



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 32 OF 2020**

**BETWEEN**

**ELIJAH MUGAMBI.....1<sup>ST</sup> APPELLANT**

**PERMINUS MURANGIRI.....2<sup>ND</sup> APPELLANT**

**AND**

**MERCY WANGARI WANJOHI.....RESPONDENT**

**(Suing as legal representative of the estate of Josphat Mutwiri (Deceased))**

**(Being an Appeal from the Judgment and Decree in Meru CMCC No. 220 of 2019**

**by Hon. E. Tshimonjero (RM) on 06<sup>th</sup> May, 2020)**

**JUDGMENT**

1. On 08.05.2019, **Josphat Mutwiri (Deceased)** was lawfully riding a motor cycle at Kwa Koome area along Isiolo-Meru Road when he was knocked down by motor vehicle **KCM 860M ISUZU FSR (accident motor vehicle)** owned by **ELIJAH MUGAMBI (1<sup>st</sup> Respondent)** which was being driven by **PERMINUS MURANGIRI (2<sup>nd</sup> Respondent)** as a result of which he suffered fatal injuries.

2. **MERCY WANGARI WANJOHI (Appellant)** in her capacity as wife to the deceased filed suit against Respondents seeking damages.

3. The Defendants/Appellants in their statement of Defence denied the claim and blamed deceased for causing the accident.

4. At the conclusion of the trial, the learned trial magistrate entered judgment on liability at 100% against the Appellants a jointly and severally and proceeded to award damages as follows:

- 1) Pain and suffering Kshs. 20,000/-
- 2) Loss of expectation of life Kshs. 100,000/-
- 3) Loss of dependency Kshs. 3,000,000/-
- 4) Special damages Kshs. 57,100/-

**The Appeal**

5. The Appellants dissatisfied with the lower court's decision on l quantum preferred this appeal mainly disputing the award on:

- 1) Multiplicand

2) Multiplier

3) Dependency ratio

### **Analysis and Determination**

6. I have considered the evidence at the trial and the submissions and the authorities cited by counsel on behalf the parties.

7. Concerning assessment of damages, the principle stated by *Kneller JA* in **Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2 [1987] KLR 30** at page 35 is instructive:

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”**

8. The award on loss of dependency is however worthy consideration for the reason that there was no prove of earnings by the deceased who was said to have been a pastor.

9. The court in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** set out the guidelines applicable in assessment of damages under the Fatal Accident’s Act as follows:

**The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.**

10. The general rule is that in the absence of prove of earnings, courts have adopted the minimum wages guidelines in calculating the award for loss of dependency. (See *Beatrice W Murage v Consumer Transport Ltd & another [2014] eKLR*; *Monica Njeri Kamau v Peter Monari Onkoba [2019] eKLR* and *Patrick Barasa v Serah Wambui Karumba (Suing as the legal representative to the estate of the late ALBERT CHEBAYA) [2019] eKLR*).

11. There being no evidence that the deceased earned more decently than a general worker as ruled by the trial court, I find that the trial magistrate erred in failing to apply the minimum wage at the time of deceased’s death.

12. The Regulation of Wages (General Amendment) Order, 2018 which was in force in 2019 when the accident occurred provides for wages for a general worker at Kshs. 12522.70 which ought to have been applied as the multiplicand.

13. The evidence on record reveals that the deceased was 35 years old. At the hearing, the Respondent proposed a multiplier of 20 years whereas the Appellants proposed a multiplier of 25 years. Bearing in mind the *vicissitudes* and *uncertainties of life*, I am persuaded that a multiplier of 25 years proposed by the Appellants is reasonable.

14. On the issue of dependency ratio, Appellant testified that she was deceased’s wife and that they were blessed with one child. In **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013] eKLR**, the court stated that:

**“...there is no rule that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.”**

15. Appreciably, it is reasonable to expect that the deceased financially supported his wife and child. This court finds and holds that it would not be reasonable to have expected that deceased would have to spend a large chunk of his income on his two dependents. From the foregoing, I am persuaded that a dependency ratio of 1/3 is reasonable.

16. In the final analysis, this appeal has merit and it is allowed in the following terms:

**1) The award of Kshs. 3,000,000/- for loss of dependency is set aside and substituted with  $12522.70 \times 25 \times 12 \times 1/3 =$  Kshs. 1,252,270/- (Kshs. one million, two hundred fifty-two, two hundred seventy)**

**2) Since both parties have partially succeeded, each party shall bear its own costs**

**DATED AT MERU THIS 2<sup>nd</sup> DAY OF December 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Appellant - Mr.Mwiti for Joshua Mwiti Law Advocates**

**For Respondents - Mr.Kahiga hb for Mr. Nyoro for J.K.Kibicho & Co. Advocates**