



**Yuga & another v Kamau (Civil Appeal 208 of 2019)  
[2023] KEHC 20147 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 208 OF 2019**

**DKN MAGARE, J**

**JULY 6, 2023**

**BETWEEN**

**SALIM MOHAMMED YUGA ..... 1<sup>ST</sup> APPELLANT**

**ZAWADI ABDALA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE MUNGAI KAMAU ..... RESPONDENT**

*(Appeal arising from the decision of Hon. R Mutai  
in Mombasa CMCC 75 of 2015 given on 18/7/2018.)*

**JUDGMENT**

1. The appeal is a straight forward one. The appeal arose from the decision of Hon. R Mutai in Mombasa CMCC 75 of 2015 given on 18/7/2018. The record of Appeal was filed on 11/9/2020 and I gave directions for hearing of the appeal.
2. It is an appeal from the decision of the lower court awarding damages for loss of dependency at 1/3 while the Appellant was craving for 2/3. This is the only issue in this appeal.

**Duty of the first Appellate court**

3. The duty of the 1<sup>st</sup> Appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of



particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

4. In the case of *Peters vs Sunday Post Limited* [1985] EA 424, court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
5. The Court is to bear in mind that it has neither seen the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
6. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”
7. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.
8. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

### **Pleadings and Evidence**

9. Given the nature of the dispute or the issue at hand I will limit the pleadings and evidence to issues pleaded and testified on related to loss of dependency.
10. The Plaintiffs described themselves as administrators and dependants of the estate of the deceased who was 32 years. The deceased is said to have a father and three 33-year old sisters, and children aged 13, 7 and 4 year. There was no pleading in respect of the mother and wife. For purposes of loss of dependency, the father and 3 children are counted as dependants.
11. The defendant filed defence and denied that the three sisters are dependants. From the outset, it is a moot point as the defendant was correct. Under section 4 of the *Fatal Accidents Act*, provides as follows: -

“ 4. Action to be for benefit of family of deceased

- (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided



amongst those persons in such shares as the court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

- (2) In assessing damages, under the provisions of subsection (1), the court shall not take into account—
- (a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;
  - (b) any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.”

12. Liability was agreed at 20: 80.
13. The 1<sup>st</sup> plaintiff testified that the deceased was married but the son was separated from the wife. I recall that he also did not list his wife as one of the dependents, though stating that he stays with her.
14. The plaintiff was not a dependant for purpose of the law relating to *Fatal Accidents Act*.
15. The Court awarded the following: -
  - a. Loss of expectation of life 100,000/=
  - b. Pain and suffering 50,000/=
  - c. Loss of dependency 500,112 (5436 x12x 23 x13)
  - d. Specials 45,000/=

### **Analysis**

16. Dependency is a matter of fact. It has to be proved. The court is to determine only 1 issue, dependency. There is no dispute regarding multiplicand and multiplier. The main issue is loss of dependency. The evidence was the deceased was a fisherman in Tiwi. He was not by all means, an agricultural worker. He can be regarded as a general labourer, so the award should be based on a general worker.
17. By basing the award on the deceased being an agricultural worker and unskilled one, the court did not exercise discretion properly. A sum of Ksh 10,107 was the rate gazetted for general workers. This amount could still be gotten from the average between 5,000/= to 15,000/=, which the deceased used to get. This piece evidence was not challenged.
18. I therefore agree with the third ground that the court fell into error. The second error is that the court used 2015 rates. The rates to be used were 2014 rates, since that is when the deceased died on 13/9/2014. However, some findings of fact are clearly disturbing. The court was copy pasting from a different case. At the beginning of the judgment, he indicated the deceased had 2 children. At the end he said the deceased had only 2 dependants, who were his uncles.
19. The children as pleaded are two boys and a girl. There was no disputation on the same. The court therefore erred in stating that the deceased only left uncles as dependants.



