Rutto v Tanui & another (Suing as the Legal Administrators of the Estate of Cyrus Kibiwott Kiptoo) (Civil Appeal 10 of 2023) [2024] KEHC 14816 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14816 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL 10 OF 2023

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

VINCENT KIBIWOTT RUTTO ..... APPELLANT

AND

SAMMY KIPTOO TANUI ..... 1ST RESPONDENT

JULIUS JEPKOSGEI SERONEI ..... 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF CYRUS KIBIWOTT KIPTOO

JUDGMENT

1. This Appeal is against the quantum of damages awarded in Iten Principal Magistrates Civil Case No. 5 of 2020 as compensation for the death of a 23 years old adult male that occurred as a result of a fatal road accident. In the trial Court, the Appellant was the Defendant whereas the Respondents were the Plaintiffs. The Appellant now seeks reduction of the amount of compensation awarded claiming that the same was manifestly excessive.

2. The background of the case is that by the Plaint filed on 22/01/2020 through Messrs Mwakio, Kirwa & Co. Advocates, the Respondents sued the Appellant seeking general damages under the *Fatal Accidents Act* and the *Law Reform Act* and for loss of consortium, special damages at Kshs 275,120/-, costs of the suit and interest.

3. The Appellants alleged that at all material times, the Appellant was the driver and/or owner of the motor vehicle registration number KBG 035L (matatu) that on 28/01/2019, along the Eldoret-Eldama Ravine road at Maji Mazuri, the Appellant or his agent, while driving the said motor vehicle in which the deceased, Cyrus Kibiwott Kiptoo, was lawfully travelling in as a fare paying passenger so negligently drove and/or controlled the motor vehicle causing it to swerve and overturn at an area of the road with a sharp bend occasioning a self-involving accident. It was pleaded that the accident resulted into fatal

injuries to the deceased and consequently, loss and damage to the deceased's estate and dependents who were then listed as the two parents, siblings and also a son of the deceased. As aforesaid, the special damages were particularized at the sum of Kshs 275,120/- comprising of funeral expenses, charges of seeking grant of Letters of Administration ad Litem and for motor vehicle search.

4. It was pleaded further that at the time of his death, the deceased was in perfect health and was employed at Landmark Development Limited as a Supervisor earning net wages of Kshs 28,800/- per month, and that he was using his earnings to maintain his dependents

5. The Appellant filed his Statement of Defence on 11/03/2020 through Messrs Kimondo Gachoka & Co. Advocates denying the claim.

6. It was then agreed that a separate suit arising from the same accident as the one the subject hereof, namely, Iten PMCC No. 5 of 2020, do serve as a test suit on the issue of liability. Upon such test suit being determined and liability found at 100% against the Appellant, the same was adopted and the suit then proceeded to formal proof for purposes of assessment of damages. The Respondent called 1 witness while the Appellant did not call any.

Respondent's evidence before the trial Court

7. PW1 was the 1st Respondent herein, Sammy Kiptoo. He adopted his Witness Statement and produced the exhibits contained in his bundle of documents. Under cross-examination by Mr. Amihanda, Advocate for the Appellant, he stated that he was the father of the deceased although he did not produce a Birth Certificate to prove so, that the deceased had a child but he could not remember the child's name, and that the deceased was not married. He conceded that he was not taking care of the child and stated that the deceased was 23 years old and a casual supervisor. He however conceded that the death certificate produced by him indicated that the deceased was a student and that in his witness statement, he stated that the deceased was a nurse. He however sought to clarify that the deceased was working and also studying, and that the company the deceased used to work for is in Eldoret. He however conceded that the letter from the company that he produced was not addressed to him and also that he did not produce a pay-slip for the deceased. Regarding himself, he stated that he was a farmer and conceded that he takes care of his family whom he still provides for. He also stated that they held a "harambee" (public fundraising exercise) to raise funeral expenses. In cross-examination, he stated that he had obtained the Letters of Administration.

8. By its Judgment delivered on 20/04/2022, the Court assessed and awarded damages to the Respondents as follows:

Pain & suffering	Kshs 50,000.00
Loss of expectation of life	Kshs 60,000.00
Loss of dependency	Kshs 2,400,000.00
Special damages	Kshs 214,420.00
Total	Kshs 2,724,420.00

9. The award for "loss of dependency" at Kshs 2,400,000/- (computed as Kshs 24,000/- for 12 months x 25 years x 2/3) was based on the following parameters:

Multiplicand (monthly earning)	Earning years (multiplier)	Dependency ratio
24,000/-	25	1/3

