



Kimuri v MLW & another (Suing as the legal representatives and administrators of the Estate of CM) (Civil Appeal E136 of 2021) [2023] KEHC 23125 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E136 OF 2021
HM NYAGA, J
OCTOBER 4, 2023**

BETWEEN

BEATRICE WARUARE KIMURI APPLICANT

AND

MLW 1ST RESPONDENT

RLL 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF CM**

*(Being an appeal from the Judgment and Decree of the E. Usui (CM)
delivered on 14th January, 2021 in Nakuru CMCC No. 616 of 2019)*

JUDGMENT

1. The respondent brought action against the appellant in the lower court in the above stated case, seeking general and special damages for the death of CM, through a road traffic accident that occurred on 24th January 2019.
2. A consent on liability was entered at 90% against the appellant and at 10 % against the respondent. Parties then proceeded for assessment of damages. Judgment was delivered on the 14th January, 2021 in the following terms: -
 - a. Pain and Suffering Ksh.50,000/=
 - b. Loss of Expectation of life Ksh.100,000/=
 - c. Loss of Dependency Ksh. 1,614,392/=
 - d. Special Damages Ksh.55,500/=



Less 10 % contribution Ksh.181, 989/=

Total award.....Ksh. 1,637,903/=

- e. Costs of suit
 - f. Interest as prayed.
3. Being aggrieved by the said judgment, the appellant filed this appeal vide a memorandum of appeal dated 9th December, 2021 in which she cited the following five(5) grounds of appeal:-
- a. That the Learned Trial Magistrate erred in Law and in fact in failing to accord due regard to the evidence by the Defence Witnesses and the Defendant's submissions in arriving at its judgment on quantum.
 - b. That the Learned Trial Magistrate erred in Law and in fact in awarding Ksh.1, 614,392/= under loss of dependency which was inordinately high in the circumstances.
 - c. That the Learned Trial Magistrate erred in Law and in fact in relying on the wrong multiplicand hence arriving at an erroneous decision.
 - d. That the Learned Trial Magistrate erred in Law and in fact in failing to accord due regard to the Appellant's submissions on quantum on applicable principles for assessment of damages.
 - e. That the Learned Trial Magistrate erred and misdirected herself in law and in fact in misapplying the principles applicable to assessment of damages.
4. The Appellant prays that the judgment on quantum by the lower court be set aside and this Honourable Court be pleased to assess damages afresh and the Appeal be allowed with costs.
5. The appeal was canvassed through written submissions.

Appellant's Submissions

- a. The Appellant submitted only on Loss of Dependency. The appellant argued that the respondents did not prove earnings and therefore the trial court ought to have adopted a global sum approach which applies in cases where there is no proof of earning/proof of employment. Reliance was placed on the case of Frankline Kimathi Baariu & Another vs Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] eKLR where the court while dealing with a similar issue stated:

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency...”

6. In view of the above, the Appellant argued that Ksh.1, 614.392.00 awarded under this head was inordinately high and ought to be substituted with the sum of Ksh. 800,000/-. To buttress her submissions, the Appellant relied on the following cases:-
 1. John Macharia Mwangi vs Josephat Muriungi Muguongo & another (Suing as the legal representatives of the estate of Christine Nkirote Muriungi (Deceased) [2020] eKLR- where the court awarded Ksh.1,000,000/= under this the head of loss of dependency to the estate of deceased aged 31 years who was survived by two children and also supported her father.



2. Geoffrey Obiero & another vs Kenya Power & Lighting Corporation Limited & another [2019] eKLR -where the court awarded a global sum of Kshs.1,200,000/ under this head to the estate of a deceased aged 25 years.
 3. Civiscope Limited vs Gilbert Kimatare Nairi & another [2021] eKLR – where the High court upheld the lower court awarded a global figure of Kshs. 600,000 on loss of dependency for a deceased aged 31 years.
7. The appellant prayed for costs based on section 27 of the *Civil Procedure Act*.

Respondents' Submissions

8. The Respondents submitted on all grounds of the Memorandum of appeal but considering the Appeal only limited itself on the award under loss of dependency in the appellant's submissions, I will only consider the Respondents' submissions in this regard.
9. The respondents concurred with the lower court award on loss of dependency. They submitted that the deceased was a casual laborer and technician. They confirmed that they did not produce any document to prove earnings and enjoined this court to be guided by the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the court opined as follows:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things”
10. The respondents also relied on the case of Petronila Muli vs Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR where the court held that in circumstances where deceased income is unascertainable the legal position is to adopt the minimum wage guideline as guiding principle in assessing loss of income & the case of Leon Ojiambo Ojian & Another vs Lilian Mushiele Wafula & Another (suing As Personal Representatives Of The Estate Of Robert Masika Kalinda(Deceased) [2021] eKLR where the court held a similar view.
11. The respondents thus submitted that the deceased being a casual laborer and technician, then the Regulation of Wages (General) (Amendment) Order 2018 would apply and it provided for a monthly income of Ksh.13,975.55 for a person in “all other areas”
12. The respondent further submitted that the trial court in its discretion classified the deceased as a general labourer and applied the Regulation of Wages (General) (Amendment) Order in arriving at its decision. It was also submitted that the deceased was 28 years old at the time of the demise and the trial court in its discretion rightly adopted a multiplier of 26 years given the vicissitudes of life.
13. The respondents also submitted that dependency of ratio of 1/3 adopted by the trial court was appropriate considering the deceased was unmarried and did not have children.
14. The respondents urged this court to find the appeal lacks merit and dismiss it with costs to them.



