



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

CIVIL APPEAL NO. 58 OF 2019

FRANKLINE KIMATHI BAARIU.....1ST APPELLANT

LUCY MUTHONI MWENDA.....2ND APPELLANT

VERSUS

PHILIP AKUNGU MITU MBOROTHI

(suing as the administrator and personal representative of

ANTONY MWITI GAKUNGU DECEASED).....RESPONDENT

(An appeal from the judgment and decree of Hon. Sogomo, PM

made on 15/11/2018 in the Tigania PMCC No. 31 of 2018)

J U D G M E N T

1. The appellants were defendants before the trial Court. By a plaint dated 5/4/2018, the respondent sued the appellants claiming both special and general damages for the death of **Antony Mwiti Gakungu (“deceased”)** arising out of a road traffic accident that occurred on 21/01/2018.
2. The respondent alleged that on the material date, the deceased was lawfully riding a motorcycle along the Miathene-Kianjai Road when the 1st appellant so negligently drove motor vehicle registration number KBM 810G Toyota Saloon that knocked him down causing him fatal injuries which caused his death.
3. The respondent set out what they considered to be the particulars of negligence of the 1st appellant driving the said motor vehicle owned by the 2nd appellant. They also set out the particulars of special damages and those pursuant to both the **Law Reform Act** and the **Fatal Accidents Act**.
4. The appellants defended the suit vide their statement of defence dated 15/5/2018. They denied the respondents claim and blamed the deceased for the accident. They set out the particulars of negligence and pleaded contributory negligence.
5. At the trial, the parties agreed on liability at 80/20 in favour of the respondent. By a judgment made on 7/12/2018, the trial Court awarded damages in the sum of Kshs. 2,576,800/-. Aggrieved by the said decision, the appellants have appealed to this Court setting out 7 grounds which are to the effect that the trial Court used wrong principles whereby it arrived at an excessive award.
6. This being a first appeal, this Court is enjoined to re-appraise and re-evaluate the evidence afresh bearing in mind that it did not have the opportunity of seeing and hearing the witnesses testify. See **Selle v. Associated Motor Boat Company Ltd [1968] EA 123** and **Peter v. Sunday Post Limited [1958] 424**.
7. **Philip Akungu Mborothi (PW2)** testified in proof of his case. He told the Court that the deceased had two children and was employed as a fireman at Gaukungu Company Limited. That he was earning Kshs. 20,000/- per month.
8. Both parties filed their respective submissions which this Court has considered. This being an appeal on quantum only, this Court’s jurisdiction is well settled. In **Butt v. Khan [1982-88] 1 KAR 1**, the Court held: -

“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”.

9. In the claim under the ***Law Reform Act***, the trial Court awarded Kshs. 100,000/- for loss of expectation of life and Kshs. 50,000/- for pain and suffering. The appellants submitted that the trial Court should have awarded Kshs. 70,000/- and Kshs. 10,000/-, respectively under those heads. The cases of **IDKN v. John Murithi China Wu Yi Limited & Another [2017]** were relied on for those submissions.

10. On his part, the respondent submitted that the trial Court did not apply wrong principles in making the impugned awards. That the trial Court had indicated that it had considered the respective parties' proposals. That the cases relied on by the appellants were not applicable. The cases of **Judy Njura Kathuri & Another v. Kenya Power & Lighting Company Ltd [2017] Eklr**, **JKN v. The Chairman Board of Governors (Boys) High School [2018] Eklr**, **FMM & Another v. Joseph Njuguna Kuria [2018]** and **Anna Kanja Kithinji & Others v. Jacob Kirari & Another [2018] Eklr** were relied on in support of those submission.

11. The decisions relied on by the respondent shows that in those cases the Courts awarded Kshs. 100,000/- for deceased of like age as the deceased in this case. I find that the award of Kshs. 100,000/- to have been reasonable. On pain and suffering, the deceased died after two days. The accident occurred on 21/1/2018 and he died on 24/1/2018. He must have endured substantial pain and suffering. I not interfere with those awards.

12. On the claim under the ***Fatal Accidents Act***, the trial Court used a multiplicand of Kshs.15,000/- and multiplier of 24 years and awarded Kshs. 2,880,000/-.

13. The appellants submitted that there was no basis for the trial Court to fix the multiplicand at Kshs.15,000/-. That there was no evidence that that was the amount the deceased was being paid as a monthly salary. That the trial Court should have applied the global sum approach and award Kshs.300,000/-. That if the multiplicand approach had to be applied, the Court should have used the minimum wage of Kshs. 6,896/15 and a multiplier of 10 years.