10. Dissatisfied with the Judgement, the Appellant filed this Appeal on 17/03/2022. The Memorandum of Appeal contains the following grounds:

    i. That the learned trial magistrate erred in law and in fact by proceeding on wrong principles when assessing the damages payable to the Respondent for loss of dependency under The *Fatal Accidents Act*.

    ii. That the learned trial magistrate erred in law and in fact in applying the wrong principles in law and/or misapprehending the evidence on record while assessing the damages payable to the Respondent.

    iii. That the learned trial magistrate erred in law and in fact using the multiplier approach in awarding damages for loss of dependency under the *Fatal Accidents Act* instead of applying the global award approach in view of the evidence on record and/or adduced during trial.

    iv. That the learned trial magistrate erred in law and in fact using the multiplier approach in awarding damages for loss of dependency under the *Fatal Accidents Act* by ignoring the contents of the Death Certificate that the deceased was a student yet instead of applying the global award approach in view of the evidence on record and/or adduced during trial, the Court adopted a multiplier approach.

    v. That the learned trial magistrate erred in law and in fact by awarding Kshs 2,510,000/= as general damages which award is inordinately high in the circumstances thus representing an entirely erroneous estimate of an award of general damages vis-a-vis the Respondent's claim and thus the award constituted a miscarriage of justice.

    vi. That in the alternative and without prejudice to the foregoing if at all applying the multiplier approach was proper, the learned trial magistrate erred in law and in fact by adopting a multiplicand of Kshs 24,000/= without any lawful justification instead of adopting a global approach considering it was not proved that the Deceased was in employment neither were alleged earnings proven.

    vii. That the learned trial magistrate erred in law and in fact by adopting a multiplicand of Kshs. 24,000/= which is speculative given that the deceased's earnings were not proved during trial.

    viii. That the learned trial magistrate erred in law and in fact by awarding a sum of Kshs. 214,420/= as Special Damages pursuant to receipts which contravened provisions of the *Stamp Duty Act* (Sections 19, 20 and 88 of the Act).

    ix. That the learned trial magistrate erred in law and in fact by applying a multiplier of 25 years without any justification and which multiplier is erroneously high in view of the authorities cited by the Appellant in his written submissions.

    x. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's written submissions on quantum more specifically on the issue of loss of dependency thereby arriving at a determination on quantum which is wholly erroneous.

Hearing of the Appeal

11. It was then directed that this Appeal be canvassed by way of written Submissions. Pursuant thereto, the Respondents filed their Submissions on 06/06/2024. For the Appellant however, up to the time of concluding this Judgment, I had not come across any Submissions filed by him or on his behalf.

Respondents' Submissions

12. Regarding "pain and suffering", Counsel for the Respondents submitted that damages awardable under this head usually depends on span of time it took for the deceased to succumb to his injuries and that in this case, the deceased died on the spot. For this reason, he urged that the award was proper and should be maintained.

13. On "loss of expectation of life", he submitted that from the evidence, the deceased was 24 years of age, enjoyed good health, lived a vigorous life, and that that he was earning a salary of Kshs 32,000/-. He therefore supported the award of Kshs 60,000/- under this head.

14. Regarding "loss of dependency", he submitted that the deceased had 2 dependents, the mother and the father, that evidence of earnings was tendered in evidence, and that the decedied without a child. He proposed a figure of 2/3 as dependency ratio. He submitted that the retirement age for public servants is 65 years and therefore suggested a multiplier of 41 years. At the end he proposed an award of Kshs 10,496,000/- under this head, computed as follows:

    (Kshs 32,000/- for 12 months) x 41 years x 2/3 = Kshs 10,496,000/-

15. On "special damages", Counsel submitted that all the receipts contained in the Respondents' List of documents were produced as a bundle, that the Appellant did not contest their production and that therefore, the same cannot be an issue in this Appeal.

Determination

16. This being a first appeal, the Court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify (see Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348).

17. Further, this being an appeal only on quantum, this Court is aware of the limits of its jurisdiction. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia [1985], the following was stated:

> " 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."

18. Before I proceed further however, I observe that while the trial Court awarded "loss of dependency" at the sum of Kshs 2,400,000/-, Counsel for the Respondent (who was the successful party), in his Submissions, appears to be seeking an enhancement thereon to Kshs 10,496,000/-. My simple answer to this is that the Respondents not having filed any cross-Appeal of their own, and this Appellate Court having not therefore been moved to determine the issue of enhancement of damages, the Appellant has not had an opportunity to respond thereto. The only Appeal before this Court is the one seeking

reduction of the quantum and that is all I will deal with herein. I therefore decline the invitation to "stray" into the issue of enhancement of the award for "loss of dependency".

