# Thigani & another v Kiumi & another (Suing as the administrator of the Estate of Kennedy Nzuki Kiumi - Deceased) (Civil Appeal E004 of 2023) [2023] KEHC 22436 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22436 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E004 OF 2023**

**FROO OLEL, J**

**SEPTEMBER 21, 2023**

**BETWEEN**

**JAMES THIGANI ........................................................................ 1ST APPELLANT**

**SUNCORP HOLDINGS LIMITED .................................................. 2ND APPELLANT**

**AND**

**FLORENCE NDUKU KIUMI ........................................................ 1ST RESPONDENT**

**CAROLIN MUTHEU KIUMI ........................................................ 2ND RESPONDENT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF KENNENDY NZUKI KIUMI - DECEASED**

## JUDGMENT

1. This appeal arises from the considered judgment of Hon. Martha Opanga (SRM) dated 13th December 2022 delivered in Kangundo CMCC no. E37 of 2021 where she awarded the Respondents General damages under *Law Reform Act* and *fatal Accidents Act* as compensation of an accident which occurred on 16th April 2020 around 15:00hrs resulting in the death of one Kennedy Nzuki Kiumi. The sub total sum awarded was Ksh.3,769,450/= less 20% Contributing negligence (ksh.753,809/=). The total award being Ksh.3,015,560/= plus costs and interest.
2. Being wholly dissatisfied with the said judgment, the appellants did prefer this appeal challenging the general damages awarded for loss of dependency and quantum awarded for special damages and raised seven (7) grounds of appeal namely that;
   a. That the learned trial magistrate erred in law and in fact in the manner in which she assessed damages for loss of dependency and thereby awarded a sum of ksh.3,600,000/= as damages that were excessive in the circumstances.

b. That the learned trial magistrate erred in law and in fact in adopting a multiplier of 30 years in calculating loss of dependency without taking into consideration vagaries and uncertainties of life and the relevant law governing assessment of damages for loss of dependency.

c. That the learned trial magistrate erred in law and in fact by adopting a multiplicand of ksh.30,000/= per month in calculating loss of dependency without taking into account the fact that the said amount was not pleaded and there was also no evidence that was adduced to support the awarded ksh.30,000/= per month.

d. That the learned trial magistrate erred in law and in fact in relying on the formal proof proceedings particularly the evidence of PW1 while adopting a multiplicand of ksh.30,000/= yet the said proceedings and the judgment of 9th November 2021 and all consequential orders thereto were set aside vide the ruling of 15th March 2022.

e. That the learned trial magistrate erred in law and in fact in failing to hold and find that the deceased earning had not been proved, the minimum wage applicable for a loader should have been adopted.

f. That the learned trial magistrate erred in law and in fact in awarding the Respondents Ksh.39,450/= in special damages that were not strictly proved.

g. That the learned trial magistrate erred in law and in fact in disregarding the appellants submissions and judicial authorities on special damages and on general damages for loss of dependency.

3. The appellants prayed that this appeal be allowed and the award under the two headings be set aside and substituted with a fair and reasonable award based on proved special damages and other circumstances of this case.

4. From the record/proceedings, it is noted that on 27th September 2022 the parties did enter into a consent judgment on liability which was recorded at 20.80% in favour of the Respondents. The Respondents documents as listed in the list of documents dated 5th March 2021 was produced as Exhibits and the parties proceeded to filed submissions which the trial court considered and rendered its judgement.

**Appellants Submissions**

5. The appellant did file their submissions on 22nd March 2023 and admitted that the motor vehicle KBX 003J (hereinafter referred to as the suit motor vehicle) belonged to the 2nd Appellant. Liability was agreed upon and what they were challenging were two aspects of the award. The quantum of damages awarded under loss of dependency was inordinately high and special damages of Ksh.39,450/= was not proved and thus should not have been awarded.

6. The appellant submitted that the trial magistrate erred in adopting a multiplier of 30 years after taking into account the retirement age of those in public service and thereby failed to consider and take into account the uncertainties and vagaries of life that may cause a person to work for less years. Further the 1st Respondent failed to adduce evidence of her age and it could not be assumed that she would survive the deceased for that period of time. The appellants proposed a multiplier of 18 years as adequate. Reliance was placed in the case of Leonard Wanganga Ngara and 2 others versus Joyce Warurii Ndung'u and 2 others (2020) eKLR.