20. The error took him to a downward spiral that ended treating the deceased as single. The court should have had a cultural context of this case, where once a person dies and there is likelihood of compensation, old men gain a false sense of sense-importance and jettison widows to the back banner.
21. The Appellant lied that he was a father till the defence got him out of the same. I hold that he was also lying about the mother of the children so as to have his hand on the money. I do not believe as true that the deceased and the wife were separated. I equally don't believe that the 1<sup>st</sup> appellant is the sole protector of the children. That will have an impact on what I will be saying shortly.
22. However, whether or not the wife was separated, it has no legal effect. Even if they were divorced, the presence of children, especially children of tender years, increases the work a person does. In fact, where a father has children without a wife, there is a heavier burden of dependency. The courts will be tempted to increase dependency to 4/5. This is also in occasions where we have otherwise single parent headed households, which are increasingly becoming a reality.
23. I therefore hold and find that the court fell into a deep error by relying on facts not born out of evidence. I set aside the finding and the award on loss of dependency. The same is clearly erroneous. I also set aside the award of Ksh. 5,437. The deceased was not an agricultural worker but a fisherman in Tiwi. The court takes judicial notice under section 60(1) (h) which provides as doth: -

“The courts shall take judicial notice of the following facts—

- (h) natural and artificial divisions of time, and geographical divisions of the world, and public holiday.”

24. Tiwi is about 24 km south of Mombasa law courts, within Kwale county. This is within the other municipalities other than Mombasa, Kisumu and Nairobi.
25. Under the regulation of wages(general)(amendment) order, 2015, legal notice no. 197 of 2013 dated 30/7/2013 a general labourer is entitled to Ksh. 9024.15 as a minimum wage.
26. Further, though the court was correct that the deceased could have retired at 55, the court was under duty to accurate the award downwards to take into consideration the vicissitudes of life and other preponderances. The multiplier should therefore be accelerated to 18 instead of 23. This is because the payments are being given in a lump sum
27. This works out to be as follows: -

$$18 \times 12 \times \frac{2}{3} \times 9,023.15 = 1,299,333.60$$

28. The court therefore sets aside the award of Ksh 500,112 and awards Ksh. 1,299,333.60 as damages for loss of dependency. This works out as follows:-
- a. Loss of expectation of life 100,000/=
  - b. Pain and suffering 50,000/=
  - c. Loss of dependency  $18 \times 12 \times \frac{2}{3} \times 9023.15 = 1,299,333.60$
  - d. Specials 45,000/=
- Subtotal Ksh. 1,494,333.60
- Less 20% liability 298,866.72
- Sum due – 1,195,466.88



29. I therefore make the following orders: -

- a. I allow the appeal, set aside the judgment of the lower court as aforesaid and enter judgment for the Appellant at Ksh 1,195,466.88 costs and interest made up as hereunder:
  - i. Loss of expectation of life Ksh 100,000/=
  - ii. Pain and suffering Ksh 50,000/=
  - iii. Loss of dependency  $18 \times 12 \times \frac{x^2}{3} \times \text{Ksh } 9023.15$   
Ksh 1,299,333.60
  - iv. Specials damages Ksh 45,000/=  
Subtotal Ksh. 1,494,333.60  
Less 20% liability Ksh 298,866.72  
Sum due – Ksh 1,195,466.88
- b. Interest on specials should be from the date of filing while other damages from the date of entry of judgment in the lower court.
- c. The Appellant will have costs of Ksh 95,000.
- d. Judgment be served on the trial court.
- e. Upon the advocates settling the issue of their fees, 75% the net amount should be shared and invested in the names of Zawadi abdalla Sinango and deceased widow who was the mother of the children, with the last born taking 30 % and the other 2 children sharing equally at 20% each. 20% shall be given to the widow with each of the administrators taking 15,000/= each as costs of the administration.
- f. The file is closed

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6<sup>TH</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

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**KIZITO MAGARE**

**JUDGE**

In the presence of:-

No appearance for parties