Analysis & Determination

15. Under Section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.
16. Accordingly, the first Appellate Court should re-evaluate the evidence and make its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor vs Associate Motor Boat Co. Ltd.* 1968 EA 123.
17. No challenge was made on the lower court's awards for pain and suffering, loss of expectation of life and special damages. I therefore I uphold these awards.
18. This appeal is on quantum of damages only, and only in respect to the award for loss of dependency.
19. Assessment of damages is at the discretion of the trial court, and this court cannot interfere with the exercise of such discretion except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd Vs Gathogo Kanini vs A.M.M Lubia & Another* where it was stated as follows: -

“I think it is well settled that this court will not interfere with the 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 because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
20. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 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.”
21. The Court of Appeal in *Odinga Jacktone Ouma vs Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
22. On loss of dependency, the Appellant argues that the trial Court ought to have adopted a global or lump sum amount instead of a multiplier approach.
23. Thus, the issue at hand is whether the trial Court erred in failing to adopt a global sum award.



24. In the case of Board Of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku Court of Appeal sitting at Nyeri In Civil Appeal No. 35 of 2014 eKLR pronounced itself as follows:
- “The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason”
25. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* and quoted in *Albert Odawa vs Gichumu Githenji* NKU HCCA No. 15 of 2003 (2007), KLR, Justice Ringera was of the following view;
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known 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.”
26. This reasoning was adopted in *Mary Khayesi Awalo & Another -vs Mwilu Malungu & another* ELD HCCC NO. 19 OF 1997 [1999] eKLR where Nambuye J., stated that:-
- “As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court’s opinions that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”
27. In *Seremo Korir & Another vs SS (Suing as The Legal Representative of the Estate of MS, Deceased)* [2019] eKLR, the court said:
- “In the lower court’s judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased’s school and that the deceased was 12 years old, a fact that was not contested. It was the appellants’ submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method.
- In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the ‘global sum’, ‘separate heads’, or ‘mixed’ approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach”
28. From the above, it is apparent that the choice of whether to adopt a multiplier or make a global award is entirely a matter of discretion of the court, but of course, it is dictated by the circumstances of the case.
29. The deceased in this case was said to be a casual laborer and a technician and no documentary proof was adduced to prove his earnings. Guided by the holding in *Jacob Ayiga Maruja & another vs Simeon Obayo* (supra) it is true that evidence of income is not to be proved only by documentary evidence.
30. The Appellant has urged this court to adopt a global sum approach, and be guided by the holding in *Frankline Kimathi Baariu & Another vs Philip Akungu Mitu Mborothi* (suing as the Administrator



and Personal Representative of Antony Mwiti Gakungu Deceased)(supra). I have read this authority and it is distinguishable from the instant case in that the deceased therein was in formal employment and the court was not satisfied why his employment letter or payment records were withheld. The court opined as follows:

“I am aware of the decisions of the Court of Appeal to the effect that evidence of income is not to be proved only by documentary evidence. However, in the circumstances of this case, the evidence produced is not convincing. This is so considering that; the respondent is said to be a director with Gakunju Company Limited where the deceased was allegedly employed. He had access to all the records of that company including and not limited to, the deceased’s letter of employment, payment records of the deceased amongst others. He decided to withhold them from the Court...”

31. In the instant case the deceased was not in any formal employment. I have also perused the submissions of the Appellant in the lower court. Her submissions were based on a multiplier approach. The global sum approach has only been raised in this Appeal. It is common for courts to refer to minimum wage where the claimant’s income is unascertainable.
32. In *Oyugi & Another -vs- Fredrick Odhiambo Ongong & 3 Others* [2014] eKLR the court stated that;
“Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time.”
33. The court, in my view, correctly referred to the statutory wage guidelines in force at the material time when approximating the deceased income in this matter. Now that it is well settled that the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the court, I reject the Appellant’s contention that the Court erred in failing to adopt a lump sum figure.
34. I note the Appellant has not challenged the income, multiplier and dependency ratio adopted by the trial court in calculating award under this head and I therefore find that there are no justifiable grounds to warrant the setting aside of the finding of the trial Court on the award on loss of dependency.
35. Consequently, I find that the Appeal is devoid of merit and I hereby dismiss it with costs to the Respondents.
36. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF OCTOBER, 2023.

H. M. NYAGA

JUDGE

In the presence:-

C/A Jeniffer

Ms Saringi for Respondent

Mr. Njuguna for Appellant

