



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 64 OF 2021

SARAH NAITORE M'IKUNYUA

(Suing as the legal representative and administrator of the estate of the late

JOSEPHINE KENDI (Deceased).....APPELLANT

VERSUS

GEOFREY MWANGI BOR1ST RESPONDENT

RENT WORKS EAST AFRICA LIMITED.....2ND RESPONDENT

(Being an appeal from the Judgement of the Chief Magistrate's Court in Meru CMCC No. 14 of 2020 delivered on the 26th day of April, 2021)

JUDGMENT

1. This is an appeal on quantum of damages with respect to a fatal accident claim. The Appellant is the personal representative to the deceased who was involved in the fatal accident. The matter was heard and determined by the trial Court in Meru CMCC No. 14 of 2020. The trial Court apportioned liability in the ratio of 85:15 in favour of the Appellant and it awarded her damages totaling to Ksh 947,948/= after factoring contribution.

2. The Appellant is dissatisfied with the finding of the trial Court and has lodged the instant appeal seeking an enhancement of the damages. Her two grounds of appeal as per her Memorandum of Appeal dated 25th May 2021 are as follows: -

i) The learned trial magistrate erred in both law and fact by using a dependency ratio of ½ and a multiplier of 12 years.

ii) The learned trial magistrate erred in both law and fact by ignoring the Applicant's submissions on the issue of awarding a lump sum award.

3. By consent of parties, the Appellant's supplementary record of appeal exhibiting the decree being appealed against was admitted into the record. The appeal was then canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant urges that the trial Court erred in using a dependency ratio of ½ and a multiplier of 12 years. She urges that during hearing at the trial Court, PW2, the Plaintiff testified and produced exhibits including a death certificate which indicated that the deceased was 43 years at the time of her death. She urges that PW2 testified that the deceased was a tailor at the time of her death and that she had two dependants as indicated in the chief's letter. She urges that the Court erred in adopting a ratio of ½ and that this Court should adopt a ratio of 2/3. She cites the cases of *Benedata Wanjiku Kimani vs Changwon Cheboi & Another (2013) eKLR* and *United Millers Ltd vs Yano Omoro Oindo (2007) eKLR*. She gives the definition of a dependent under Section 4 (1) of the Fatal Accidents Act to include the deceased person's wife, husband, parent and child. She also cites the case of *Crown Bus Services Ltd & 2 Others vs Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Najala (Deceased) (2020) eKLR*.

5. On the multiplier, she urges that the deceased who died at 43 years was a healthy lady and she would have worked as a tailor beyond the general age of retirement of 70 years bearing in mind that tailors are not held by the constraints of the retirement age such as the employed. She cites the case of *Joseph Mwangi Wanyeki vs Alex Muriithi Mucoki & Another (2019) eKLR* for the proposition that there being no vicissitudes on life that would have curtailed the life of the deceased, the Court should adopt a multiplier of 27 years. She further cites the cases of *Caleb Juma Nyabuto vs Evance Otieno Mogaka & Another (2021) eKLR*, *Marko Mwenda vs Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993* and *Roger Dainty vs Mwinyi Haji & Another (2004) eKLR*.

6. One earnings, citing the case of *Jacob Ayiga Maruja & Another vs Simeon Obayo (2005) eKLR*, she urges that although her averment that the deceased earned Ksh 15,000/= per month for her tailoring business was not proven, Courts have stated that proof of earnings and profession is not only proved by way of documentary evidence. He urges that the amount of Ksh 11,602 would thus suffice. She urges that the calculation would thus be as follows: - Ksh 11,602/= * 12 * 2/3 * 27 = 2,506,032/= which she prays for the Court to award her.

7. Finally, she urges that the trial Court erred in rejecting her submission for a lump sum amount, which she urges would have been the best approach in the circumstances. She cites the case of *Charles Ouma Otieno & Another vs Bernard Odhiambo Ogecha (Suing as brother and legal representative and administrator of the estate of the late Oscar Onyango Ogecha (Deceased)) (2014) eKLR*.

