



Mwito v Murungi (Suing as the legal representative of the Estate of Boniface Mwenda Mithika (Deceased) (Civil Appeal E022 of 2023) [2023] KEHC 23324 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E022 OF 2023
TW CHERERE, J
OCTOBER 5, 2023**

BETWEEN

ROMANO MUGAMBI MWITO APPELLANT

AND

**STEPHEN MITHIKA MURUNGI (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF BONIFACE MWENDA MITHIKA
(DECEASED) RESPONDENT**

*(Being an appeal from the judgment and decree in MAUA CMCC
NO. E113 of 2022 by Hon. T. Gesora (CM) on 19th January, 2023)*

JUDGMENT

1. On January 14, 2021, Boniface Mwenda Mithika (Deceased) was knocked down by appellant's motor vehicle KCR 595W which was allegedly being driven negligently by the appellant and/or his servant as a result of which Boniface Mwenda Mithika suffered fatal injuries.
2. Consequently, Stephen Mithika Murungi filed suit for compensation in his capacity as father and legal representative of deceased's estate.
3. The suit was heard on merit and at its conclusion, the learned trial magistrate by a judgment dated January 19, 2023 entered judgment in favour of the Respondent against the Appellant as in the following terms:
 1. Liability 100%
 2. Pain and suffering KES. 50,000/-
 3. Loss of expectation of life KES. 200,000/-
 4. Loss of dependency KES. 2,100,000/-



5. Special damages KES. 150,000/-
Grand total KES.2,500,000/-
4. Respondent was additionally awarded costs of the suit and interest.

The Appeal

5. Appellant was aggrieved by the lower court's decision as a result of which he filed this appeal mainly on the ground that the sum awarded for loss of expectation of life, the multiplier and dependency ratio were not explained as a result of which the trial court's award was excessive.
6. The appeal was argued by way of written submissions which both parties dutifully filed.

Appellant's Submissions

7. Appellant disputes only two items namely loss of expectation of life and the multiplier of 35 years.
8. By submissions filed on April 13, 2023, appellant faulted the trial magistrate for failing to explain how the sum of KES. 200,000/- was arrived at and on the basis of the holding in *Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* [2021] eKLR urged the court to award KES. 100,000/- under this heading.
9. Concerning the award on loss of dependency, Appellant does not dispute the multiplicand and the dependency ratio of 1/3 but faults the trial magistrate for failing to consider the duration of dependency thereby applying a multiplier of 35 years which he contends is erroneous. Appellant proposed a multiplier of 15 years and relied on the following authorities:
 - a. *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another* Nairobi HCCC No. 1638 of 1988 (UR) set out the guidelines applicable in assessment of damages under the *Fatal Accident's Act* as follows:

The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature. (emphasis added)
 - b. *Elizabeth Gacoki W/O Kibara v Paul Ekulan & another* [1987] eKLR- where the court emphasized that:

Section 8 of the Fatal Accidents Act, cap 32 Laws of Kenya, does require that the full particulars of the deceased's dependents be set out in the claim, presumably to give some indication as to the extent of their dependency and the duration of the dependency. The plaintiff was under a duty not only to supply those particulars but also to prove by evidence on a balance of probabilities the extent of their dependency on the deceased and, also, the duration of that dependency. (emphasis added)



- c. *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 where the court held 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. (emphasis added)

Respondents’ Submissions

10. In support of the sum of KES. 200,000/- for loss of expectation of life and cited *Vincent Kipkorir Tanui (Suing as the administrator and/or Personal representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiak Tea Factory Co. Ltd & another* [2018] eKLR where the court on appeal upheld an award for KES. 200,000/- under this heading.
11. In support of the multiplier of 35 for loss of dependency, respondent made no response to the contention by the appellant that the age of the dependent was a material factor in determining loss of dependency but maintained that 35 was reasonable on the round that the deceased who was 21 was expected to have lived for more than 60 years.

Analysis and Determination

12. I have considered the evidence at the trial, the submissions and authorities filed on behalf of the parties.
13. The principles on which a court can interfere with an award for damages was stated by Madan JA in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898 and restated by Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & anor v Lubia & anor, No 2* [1987] KLR 30 that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either 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.”

14. In determining this appeal, I will endeavour to address the issue of the disputed damages under each heading as follows:

Loss Of Expectation Of Life

15. At the hearing, respondent prayed for KES. 200,000/- and cited no authority. Appellant on the other hand offered KES. 100,000/- and cited *Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* (supra). In awarding KES. 200,000/-, the learned trial magistrate failed to justify why he departed from the generally accepted principle that that require comparable level of awards in similar cases. From the foregoing, I am persuaded that the sum of KES. 200,000/- was not supported by evidence. I find in favour of the appellant that KES. 100,000/- is reasonable under this heading.
16. The general approach being that comparable damages should, as far as possible, be compensated by comparable awards, I find that this is a proper case for the court to interfere with the award under this heading and the same is substituted with KES. 100,000/-.



Loss Of Dependency

17. Section 4 (1) of the *Fatal Accidents Act* cap 32 Laws of Kenya provides as follows: Action to be for benefit of family of deceased

Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:..."

18. For the foregoing reason, it was upon the Respondent to not only prove the age of the deceased but also his age being the sole dependent, so that the court could rightly determine the expected length of dependency. By only considering the age of the deceased, the court fell into error and doing the best in the circumstances of this case, I shall substitute the multiplier of 35 with 20.

19. In the final analysis, this appeal partially succeeds and it is hereby ordered:

1. The award for KES. 200,000/- for loss of expectation of life is set aside and substituted with an award for KES. 100,000/-
2. The multiplier of 35 is set aside and substituted with 20
3. Each party shall bear its costs

DATED AT MERU THIS 05TH DAY OF OCTOBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti/Munene

For Appellant - Mr. Thuku for J.M.Mwangi & Co Advocates

For Respondent - Ms. Asuma for Mutembei & Kimathi & Co. Advocates

