



**Maina v Kavela (Civil Appeal E135 of 2022)
[2024] KEHC 14133 (KLR) (Civ) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E135 OF 2022

BK NJOROGE, J

NOVEMBER 14, 2024

BETWEEN

ANASTACIA WANJIRU MAINA APPELLANT

AND

MEHELA KAVELA RESPONDENT

JUDGMENT

1. This Appeal arises out of the decision of Honourable Kagoni E.M (PM) delivered on 8/2/2022. This was in Milimani MCC No. 477 of 2014.

Background facts

2. This is a fatal running down claim. The deceased was said to be a driver of a motor vehicle KAP 960R along the Outering Road near Mutindwa. It was involved in a collision with a motor vehicle KTM 523 hauling vehicle ZA 938. The deceased sustained fatal injuries alongside other passengers in his vehicle. He was said to be a driver.
3. A suit was filed by the Appellant herein claiming as a wife and brother of the deceased. They claimed damages arising from the death of the deceased. This was under Land Reform Act Cap 26 and under the *Fatal Accidents Act* Cap 32 of the Laws of Kenya. In essence they blamed the Respondents in negligence for causing the accident that led to the death of the deceased. The 1st Respondent was sued as the beneficial owner of Motor Vehicle/trailer registration number KTM 527 - ZA 938. The 2nd Respondent was sued as the Registered owner of Motor vehicle/cargo registration number ZA938.
4. The 2nd Respondent did not enter an appearance or file a Defence to the suit.



5. The suit proceeded when only the 2nd Appellant John Mwangi Kamau testified. A Police Officer also testified and the Appellants closed their case after calling two witnesses only. The Respondents did not call any witnesses.
6. The Court delivered a Judgement on 8/2/2022 in the following terms.
 - a. Liability 100%
 - b. Special damages Kshs. 54,390.00/-
 - c. Loss of expectation of life Kshs. 100,000/-
 - d. Pain and suffering Kshs. 10,000/-
 - e. Total award Kshs. 164,390/-
 - f. Interest on (e) is granted at Court rates from the date of Judgement.
 - g. Prayer for dependency is denied
 - h. The Plaintiff is awarded the costs of the suit at Court Rates from the date of Judgement.
7. The Appellants are aggrieved by this failure by the Court to award them dependency and hence this appeal.
8. This matter was flagged for the Rapid Result Initiative (RRI) during the month of September 2024.
9. The Appeal was admitted on 22nd February 2024. Directions were also issued that the matter be disposed of by a way of written submissions
10. The Court has seen and perused the Appellant's written submissions dated 10/4/2024 with authorities attached. The Court has equally also seen the Respondent's written submissions dated 15/8/2022 and noted the authorities referred to.
11. The Court has also taken note of the Appellant's Memorandum of Appeal dated 7/3/2022. It raises 8 grounds of appeal. All the 8 grounds challenge the Trial Court's refusal to make an award for dependency. The Appellant's seek the following reliefs in this appeal: -
 - a. That the Appeal herein be allowed and the Judgement of the Lower Court declining the prayer for dependency be set aside in part and be substituted with an award for loss of dependency.
 - b. That the Honourable Court proceeds to assess and award the Appellants compensation for loss of dependency under the *Fatal Accidents Act*.
 - c. That in the alternate, that a retrial be conducted before a different Magistrate at the Chief Magistrate Court Milimani.
 - d. That the costs of this Appeal be awarded to the Appellants.

Issues for Determination

12. Having perused the Memorandum of Appeal as well as the submissions filed by both parties, the Court frames two issues for determination as follows;
 - a. Did the Appellants prove dependency before the Trial Court?
 - b. What reliefs flow from this appeal?



Analysis

13. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the Trial court afresh. Then this Court has to reach its own conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
14. When it comes to interfering with the exercise of judicial discretion, the Court turns to the case of *Mbogo & another Vs. Shah* [1960] E.A. 93. The assessment of awards of general damages is an exercise of Judicial discretion. The Appellate Court will not interfere unless the trial Court misdirected itself and has clearly been wrong in exercise of the discretion, that there has been a resultant injustice.
15. The Court therefore warns itself that the assessment of quantum is an exercise in discretion The Court should therefore be slow and cautious in interfering with the exercise of such discretion by the Trial Court. See *Butt v Khan (Civil Appeal 40 of 1977)* [1978] KECA 24 (KLR) (Civ) (1 February 1978) (Judgment).