Respondents' Submissions

8. The Respondent filed submissions dated 27th July 2021. The Respondent had submitted at length on the incompetency of the appeal for failure to include the decree but pursuant to the consent adopting the decree as part of the record of appeal, this issue is now settled. This Court will thus not reproduce the Respondent's submissions on the importance of attaching the decree in the record of appeal.

9. With respect to damages, citing the case of *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982) 1 KAR 278* which was cited with approval in *Savannah Hardware v EOO (Suing as representative of SO (Deceased) (2019) eKLR*, the Respondents submit that a court of law will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or that a judge acted on wrong principles in reaching his findings. They submit that the use of the multiplier approach is favoured as per the case of *Beatrice Wangui Thairu vs Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)* which was quoted by the Court in *Mwita Nyamohanga & Another vs Mary Robi Moherai (Suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & Another) (2015) eKLR*.

10. They submit that in the trial Court's judgment, the learned magistrate referred to parties' submissions on the issue of loss of dependency. They urge that the aspect of the deceased's income has not been challenged in the grounds of appeal and this aspect is therefore moot and that parties are bound by their pleadings. On the issue of the multiplier, they urge that the learned magistrate used a multiplier of 13 years and not the 12 years that the Appellant contests. They urge that the 13 years is based on the learned magistrate's discretion and legal authorities including *Tobias Odoyo Oburu vs Callen Kwamboka Okemwa & Another (Suing as the legal representative of Obed Okemwa Obwoye (Deceased)) (2018) eKLR*. They urge that the Appellant has not shown any unnecessary consideration to fault the learned magistrate's decision.

11. On the dependency ratio, they urge that the learned magistrate exercised her discretion and settled on the ratio of ½ as the deceased had only two dependants, her mother and son. They urge that dependency is a matter of fact and not speculation. They urge that the Appellant must show improper reasoning or methodology and not mere dissatisfaction. Citing the case of *Beatrice Wangui Thairu vs Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)* which was quoted by the Court in *Bendeta Wanjiku Kimani vs Changwon Cheboi & Another (2013) eKLR* they urge that dependency must be established in each case. They further cite the case of *Karanja Ndirangu vs Wilson P. Kariuki (administrators of the estate of Lilies Gathumbi) (2019) eKLR* for the definition of dependency as per Section 2 of the Insurance Act as follows: 'That part of the deceased earnings that he/she spent on the maintenance or financial support of his dependants.' They urge that as per Section 107 of the Evidence of the Act, the burden of proof rests with the Appellant.

12. They urge that in the absence of proof of dependency (recipient and amount) the claim must fail or be awarded nominally. They urge that the trial Court was not supplied with empirical evidence showing the level of dependency of the deceased's stated dependants i.e whether the deceased's mother was actually dependent on the deceased and whether the alleged child of the deceased was actually her child as evidenced by a birth certificate or whether the child was an adult of working age. They urge that the learned magistrate found that the deceased had 2 dependants and that the fraction of the income used by the deceased to maintain her family is not a ratio cast in stone. They urge that no evidence has been presented to show that the magistrate acted on a wrong principle. They cite the case of *David Mwaniki Waithera & Another vs Jemimah Mwikali Moto (2020) eKLR*.

13. On the second ground of appeal, they urge that the same faults the trial Court for not adopting a lump sum award. They urge that this ground is patently inconsistent with the Appellant's submissions at the trial Court wherein she submitted on both the multiplier approach as well as lump sum, leaving the Court to adopt the most relevant and the magistrate was therefore in order in choosing the multiplier approach and rejecting the lump sum approach. They cite the case of *Simon Kibet Lang'at & Another vs Miriam Wairimu Ngugi (Suing as the Administrator of the Estate of Daniel Mwiruti Mgugi) (2016) eKLR*. They urge that it is within the Court's discretion to use or reject any proposed method of assessment of damages under the Fatal Accidents Act. They urge that in the *Simon Kibet* case (supra), the Court differed with the trial Court's use of the multiplier approach pronouncing itself on preferring the global/lump sum method for those circumstances, but eventually conceded to the trial Court's discretion in adopting the multiplier approach. They urge that in this case, the evidence of the deceased's age, her dependants and her trade were sufficient for the trial Court to adopt the multiplier approach without undue speculation.