19. In the circumstances, I find the issues that arise for determination herein to be the following;

    i. Whether adoption of the multiplier method in computing "loss of dependency", rather than the global method, was justified and whether the award was manifestly excessive.

    ii. Whether the awards for "pain and suffering", "loss of expectation of life", and "special damages" were proper and/or justified.

20. I now proceed to analyse and answer the issues.

Whether adoption of the multiplier method in computing "loss of dependency", rather than the global method, was justified and whether the award was manifestly excessive

21. The Respondents' claim was based on the provisions of Section 4 of the *Fatal Accidents Act*, which provides as follows:

> "
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> "(1) 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:
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> Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

22. Regarding the choice of the method to adopt in computing "loss of dependency", Mabeya J in the case of Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR, stated as follows:

> "(23) 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.
>
> [24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

23. Similarly, Nambuye J (as she then was), in the case of Mary Khayesi Awalo & Another v Mwilu Mulungi & Another [1999] eKLR cited in Albert Odawa v Gichimu Gichenji [2007] eKLR, stated the following:

> " 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."

24. In the said Mary Khayesi Awalo & Another (supra), the Judge further stated as follows:

> " 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 opinion 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".

25. It is therefore evident that the principle advanced in the said cases and in many others, which I have not necessarily also cited, is that the "multiplier" approach should only be adopted in cases where there is satisfactory proof of the monthly income earned by a deceased person. The question therefore is whether in this case, the monthly income earned by the deceased was satisfactorily established before the trial Court.

26. In this case, it is true that the Plaintiff mixed himself up regarding the deceased's occupation. In the Plaint, it is pleaded that the deceased was employed as a "supervisor" at Landmark Development Limited earning a monthly net income of Kshs 28,800/-. In his evidence-in-chief, the Plaintiff that the deceased was employed as a "casual supervisor" and in cross-examination, he stated that the deceased was also a "student" because, apart from the employment, he also used to study at a college. Indeed, in the Certificate of Death, the deceased is indicated as "student". However, in his Witness Statement, he had stated that the deceased was a "nurse" at Elgeyo Marakwet earning a net monthly income of Kshs 28,800/-

27. I note however that the Plaintiff did produce in evidence the letter dated 31/05/20 said to have come from the said Landmark Development Limited, indicating that the deceased was employed in that company as a "site supervisor" and that he used to earn an income of Kshs 1,200/- per day. The import of that letter is therefore that the deceased used to earn an estimated aggregate monthly wage of about Kshs 30,000/-. This letter was produced without any objection from the Appellant and was not controverted in any way. The cross-examination did not also challenge or touch on the authenticity of the letter. In the circumstances, and although no pay-slips or wages payment vouchers were produced to prove the alleged earning, I do not find any ground to fault the trial Magistrate for finding that the earnings had been proved by evidence and therefore adopting the multiplier method in computing "loss of dependency".

28. I note that the trial Magistrate used as "multiplicand", the figure of Kshs 24,000/-. Although he did not expressly state the basis thereof, I presume that he went by the figure of Kshs 28,800/- mentioned in the Plaint since a party is bound by his pleadings. I presume further that he then considered the amount that would be payable in income tax and therefore arrived at the net figure of Kshs 24,000/-. Looked

at from this point of view, the figure of Kshs 24,000/- sounds reasonable. Under these circumstances, I find no fault in the trial Magistrate's choice of the "multiplicand" and I therefore decline to interfere.

29. Regarding the "multiplier" adopted by the trial Court at 24 years, I note that before the trial Court, the Respondents had proposed a figure of 42 years while the Appellant proposed 20 years, if the Court were to adopt the multiplier method. I have looked at comparable previous cases in terms of age and I have come across the following decisions:

    a. In Mosonik & Another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment), while dealing with an Appeal concerning a 23 years old deceased, Hon. Lady Justice O. Sewe upheld a multiplier of 37 years adopted by the lower Court.

    b. In Grace Wanjiru Gichuki v Peter Gateru Macharia [2004] eKLR, while dealing with a suit concerning a 23 years old deceased, Hon. Lady Justice An'gawa Mwangi adopted a multiplier of 20 years.

    c. In Ireri Moses v Peter Mutugi Muthike (suing as the legal administrator of Estate of the Late Mary Njeri Muthike (Deceased) [2019] eKLR, Hon. Lady Justice L. Gitari while dealing with an Appeal concerning a 23 years old deceased, upheld a multiplier of 20 years adopted by the lower Court.

    d. In Rottger v Karisa & another (Suing on behalf of the Estate of Said Thoya) (Civil Appeal E062 of 2023) [2023] KEHC 26981 (KLR) (18 December 2023) (Judgment) while dealing with an Appeal concerning a 29 years old deceased, Hon. Lady Justice M. Thande upheld a multiplier from 25 years adopted by the lower Court.

    e. In Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) [2020] eKLR, while dealing with an Appeal concerning a 21 years old deceased, Hon. Justice E. Mureithi reduced a multiplier of 39 years adopted by the lower Court to 25 years.

