



**Kimathi v Kithinji & another (Civil Appeal E210 of 2023)  
[2024] KEHC 14533 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14533 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E210 OF 2023  
CJ KENDAGOR, J  
NOVEMBER 18, 2024**

**BETWEEN**

**ANN KINYA KIMATHI ..... APPELLANT**

**AND**

**ROYFORD KITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**LAKWOOD (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. M.A. Odhiambo – Senior Resident Magistrate arising from the Chief Magistrate’s Court at Meru in Civil Suit No. E2023 of 2022)*

**JUDGMENT**

**Background**

1. One 20<sup>th</sup> May, 2021 Shadrack Gitonga (the Deceased) was involved in a road traffic accident along Meru-Ruiru Road while riding a motor cycle. The Motorcycle was hit by a motor vehicle, as a result of which he sustained severe injuries. He was rushed to Meru Level 5 Hospital, but he succumbed to the injuries later on the same day. The Appellant blamed the Respondents for the fatal accident and sued them, seeking Special damages of Kshs.76,310/= and Damages under the Law Reform Act and Fatal Accident Act. She also sought Damages for loss of consortium.
2. The Respondents filed a Statement of Defense denying negligence for the accident. They stated that the Deceased wholly caused and or substantially contributed to the accident. On 15<sup>th</sup> August, 2023 the parties registered consent on liability and production of documents. The consent read:

“Judgment on liability be apportioned on the ration of 80:20% in favour of [Appellant] against the [Respondents]. The [Appellant’s] document be produced. Parties to proceed and file submissions.”



3. The trial Court delivered a judgment on 31<sup>st</sup> October, 2023 in the following terms: Special Damages- Kshs.76,310/=, Pain and Suffering- Kshs.100,000/=, Loss of Expectation of Life-Kshs.100,000/=, and Loss of Years- Kshs.984,776/=. The Court arrived at the award for Loss of Years by adopting a multiplicand of 7,241/=, a dependency Ratio of 2/3, and a multiplier of 17 years. It rejected the Appellant's claim for Loss of Consortium.
4. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 27<sup>th</sup> November 2023. She raised 7 Grounds of Appeal which are as follows;
  1. That the Learned Magistrate erred in law and in facts by failing to consider or take into consideration the fact that the Appellant had on a balance of probabilities established the profession of the Deceased i.e. a Pastor working within Meru County and the estimate of income for such a profession within Meru County thereby arriving at an erroneous conclusion on Loss of Dependency.
  2. That the Learned Magistrate erred in law and in facts in wrongly applying the minimum wage as a dogma in law and further applying the wrong minimum wage amounts in existence at the time of Judgment while the Appellant had on a preponderance of evidence proved what the deceased was earning and thereby arriving on the wrong conclusion on the amount on Loss of Dependency thereby arriving at an erroneous conclusion.
  3. That the Learned Trial Magistrate erred in law and facts while she failed and/or ignored to consider the totality of evidence adduced by the Appellant and her submissions on Loss of Dependency thereby arriving at a wrong conclusion and finding on the Loss of Dependency.
  4. That the Learned Trial Magistrate erred in law and facts in failing to draw a clear distinction between Loss of Expectation of Life, Lost Years, and Loss of Dependency while making an award under Lost Years within the ambit of *Fatal Accidents Act* and *Law Reform Act* thereby arriving at a wrong conclusion.
  5. That the Learned Magistrate erred in law and in fact in the exercise of her discretion while applying the Multiplier of 17 years against the authorities availed by the Appellant that are binding on the trial court in regards to a 39-year-old deceased person thereby arriving at an erroneous conclusion on the Multiplier applicable.
  6. That the Judgment and decree of the Learned Trial Magistrate dated 31<sup>st</sup> October, 2023 is against the weight of evidence, submissions, and authorities placed before the court therefore erroneous.
  7. That the Judgment of the Learned Magistrate (Hon. M.A Odhiambo-S.R.M) dated 31<sup>st</sup> October 2023 is bad in law.
5. She asked this Court to allow the appeal, set aside the trial court's decision and reassess the quantum of damages payable to the Appellant on the Loss of Dependency. The Appeal was canvassed by way of written submissions.

### **Appellant's Written Submissions**

6. The Appellant submitted that the quantum of damages awarded for Loss of Dependency (Kshs.984,776/=) was inordinately too low. Although she conceded that the court was right in applying the Multiplicand Approach, she argued that the court used the wrong Multiplicand. Her first argument is that the court was wrong in classifying the Deceased as a general labourer. She submitted that the Deceased's profession (Pastor) does not fall within the definition of a general labourer as



outlined under the Regulations of Wages. She argued that the Deceased was a professional, and thus, an estimate of his salary could not be arrived at using the Regulations of Wages.

