



**Maina v Njuguna & another (Suing as Legal Representatives of the Estate of Julius Kamande Muchoki - Deceased) & another (Civil Appeal 183 of 2019) [2023] KEHC 21128 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 183 OF 2019  
PM MULWA, J  
AUGUST 3, 2023**

**BETWEEN**

**RAPHAEL N. MAINA ..... APPELLANT**

**AND**

**BERNARD M. NJUGUNA & NAOMI W. MUCHOKI (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JULIUS KAMANDE MUCHOKI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JOHNSTONE MAGIRI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. C. M. Makari SRM delivered by Hon. L. M. Wachira SPM on 20th December 2018 in Gatundu PMCC No. 251 of 2010)*

**JUDGMENT**

1. The respondent filed a suit against the appellant in the trial court vide a plaint dated August 6, 2010, seeking damages under the *Fatal Accident Act* and the *Law Reform Act*, costs and interest of the suit, arising out of a road traffic accident that occurred on November 26, 2007 along Thika–Nairobi road. According to the plaint the driver of motor vehicle KAY 666Y drove, and or managed/controlled the same hit motor vehicle KAH 143K which flung to where the deceased stood causing him fatal injuries. The appellants particularized the negligence of the driver, agent of motor vehicle KAY 666Y.
2. The appellant filed a statement of defence dated February 21, 2014 and denied the particulars of negligence as attributed. He denied being the registered owner and/or driver of the motor vehicle. He denied the occurrence of the accident and averred that if the same happened the same was caused by the negligence, recklessness and carelessness of the deceased and driver of motor vehicle KAH 143K.
3. After the hearing of the case, the trial magistrate made a finding on liability and awarded damages as follows;



Liability at 10:90 in favour of the plaintiff.

Pain and suffering Kshs 20,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency Kshs. 1,000,000/=

Less 10% contribution Kshs. 102,000/=

Total Kshs. 918, 000/=

4. Aggrieved by the judgment of the trial magistrate the appellant filed the memorandum of appeal dated November 19, 2019, on the following 3 grounds:
  - i. That the learned trial magistrate erred in law and in fact in failing to appreciate that the burden of proof lay squarely on the Plaintiff.
  - ii. That the learned trial magistrate misdirected herself in awarding the plaintiff Kshs. 1,000,000/= for loss of dependency despite there being no evidence adduced by the plaintiff to support the same.
  - iii. That the learned magistrate misdirected herself by failing to take into consideration the 1<sup>st</sup> defendant's submissions.
5. He proposed to ask the court to allow the appeal and set aside the trial court judgment of Kshs. 1,000,000/= on the award of loss of dependency as well as award costs of the appeal.
6. This court having directed that the appeal be heard by way of written submissions, the appellant filed submissions on November 11, 2022 and the respondent on December 13, 2022.

#### **Appellant's submissions**

7. It was submitted for the appellant that the main issue for determination was the award of Kshs. 1,000,000/= under the head loss of dependency. According to counsel, the respondents failed to prove dependency on the deceased. He faulted the trial court for adopting a global-award approach to arrive at kshs. 1,000,000/= which is excessive as opposed to the use of the minimum wage in calculating dependency.
8. That since the deceased was a baker, the minimum wage as per the legal notice no. 38 of the Regulation of Wages and Conditions of *Employment Act* is Kshs. 5,497/=. The award under the head loss of dependency ought to be calculated as follows; 32 years  $\times$  1/3  $\times$  12  $\times$  Kshs. 5,497 = 701,312/=.
9. The court was urged to allow the appeal and review the trial court's award on the head loss of dependency.

#### **Respondent's submissions**

10. It was submitted that respondents had proved their case against the appellant in the trial court where their evidence remained unchallenged.
11. According to counsel the trial magistrate elaborated on the reasons behind adopting a global sum approach as opposed to the minimum wage formula. That the court is clothed with the jurisdiction to either adopt a global sum approach or multiplier approach, and hence the trial court did not err in adopting the former.



12. Counsel submitted that the award of kshs, 1,000,000/= under the head loss of dependency was not excessive and ought not be disturbed, and the appeal should be dismissed.

