in favour of the appellant in the following terms: -
Liability - 100%.
Pain and Suffering - Kshs 150,000/=
Loss of expectation of life - Kshs 170,000/=
Loss of dependency - Kshs 1, 138, 720/=
Special damages - Kshs 192, 648/=
Total - Kshs 1, 651, 368/=.
6. Interest was to accrue from the date of the judgement until payment in full. The appellant was also awarded the costs of the suit.
7. Being dissatisfied with the judgement and decree of the trial court, the appellant commenced this appeal on the following grounds of appeal: -
 - a. The trial court erred in law and in fact by holding that the appellant would have left employment at thirty years yet the age of retirement for public servants in Kenya is sixty (60) years;
 - b. That the trial court erred in law and in fact by holding that the appellant would have left employment of the Kenyan Defence Forces and ventured into other employments to start her business yet no such evidence was led in the testimony of the plaintiff;
 - c. That the trial court erred in applying the wrong principles of law in establishing the loss of dependency thus arriving at a wrong verdict;
 - d. That the trial court erred in holding that under the head of loss of dependency was contrary to the weight of evidence presented taking into account the age of the deceased.
8. The appellant filed written submissions dated 18/1/2023 in support of her appeal. This court has read and considered the submissions made by the appellant.
9. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & another v Associated Motorboat Co. Ltd* [1968] EA 123.
10. It is also settled 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 on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbugua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”



11. Guided by the above decisions, I have read, understood and considered the grounds of appeal, the record of appeal and the submissions of the appellant. The issue which arises therefrom is whether the trial court assessed the damages on loss of dependency correctly.
12. The appellant contended that the deceased was serving in the Kenya Defence Forces at the time of her demise; that she was a public servant whose employment was regulated by the Kenyan labour laws and the retirement age is 60 years by virtue of the circular dated OP.CBA.2.7A of 20/3/2009. In reaching its finding, the trial court found that the deceased was to work for 8 years and the contract would have lapsed on 25/1/2029.
13. The appellant testified that the deceased was working as a Kenyan Defence Force Officer. There was no contract of employment produced in court but the leave pass (PEXH-8) shows that the deceased worked as a servicewoman. The deceased therefore was employed as a servicewoman with the Kenya Defence Forces.
14. The *Kenya Defence Forces Act* gives the title to persons who serve as service men/women a gender neutral word “service members.” A service member means any member of a service of the Defence Forces who is not an officer.
15. A service member serves what is described as “colour service.” Colour service is defined under the *Kenya Defence Forces Act* No. 25 of 2012 as service in the Defence Forces other than service in the reserve or in a cadet force and does not apply to officers.
16. The terms in which a person who serves as a service member are outlined in Section 253 of the *Kenya Defence Forces Act* No. 12 of 2012 as follows:-

253. Term of enlistment

- (1) The term for which a person who has attained the age of eighteen years may enlist, shall be one of the prescribed periods of colour service (not exceeding twelve years) beginning on the date of attestation.
- (2)
- (3) Within two years before completing the period of colour service of a service member who is of good character, the member, with the approval of the competent service authority, may re-engage for such further period of colour service as may be prescribed, subject to subsection (5).
- (4) Except as provided by subsection (6), the further period of colour service, together with the previous period of colour service, shall not exceed a total continuous period of twenty-one years colour service from the date, of the original attestation or the date upon which the person attained the age of eighteen years, whichever is the later.
- (5) A service member who has completed a period of twenty-one years colour service may-
 - (a) with the approval of the Service Commander or an Officer authorised by the Service Commander in that behalf, continue to serve from year to year in all respects as if the period of colour service were still unexpired, and
 - (b) at any time give to the member’s commanding officer three months’ notice to be discharged, and on the expiration of that notice the member may claim to be discharged.



- (6) A service member who completes a period of colour service (and any period by which that service is prolonged under subsection (6) of this section or under section 255 or is otherwise discharged (other than under sections 254 or 256) shall thereupon be transferred to the reserve and shall serve therein until attaining the age of fifty-five years.
17. Therefore, in computing the time in which a service member is enlisted to work with the Kenya Defence Forces, the service member is allowed to work for a colour of service not exceeding 12 years. Within 2 years before completion of the colour of service, the service member if they so wish, may be re-engaged for a period of upto 21 years. Thereafter, the service member is engaged on year to year contractual period until retirement at the age of 55 years. Therefore, the legitimate expectation of a service member to serve in the Defence Forces is up to 55 years which is the age of retirement.
18. This court is persuaded by the findings of Musyoka J in *Mombasa Maize Millers Limited vs Jennifer Linda Mutsiambo (suing as representative of the Estate of Festo Allan Mwashii, Deceased) & another* [2018] eKLR where the court considered the damages payable to a 23 years old deceased serviceman. The court took in to account the retirement age of 60 years and adopted a multiplicand of 30 years. The court also picked the dependency ratio of 1/3 since he was unmarried.
19. This court also adopts the same view. The deceased was only 9 months into employment and at the tender age of 22 years. Due to the vagaries of life and taking into account that the retirement age of a serviceman is the age of 55 years, I will adopt a retirement age of 50 years. It was testified that the deceased's parents, brothers and sisters depended on her. However, there is no evidence which was led to the extent of dependency. I find that the multiplicand of 30 years of remaining service and the ratio dependency of 1/3 is reasonable. The damages for loss of dependency is therefore worked out as follows:-

Kshs $35,585 \times 12 \times 30 \times 1/3 = 4,270,200.00$

20. The finding on the pain and suffering, loss of expectation of life, loss and special damages remain undisturbed.
21. Flowing from the above, this court does find reason to interfere with the judgement and decree of the trial court dated and delivered on September 27, 2022 and it is hereby set aside.

The appeal succeeds on the following terms: -

- a. Liability - 100%.
- b. Loss of dependency - Kshs 4, 270, 200
- c. Pain and Suffering - Kshs 150,000
- d. Loss of expectation of life - Kshs (170,000) Less
- e. Special Damages -Kshs 192, 648

Total- Kshs 4,612,848

The appellant is awarded costs of this appeal. Interest will start running from the date of the trial court's judgement.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF JULY,2023

R. WENDOH

JUDGE



Judgment delivered in the presence of:

Mr. Singei for the Appellant.

No appearance for the Respondent.

Emma / Phelix Court Assistant.

