



Kiura v Mikiao & another (Suing as the legal representatives of the Estate of Shadrack Mutwiri Ikiao – Deceased) (Civil Appeal E194 of 2023) [2024] KEHC 14648 (KLR) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E194 OF 2023
CJ KENDAGOR, J
NOVEMBER 18, 2024**

BETWEEN

JAMLECK GITARI KIURA APPELLANT

AND

DANIEL MUTUMA MIKIAO 1ST RESPONDENT

WINNIE KATHURE MWITI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SHADRACK
MUTWIRI IKIAO – DECEASED**

*(Being and Appeal from the Judgment and Decree of Hon. T.M. Mwangi,
SPM, delivered on 12th October, 2023 in Meru CMCC E262 of 2022)*

JUDGMENT

Introduction

1. On 22nd July, 2021 Shadrack Mutwiri Ikiao (the deceased) was involved in a traffic road accident along the Nanyuki-Meru highway, where he sustained fatal injuries. He was aboard the Appellant’s Motor Vehicle when the vehicle collided with an oncoming vehicle. He was rushed to the hospital, where he died the same day. He was 37 years. The Respondents, his legal representatives, blamed the Appellant for the accident and sued him for special damages of Kshs.313,350/= and General damages under the Fatal Accident & Law Reform Act. The Appellants filed a Defence and denied liability.
2. The trial Court delivered a Judgment on 12th October, 2023 finding the Appellant 100% liable for the accident. The trial Court awarded the Respondents Kshs.30,000/= for Pain and Suffering, Kshs.150,000/= for Loss of Expectation, and Kshs.313,350/= as Special Damages. He also awarded Kshs.2,880,000/=for loss of Dependency. The trial Court arrived at the award for Loss of Dependency



by assessing the Deceased's monthly wages at Kshs.20,000/=, adopting 18 years as a multiplier and a dependency ratio of 2/3. Lastly, the trial Court awarded them costs and interests at 10% from the date of filing the suit.

3. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 7th November, 2023. His appeal was only about the quantum of damages. He listed three grounds of appeal;
 - i. That the Honourable Trial Court erred in fact and law by failing to find that there was no cogent, reliable, and credible evidence supporting the claim that the deceased, Shadrack Mutwiri Ikiao, was a hardware owner, which failure resulted in the court adopting an inordinately high multiplicand representing an entirely erroneous estimate as general damages for Loss of Dependency.
 - ii. That Honourable Trial Court erred in fact by awarding the sum of Kshs.53,000/= as special damages for the items programs, photos/videos vide a receipt issued before the accident and, in so doing, the court failed to take into account the crucial element of causation in the tort of negligence.
 - iii. That erred in law by awarding interest from the date of filing this suit on all heads of damages without stating the reasons for condemning the [Appellant] to pay interest on general damages from the date of filing the suit.
4. He asked the court to allow the appeal and set aside the judgment and Decree with respect to the quantum of damages. He asked the court to make a determination on the amount due as damages for Loss of Dependency, the amount due as Special Damages, and the period during which interest should accrue on general damages.

The Appellant's Written Submissions

5. The Appellant submitted that the Trial court should not have used a multiplicand of Kshs.20,000/= in determining the award for Loss of Dependency. He argued that the Kshs.20,000/= was not supported by any evidence. He argued the trial court's choice of the multiplicand was erroneous because the Court could not determine, on the evidence, whether the Deceased was employed (in a contract of service) or self-employed (in business on his own account). They argued that the trial Court should not have used the multiplier approach but should have adopted a lump sum figure of Kshs.1,000,000/=.
6. On the second issue, the Appellant submitted that the trial Court should not have awarded the Respondents the sum of Kshs.53,000/= in the Special damages because the receipts showed that the amount was spent before the occurrence of the accident. He argues that the fact that a document is produced as an exhibit does not detract the Court's obligation to determine its weight in proof of any fact in issue. He opined that the receipt should be disregarded because such expenses could not have been incurred before the accident date.
7. Lastly, he argued that the trial Court should have clarified how interests were to accrue with regard to special and general damages. He submitted that the trial Court's decision was erroneous because it did not observe the principles governing interests on special and general damages. He submitted that the trial Court should have held that interests on special damages is from the date of filing the suit while on general damages from the date of judgment. He also argues that the trial Court's decision was erroneous because it is unclear whether costs bear interest. He submitted that no interest should accrue on costs.



The Respondents' Written Submissions

8. The Respondents submitted that the trial Court did not err by relying on a multiplicand of Kshs.20,000/= in calculating Loss of Dependency. They argued that they had proved at the lower Court that the Deceased was gainfully employed operating a hardware shop in Kayole. They argued that the Multiplicand of Kshs.20,000/= was on the lower end and should be revised upwards. They submitted that a multiplicand of Kshs.45,000/= should be applied since the Deceased was a hardware owner. In the alternative, they urged the Court to use the Regulation of Wages (General) Order 2018, which states that the minimum wage of a shopkeeper like the Deceased would be Kshs.20,904.50/=.
9. On the second issue, they submitted that the trial Court did not err by admitting a receipt in the amount of Kshs.53,000/= as part of the Respondent's special damages evidence despite said receipt predating the date of the accident. They submitted that the discrepancy between the dates was not a material departure from the rest of the evidence. They submitted that, on a balance of probabilities, it is more likely than not that the vendor who billed the Respondents for the photo and video services simply made an error when issuing a receipt for services rendered.
10. On the last issue, they submitted that the trial Court did not err by directing that costs and interest of the suit be calculated from the date of filing the suit. They argued that under Section 26 (1) of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, the Court has the discretion to award costs and interest from the date of filing the suit to the date of the decree. They however admit that in the Kenyan jurisdiction, interest on general damages is typically awarded from the date of judgment while interest on special damages is awarded from the date of filing the suit.

Issues for Determination

11. I have reviewed the grounds of appeal and submissions from counsel for both parties, and I outline the following issues for determination.
 - a. Whether the Deceased was an employee or the Sole Proprietor of Samaki Hardware.
 - b. Whether the Respondents proved the Deceased's monthly earnings.
 - c. Whether the award of Kshs.2,880,000/= for Loss of Dependency was a reasonable estimate
 - d. Whether the Court should admit the Receipt for Kshs.53,000/= dated 30th June 2021
12. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the lower Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to 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 Deceased was an employee or the Sole Proprietor of Samaki Hardware

13. The parties differ on whether the Deceased was an employee at Samaki Hardware. The Appellant argued that there was no evidence before the Court to show help the Court determine whether the deceased was employed (in a contract of service) or self-employed (in business on his own account). He argued that the Respondents could not prove either of the two.

14. The trial Court assessed these facts and could not make a definite finding on whether the Deceased was an employee at the Hardware or the Sole Proprietor. I have read the judgment, and it appears that the trial Magistrate made conflicting findings on this issue. At one part of the judgment, the Court held that the Deceased was an employee at the hardware. Yet, in another part of the judgment, the Court seemed to hold the contrary view that the Deceased was a sole Proprietor. The Court stated:

“I state so because as a hardware owner he earned above the minimum wages.”

To my mind, the trial Court did not determine with certainty whether the deceased was an employee at the hardware or the Sole Proprietor.

15. I am mandated to review and analyze the evidence placed before the trial Court and come up with my own independent findings. I appreciate that, while doing the review, I must be conscious of the fact that I never saw the witnesses testify and the trial Court had the advantage of observing their demeanor.

16. I have relooked at the typed proceedings and the Respondent’s documents filed in Court with a view to ascertaining this issue. It appeared to me that the Respondents were not straightforward on this issue and took different positions at different stages of the proceedings. In some of their pleadings, the Respondents stated that the Deceased was a sole proprietor of the hardware. Yet, in other pleadings, they claimed that the Deceased was an employee at the Hardware. For instance, in their Complaint, the respondents claimed that the Deceased was a sole proprietor of the hardware store.

17. The Deceased’s widow, however, took a different position in examination-in-chief where she stated that the Deceased was employed at the Hardware at Kayole. She maintained the same in cross-examination by stating that the Deceased was employed at the hardware. She also admitted that she did not produce the Deceased’s employment letter. Later on in the same cross-examination, the Deceased’s widow appeared to change this position by stating that the Deceased was self-employed and he was filing KRA returns. She maintained these claims in re-examination, where she stated that the Deceased was self-employed trading as Samaki hardware, belonging to him.

18. Courts have times are bound by their pleadings. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

19. I find that the Respondents offered contradicting oral testimony on this issue and the court is unable to rule either way. They did not produce any documents to show that the Deceased was self-employed or the sole proprietor of Samaki Hardware. Again, on the issue of the Deceased being an employee at the hardware, the evidence of PW3, the Deceased’s widow, was so conflicting that the Court could not discern her truthfulness on the question of the Deceased’s employment status at the Hardware.



Therefore, due to the lack of cogent evidence, I am unable to determine whether the Deceased was employed or was in self-employment.

Whether the Respondents proved the Deceased's monthly earnings

20. The Appellants argued that there was no proof of the Deceased's monthly earnings, and thus, the Court should employ a global sum. On the other hand, the Respondents maintained that Deceased used to earn a monthly net of Kshs.45,000/= . The trial Court did not make a specific finding on the Deceased's exact monthly earnings but instead reverted to the Government's monthly wage guidelines on minimum wages. The trial court assessed the Deceased's monthly salary at Kshs.20,000/= on the presumption that the Deceased was the owner of the Hardware. I find the lower Court's assessment erroneous because there was not enough evidence to show that the Deceased was the owner of the Hardware.

21. I have looked at the typed proceedings and documents placed before the lower Court to ascertain the Deceased's monthly earnings from whatever activities he was undertaking to earn a living. In the Plaintiff, the Respondents stated that the Deceased used to earn Kshs.45,000/= monthly. PW3, the Deceased's widow, maintained the same claims in her examination-in-chief. However, on cross-examination, she stated as follows:

“I agree with you that my husband was supporting me but I do not know how much he earned.”

Based on this, I find that the Respondents did not prove the Deceased's exact monthly earnings.

22. Courts have held that the multiplier approach should be avoided where the Deceased's exact employment monthly earnings are unknown or cannot be estimated under the Regulation of Wages (General) Order. 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.”

23. 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.”

24. Based on the above authorities, I find that the Multiplier Approach was unsuitable to determine the award for Loss of Dependency for want of a Multiplicand. In this case, the Deceased's monthly income



was unknown. In addition, there was no proof that he was employed at the Hardware. Thus, the court could not utilize the Regulation of Wages (General) Order to estimate his wages because there was no proof that the Deceased was a worker in any of the specified categories of Labourers.

25. 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.2,880,000/= for Loss of Dependency was a reasonable estimate

26. 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.”

27. As analyzed above, this court holds that the award of Kshs.2,880,000/= 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.
28. The undisputed facts of this case are as follows: the Deceased was 37 years old at the time of his death. The parties also agree that he was survived by a wife and two children aged below 13 years at the time of this judgment. It is also agreed that the wife and the children depended on him. He was in good health, and of course, he was earning, although parties could not agree on what exactly he used to do to earn a living.
29. In *Nicholas Mugo Mbindu v Calyster Muthoni Ileri* [2021] eKLR, the High Court awarded Kshs.1,500,000/= for Loss of Dependency for a deceased who died at 36, leaving behind a widow and children. In the case, the Respondent could not prove the exact monthly earnings of the deceased, so the court used the global sum approach.
30. In *Njoroge* (Suing as the Legal Administrator of the Estate of Francis Karanja Wainaina - Deceased) v *Ponderosa Logistic Ltd* [2024] KEHC 1606 (KLR), the High Court awarded Kshs.1,500,000/= for Loss of Dependency for a deceased who died at 37 leaving behind a widow and two children. Similarly, in the case, the Appellant could not prove the exact monthly earnings of the deceased and the court



used the global sum approach. This case is the most suitable comparable to the current case because it's the most recent, and it is similar to the current case in terms of the age of the deceased persons and the ratio of dependency.

31. Therefore, the Court awards a global sum of Kshs.1,500,000/= which is considered reasonable and moderate in the circumstances for Loss of Dependency.

Whether the Court should admit the Receipt for Kshs.53,000/= dated 30th June 2021

32. I have relooked at the disputed receipt and it shows that it was issued on 30th June, 2021. The Deceased died on 22nd July, 2021, meaning the receipt was issued three weeks before the Deceased died. The Appellants argued that the receipt ought to be disregarded because such expenses could not have been incurred before the date of the accident. On the other hand, in their submissions, the Respondents stated that it could have been an error by the vendor who issued the receipt. They argued that it was more likely than not that the vendor who billed them for the services made a mistake when issuing the receipt.

33. I have perused the typed proceedings to ascertain whether the Respondents explained how the error occurred. During the cross-examination of the PW3 (the deceased's widow), the Advocate for the Appellant drew her attention to the discrepancy in the dates of the document. The Advocate showed her that the document predated the death of the Deceased. However, the witness did not clarify or explain the error in her re-examination. Having been asked about it in cross examination, she ought to have given an explanation of how the error came to be. She did not seize the opportunity.

34. I am not persuaded by the explanation coming from the Respondent's submissions that it's likely the vendor made an error. It is a well-known principle of law that Submissions are not pleadings. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal stated:

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

35. In the end, I, therefore, agree with the Appellant that the trial court ought to have disregarded the receipt. As a consequence, I hold that the Respondents must lose the claim for the Kshs.53,000/= indicated in the disputed receipt dated 30th June, 2021.

36. I found no reasons to disturb the Trial Court's award for Pain and Suffering and Loss of Expectation of Life.

Disposition

37. The Appeal succeeds, and the judgment regarding the quantum of damages is hereby set aside.

38. The final awards are as follows:

- i. Pain and Suffering- Kshs.30,000/-
- ii. Loss of Expectation of Life- Kshs.150,000/-
- iii. Loss of Dependency - Kshs.1,500,000/-



iv. Special Damages- Kshs.260,350/-

Grand Total Kshs.1,940,350/=

39. The Respondents shall have interest on Special and General Damages.
40. Special damages shall attract interest at court rates from the date of filing suit, while all the other awards under general damages shall attract interest from the date of this judgment.
41. Each party to bear its costs for this Appeal.
42. The Respondents shall have costs of the trial Court suit, and there shall be no interest on the same.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS PLATFORM ON THIS 18TH DAY OF NOVEMBER, 2024.

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Nduta Advocate present holding brief for Mwangi Muthoni Advocate for Appellant

Mr. Owino Advocate present for Respondent

