



REPUBLIC OF KENYA



Yaf Japan Motors Limited & 2 others v Wambughu & another (Civil Appeal E025 of 2022) [2023] KEHC 22438 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E025 OF 2022
GMA DULU, J
SEPTEMBER 20, 2023**

BETWEEN

YAF JAPAN MOTORS LIMITED 1ST APPELLANT

RAYMOND NYANGE NGOO 2ND APPELLANT

ENKE NGOMBO NGOO 3RD APPELLANT

AND

DOROTHY WAMBUGHA 1ST RESPONDENT

LAWRENCE MWANJEWU JUMA 2ND RESPONDENT

(From the judgment delivered by Hon. D. Wangeci (PM) at Wundanyi Law Court on 23rd May 2022 in Civil Case No. E036 of 2021)

JUDGMENT

1. In a judgment delivered on 23rd May 2022, the Magistrate's court at Wundanyi concluded as follows:-
 25. In the upshot, I enter judgment in favour of the plaintiff's against the defendants jointly and severally as follows:-
 - (a) Liability (as per the consent between the plaintiff's and the 2nd and 3rd defendants) 80:20%
 - (b) Pain and suffering Kshs. 80,000/=
 - (c) Loss of expectation of life Kshs. 200,000/=
 - (d) Loss of dependency Kshs. 3,600,000/=
 - (e) Special damages Kshs. 111,600/=



Total Kshs. 4,011,600/=

Less 20% Kshs. 802,320/=

Total Kshs. 3,209,280/=

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

2. Dissatisfied with the above decision of the trial court, the appellants, who were the defendants in the trial court, have come to this court on appeal through Counsel Cootow & Associates Advocates on the following grounds : –
 1. The learned trial Magistrate erred in law and in fact in awarding the plaintiff a sum of Kshs. 3,600,000/= as loss of dependency when neither evidence of employment nor income was adduced before court and the award went against the weight of the evidence.
 2. The learned trial Magistrate erred in law and in fact in adopting the monthly salary of Kshs. 30,000/= as a multiplicand when no such evidence was adduced before the trial court to prove the income.
 3. The learned trial Magistrate erred in fact in adopting the dependency ratio of two thirds (2/3) when there was no evidence that the plaintiff and or alleged dependants depended solely to necessitate a ratio of 2/3.
 4. The learned trial Magistrate erred in fact in adopting the multiplier of 15 for the deceased who was aged 50 years and completely failed to consider the vicissitudes of life when awarding damages.
 5. The learned Magistrate erred in fact in awarding the plaintiff loss of consortium, fellowship and servitude when the court had awarded loss of dependency therefore amounting to double compensation.
 6. The learned 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 Magistrate erred in fact in failing to exercise her 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 appellants lightly and disregarded the appellants 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 2nd and 3rd appellants and the submissions filed by S. N. Ngare & Company Advocates for the respondent.
4. This being a first appeal, I have an obligation to reconsider and re-evaluate all the evidence on record and draw my own conclusions though I have to bear in mind that I did not see or hear witnesses testify and make due allowance for that fact – see *Selle v Associated Boat Company Ltd* (1968) EA 123.
5. At the trial, the respondents called one (1) witness after liability had been recorded by consent. It was PW1 Dorothy Wambugha Mliwa the wife of the deceased Peter Kwaze Juma, who adopted her witness statement as her evidence in chief. She relied on a number of documents.
6. It was her evidence that the deceased was aged 50 and healthy and that they had five (5) children, one being Purity at 18 and schooling at Kijire Secondary School.



