



**Kinya (Suing as the Legal Representative of the Estate of Eric Bundi
– Deceased) v Meru County Government (Civil Appeal E175 of 2022)
[2023] KEHC 23650 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E175 OF 2022
LW GITARI, J
OCTOBER 17, 2023**

BETWEEN

**JACKLINE KINYA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF ERIC BUNDI – DECEASED) APPELLANT**

AND

MERU COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. This is an appeal from the judgment delivered on December 7, 2022 in Meru CMCC No. E053 of 2022. The said judgment was issued in the favour of the Appellant herein as against the Respondent in the following terms:
 - a. Liability at 100% in favour of the appellant against the respondent
 - b. Pain and Suffering – Kes. 10,000/=
 - c. Loss of expectation of life – Kes. 100,000/=
 - d. Loss of dependency – $7,2440.95 \times 31 \times 12 \times 2/3 = 1,098,416/=$
 - e. Special Damages 160,000/=
 - Net Total of Kes. 1,303,766/=
 - f. Costs and Interest of the suit to the Appellant at court rates.
2. The appellant's case at the trial court was that on or about November 1, 2021 at around 2000Hps, one Eric Bundi (deceased) a pillion passenger on motor cycle registration number KMFM 336Q Captain along Meru-Nanyuki Road when the respondent's agent/driver/employee and/or servant negligently, recklessly and/or carelessly drove, controlled and/or managed the motor vehicle registration no. KAW



714Z Toyota Hilux that while he was overtaking, he rammed into the motor cycle registration no. KMFM 336Q and as result caused the untimely and premature death of the deceased.

3. Aggrieved by the decision of the trial court the appellant raised 6 grounds of appeal challenging the award under the head of loss of dependency to wit:
 - a. That the learned trial magistrate erred in law and fact in awarding the appellant Kes. 1,098,416/= general damages for loss of dependency under the *Fatal Accident's Act*, which award was inordinately low in the circumstances.
 - b. That the learned trial magistrate erred in law and fact by applying wrong principles in the assessment of damages, in terms of the multiplier of 22 and the multiplicand of 6,241/=.
 - c. That the learned trial magistrate erred in law and fact in failing to appreciate the evidence tendered with regard to employment records of the deceased.
 - d. That the learned trial magistrate misdirected herself in totally disregarding evidence by the appellant witnesses and evidence on record on issue of employment of the deceased.
 - e. That the learned trial magistrate erred in law and fact by placing more weight on assumptions rather than facts.
 - f. That the learned trial magistrate erred in law and fact by failing to consider the submissions and authorities cited by the appellant.
4. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

5. It was the appellant's submissions that the trial magistrate erred in finding that since there was no evidence of a payslip, no proof was adduced confirming that the deceased used to earn Kes. 20,000/= and that there was no proof that the deceased was earning Kes. 50,000/= per month from his farming venture. In this regard, the Appellant urged this Court to take judicial notice that in the Kenyan market, especially the fresh produce market, transactions are mainly conducted in cash and rarely are receipts issued. That as such, it would be unfair and unjust to dismiss the Appellant's claim on grounds that no proof had been adduced confirming that the deceased used to earn from his farming activities. She relied on the holding in *Jacob Ayiga Maruja & anor v. Simeon Obayo* [2005] eKLR to buttress this position.
6. On the multiplier, it was the Appellant's submission that since there was uncontroverted evidence that the deceased was 29 years old at the time of his death, he would have lived a full life up to 70 years or even above were it not for the accident. The Appellant thus urged this court to adopt 31 in assessing damages under the head of loss of dependency.
7. In conclusion, the Appellant prayed for a finding by this Court that her appeal is merited and allow the same by awarding her Kes. 17,360,000/= (70,000/= x 12 x 31 x 2/3) under the head of loss of dependency.

The Respondent's Submissions

8. The appeal is opposed. It was the Respondent's submission that the trial court's award of general damages for loss of dependency under the Fatal Accident's Act of Kes. 1,098,416/= was correct and appropriate in law. That the trial court's use of the multiplier method in assessing loss of dependency was proper as both made submissions in favour of the use of the multiplier method.



9. In view of the above submissions, the Respondent urged this Court to find that the impugned judgment did not exemplify any wrong principles or misapprehension of evidence. That the award was neither inordinately high or low and as such, the impugned judgment ought to be upheld.