14. They urge that costs follow the event and they should be awarded the costs of the appeal which they urge should be dismissed.

Issues for determination

15. The only issue arising for determination in this appeal is on whether to disturb the findings of the trial Court on damages. The sub issues are as follows: -

i) **Whether the trial Court erred in adopting a ratio of ½ and a multiplier of 13 years.**

ii) **Whether the trial Court erred in failing to adopt a lump sum award.**

General Principle

16. The general principle with respect to an appellate court's power to reverse a lower court's award of damages was established in **Butt vs Khan** CA 40 of 1977 and restated by the Court of Appeal in **Mariga vs Musila**, Civil Appeals Nos. 66 of 1982 and 88 of 1983 (1984) KLR as follows: -

"The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."

17. I extensively dealt with the principles on award of damages with respect to loss of dependency in the case of **Crown Bus Services Limited & 2 Others Vs Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala) (Deceased) Kabarnet HCCA No. 9 of 2019** where I held as follows concerning the formula for calculation of dependency: -

"Both parties agree as to the formula for computation of dependency as observed by Ringera, J. as he then was in Beatrice Wangui Thairu case, supra. Indeed, Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another cited by the Court of Appeal for Eastern Africa in Radhakrishen M. Khemany v. Mrs Lachaba Murlidhar (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:

"I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:

"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (ie. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

Upon an appeal against this judgment this court held ([1957] RA. 748 (C.A.):

"That the method of assessment of damages adopted by the learned chief justice was correct."

Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.

Whether the trial Court erred in adopting a ratio of ½ and a multiplier of 13 years.

18. The trial Court adopted a ratio of 1/2 and a multiplier of 13 years and not 12 years as submitted by the Appellant. The trial Court considered that the deceased died at the age of 43 years and was guided by the case of **Tobias Odogo Oburu vs Callen Kwamboka & Another (2018) eKLR**. Adding 13 years to 43, this means that the trial Court estimated that the deceased would have worked up to the age of 56. This is the normal retirement age and taking into account the uncertainties of life, this Court finds no fault in the trial Court's finding.

19. The trial Court adopted a dependency ratio of ½ as the deceased had only two dependants i.e her mother and her son. The Appellant contends that the Court should have adopted a ratio of 2/3. This Court has considered that the deceased was an elder sister to the Appellant. The deceased thus had a greater responsibility with respect to providing for their mother, in addition to her son. The Court notes that in the case of **Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu**, Civil Appeal No. 98 of 2018 [2021] eKLR, Limo J held that if a deceased person was unmarried, the Court should adopt a ratio of 1/3. However, in that case, the deceased's dependants were only his parents. In the present case, the deceased's dependants are her parent and her child. Although she was unmarried at the time of her death, the fact that she had a child means that she had to cater for the child as a single parent. In the circumstances, a larger proportion of her income was expended to her child's upkeep.

20. This Court thus finds that a dependency ratio of 2/3 would best suit the circumstances of this case. The total damages awardable for loss of dependency before apportionment of liability would thus be as follows: - **Ksh 11,603 * 2/3 * 13 * 12 = Ksh 1,206,712/=.**

Whether the trial Court erred in failing to adopt a lump sum award.

21. The Appellant urges that the trial Court ought to have adopted a lump sum amount. As pointed out by the Respondent, the Appellant in the trial Court submitted on both the question of lump sum and on the multiplier approach. In the submissions before this Court, the Appellant has also urged for both. When a court adopts a multiplier approach, then it cannot adopt a lump sum award and vice versa. One is adopted in the alternative of the other. It is thus misplaced for the Appellant to urge that the trial Court erred in failing to adopt a lump sum award when by her own submissions, she was inviting the Court to pick which of the two would be applicable to her case.