7. It was her evidence that the deceased was sole bread winner of the family and was making a minimum of Kshs. 30,000/= per month. It was her evidence also that three of their children Judith, John and Margaret had their own families.
8. In cross-examination, she stated that though she had testified on the monthly income of the deceased being Kshs. 30,000/= she did not produce in court any documents on his work or occupation, nor did she give a breakdown of the income. She also agreed that she assisted her husband to pay bills, as she was an ECD employee.
9. The appellants, who were defendants did not call any witnesses, and instead their advocates filed written submissions. I have to put it on record here that on 31st January 2022, the trial court entered interlocutory judgment against the 1st defendant Yaf Japan Motors Limited.
10. This is an appeal principally against the quantum of damages awarded, as liability had been recorded by consent of the two appellants herein at 80%:20%. Being an appeal against quantum of damages, I have to be guided by the principles which were restated in the case of *Kenfro Africa Ltd v Lubia & another* (1982-88) I LR wherein the Court of Appeal stated as follows:-

“In deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the Judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
11. From the contents of the Memorandum of Appeal, it can be noticed that the appellants are not challenging the award for pain and suffering or the award for loss of life expectancy or special damages. The challenge is on the amount awarded for the loss of dependency and also loss of consortium.
12. With regard to the award for loss of consortium, though the appellants counsel has listed grounds against an award for loss of consortium, fellowship, and servitude, I find no such award in the judgment. That ground of appeal is thus not merited and I dismiss the same.
13. On the award for loss of dependency, I note that the trial Magistrate went by what PW1 stated in examination in chief and in re-examination, without considering what she said in cross-examination which in my view was an error.
14. Having said as above, the age of 50 years when the deceased died was not shaken in cross-examination. It was evidenced in the burial permit dated 28th January 2021. In my view the trial court was correct in finding that the deceased was aged 50 at death.
15. On the multiplier, which was the remaining economic working life of the deceased, the trial court applied 15 years, which would mean working up to 65 years of age. In my view, the general retirement age in Kenya being 60 years, the trial Magistrate erred in that regard. In my view, it would be generous enough and justified for this appellate court to reduce the multiplier to 10 years which would terminate at 60 years of age.
16. With regard to the multiplicand, which is the earnings of the deceased per month and which would be depended upon by him and his dependants that is wife and two (2) of the five (5) children, the trial court used the amount of Kshs. 30,000/= as testified by PW1.



17. Again on this multiplicand, I am of the view that the trial court erred because PW1 did not indicate the deceased's occupation, and it was only in re-examination that PW1 stated that the deceased was a Pastor, and the counsel for the appellants was at that time not able to cross-examine her.
18. Additionally, there was no documentary evidence tendered at the trial to support the deceased's monthly income. In my view therefore, the trial court erred in finding that the multiplicand be Kshs. 30,000/= as the basis of such income of the deceased was not explained to the court.
19. Since the income of the deceased could not be easily ascertained, I am of the view that this is a case for departure from the conventional method of assessing loss of dependency using the multiplier/multiplicand method, and instead I will use a global award for loss of dependency. Relying on the case of *Stanley Maore v Geoffrey Mwenda* (2004) eKLR, in my view a global award of Kshs. 2,000,000/= will be appropriate and sufficient award for loss of dependency herein, which I hereby assess at Kshs. 2,000,000/= due to inflation and rise of cost of living.
20. With regard to the dependency ratio of 2/3 for the surviving wife and two school going children, I am satisfied that the said survivors of the deceased were largely dependant on the deceased. I am thus of the view that the Magistrate was correct in applying a dependency ratio of 2/3.
21. With regard to costs, as this was a case where liability was entered by consent, and since in this appeal, only the award for loss of dependency was in issue, I will order that parties bear their respective costs of the appeal.
22. Consequently and for the above reasons, I vary the award of damages made by the trial court and enter judgment in favour of the plaintiffs (respondents) against the defendants (appellants) jointly and severally as follows:-
 - (a) Liability (as per the consent between the plaintiff (respondents) and the 2nd and 3rd defendants (appellants) and the plaintiffs (respondents) 80:20%
 - (b) Pain and suffering Kshs. 100,000/=
 - (c) Loss of expectation of life Kshs. 200,000/=
 - (d) Loss of dependency Kshs. 2,000,000/=
 - (e) Special damages Kshs. 111,600/=Sub-Total Kshs. 2,411,600/=
Less 20% Kshs. 482,320/=
Total Kshs. 1,929,280/=
23. Parties will bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF SEPTEMBER 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Nusura/Alfred – court assistants

Mr. Weloba for appellant



Mr. Ndungu for respondent