Issue for Determination

10. I have considered the grounds of appeal, the record of appeal and the submissions by the parties. The main issue that arises for determination is whether the trial court erred in assessing the damages for loss of dependency at Kes. 1,098,416/= which the appellant contends that it was inordinately low in the circumstances.

Analysis

11. Being a first appeal, I am aware of this Court's duty to evaluate the entire evidence on record bearing in mind that it had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

Section 78 of the *Civil Procedure Act* (cap 21 Laws of Kenya) spells out the duty of the appellate court. It provides:

- “78. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (1)
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Thus a first appellate court conducts a re-trial by evaluating the evidence and coming up with its own independent finding.

The only draw back being that it does not have the benefit of seeing the witnesses in order to assess their demenour and must leave room for that. There is no set format on how the court should analyse and re-evaluate the evidence. In a persuasive decision of the Supreme Court of Uganda in the case of *Uganda Breweries Limited v Uganda Railways Corporation* (2002)2 E.A 634 the Court stated:-

- “The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the 1st appellate court.”



In this regard I shall refer to what this court said in two cases in *Sembuya v Airports Services Uganda Limited* (1999) LLR 109 (SCU) Tsekooko JSC said at 11 while considering a submission that the Court of Appeal did not go into details of the evidence the Judge stated-

“There is no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinize and make an assessment of the evidence but that does not mean that the Court of Appeal should write a judgment similar to that of the trial court.”

The Court of Appeal in *David Njuguna Wairimu v Republic* (2010) eKLR stated as follows:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusions of the trial court. There are instances where the appellate court may depending on the facts and circumstances of the case come to the same conclusion as those of the lower court..... provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

Thus, the court has a duty and the appellant has a legitimate expectation that the appellate court will re-evaluate the evidence and the court’s own independent finding.

12. PW1 was PC Alice Ndinda based at Subuiga Police Station on traffic duties. She was the investigating officer in the traffic case which gave rise to this proceedings. It was her evidence that as per OB No. 26-2-11-21, a traffic accident took place on 1st November, 2021 at 2000 Hours at Kiirua area along Meru-Nanyuki road. That the investigations established that motor vehicle registration number KAW 714Z Toyota Hilux pickup was being driven by an unknown driver who upon reaching the location of the accident, knocked down motor cycle registration number KMFM 336Q Captain and escaped after the accident. That the motor cycle had a rider one David Kigongi aged 36 years from Meru direction carrying one pillion passenger, the deceased herein. The said pillion passenger (deceased) and the rider died on the spot. According to PW1, the investigations revealed that the driver of the motor vehicle was to blame for the accident as he failed to keep to his lane. The driver of the subject motor vehicle, David Kiogora, was arrested and later charged with two counts of causing death by dangerous driving and he pleaded guilty to both counts and was fined Kes.60,000/- for both counts in default four months imprisonment. She produced a police Abstract as exhibits:-1-
13. The Appellant Jackline Kinya herein testified as PW2. She is the widow of the deceased. The Appellant adopted her witness statement dated February 8, 2022 as her evidence in chief. She produced as exhibits a list of documents which include Police Abstract. Postmortem report, Death Certificate of the deceased, Chief’s letter, Birth Certificates of her children, limited grant of Letters of Administration ad litem, receipts of motor vehicle search certificate, demand letter and letter from Kibantu Sacco. It was her testimony that the deceased was a driver at Kibantu Nissan Sacco earning Kes. 20,000/=. That she however did not have a copy of his pay slips or records from KRA to prove the same. The appellant also relied on proceedings in Magistrate’s Court Meru Traffic Case No.E067/2022 which she produced as exhibit 11.
14. PW3 was Brian Kaimenyi, a motor cycle rider. He adopted his witness statement dated February 8, 2022 as his evidence in chief. On cross examination, he stated that the accident took place at 8 p.m. That he was coming from Meru to Kiirua when a Hilux motor vehicle, which was in the process of overtaking, hit the motor cycle on the left side while the motor cycle was on the other lane. According to him, the motor vehicle which was overtaking was very close to the motor cycle.



