



**Muriithi v Kiarie & another (Both Suing on Behalf of the Estate of Joseph Kiarie Ngina)
(Civil Appeal E021 of 2022) [2023] KEHC 19965 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E021 OF 2022
GMA DULU, J
JULY 13, 2023**

BETWEEN

ANTONY MACHARIA MURIITHI APPELLANT

AND

ANN NGINA NJOROGE 1ST RESPONDENT

TERESIA NYAMBURA KIARIE 2ND RESPONDENT

BOTH SUING ON BEHALF OF THE ESTATE OF JOSEPH KIARIE NGINA

*((From the judgment and decree of Hon. D. Wangeci (PM) delivered
in Voi Law Courts in CMCC No. 106 of 2020 on 28th April 2022))*

JUDGMENT

1. In a judgment delivered on April 28, 2022, the Magistrate’s court concluded as follows:-

“ 45. In the upshot, I enter judgment in favour of the plaintiffs against the defendant as follows:-

- a. Liability 100%
 - b. Pain and suffering Kshs 10,000/=
 - c. Loss of expectation of life Kshs 200,000/=
 - d. Loss of dependency Kshs 5,082,036/=
 - e. Loss of consortium Kshs 150,000/=
 - f. Special damages Kshs 80,000/=
- Total Kshs 5,522,036/=



Plus costs of the suit and interest at court rates.”

2. Dissatisfied with the judgment of the trial court, the appellant who was the defendant in the trial court has come to this court on appeal through counsel Cootow & Associates Advocates on the following grounds: –
 1. The learned trial Magistrate erred in law and fact in awarding the plaintiff a sum of Kshs 5,032,030/= as loss of dependency when neither evidence of employment nor income was adduced before court and the award went against the weight of evidence.
 2. The learned trial Magistrate erred in law and facts in adopting a monthly salary of Kshs 21,175.15 as a multiplicand when no such evidence was adduced before the trial court to prove income.
 3. The learned trial Magistrate erred in adopting the dependency ratio of two thirds (2/3) when there was no evidence that the plaintiff and or the alleged dependants depended solely to necessitate a ratio of 2/3.
 4. The learned trial Magistrate erred in fact in adopting a multiplier of 30 for the deceased who was aged 33 years and completely failed to consider vicissitudes of life when awarding damages.
 5. The learned trial Magistrate erred in fact and law in awarding plaintiff loss of consortium, fellowship and servitude when the court had awarded loss of dependency therefore amounting to double compensation.
 6. The learned trial Magistrate erred in fact in awarding damages for loss of consortium when there was no evidence on record to support such award.
 7. The learned trial Magistrate erred in law and fact in failing to exercise discretion judiciously and proceeded to arbitrarily award damages that were inordinately too high in the circumstances of the case.
 8. The trial court treated the submissions of the appellant lightly and disregarded the appellant’s evidence on record.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Cootow & Associates Advocates for the appellant and Njoroge Mwangi & Company for the respondent. Both sides cited decided court cases.
4. This being a first appeal, I have to be guided by the legal principle that as a first appellate court, I am duty bound to reconsider the evidence on record, evaluate it afresh and come to my own conclusions. See *Selle & Another Versus Associated Boat Company Ltd* (1968) EA 123.
5. This being an appeal mainly on quantum of damages, I have to bear in mind that the functions of awarding damages is an exercise of the trial courts discretionary power, and appellate courts should be slow to interfere with such awards – see *Butt =Versus= Khan* (1977) 1 KAR.
6. I also go by the reasoning of the case of *Catholic Diocese of Kisumu =Versus= Tete* (2004) eKLR wherein the court stated as follows:-

“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 or leaving out of account some relevant one or