7. The appellant further faulted the trial magistrate for finding that the deceased was earning ksh.1000/= per day, yet the same was not pleaded nor was it in the witness statement adopted of the 1st Respondent. The Respondents had failed to prove this fact and there was therefore no basis of awarding the same. In a scenario where no earnings was provided, the court could adopt the minimum wage of turn boy as specified under the Regulation of wages (General) (Amendment) order 2018 legal notice no.9 of 2019 which provided that the applicable multiplicand for a turn boy was ksh.8,366.35/=. The award therefore should have been considered based on these regulations. Reliance was placed on Sukari Industries Limited versus Lensa Awour Nyagumba and another (2019)eKLR.

8. The final issue raised by the appellants was that for special damages to be awarded, they had to be specifically pleaded and proved. The Respondents did plead special damages of Ksh.39,450/= but only proved as sum of ksh.9,350/=. This is what the court ought to have awarded and prayed that the award of Ksh.39,450/= be reduced appropriately. The appellant prayed that this appeal be allowed and the awards be reduced appropriately.

**Respondents Submissions**

9. The Respondent did file their written submission dated 17th April 2023 and stated that the judgement challenge was proper and the trial magistrate could not faulted for the award arrive at as the same was based on a proper evaluation of the documentary evidence and witness statement adduced into evidence. Further, the awards were not excessive considering the age of the deceased and the average income of a person working as a sand/stone's loader. They had proved in evidence that the appellant would earn ksh.1,000/= daily which translated to ksh.30,000/= as his monthly income. Reliance was placed on Jacob Ayiga Maruja and Ano versus Simeon Obayo (2005)eKLR, Aphia Plus (program for Appropriate Technology Health) versus Cephas Owuoth Najuna and Ano ( 2015) eKLR and Crown Bus Services Ltd. and 2 others versus Jamila Nyongesa, which subscribed to the view that proof of wages earned need not be through production of documents only.

10. On the issue of the multiplier (30 years) the appellant did submit that the court correctly used a multiplier of 30 years as the average working life of a Kenya went upto 60 years. The deceased was a young active and healthy person and the multiplier was considered in relation to the expectation of earning in life and dependency by his family and /or mother. There was therefore no basis laid before court to warrant interference of the award. Reliance was placed on Gitobu Imanyara and 2 others versus Attorney General (2016) eKLR, Bashir Ahmed Butt versus Uwais Ahmed Khan (1982 – 1988) KAR 5, Butt versus Khan (1981) KLR 34 and Swan Mills Ltd versus Garage Mwale Mudomo (2005) eKLR.

11. On special damages, the Respondents submitted that the same were specifically pleaded and proved. The Respondents incurred funeral expenses and also expenses to get letters of administration ad litem to enable them file the primary suit. The trial court was thus justified in awarding the same. The Respondent prayed that this appeal be dismissed with costs.

**Analysis and Determination**

12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316

13. As was appreciated in Peters –vs- Sunday Post Limited [1958] EA 424:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

14. It was therefore held by the Court of Appeal in Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

15. The only issue for determination in this appeal is whether the trial magistrate erred in law in awarding the Respondents loss of dependency assessed at Ksh.3,600,000/= and if the pleaded special damages of ksh.39,450/= were strictly proved.

16. The circumstances under which an appellate court can interfere with an award of damages was restated by Court of Appeal in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 where it was held that:

> "The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..." The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

17. In Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> "The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

18. Also Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the court of appeal held that that:

> "The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

19. As regards loss of expectation of life, it was held in Uganda Electricity Board vs. Musoke [1990-1994] EA 581 that:

> "Award for loss of expectation of life is made on the basis of loss of prospective happiness by the deceased and the following are the principles for making an award under this head of damages: -
>
> 1. Before any damages are awarded in respect of the shortened life, of a given individual, it is necessary for the Court to be satisfied that the circumstances

of the individual life were calculated to lead on balance, a positive measure of happiness of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.

2. In assessing damages for this purpose the question is not whether the deceased had the capacity or ability to appreciate that his future on earth would bring happiness. The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.

3. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risk and uncertainties of childhood and having in some degree attained an established character and firmer hopes, his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable.

4. Stripped of these technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth is that in putting a money value on the prospective balance of happiness in years that the deceased might have lived, the Judge is attempting to equate incommensurables. Damages, which would be proper for a disabling injury, may be much greater than for deprivation of life. These considerations lead to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen.