15. PW4 was George Burugu Muriuki, a businessman and the chair of Kibantu Sacco. He stated that he knew the deceased as a driver in their Sacco. He adopted his letter dated 10th January, 2022 and stated that the said Sacco used to pay the deceased Kes. 20,000/= . On cross examination, he admitted that he had not produced any evidence to prove that the Kibantu Sacco existed or how it operates. That the Sacco used to pay their employees in cash and he therefore did not have any pay slips for the deceased.
16. For the defence case, David Kiogora testified as DW1. He adopted his statement dated 12th July, 2022 as his evidence in Chief. He had stated in the said statement that he was the authorized driver of motor vehicle KAW 714 Z which he was driving on the material day along Meru Nanyuki road. At the scene a long a continuous yellow line the motor cycle was being ridden at an excessive speed which resulted to a head on collision where the deceased was fatally injured. He blames the deceased for driving at an excessive speed and on the wrong lane in disregard to his safety. On cross- examination, DW1 stated that the subject accident occurred on the material day and two people died. That he was charged in court for causing death by dangerous driving and that he pleaded guilty and was fined. On re-examination, it was his testimony that he pleaded guilty to the charged because he would have been suspended from work had he denied the charges.

Determination:

Liability:

On liability I note that the respondent has not disputed the finding by the learned trial magistrate. The learned trial magistrate based the finding on the fact that the respondent was charged with two counts causing death by dangerous driving contrary to section 46 of the *Traffic Act*. The respondent pleaded guilty, he was convicted and fined a total of Kes.60,000/- which he admitted that he paid. Section 47A of the *Evidence Act* provides that-

“47A. Proof of guilt

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

The conviction of the accused for the offences of causing death by dangerous driving for which he has not preferred an appeal, is conclusive evidence that he is the one who caused the accident which resulted in the death of the deceased. Under section 47A of the *Evidence Act*, that is evidence of a nature which entitles a civil court to find the defendant liable if a civil claim arises out of the same facts. The conviction of the respondent connotes some degree of negligence. It is thus not open to the respondent to deny that his driving in relation to the accident was negligent. See *Robinson v Oluoch* (1971) E.A. The respondent has not disputed the fact that he was 100% liable for the accident. I therefore find no reason to interfere with the finding by the learned trial magistrate that the respondent was 100% liable for the accident.

17. From the grounds of appeal, it is clear that this entire appeal centres on challenging the trial court’s award for loss of dependency. From the evidence, it is undisputed that the deceased was aged 29 years old and was married with two children. It is however disputed that the deceased worked for gain at Kibantu Sacco as a driver earning Kes. 20,000/= per month and that he was a prolific farmer earning Kes. 50,000/= per month.



2) Quantum of Damages:

18. In the case of *Mbogo & another v Shab* [1968] EA 93, it was held that an award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. It was stated:-

“I think it is well settled that this court will not interfere with exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or that it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

19. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. This is the principle enunciated in *Rook v. Rairrie* [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

“In *Butt v Khan* (1978) eKLR, Court of Appeal. It was stated that an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or misapprehended the evidence in some material respect and arrived at a figure which was inordinately high or low.”

20. In assessing the multiplicand to use in this case, the trial court reasoned that the testimony of PW1 and the documents produced were not convincing to prove the income of the deceased in the absence of a payslip. The learned trial magistrate also faulted the Appellant for not substantiating her claim that the deceased was earning Kes. 50,000/= from farming activities. The trial court thus reverted to the Regulation of Wages (General) Amendment Order, 2018 and adopted Kes. 7,2440.95/= as the multiplicand.

The principle applicable assessing damages under the *Fatal Accidents Act* are that the court must establish the annual dependency which is the multiplicand. This is determined by proved net earnings of the deceased. This then multiplied by the number of years as the court may determine as the lost expectation of the life of the deceased. The appellant urged the court to consider her evidence that the deceased was employed by Kibantu Sacco as a driver earning Ksh. 20,000/- save for the letter by the chairman of Kibantu Sacco no payslip or other proof was laid before the court to show payment of salary to the deceased since the time he was employed in 2018. The parties had made submissions before the trial court a multiplier method of assessing loss of dependency. The appellant proposed a multiplier of Ksh.20,000/-.

A multiplier of forty one (41) years was proposed and a dependency ratio of 2/3 since the deceased was survived by a wife and two children.