7. She argued that the Court should use Kshs.25,000/= because her testimony that the Deceased used to earn as much remained unchallenged. In the alternative, the Appellant argued that even if the Deceased was a General Labourer, the court should have used the Multiplicand of Kshs.12,522.70/= because he worked within Meru Municipality. She argued that the Court was wrong in using Multiplicand of 7,241/= because, as per the Regulations, the same is not the minimum wage within a Municipality.
8. Lastly, she argued that the trial Court should not have used the Multiplier of 17 years, given that the Deceased was 39 years old at the time of his death. She argued that Pastoral duties are a calling where one can work beyond the retirement age of civil servants, i.e. 60 years. She submitted that the Court should use a Multiplier of 21 years in line with two comparable cases quoted by the Appellant at the trial. The cases were *Abdimana Abdulwahab & Another v Janet Njeri Wambui & Another* [2021] eKLR, and *Agnes Mutinda Ndolo & Another v Mboya Wambua & 2 Others* where the courts used a Multiplier of 21 years for deceased persons who had died at 39 years.

### **Issues for Determination**

9. I have considered the grounds of appeal and the Appellant's submissions, and I am of the view that the issues for determination are;
  - a. Whether the Court Used the Right Approach in determining the award for Loss of Dependency.
  - b. Whether the award of Kshs.984,776(=) for Loss of Dependency was a reasonable estimate.
10. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court re-evaluates the evidence, it must bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 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 account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Court Used the Right Approach in determining the award for Loss of Dependency

11. The Appellant argued that the lower Court should not have classified the Deceased as a General Labourer. She argued that the Deceased, being a Pastor, was a professional and thus should not have been subjected to the Regulations of Wages (2018). I have looked at the Regulation of Wages (General) (Amendment) Order, 2018, to ascertain whether a Pastor can be placed within the application of the Regulations.
12. The Regulations define a General Labourer as a cleaner, sweeper, gardener, children's ayah, house servant, day watchman, and messenger. The other categories of persons provided for are workers in the mining sector, Machine attendants, Machinists, Machine operators, tailors, cashiers, ungraded artisan, and Artisan Grade I, II, and III. In my opinion, the Regulation of Wages (General) (Amendment) Order, 2018, does not apply to persons engaged in Pastoral Duties in the Religious



Sector. Consequently, I find that the trial Court was wrong when it held that the Deceased fell under the category of General Labourers.

13. The Appellant has asked the Court to use a Multiplier of Kshs.25,000/=. Her argument was that the Respondents never challenged her testimony that the Deceased used to earn around Kshs.25,000/= per month for his Pastoral Duties. Her argument is that, with her testimony being challenged, the Court should agree with her and hold that the Deceased used to earn as much. I disagree with her on this issue. The Appellant had a duty to prove to the Court the existence of this fact on a balance of probability.
14. It is trite law that he who alleges must prove. In civil matters, the burden of proof is on the one who alleges a fact. Sections 107 and 108 of the Evidence Act provide as follows:
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
15. The Appellant did not discharge this duty to the required standard. There was no documentary proof of his earnings besides her statement. I therefore agree with the lower Court that the Appellant did not prove the exact monthly earnings of the Deceased.
16. Lastly, the Appellant argued that the Court should nonetheless settle the Deceased’s salary at Kshs.25,000/= because the facts of this case are similar to the facts of Hussein Shariff Ali v Grace Kareia Mutua (Suing as the legal representative of the Estate of John Mutua (Deceased)) [2021] eKLR, where the Court found that a Deceased, who was serving as a Pastor within Meru Municipality, earned 25,000/= monthly.
17. I, however, do not agree with this submission. The facts of the two cases are significantly different and distinguishable. In Hussein Shariff Ali, the Deceased’s widow produced a letter from the top Management of the church, Bishop Geoffrey Mutuma, confirming that the Deceased worked at the African Mission Church earning the said amount of Kshs.25,000/=. The letter was also stamped by the church's stamp. The Appellant did not produce a similar letter or any other documentary evidence.
18. Based on the above analysis, I hold that the Appellant did not prove the Deceased’s monthly earnings or salary. I also find that the court has no means of estimating the Deceased’s salary or wages because, as pointed out above, pastoral duties within the religious sector do not lie under the Regulation of Wages (General) (Amendment) Order, 2018.
19. Consequently, I hold that the Multiplier Approach is not applicable in this case because the multiplicand cannot be ascertained with any precision. I am guided by the Court’s decision in Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR, where the Court stated as follows;

“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.”

20. Similarly, in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the court held as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case 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. I take the view that the global sum approach is the most applicable approach in this case. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR, the Court 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.”

Whether the award of Kshs.984,776/= for Loss of Dependency was a reasonable estimate

22. An Appellate court can justifiably interfere with the quantum of damages awarded by the trial Court if it is satisfied that the trial court applied the wrong principles. This principle was restated by the Court of Appeal in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, where the Court said:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

23. As analyzed above this Court holds that the award of Kshs.984,776/= for Loss of Dependency was not a reasonable estimate of the Damages because the trial court applied the wrong principle. The court should have used the global sum approach instead of the Multiplier Approach. I thereby set it aside.

