



Tumwesigye v Mutua & another (Both suing on behalf of the Estate of Michael Mutua Kavuli (Deceased)) (Civil Appeal E031 of 2022) [2023] KEHC 20206 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E031 OF 2022
GMA DULU, J
JULY 14, 2023**

BETWEEN

PHYLLIS KAMWADA TUMWESIGYE APPELLANT

AND

JONATHAN KAKOI MWALUKO 1ST RESPONDENT

FRANSISCA MUENI MUTUA 2ND RESPONDENT

**BOTH SUING ON BEHALF OF THE ESTATE OF MICHAEL MUTUA KAVULI
(DECEASED)**

*(From the judgement and decree of Hon. A. M. Obura (Mrs.) (CM) delivered
in Voi Law Courts on CMCC No. E0199 of 2022 on 29th July 2022)*

JUDGMENT

1. In a judgment delivered on 29th July 2023 the trial Magistrate entered judgment in favour of the plaintiff (now respondents herein), and awarded them damages under various heads, with costs and interest at court rates.
2. Aggrieved by the trial court's decision, the appellant, who was the defendant in the trial court has come to this court on appeal through counsel Jengo & Associates Advocates on several grounds as follows:-
 1. The court erred in law and in fact in placing the minimum wage of the deceased at Kshs. 27,023.95 hence ended up making an award for loss of expectancy that was inordinately high and erroneous.
 2. The learned Magistrate erred in fact and in law in her approach in assessment of general damages under the head of loss of dependency and therefore arrived at a sum that was inordinately high, excessive in the circumstances, unsustainable in law hence occasioning a miscarriage of justice.



3. The learned trial Magistrate erred in assessing damages for loss of dependency by applying the wrong principles in taking into account some irrelevant factors and leaving out of account relevant factors hence arrived at an award that was erroneous.
 4. The learned Magistrate erred in her approach in assessment of damages under the head of loss of consortium, fellowship and companionship and therefore arrived at a sum that was inordinately high, excessive in the circumstances, unsustainable in law hence occasioning a miscarriage of justice.
 5. The trial Magistrate erred in failing to apply the provisions of section 7 of the *Insurance (Motor Vehicle) Amendment Act* 2013 in ascertaining the income of the deceased in failing to apply the minimum wage.
 6. The award of loss of dependency and loss of consortium, fellowship and companionship was arbitrarily made without due regard to facts, law, evidence, judicial precedent, the parties submissions and considering relevant factors hence inordinately high.
3. That appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Jengo & Associates Advocates for the appellant, as well as the submissions filed by Njoroge Mwangi & Company Advocates for the respondents. I have to acknowledge here that each counsel relied on decided court cases.
 4. This being a first appeal, I have to be guided by the legal principle consistently applied by courts that as a first appellate court, I have a duty to reconsider and evaluate the evidence on record afresh and come to my own conclusions and inferences – see *Selle & Another = Versus = Associated Motor Boat Company Ltd and Others* (1968) EA 123.
 5. This appeal being basically an appeal on quantum of damages, I am guided by the principle stated in the case of *Catholic Diocese of Kisumu = Versus = Tete* (2004) eKLR, and the earlier case of *Butt = Versus = Khan* (1981) eKLR wherein the Court of Appeal stated that an appellate court can justifiably interfere with an award of damages made by the trial court only if it is satisfied that, the trial court applied wrong principles as by taking into account an irrelevant factor, or leaving out of account a relevant factor or misapprehended the evidence and so arrived at a figure so inordinately high or so inordinately low as to represent an entirely erroneous estimate.
 6. I have evaluated the evidence on record. In the present case, only one witness testified for the respondents who was 1st plaintiff, PW1 Fransisca Mueni Mutua. She stated that the deceased was her husband, who was a businessman, selling second hand clothes. He was the bread winner. She relied on her witness statement and produced several documents. She said that they had school going children, and that they spent Kshs. 80,000/= for the funeral. It was also her evidence that the deceased paid fees for the children.
 7. In cross-examination, she stated that her husband earned Kshs. 28,000/= monthly, but it was not constant. She did not have documents on income of the deceased, nor for the funeral expenses incurred.
 8. The appellant opted not to call any witness, and counsel for the parties then filed written submissions and left it to the court to write and pronounce its judgment.
 9. The appellant through counsel has challenged the way the trial court assessed the award of damages for loss of dependency. Counsel stated that the appellant does not have an issue with the multiplier and ratio of dependency used by the trial court, but has a problem with the multiplicand, as there was no documentary evidence to support the multiplicand applied by the trial court.