30. From the foregoing, I deduce that in comparable cases, where the deceased is around 23 years of age, the Courts have given multipliers of between 20-25 years. In the circumstances, and taking into account the vagaries, uncertainties and vicissitudes of life, I find the multiplier of 24 years adopted by the trial Court to have been reasonable and cannot be said to have been inordinately high. In fact, it appears to have been substantially on the lower side. I am therefore not persuaded that I should interfere with the same.

31. Regarding the "dependency ratio", before the trial Court, the Respondents proposed 2/3 while the Appellant suggested 1/3. It is true that ordinarily, where a person dies unmarried, the dependency ratio would generally be awarded at 1/3, rather than 2/3. In this case, it was conceded that the deceased was not married. Further, although it was pleaded in the Plaint, that the deceased had a child, no proof thereof was presented and the 1st Respondent (PW1) could not even remember the alleged child's name. He did not even seem aware of the whereabouts of the alleged child or the child's mother or even the child's gender. In addition, in his evidence, the Plaintiff's father, although he did not disclose his own age, testified that he is a farmer, that he is fit enough and that he is himself the one who is and has always been providing for his own family. In the circumstances, I find that the parents of the deceased did not substantially depend on the deceased for their livelihood. The choice of the 1/3 dependency ratio by the Learned Magistrate having been well explained, I am not persuaded to review it. Thid ground therefore also fails.

Whether the awards for "pain and suffering", "loss of expectation of life", and "special damages" were proper and/or justified.

32. On the award of "pain and suffering" at Kshs 50,000/-, there is no express mention of it in the Grounds of Appeal and I presume that there is therefore no serious dispute, if any, regarding it. Before the trial Court, the Respondents proposed a sum of Kshs 50,000/- while the Appellant proposed Kshs 10,000/-. It is not in dispute that the deceased died a short time after the accident, if not instantly. My review of awards for "pain and suffering" in instances where the deceased dies on the spot reveals that the majority of the awards given by the Courts range in the region of about Kshs 20,000/- to 50,000/-. This is in consideration of the fact that there would be no prolonged distress or torture on the part of the deceased before death. I do not therefore find the award of Kshs 40,000/- to be excessive or inordinately high to merit a review by this Court. I therefore also decline to interfere with the award made under this head.

33. On the award of "loss of expectation of life" at the sum of Kshs 60,000/-, that, too, has not elicited any express mention in the Grounds of Appeal and I also therefore presume that there is no serious dispute about it. I note while the Respondents had, before the trial Court, proposed an award Kshs 60,000/-, the Appellant proposed an even higher figure of Kshs 70,000/-. From my own review of comparable and recent authorities, it is clear that the Courts have been awarding figures in the region of about Kshs 80,000/- to Kshs 150,000/-. The trial Magistrate having therefore awarded Kshs 100,000/-, although higher than what the Respondents had even sought, that figure is within what is ordinarily awarded. I do not therefore find any fault on the part of the Magistrate in awarding that amount.

34. The Appellants have also faulted the trial Magistrate for awarding the sum of Kshs 214,420/- as "special damages". It is trite law that a claim for special damages must not only be pleaded, but must also be strictly proved. This is because such claim represents what a party has actually lost in the form of expenses incurred and he ought to be restored to the position he was in had he not been forced to incur the expenses, hence the need to strictly prove the claims.

35. In the Plaint, the Appellants pleaded a sum of Kshs 275,120/- as the total special damages figure as follows:

Funeral expenses	Kshs 244,570.00	
Charges in seeking grant of letters of Letters of Administration ad litem	Kshs 30,000.00	
c)	Motor vehicle search	Kshs 550.00
Total	Kshs 275,120.00	

36. I have carefully perused the receipts produced by the Respondents before the trial Court and I am satisfied that the figure of Kshs 214,420/- awarded by the trial Magistrate was sufficiently proved by receipts. In any event, the Appellant's Counsel did not object to the production of the receipts and did not also even cross-examine on the same. It is only in the Submissions that the Counsel emerged with challenges thereon. In the circumstances, again, I find no reason to interfere with the trial Magistrate's award under this item.

Final Orders

37. In the end, I dismiss this Appeal in its entirety and I award costs thereof to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Choni for Appellant

Kirwa for Respondent

Court Assistant: Brian Kimathi