22. Perhaps the Appellant expected the Court to give reasons for rejecting the lump sum approach. If so, this was a valid expectation, going by the fact that in the Judgment, the trial Court did not give reasons as to why it was opting for the multiplier approach and not the lump sum approach. By failing to give reasons, this may have given the Appellant the impression that her submissions were ignored or rejected without reason. This omission is, however, not material enough to have this Court upset the finding of the trial Court.

23. This Court adds that the use of the lump sum approach is favourable in cases where the deceased person was very young, thus making it difficult for the Court to predict the future occupation, career and earnings of the deceased. In the present case, the Appellant tendered evidence with respect to the deceased's advanced age of 43 years at the time of her death and her occupation as a tailor. The Court was, therefore, well seized with sufficient details with respect to her approximate earnings and the number of years she was expected to have worked. It was thus in order for the Court to adopt a multiplier approach in favour of the lump sum approach.

Conclusion

24. The deceased was involved in a fatal accident involving herself and motor vehicle registration number GKB 357U. The Appellant lodged a claim against the Respondents for liability for negligence and for damages at the trial Court. By consent of parties, the trial Court apportioned liability at 85:15 in favour of the Appellant. Upon hearing, the Court awarded the Appellant damages totaling to Ksh 947,948.90/= after factoring contribution. The Appellant's appeal is on quantum of damages, principally on loss of dependency. The Appellant is aggrieved by the dependency ratio of 1/2 and the multiplier of 13 years adopted by the trial Court.

25. The Court considers that the circumstances of the case, involving the deceased who was a single parent and who supported her mother calls for enhancement of the dependency ratio from 1/2 to 2/3. With respect to the multiplier of 13 years adopted by the trial Court, the Appellant has not demonstrated that the trial Court **acted on a wrong principle of law, or misapprehended the facts, or made a wholly erroneous estimate of the damage suffered** as per the case of *Mariga vs Musila*, Civil Appeals Nos. 66 of 1982 and 88 of 1983 (1984) KLR. The Court will, therefore, not disturb the finding of the trial Court on the multiplier of 13 years.

26. The Court rejects the Appellant's contention that the Court erred in failing to adopt a lump sum figure. As the Court was fully seized with sufficient details on the deceased's age, occupation and approximate earnings, it was in order for the Court to favour the multiplier approach over the lump sum approach. The Court however considers that since the Appellant had submitted on the same before the trial Court, the trial Court ought to have given reasons for favouring one approach over the other in its Judgment. This omission is however not material enough to warrant a disturbance of the finding of the trial Court.

ORDERS

27. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) The Appellant's appeal is allowed to the extent that the dependency ratio of a half (1/2) adopted by the trial Court is substituted with a ratio of two thirds (2/3).

ii) Pursuant to order i) above, the damages of Ksh 947,948.90/= awarded by the trial court is substituted with damages of Ksh 1,204,375.20/= arrived at as follows: -

General Damages under the Law Reform Act

Loss of Expectation of Life **Ksh 100,000/=**

Pain and Suffering **Ksh 30,000/=**

General Damages under the Fatal Accidents Act

Loss of Dependency **Ksh 1,206,712/=**

Special Damages **Ksh 80,200/=**

Sub total **Ksh 1,416,912/=**

Less 15% contribution **-Ksh 212,536.80/=**

Total award **Ksh 1,204,375.20/=**

iii) The Ksh 1,204,375.20/= is to be distributed as follows: -

1. Dennis Kimathi (Son) Ksh 800,000/=

2. Margaret Muthamia MIkunyua (Mother) Ksh 404,375.20/=

iv) The Appellant's prayer to enhance the multiplier of 13 years adopted by the trial Court is hereby declined.

v) *The Appellant's prayer to have the Court adopt a lump sum award is hereby declined.*

vi) *As each party has partially succeeded in the appeal, there shall be no order as to costs.*

Order accordingly

DATED AND DELIVERED ON THIS 7TH DAY OF OCTOBER, 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

M/S MUTEGI MUGAMBI & CO. ADVOCATES FOR THE APPELLANT

M/S KIRUKI & KAYIKA ADVOCATES FOR THE RESPONDENTS