



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CIVIL APPEAL NO. 44 OF 2018**

**MARY WANJIKU GITAU.....1<sup>ST</sup> APPELLANT**

**ARTHUR THUO CHEGE (Suing as the Administrators of the**

**Estate of KENNETH MBUGUA CHEGE - DECEASED).....2<sup>ND</sup> APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LIMITED.....RESPONDENT**

*(Being an appeal from a Judgment of the CM'S Court Naivasha in Civil Case No. 759 of 2012 delivered on 30<sup>th</sup> July, 2018, V. Chianda - SRM)*

**JUDGMENT**

1. Kenneth Mbugua Chege was killed in an accident as was driving a vehicle Registration Number KAT 279D, matatu. His vehicle collided with a Land Cruiser Registration Number KBY 284N belonging to the Respondent. The deceased's estate sued for compensation in the lower court. The Respondent did not defend the suit. Interlocutory judgment was entered, and a judgment awarded on 30<sup>th</sup> July, 2018 in the following terms:

a) Pain and suffering	Kshs	80,000.00
b) Loss of Expectation of Life	Kshs	50,000.00
c) Loss of Dependency	Kshs	506,200.00
d) Special Damages	Kshs	<u>93,100.00</u>
<b>Total</b>	<b>Kshs</b>	<b><u>729,300.00</u></b>

2. The Defendant/Respondent paid the award of compensation. However, being dissatisfied with the award, the Appellant has appealed on the following grounds:

*1. That the learned magistrate erred in law and facts in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.*

*2. That the learned magistrate erred in law in making an award on loss of expectation of life and pain and suffering which were so inordinately low as to represent an entirely erroneous estimate of the compensation to which the appellant was entitled to.*

*3. That the learned trial magistrate erred in law and fact in applying the wrong multiplicand/minimum of wages regulation.*

*4. That learned magistrate erred in law and fact in applying a multiplier that was manifestly low as to represent an entirely erroneous estimate.*

3. This court's role in an appeal based on quantum only is to re-evaluate the evidence of injuries sustained in the accident and assess whether the amount awarded is neither inordinately high nor low, and that the same were not based on a misapprehension of the evidence or that the

trial court applied wrong principles of law in reaching its findings.

### **Loss of expectation of life**

4. The Appellant sought Kshs 150,000/= under this head. Reliance was placed on **Wilson Mwangi Kabiro Administrator of the Estate of Stephen Irungu Mwangi, Deceased) v Charles Nyamumbo Mageto [2015] eKLR Nairobi HCCC No. 200 of 2011** and **Ruth Wangechi Gichuhi v Andrew Mangeni Luande [2011] eKLR** both of which were cited in the lower court. In those cases the appellate courts awarded Kshs 150,000/= in 2015 and 2011 respectively.

5. The deceased was aged 50 years at the time of death. The Respondent argued that in **Francis Righa v Mary Njeri (Suing as legal representatives of the Estate of James Nganga Kariuki [2014] eKLR** and **Eliud Musangi v Gilbert Omedo [2018] eKLR**. The courts awarded Kshs 80,000/= in each case. In **Francis Righa** the deceased was 59 years old and **Eliud Musangi** the deceased was 32 years old.

6. The Respondent conceded on authority that an award of Kshs 80,000/= to 100,000/= would be sufficient under this head. On perusal of the various authorities, it is clear that an award of Kshs 50,000/= for loss of expectation of life was on the lower side, and I would enhance the same to Kshs 100,000/= as I hereby do.

### **Loss of Dependency:**

#### **Multiplicand and Minimum Wages Regulations Applicable**

7. The appellant argues that the trial court found that the deceased was a driver and a resident of a former municipality, at the date of 31<sup>st</sup> January, 2017 when he died. As such, that the Regulation of Wages applicable was the **Regulations of Wages (General) (Amendment) Order 2015** which they attached. According to the Appellant, that order prescribes a minimum wage of Kshs 17,090.50. The Appellant argued that a multiplier of 20 years should have been applied.

