



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Mwangi & another v Muya & another (Suing as legal representatives
of the Estate of Samuel Mutunga Mutua (Deceased)) (Civil Appeal
73 of 2018) [2023] KEHC 24032 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 73 OF 2018
FN MUCHEMI, J
OCTOBER 24, 2023**

BETWEEN

CLEMENT KARURU MWANGI 1ST APPELLANT

THOMAS KARURU KAMAU 2ND APPELLANT

AND

FRANCIS MUTUA MUYA 1ST RESPONDENT

JOYCE NDUNGA KATILA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SAMUEL
MUTUNGA MUTUA (DECEASED)**

*(Being an Appeal from the Judgment and Decree of Hon. D. Nyaboke (RM)
delivered on 26th November 2018 in Wang'uru PMCC No. 56 of 2017)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Wang'uru Resident Magistrate in PMCC No. 56 of 2017 arising from a road traffic accident whereby judgment was delivered in favour of the respondents as against the appellants in the following terms:-
 - a. Liability 100%
 - b. Pain and suffering Kshs. 10,000/-
 - c. Loss of expectation of life Kshs. 100,000/-
 - d. Loss of dependency Kshs. 1,500,000/-



- e. Special damages Kshs. 13,550/-
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 4 grounds summarized as follows:-
 - a. The learned magistrate erred in law by finding the appellants 100% liable in negligence thereby disregarding the deceased's contributory role in the accident;
 - b. The learned trial magistrate erred in law in awarding damages for loss of dependency at Kshs. 1,500,000/- which amount is manifestly excessive.
3. Parties put in written submissions to dispose of the appeal.

Appellants' Submissions

4. The appellants submit the bone of contention is whether the trial court erred in awarding Kshs. 1,500,000/- as damages for loss of dependency. The appellants submit that the trial court erred in adopting a global award approach when there was no proof of earnings. To support their contention, they rely on the cases of Beatrice W. Murage vs Consumer Transport Limited & Another (2014) eKLR and Monica Njeri Kamau vs Peter Monari Onkoba [2019] eKLR and submit that the trial court ought to have adopted the minimum wage formula. The appellants further submit that the minimum wage of the deceased at the time of death was Kshs. 5,844.20/- per month as per the Regulation of Wages (General Amendment) Order, 2015. The appellant further submits that the deceased's place of residence at the time of his death was Mwea which falls under the category of other areas as listed in the regions in the Regulation of Wages (General Amendment) Order 2015. The appellant further relies on the case of Petronila Muli vs Richard Muindi Savi & Catherine Mwendu Mwindu [2021] eKLR and submits that the court ought to award Kshs. 5,844.20/- per month.
5. On the issue of multiplicand, the appellants rely on the cases of Roger Dainty vs Mwinyi Omar Haji & Another [2004] eKLR and Kenya Power & Lighting Co. Ltd vs Bernard Kilonzo (Suing as the administrator of the Estate of the late Maurice Mutonda Kilonzo) [2012] eKLR and submit that the deceased died at the age of 21 years as per the death certificate. Thus owing to the vicissitudes of life, life expectancy has reduced and thus the appellants urge the court to adopt a multiplier of 25 years.
6. On the issue of dependency ratio, the appellants cite the case of Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR and submit that the extent of dependency is a question of fact to be established in each case. In the instant case, the appellants submit that from the chief's letter, the deceased was survived by his mother and father. Furthermore, PW1 testified that the deceased used to give her money for upkeep. As such, the appellants urge the court to adopt a dependency ratio of $\frac{1}{2}$ as the deceased was unmarried and did not have any children. Accordingly, the appellants submit that general damages under the heading loss of dependency ought to have been assessed as follows:-
$$5,844.20 \times 12 \times 25 \times \frac{1}{2} = 876,630/-$$