misapprehending the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

7. During trial, the respondent who were the plaintiffs called three (3) witnesses. PW1 was Duncan Nyivisi Sakwa from Nakuru who explained how the accident wherein the deceased died occurred at about 3:30a.m at night in Ndara area near Voi on Nairobi – Mombasa road. He stated that he employed the deceased as a casual driver on trip basis to drive his vehicle to Mombasa which had a tyre burst, and that the accident occurred due to an over speeding by a lorry which hit his stationary vehicle when the deceased was replacing the tyre, and the deceased died on the spot.
8. PW2 was Teresia Nyambura Kiarie from Nakuru town who testified that she was wife of the deceased with one child aged 1 year 8 months. It was her evidence that the deceased earned Kshs 36,000/= as a truck driver, and that she and the child and the mother of the deceased, depended on him. She also testified that they incurred burial expenses and litigation expenses, and that she had not re-married.
9. PW3 was Cpl Judy Sigei a traffic police officer who conducted investigations and charged the lorry driver before the Voi SPM Court with causing death by dangerous driving and the said driver Antony Macharia Muriithi (the appellant) was fined Kshs 50,000/= or in default 1 year imprisonment.
10. I note that, though counsel for the appellant was granted a number of adjournments to call witnesses, he opted to close the defence case without calling any witness. In effect, apart from cross-examination, there was no contra evidence that was tendered in the trial to what the respondent’s witnesses stated.
11. The appeal was canvassed through written submissions. I have perused and considered the submissions filed by Cootow & Associates Advocates for the appellant, and the submissions filed by Njoroge Mwangi & Company Advocates for the respondents. Both sides relied on decided court cases.
12. The appellant has challenged the monetary awards made by the trial court in favour of the respondent on many grounds, and in submissions.
13. When the appellant says that the Magistrate erred in using a multiplicand of Kshs 21,175.15, because there is no evidence on the income of the deceased on record, that is not true. There is oral evidence on record from PW2 Teresia Nyambura Kiarie that the deceased was a truck driver earning Kshs 36,000/= Though there was no documentary proof of such testimony, as the proof required in civil cases is on the balance of probabilities, and considering that there was no contra evidence on record, and also since driving for pay does not necessarily mean formal employment where letters and payslips are issued, and since the deceased was actually driving a vehicle to Mombasa when he was killed, in a road traffic accident, it can logically be said that he was a qualified driver, or that he was a truck driver.
14. Thus in my view the trial court was correct in taking the minimum wage of a truck driver as the multiplicand.
15. The appellant’s counsel has also argued that the trial court erred in using a dependency ratio of 2/3. Again, from the evidence on record where PW2 stated that she was married to the deceased and that they had a 1 year and 8 months child, and that the deceased had a living dependant mother, which evidence was not controverted by other evidence, it cannot in my view be justified to state that the Magistrate erred in using a dependency ratio of 2/3.
16. The appellant through counsel has also complained that the trial Magistrate erred in using a multiplier of 30 years in this case where the deceased was aged 33 years. Indeed, PW2 stated that the deceased was aged 33. The trial Magistrate used a multiplier of 30 years, which would mean that the deceased economic working life would go to 63 years.



17. In my view, on the multiplier used, the trial court erred, firstly because the normal retirement age in Kenya is now 60 years, and there are no special circumstances on record that would suggest that he should have worked up to 63 years. Secondly, there is no evidence on record of a formal and continuous employment, or permanent employment of the deceased. Thirdly, the vagaries and vicissitudes of life should have been taken into account by the trial court in determining the multiplier.
18. Taking all the above factors in mind, in my view a multiplier of 17 years which puts the deceased's continued working life to 50 years would be reasonable, as there is no evidence that the deceased was on permanent or continuous formal employment. The multiplier should therefore be 17 years.
19. The appellant has also attacked the trial court's award for loss of consortium. This claim was pleaded under paragraph 11 of the plaint. Though the appellant contends that it was double compensation as there was already an award for loss of dependency, in my view, that contention is not correct. In my view, a husband or wife can be entitled to a modest award for loss of consortium, even if he or she has been awarded compensation for loss of dependency. Other dependants are not eligible for an award for loss of consortium and companionship. In my view therefore the amount of the award herein under this head was not inordinately high, nor was it invalid.
20. In conclusion, having considered the evidence on record afresh, the submissions on both sides before the trial court and on appeal, and the proposed figures for awards under various heads by counsel on both sides, and the law, I find that this appeal will be allowed in part, and the award for loss of dependency will be adjusted accordingly.
21. The resultant awards of damages will thus be as follows:-
 - a. Liability 100%
 - b. Pain and suffering Kshs 10,000/=
 - c. Loss of expectation of life Kshs 200,000/=
 - d. Loss of dependency $21,175.15 \times 17 \text{ years} \times 12 \text{ months} \times \frac{2}{3}$ Kshs 2,879,820/=
 - e. Loss of consortium Kshs. 150,000/=
 - f. Special damages Kshs 80,000/=Total Kshs 3,319,820/=
Plus costs and interest at court rates.
22. The appellant will also pay the respondent 70% of the costs of appeal.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Mr Ndambuki holding brief for Weloba for appellant

Mr Kazungu for respondent

Mr Otolo court clerk