8. In this regard, the Appellants cited the following persuasive authorities:

a) **Kisii HCCA 42 of 2010, Samuel Osewe Ochillo v Simon Omwoyo Obare (Suing as the legal representative of the estate of Mary Nyasuguta Simion**, where Sitati J upheld a multiplier of 15 years to a deceased aged 50 years.

b) **Mombasa HCC No. 301 of 2002, Floice Adema Onami v Kezia Muthoni Ngure & 2 Others**, where Khaminwa J applied a multiplier of 15 years to a deceased aged 50 years.

c) **Mombasa HCCA No. 18 of 2014, Stephen Kiarie Muruguru v Seleman Hamadi Koi & Another, suing as the legal representative of the estate of Adam Huseni Dago**, where Njoki Mwangi J upheld a multiplier of 13 years to a deceased aged 52 years.

d) **Machakos HCC No. 332 of 2012, Janet Chonge Walumbe & Another suing as the legal administrator of the estate of Eric Sifuna Walumbe**, where Odunga J applied a multiplier of 10 years to a deceased aged 50 years.

9. The Respondent submitted the quotation by Mwera J (as he then was) in **Grace Wairimu Mwangi v Joseph Mwangi Gitundu HCCC No. 162 of 1994** where he said:

***“Loss of dependency is a matter of hard, pounds and shillings the deceased was earning at the time of death.”***

Further, that under the Fatal Accidents Act the three issues considered are multiplicand, multiplier and dependency ratio. In this case, the Respondent argues, the Deceased was a matatu (van) driver; did not prove he was earning Kshs 3,500/= per day, died on 31<sup>st</sup> January, 2017; and died whilst residing in Kiambu Municipality. The Respondent urged an award of Kshs 13,646.40 with a multiplier of 15 years and dependency ration of 2/3.

10. The trial court found that there was no proof of the earnings of the deceased. It applied the **Regulation of Wages General Amendments Order** of 2013 (Kshs 12,653) and applied a multiplier of 5 years.

11. The parties are agreed on appeal, correctly in my view, that the **Regulation of Wages (General) (Amendment) Order, 2015**, applies. The Appellant seeks Shs 17,090.50 under the category *“Tailor, Driver (medium sized vehicle)”*. The Respondent seeks Kshs 13,646.40 under the category *“driver (cars and light vans)”*. The unchallenged pleadings show that the deceased was driving a Toyota Matatu van Registration No. KAT 279D.

12. In my view, the appropriate vehicle category under the Regulation of Wages Order would be a van, not medium sized vehicle, and I find that the remuneration applicable is Kshs 13,646.40 as urged by the Respondent.

13. With regard to the multiplier, the Respondent seeks that I uphold the trial court’s multiplier of 5 years. With respect, the trial court did not indicate how it arrived at 5 years. Despite this it, very appropriately, cited a passage from **Osman Mohammed & Another v Saluro Bundit Mohammed Civil Appeal No. 30 of 1997** that:

***“Damages must be within limits set by decided cases and also the limits the Kenyan economy can afford.”*** (Emphasis supplied)

14. Neither the trial court nor the Respondent has justified the multiplier of 5 year on authority. The Appellant however, cited five authorities in the lower court where the multiplier ranged from 6 years for a deceased aged 62 years to 25 years for a deceased aged 41 years. On appeal the authorities cited were for deceased persons aged 50 - 52 years and the multiplier ranged from 10 years to 15 years. The authorities are for appeals filed between 2002 and 2014.

15. I think a multiplier of 13 years would be appropriate in this case, considering that three authorities cited above allow 15 years and one allows 10 years for deceased persons all aged 50. The average multiplier would be 13 years. I would apply a multiplicand of 13 years and the calculation will therefore be:

$$13,646.40 \times 12 \times \frac{2}{3} \times 13 = 1,419,225.60$$

#### **Disposition**

16. The awards of pain and suffering and special damages were not challenged and are hereby left intact.

17. The trial court's award for loss of expectation of life and loss of dependency are set aside and substituted with awards of Kshs 100,000/= and Kshs 1,419,225.60 respectively.

18. The final award is as follows:

Pain and suffering	Kshs	80,000.00
Loss of Expectation of Life	Kshs	100,000.00
Loss of Dependency	Kshs	1,419,225.60
Special Damages	<u>Kshs</u>	<u>93,100.00</u>
<b>Total</b>		<b><u>Kshs 1,692,325.60</u></b>

19. Interest is awarded at court rates from the date hereof on the amounts not already paid by the Respondent.

20. The appellant shall have costs of the appeal.

#### **Administrative directions**

21. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

22. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

23. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 11<sup>th</sup> Day of May, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Wainana for the Appellants
2. Geno for the Respondent
3. Court Assistant - Quinter Ogutu