10. Counsel in particular, raises issue with the Magistrate finding that Kshs. 27,023.95 was the minimum wage, putting the deceased in the income scale of a cashier, heavy commercial vehicle driver, or salesman, while the deceased was just described as a general trader. Counsel proposed a multiplicand of Kshs. 7,240/ monthly, which was applicable to a general worker under the Regulation of Wages (General) Amendment Order 2018.
11. In my view, the trial Magistrate erred in placing the deceased at the level of a cashier's wages as there was no supporting documentary evidence, but I am also of the view that as a commodity seller items like clothes, he cannot be treated as a general worker at a monthly income of Kshs. 7,240/=. In my view, a middle figure of monthly income of Kshs. 20,000/= is a reasonable figure in view of the evidence on record, wherein there is no contra evidence tendered from another witness, or by the appellant. The figure of Kshs. 20,000/= will be the multiplicand. Thus the award for loss of dependency will be $20,000 \times 7 \text{ years} \times \frac{2}{3} \times 12 \text{ months} = \text{Kshs. } 1,120,000/=$ subject to agreed contribution.
12. The appellant also challenges the award under the head of loss of consortium. This claim was pleaded under paragraph 10 of the plaint. I note that counsel for the appellant has relied on the case of *Acceler Global Logistics =Versus= Gladys Nasambu Waswa & Another* (2020) eKLR wherein it was stated that damages for loss of consortium and companionship is only awarded in cases where a spouse is injured and incapacitated but is alive.
13. The respondent's counsel on the other hand, has relied on an earlier decision of the Court of Appeal in *Salvatore De Luca =Versus= Abdullah Hemed Khalif & Another* (1994) eKLR in which the Court of Appeal awarded Kshs. 40,000/= as loss of consortium in an appeal where the claim was rejected by the High Court Judge, and where the victim of the accident had died, just like in the present case.
14. In my view, each case will depend on its special and peculiar facts and circumstances. I note especially that in the decision by the Court of Appeal above, the learned Judges of Appeal observed as follows:-

“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..... The learned Judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium.”
15. In the present case, the trial Magistrate considered both the above two cases, together with other decided cases. The Magistrate noted that the claim was pleaded in the plaint, and that the respondent was 45 years and deceased was 48 years at death, and they had children between ages 7 years and 26 years, and awarded Kshs. 50,000/= subject to the agreed contribution.
16. With the above varying court decisions on awards for loss of consortium, I cannot say that the Magistrate erred in exercising the trial court's discretion to make the award for loss of consortium. Each case will depend on its special facts and circumstances. I am also not persuaded that the amount of award was excessive. I will thus uphold the award.
17. With regard to the ground of the Magistrate acting contrary to the provisions of Section 7 of the Insurance (Motor Vehicles) Amendment Act 2013 with regard to minimum wages, I find no violation of the law committed by the trial court. My understanding is that the section does not deal with minimum wages but the maximum amount which an insurer is bound to pay under an insurance policy.
18. Consequently, and for the above reasons, I allow the appeal in part, only with regard to the award on loss of dependency which will be as stated herein above in paragraph 11 of this judgment. Other awards are upheld.



19. The appellant will pay 80% of the respondent's costs of appeal.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF JULY 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Julu for appellant

Mr. Kazungu for respondent

Mr. Otolu court assistant