24. The undisputed facts of this case are as follows: The deceased was 39 years old at the time of his death. He was married, the breadwinner in his family, and had 3 children, all minors. One of them was born in February 2014 (10 years-old) while the other one was born in February 2016 (8 years-old). He was earning but there was no proof of his exact monthly income. Lastly, it is undisputed that he was a Pastor working at E.A.I.P.C.A Gachua.



25. The courts must ensure that the awards issued under the Multiplier Approach are comparable with those issued under the Global Award. The awards issued under both approaches should not differ unjustifiably. This principle was mentioned in the case of *Ndeti & another (Suing on their own behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased)) v Mwangangi & another (Civil Appeal E282 of 2021) [2022] KEHC 15732 (KLR)*, the court held:
- “From the above authorities, it is clear that even in making a global award, apart from comparison with previous trends or precedents, courts will also consider other factors such as the general health of the deceased before he met his death, his age as well as the number of dependent children and their ages. In my view, this is important as it ensures that the global award made is comparable to some extent with the awards based on multiplier approach. In the instant case, no questions have been raised as to the health of the deceased prior to his death. Further, the deceased left behind three school going children whose needs must be taken care of.”
26. In *Hussein Shariff Ali v Grace Kareia Mutia (Suing as the legal representative of the Estate of John Mutua (Deceased)) [2021] eKLR*, the court awarded Kshs.3,000,000/= for Loss of Dependency for Pastor who died at 48. The Court observed the unique attributes of a pastoral job by stating:
- “Being a pastor and peasant, he would have worked up to the age of retirement. Furthermore, pastoral work is ordinarily calling and one would be at liberty to work even past the normal age of retirement. There is no indication that the deceased was of ill health.”
27. I am aware that the case of Hussein Shariff Ali is similar to the current one because they both involve Pastors, particularly within Meru Municipality. However, I am also mindful that the two cases are distinct. First, the salary of the Deceased Hussein Shariff Ali was ascertainable, unlike in this case. Second, the age of the Deceased persons in the two cases is also different. Thirdly, the court utilized the Multiplier Approach, unlike in this case where the court will use the Global Sum Approach. Fourthly, there was evidence that the 48-year-old had practiced his profession of pastoral work for years. Such evidence was not provided in the current case.
28. In *Multiple Haulers Transporters (Ea) Ltd v Josephine Nzioka Muia [2019] eKLR*, the court awarded Loss of Dependency at Kshs.3,214,080/= for a Deceased who was 39 years old at the time of his death. In the case, a pay slip proved that the Deceased was an employee at Standard Chartered Bank and was earning a net income of Kshs.22,320/=. This contrasts the current case where the Appellant has neither proved the monthly income nor the employment status at the Church.
29. In the case of *Pamigo Limited v Phelestus Hoka Libulele (Suing as legal representative of the estate of Alex Olindi Opande (Deceased) [2019] eKLR*, the Court awarded Kshs.1,048,704/= for Loss of Dependency for a Deceased who died at 39 years. In this case, the Deceased had five (5) dependants.
30. Lastly, in *Sinohydro Tianjin Engineering Co Ltd v Okumu (Suing as the administratrix of the Estate of Joel Odhiambo Kimbaga) & another (Civil Appeal E287 of 2020) [2023] KEHC 23911 (KLR)*, the Court awarded Kshs.1,500,000/= for Loss of Dependency for a Deceased who died at 39 years. The Deceased had left a widow and three children who were dependent on him. In addition, there was no proof of earnings, so the Court adopted the Global Sum Approach. This case bears striking similarity with the current case regarding the age of the Deceased, the number of dependants, and the approach adopted by the Court.
31. I note that the Deceased, in the present case, left behind three school-going children, all below 12 years old at the time of this judgment. I am also inclined to follow the most recent decision of Sinohydro



Tianjin Engineering Co Ltd v Okumu (Supra) for its similarity to the current case. Considering all these factors, I find that an award of Kshs.1,500,000/= for Loss of Dependency is suitable in the circumstances.

32. Accordingly, the appeal succeeds on the issue of the award on Loss of Dependency. The lower Court's finding on the Loss of Dependency award is thus set aside.
33. The final award is as follows:-
- a. Liability.....80% against the Respondents
  - b. Pain and Suffering .....Ksh. 100,000/=
  - c. Loss of Expectation of Life ..Ksh. 100,000/=
  - d. Loss of Dependency.....Kshs.1,500,000/=
  - e. Special Damages.....Kshs.76,310/=
  - f. Loss of Consortium..... NIL
  - g. Total.....Kshs.1,776,310/=
  - h. Less 20% Contribution.....Kshs.355,262/=
  - i. Net Award.....Kshs.1,421,048/=
34. The Appellant shall have the costs of this Appeal assessed at Kshs.45,000/=.
35. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Ms. Oteko Advocate present for Respondent