The appellant had the burden to prove the actual income of the deceased, in the absence of such evidence the court reverts to the minimum wage to determine the multiplicand. The learned trial magistrate held that there was no prove adduced to support the claim that deceased was earning



- Ksh.20,000/- or Ksh.50,000/- from his earning venture. The trial court had the benefit of seeing the witnesses and this court leaves room for that. The court then ruled that it will revert to the minimum net wage to determine the multiplicand. The trial magistrate cannot be faulted for applying the minimum net wage as the multiplicand.
21. It is clear from the record that there was no proof in this case that the deceased was earning a monthly income of Kes. 20,000/= from being a driver or Kes. 50,000/= from his farming activities. In the absence of clear documentary proof of income, courts do not merely disregard the claim as doing that would do great injustice. Instead, courts would in such cases revert to the applicable Regulation of Wages Order or to a global figure in appropriate cases such when dealing with a minor. In this case, the trial court reverted to the Regulation of Wages (General) Amendment Order, 2018 and adopted Kes. 7,2440.95/= as the multiplicand. In view of the evidence tendered before it, I find that the learned magistrate applied the correct legal principles by adopting the applicable and prescribed minimum wage. The learned magistrate went on to reason that the deduction by a third from the minimum wage as a statutory deduction and as proposed by the Respondent could not suffice as the minimum wage was exempt from PAYE. The trial court thus considered NHIF and NSSF deductions and adopted a multiplicand of Kes. 6,241/=.
 22. In the case of *Joseph Ndegwa & another v Japhet Ndungu Muboro the Legal Representative of the Estate of late Dishon Irungu Ndungu* [2019] eKLR, the deceased's gross salary was Kes 84,122/=. After tax deduction (Kes 18,309/=) and other deductions including: NHIF, Pension scheme, NSSF, Emergency loans, Co-operative shares, Risk Management fund, Fringe Benefit tax, University loans and Co-operative loan (all of which deductions amount to Kes 44,403.40), the payslip shows a Net pay of Kes 39,718.60/=. The Court in that case held that non-statutory deductions are in essence for the benefit of the family. As such, it held that the amounts deducted for tax, NHIF, NSSF, Fringe benefit tax, and university loans cannot be included in the deceased's net salary. The Court further held that: "The deductions for aspects that the deceased voluntarily subscribed to such as the Pension scheme, Emergency Loans, Co-operative shares, and Co-operative loan are deductions which form part of his earnings and are a benefit to his estate that cannot be withheld from his net earnings."
 23. The above authority is persuasive and I am inclined to go by the holding as it lays down the correct position on statutory deductions other deductions which the deceased voluntarily subscribes to. I am therefore of the view that the trial court cannot be faulted for deducting NHIF and NSSF as in essence, statutory deductions are not for the benefit of the family.
 24. In arriving at the multiplier, the court 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. However, case law gives guidance on the court approach.
 25. In *Jane Wangui Njenga v Eldoret Bus Services Ltd* [2001] eKLR, the court adopted a multiplier of 20 years where the deceased was 29 years old.
 26. In *Joseph Ndegwa & another v Japhet Ndungu Muboro the Legal Representative of the Estate of late Dishon Irungu Ndungu* [2019] eKLR, Mwongo, J. upheld the adoption of 25 years as the multiplier where the deceased was 29 years. In that case, the court relied on the cases of *Gakuri Gathuri (suing as the representative of the Estate of James Kinyua Gachoki v John Ndiga Njugi & 2 others* [2015] eKLR and *Silas Mugendi Nguru v Nairobi Women's Hospital* [2014] eKLR. In the case of *Gakuri Gathuri (suing as the representative of the Estate of James Kinyua Gachoki (supra)*, the deceased died at the age of 29 years and Muchemi, J, adopted a multiplier of 25 years. Similarly, in *Silas Mugendi Nguru's case*



(*supra*) Waweru, J, also dealing with a matter in which the deceased was aged 29 at the time of death, used a multiplier of 25 years.

27. In this case, the trial court noted that the deceased died at the age of 29 years as per the death certificate and that there were no pre-existing conditions that were confirmed. The learned magistrate adopted the multiplier of 22 years noting that the deceased's life could have been cut short by other vicissitudes. In view of the comparable authorities above, it is my view that the multiplier of 22 years as adopted by the trial court is reasonable considering the vicissitudes and vagrancies of life. The above authorities show that the courts have adopted a multiplier of 20-25 years.
28. From the above analysis, it is my view that the trial court applied the correct principles and took into account relevant factors in awarding the sum of 1,098,416/= as damages for loss of dependency. The said sum was reasonable, sound and judicious in the circumstances and was commensurate to comparable awards made in the past for the injuries sustained by the deceased.

Conclusion

29. The upshot of the foregoing, is that the appeal lacks merits.

I order that:-

1. The appeal is dismissed.
2. Costs of the appeal to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 17TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE