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

16. The Court proceeds to analyse the issues framed, in seriatim as follow;

a. Did the Appellants prove dependency before the Trial Court?

17. The Appellants fault the Trial Court for failing to consider the documentary evidence that they provided to prove the dependency. This is for the claim for general damages under the *Fatal Accidents Act* Cap 32 of the Laws of Kenya.
18. They submit that when PW1 John Mwangi Kamau testified before the Lower Court, he relied upon his statement as his evidence in Chief. He also relied upon the documents filed on 12/8/2014 and 16/11/2021. They were produced as the Plaintiffs exhibits No. 1-10. That there was no objection whatsoever to the production of these documentary exhibits.
19. The Appellants through Counsel blames the Trial Court for declining to grant the Appellants audience before the Trail Court. This is for purposes of introducing or leading oral evidence on the documentary evidence as per the Plaintiffs’ list of documents. This is despite fervent prayers of the Appellants Counsel. That the Trial Court insisted that the Appellants’ witness only adopts the written statement and list of documents.
20. The Trial Court is also faulted for failing to take into consideration the materials placed before the Court, to show the deceased had children and a widow, dependent upon him.
21. Further it was argued that all the documents placed before the Trial Court were sufficient to prove dependency. That the Trial Court should have considered the documents and allowed the claim for dependency.
22. The Appellants also submitted that the Trial Court erred in holding that the documentary evidence placed before the Trial Court was irrelevant or inadmissible. That it could not prove dependency.



23. Lastly it was submitted that the Trial Court went against decided precedents. The Court was referred to *Petronila Muli vs Richard Muindi Savi & Catherine Mwendu Mwindu (2021) eKLR* and *Francis K. Righa vs Mary Njeri (suing as Legal representative of the Estate of James Kariuki Nganga (2021) eKLR*.
24. The Court was urged to consider that the death of the deceased had been proved, his age at the time of his death, his income and the dependency ratio.
25. The Court is urged to find that the multiplier be 25 years, the dependency ratio $\frac{2}{3}$ and the multiplicand 15,000/- per month. Then should work out as Kshs.15,000 x 12 x 25 x $\frac{2}{3}$ giving a figure of Kshs.3,000,000/-
26. The Respondents submit that no evidence was led to prove the issue of dependency. The Court was referred to the case of *Lwangu v Ndote (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling)*. This is on the detailed 4 stages of production and proof of documentary evidence.
27. The Court was also referred to *Raila Omolo Odinga & Another vs IEBC & 2 Others (2017) eKLR* on how the evidential burden of proof is to be discharged.
28. The Respondents submitted that the Trial Court did not err. That PW1 merely adopted his statement. That the statement narrated how the accident happened. It did not give any narration on the issue of dependency.
29. Further, it was stated that even if the Court was to hold that dependency had been proved, the salary/income of the deceased and the dependency ratio had not been proved. The Court was urged to adopt the minimum wages of a driver as per the legal income No. 116 of 26/6/2015. The income be held to be Kshs.7,966/- per month. The dependency ratio be $\frac{1}{3}$. This would therefore work out at Kshs.7,966 x 12x 15 x $\frac{1}{3}$ hence Kshs.477,960/.
30. It was also submitted that the award for loss of expectation of life should be reduced from Kshs.100,000/- to Kshs.80,000/-.
31. The Court notes that on the issue of the loss of expectation of life, the Respondent did not file any appeal against the award. The award of Kshs. 100,000/- is a conventional sum. The Court will not interfere with this award.
32. On dependency the Court notes that the Trial Court restricted itself to testimony set out in the witness statement. It is correct that the witness statement of PW1 John Mwangi Kamau only dealt on how the accident happened. It did not dwell much on the issue of dependency.
33. The Court notes that the Appellants had filed a list of documents. They sought to rely on a Police Abstract, death certificate, a letter from a Chief, Birth Certificate of Children, receipts in respect of special damages and so on and so forth.
34. When it came to looking at the issue of the special damages, the statement of PW1 John Mwangi Kamau was silent. Yet the Trial Court did consider the receipts presented and make an award on special damages, which is not the subject of any Appeal, by the Respondents.
35. In the same manner, the Trial Court had a duty to have a look and consider all the evidence presented. This includes the documentary evidence presented as proof of the claim for dependency.
36. In this day and age when parties and increasingly taking to the procedure of adopting the written statements as the evidence in chief, the drafting of detailed and cross-referenced statements must take root. Indeed, it must flourish and become the norm. A skimpy or short statement or one very lean on



facts may as well act to the detriment of the party seeking to rely on it as his/her evidence in chief. Moving forward parties should be filing statements that clearly set out the facts of the case as perceived by the witness. The statement should also identify where necessary the documents relied upon and those that support the facts presented by the particular witness.

37. In this particular case, as the Trial Court did consider some aspects of the trial documents and ignored others, the Court is inclined to interfere. The situation would entirely have been very different had the Trial Court rejected all the documents that were specifically not referred to in the statement, including those seeking to prove the special damages.
38. The Court is of the considered opinion that sufficient materials were placed before the Trial Court to prove the claim for dependency.

b. What reliefs flow from this appeal?

39. The Court notes that the Appellants seek for either a retrial or an assessment of the dependency by this Court.
40. From the evidence placed before the Court, the income of the deceased cannot be ascertained. His age at death can be seen from the death certificate. He was 35 years. A letter from the Chief dated 06/7/2011 states the deceased was married to Anastasia Wanjiru Maina. They had two children Kelvin Kamau Gatihi and Everlyne Wangechi Gatihi. The Birth certificates bear this out. These documents were admitted in evidence without any opposition.
41. This Court has a duty to assess damages. It is not tied down to the multiplier approach. The Court may adopt the global award approach, if it is of the opinion that this will assist the Court arrive a fair and just assessment. This is more so where the earnings of the deceased are not easily ascertainable.
42. This Court warns itself that it should be cautious before interfering with the award of the Trial Court. That it should not seek to substitute its own factual findings from that of the Trial Court. That it should not seek to interfere with the discretion of the Trial Court unless it is certain that the Trial Court erred. See *Kiruga vs Kiruga & Another* (1988) KLR page 348 and *Butt vs Khan* (1978) KECA 24 (KLR).
43. Having warned itself the Court proceeds to consider the following cases.
 - i. *Albert Odawa vs Gichimu Gichengi* (Civil Appeal 15 of 2003 (2007) KEHC 1358 (KLR) A global award of Kshs.400,000/- made on dependency.
 - ii. *Abson Motors Limited vs Nyangweso* (Suing as the legal representative of the Estate of Aggrey Ndalo Khwasi) & another (Civil Appeal E106 of 2023) [2024] KEHC 13382 (KLR). A global award of Kshs.500,000/- made on dependency.
 - iii. *Makueni Courts Ltd & Musyimi Nzau v Felistus Kanini Ndunda* (Suing as the legal representatives of the estate of Eric Mutuku) [2020] KEHC 3931 (KLR) an award of Kshs.1,800,000/- on dependency made.
 - iv. *Ngeno & another* (Suing as the legal administrators of the Estate of John Kibet) v *Ombui aka Joseline Ombui* (Civil Appeal E014 of 2023) [2024] KEHC 13064 (KLR) (28 October 2024) (Judgment). A global award of Kshs.1,500,000/- made.
44. Taking all factors into consideration, including the age of the deceased, that he had a family with young children and the rate of inflation, the Court makes an award on dependency of Kshs. 1,800,000/-.
45. The costs of the Appeal should follow the event. The Appellants are awarded costs.



Determination

46. The Appeal succeeds to the extent that the Decree of the Lower Court in Milimani MCCC No.4744 of 2014 is interfered with on the issue of dependency. The order dismissing the claim for dependency is set aside and replaced with an order allowing the claim on dependency which is assessed at Kshs.1,800,000/-
47. The Decree of the Lower Court is therefore set aside and in place thereof substituted with the following in favour of the Appellants, against the Respondents.
- a. Liability 100%
 - b. Special damages Kshs.54,390/-
 - c. Loss of expectancy of life Kshs.100,000/-
 - d. Pain and Suffering Kshs.10,000/-
 - e. Dependency (global award) Kshs.1,800,000/-
 - f. Total award, Kshs.1,964,390/-
 - g. Interest on (e) is granted at Court rates from the date of Judgement
 - h. The Plaintiffs are awarded the costs of the Suit at Court rates from the date of Judgement
48. The costs of this appeal are awarded to the Appellants.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024

NJOROGE BENJAMIN K

JUDGE

In the presence of

.....for the Appellants

.....for the Respondents

Court Assistant