The Respondents' Submissions

7. The respondents rely on the cases of Albert Odawa vs Gichumu Githenji [2007] eKLR, Moses Mairua Muchiri vs Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (Deceased) [2016] eKLR and Frankline Kimathi Maariu & Another vs Philip Akungu Mitu Mborothi (suing as the administrator and personal representative of Antony Mwititi Gakungu (Deceased) [2020] eKLR and submits that the global award method as applied by the trial court was the most suitable in the circumstance. The respondents further submit that the deceased died at the age of 21 years, unmarried with no children and was survived by his mother and father as his sole



dependants. Thus the court was unable to determine for how long the dependency would last. Further, the respondents submit that the trial court found it difficult to ascertain the amount earned by the deceased at the time of his death without speculations. Whereas the respondents in their pleadings stated that the deceased earned Kshs. 30,000/- PW2 testified that the deceased's income was unknown and that she only used to keep Kshs. 20,000/- from the deceased's earnings. The respondents further submit that the appellants submitted that the court use the sum of Kshs. 10,000/- as the deceased's earnings.

8. The respondents thus urge the court to adopt a multiplicand of Kshs. 30,000/- and a multiplier of 40 years since the deceased was 21 years and he may have worked way beyond 60 years. To support this contention, the respondents rely on the cases of *Midland Media Limited & Another vs Pauline Naukot Aule* (Suing as the legal representative of the Estate of the late Esinyon Esokon Ekai) [2020] eKLR and *Crown Bus Services Ltd & 2 Others vs Jamilla Nyongesa & Amida Nyongesa* (legal representatives of Alvin Nanjala (Deceased) [2020] eKLR. The respondents urge the court to adopt a dependency ratio of 2/3 and thus calculate the award as follows:-
9. $30,000/- \times 35 \times 12 \times 2/3 = 8,400,000/-$

Issue for determination

10. The main issue for determination is whether the appeal has merit.

The Law

11. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

12. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

13. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

14. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.



Whether the trial court erred in awarding an inordinately high award for loss of dependency.

15. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55* set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

16. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457* 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.”

17. The Court of Appeal in *Chunibhai J. Patel & Another vs P. F. Hayes & Others [1957] EA 748, 749* stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

18. In the instant case, the appellants are faulting the trial court for adopting a global award when there was no proof of earnings. The appellants argue that in the event one does not prove what the deceased earned, the trial court ought to use the earnings in the minimum age.
19. In *Frankline Kimathi Maariu & Another vs Philip Akungu Mitu Mborothi (Suing as administrator and personal representative of Antony Mwiti Gakungu (Deceased) [2020] eKLR* where the court was 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. The global sum would be an estimate informed



by the special circumstances of each case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

20. In the same breadth, the court in *Moses Mairua Muchiri vs Cyrus Maina Macharia (Suing as the personal representative of the Estate of Mercy Nzula Maina (Deceased))* [2016] eKLR held as follows:-

It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.

21. From the foregoing, it is evident that there are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income of the deceased, whereas the other school advocates for a global award.
22. I have perused the trial court's judgment and noted that the learned magistrate in arriving at the decision to award a global sum of Kshs. 1,500,000/- considered that the respondents' witness did not avail evidence that the deceased was earning Kshs. 20,000/- or Kshs. 30,000/-. The cases considered by the court were those of *Aphia Plus vs Cephas Owouth Najuma & Another* (2015) eKLR, *Beatrice W. Murage vs Consumer Transport Limited & Another* (2014) eKLR and *Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 Others* (2014) eKLR where the court awarded a lump sum and further noted that it would be speculative of her to adopt Kshs. 20,000/- as proposed by the respondents or Kshs. 10,000/- as proposed by the appellants. The learned magistrate considered minimum statutory wage and stood guided by the decision in *Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 Others* (2014) eKLR and came to a conclusion that awarding a global award was best in the circumstance. I therefore concur with the learned magistrate that the global sum was best in this particular circumstance and upheld that the sum of Kshs. 1,500,000/- was reasonable compensation.

Conclusion

23. In my considered view, the honourable magistrate did not err in making the awards complained of. All the relevant factors were taken into consideration in making the award.
24. Consequently, I find that this appeal lacks merit and it is hereby dismissed with costs to the respondents.
25. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 24TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 24th day of October , 2023