### **Analysis of the trial court evidence**

13. This being a first appeal the court is mindful of its duty to re-evaluate, re-assess and reanalyse the evidence with a view to determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.
14. The plaintiffs called three witnesses in support of their case. Bernard Njuguna – Pw1 adopted his witness statement dated 29<sup>th</sup> November 2018 and testified that his son was 23 years old at the time of his death, not married and earned kshs. 600 per day from the sale of vegetables. The deceased assisted him. He confirmed the accident was along Thika-Nairobi road near Ruiru. And that his son died on the spot after being hit by motor vehicle KAY 666Y.
15. Pw2 - PC Hassan Njeri Njoka attached to Ruiru Police station testified that there was a road traffic accident reported at the station on November 26, 2017 which involved Motor Vehicle KAH 143K and KAY 666Y where Julius K. Muchoki was fatally injured.
16. Pw3 - Ruth Wambui Nderitu testified that she was with the deceased Julius and one Mwangi as they had come from the bakery and were standing at the stage at Kihunguro area where Motor Vehicle KAY 666Y joined the highway without checking and it veered off the road and hit them causing fatal injuries where Julius and Mwangi died. She further told the court they worked with the deceased in selling bread and would get a profit of Kshs. 600/= daily.
17. At the close of the plaintiff's case the defendant did not call any witnesses and left the court to deliver its judgment.

### **Determination**

18. In due consideration of the memorandum of appeal, the impugned judgement, the submissions for and against the appeal, the only issue for determination is whether the award of Kshs. 1,000,000/= under the head loss of dependency was excessive.
19. Despite the appellant raising 3 grounds in the memorandum of appeal, in his submissions he only dwelt on the ground of loss of dependency. He submitted that the trial magistrate erred in adopting the global sum approach as opposed to the multiplier approach. That a figure of Kshs. 5, 497/= being the minimum wage ought to have been used.
20. I have perused the trial court record and have noted that no documentary evidence was adduced to prove the deceased's income. The respondent states the deceased was a baker before his demise. The deceased was aged 23 years at the time of his death. The trial court in the judgment appreciated the deceased was at the prime of his life and opined to adopt a multiplier of 32 years and a dependency ratio of 1/3 as the deceased was not married and was only survived by his parents.
21. The trial court observed that "...since the monthly income was unknown and the deceased being engaged in a business venture would be unwise and unjust to rely on the government minimum wage guidelines to determine his net earnings ..." and found a multiplier approach would not be appropriate.
22. Further, according to the trial magistrate the fact that there were no proper books of account by the deceased it opined the multiplier approach was not appropriate, and instead adopted the global sum approach, in an attempt to avoid a speculative approach. In arriving at this decision, the trial magistrate was guided by finding in the case of *Albert Odawa vs Gichimu Gichenji* Nakuru HCCA No. 15 of 2003



(2007) eKLR where the court held; “the multiplier approach is just a method of assessing damages. It is not a principle of law or a dogman. It can and must be abandoned, where the facts do not facilitate its application. It is plain that it a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are knowable with undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice never do.”

23. The appellant has failed to demonstrate that indeed the trial magistrate erred and arrived at a wrong principle or fact in adopting the global sum approach. It trite courts are clothed with the discretion to adopt a global sum approach or multiplier approach in the award of damages under the head loss of dependency.
24. An appellate court will only interfere with a trial court judgment if it is satisfied that the trial magistrate proceeded on the wrong principle, or misapprehension of the evidence and arrived at figures that were inordinately too high or low - see *Butt vs Khan* (1982-88) KAR 1.
25. In the circumstances, and in the absence of a particular monthly income by the deceased, this court is not persuaded that the trial magistrate erred in adopting a global sum approach as opposed to the multiplier approach. The global sum approach was the appropriate in determining the award under the head loss of dependency.
26. I uphold the award by trial court on the quantum of damages.
27. The upshot is that the appeal is dismissed with costs to the respondents.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU**

**THIS 3<sup>RD</sup> DAY OF AUGUST 2023.**

.....

**P.M. MULWA**

**JUDGE**

**In the presence of:**

*Duale* – court assistant

*Mr. Chasia h/b for Ochieng Opiyo* - for the appellant

*Mrs. Waweru* - for the respondents