5. In this case it is necessary to consider what kind of life the deceased would have enjoyed had he not been killed. There is no evidence that the deceased would have had an unhappy life. The deceased was aged fourteen and was still in primary."

20. The Respondents did not testify in the primary suit and relied on their filed witness statement. All their documents too were admitted as evidence and the parties proceeded to file written submissions. In the plaint filed and dated 5th March 2021, the Respondents did not sspecify what work/Job the appellant was undertaking, but the 1st Respondent in her witness statement adopted as evidence before the trial court did state that her son was a loader and would support her financially. In the said witness statement, she did not specify what the deceased earned.

21. The Appellants contention that the trial Magistrate did err in finding that the deceased was earning Ksh.1,000/= per day and proceeded to adopt Ksh.30,000/= as monthly earning (Multiplicand) is correct. This was a clear misdirection by the trial court and was a finding not supported by the evidence on record. The proper approach would have been to use the Regulation of wages (General), (Amendment ) order 2018 , which capped monthly wages of a turnboy (inclusive of house allowance) at Ksh 8,366.35/=.

22. The appellants further did challenge the finding by the trial magistrate of adopting a multiplier of 30 years in calculating loss of dependency without taking into account the vagaries and uncertainties of life. In arriving at the multiplier, the court generally takes into the consideration the vagrancies of life. However, there is no clear-cut approach. This was reiterated by Waweru J in West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] eKLR.

23. Further in determining the multiplier and, it was held in by Ringera, J (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 that:

> "In adopting a multiplier, the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without 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 should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

24. However on the case of Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma - Deceased) [2019] eKLR where reference was made to the case of Chunibhai J Patel & Another Vs P.F Hayes & Another (1957) EA 748, 749 the Court of Appeal stated;

> "… It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire.' In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life … In Benedita Wanjiku Kimani (supra) Emukule J awarded a multiplier of 16 years to+ a deceased aged 44 years at the time of his death … "

25. The deceased died at 30 years of age and no evidence was placed before court of vicissitudes of life or other imponderable's or illness which would have shorted the deceased life. In all probability he would have worked until 60 years or more given that he was in private sector. Be that as it may the appellant

rightly pointed out that the 2nd Respondent was the deceased sister and was not a dependant within the meaning of section 4(1) of the *Fatal Accidents Act*.

26. The 1st Respondent, on the other hand, who was the deceased mother, was a dependant but her age ought to have been considered in relation to the multiplier (being the probable period she would have benefited from support of her deceased son). Taking this factor into consideration and noting that there is no clear-cut approach in determining the Multiplier, I am inclined to disturb the multiplier of 30 years awarded by the trial court and reduce the same to 25 years. See Ndungu Wambui Christine & 2 others Vs Muusi Nzivo Maingi aka Muusi Uzivo & Another (2020) eKLR, where a multiplier of 25 years was used for a 30 years old deceased person.

27. The final issue raised by the appellant was the special damages need to be specifically pleaded and proved. The Respondent did produce receipts of Ksh.9,350/= and thus the court did err in awarding the sum pleaded as it was not proved. Though it is trite that special damages must be strictly proved, in Mary Shesia Kivairu vs. Jeffa Enterprises Ltd & Another Kakamega HCCC NO. 17 of 2004, G B M Kariuki, J (as he then was) awarded Kshs 30,000.00 as reasonable funeral expenses though the same was not proved as there was no doubt, they had incurred funeral expense. As in this case, Respondents must have been incurred expenses towards the legal and court fee in filing for Succession Ad litem to enable the Respondents sue. I am of the same view, that the same is reasonable and awardable.

**Disposition**

28. Accordingly, the award that ought to have been made to the Respondents was as hereunder:

    (a) Liability 80: 20 in favour of the Respondents

    (b) Pain and Suffering Kshs 30,000.00

    (c) Loss of expectation of life Kshs 100,000.00

    (d) Loss of dependency Kshs 8,366.35 x 12 x 25 = Kshs 836,635.00/=

    (e) Special damages 39,450.00

29. This brings the total to Ksh.804,868.00 after taking into account the 20% contribution. In the premises the appeal succeeds to that extent. The general damages will accrue interest from the date of the judgement of the lower court while the special damages will do so from the date of filing of the suit at court rates.

30. The appellant will get half costs of this appeal which is assessed at Ksh.100,000/= all inclusive.

31. It is so ordered.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 21st day of September, 2023.

In the presence of;

.......................................for Appellant

.......................................for Respondent

.........................................Court Assistant