14. In support of those contestations, the appellants relied on the cases of **KPLC v. Charles Obegi Ogeta [2016]Eklr**, **Albert Odawa v. Gichimu Githinji [2007] Eklr**, **Mary Khayesi Awalo & Anor v. Mwilu Malungu & Another [1999] Eklr**, **Moses Mairua Muchiri v. Cyrus Maina Macharia [2016] Eklr**, **Rose Munyasa & Another v. Daphton Kirombo & Another [2014] Eklr** and **Leonard Ekisa & Another v. Major Birgen [2005] Eklr**.

15. On the respondent's behalf, it was submitted that the respondent had testified as a director of the company that had employed the deceased. That his testimony that the deceased was earning Kshs.15,000/- per month was not challenged. That since the deceased was only a young man, a multiplier of 24 was reasonable. Finally, that since the deceased had two children, the dependency ratio of 2/3 was reasonable.

16. In support of the foregoing submissions, the respondent relied on the cases of **Mwita Nyamohanga & Another v. Mary Robi Moherai & Another [2015] Eklr**, **Board of Governors of Kangumbiri Girls High School & Anor v. Mary Wanjiku v. Anor [2014] Eklr**, **Nzioka David & Anor v. Jacinta Nduku Musyoka & Anor [2019] Eklr** and **Judy Njura Kathuri & Anor v. KPLC [2017] Eklr**.

17. As already stated **Pw2** testified in support of the respondent's case. He was the father of the deceased. Contrary to the respondents, submissions, his testimony that the deceased was earning Kshs.15,000/- was challenged in cross examination. He failed to produce documentary evidence or support the claim that his Company Gakunju Company Limited was paying the deceased the alleged sum of kshs. 15,000/=.

18. In any event, I find the respondent's evidence on the income of the deceased to be contradictory and inconsistent. In his witness statement that was filed together with the statement of claim on 5/4/2018, the respondent stated that the deceased was earning Kshs. 20,000/- at Gakunju Company Limited. On cross examination, he stated that the deceased was earning Kshs. 15,000/- per month.

19. In both the witness statement and cross-examination, the respondent stated that the deceased was employed as a foreman in his company. He neither produced a letter of appointment to that effect or any other evidence in support of that allegation. However, in the letter dated 20/3/2018 by the company produced as **Pexh 9**, it was stated that the deceased had been engaged as a casual from January, 2017. It neither referred to the deceased as a foreman nor did it disclose his salary.

20. I am aware of the decisions of the Court of Appeal to the effect that evidence of income is not to be proved only by documentary evidence. However, in the circumstances of this case, the evidence produced is not convincing. This is so considering that; the respondent is said to be a director with Gakunju Company Limited where the deceased was allegedly employed. He had access to all the records of that company including and not limited to, the deceased's letter of employment, payment records of the deceased amongst others. He decided to withhold them from the Court.

21. In view of the foregoing, I am satisfied that there was no basis upon which the trial Court applied the multiplicand of Kshs. 15,000/- In **Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] Eklr**, the court held: -

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books”.

22. Further, in **Mwanzia v. Ngalali Mutua Kenya Bus Ltd** as quoted in **Albert Odawa v. Gichimu Githenji [2007] Eklr**, it was held: -

“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. 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.

25. In this regard, I find that the trial Court erred in applying the multiplicand approach. It should have applied the global sum approach.

26. In **John Wamae & 2 Others v. Jane Kituku Nziva & Another [2017] Eklr.** the court awarded a lumpsum of Kshs. 400,000/- to a farmer and guard aged 61 years and having children aged between 13 and 17 years. In **Moses Mairua Muchiri v. Cyrus Maina Macharia [2016] Eklr.** a global sum of Kshs. 1,700,000/- was awarded to a lady aged 30 years who was employed and who had evidence of making deposits into her account averaging about Kshs. 22,000/- per month.

27. In the present case, the deceased was aged 36 years and had two young children aged 8 and 16 years, respectively. An award of Kshs. 1,300,000/- would be reasonable.

28. Accordingly, I allow the appeal. I set aside the trial Court’s judgment and substitute therefor with judgment for the respondent as follows: -

a) Award for general damages

i) Loss of expectation of life - KShs. 100,000/-

ii) Pain and suffering - KShs. 50,000/-

iii) Loss of dependency - KShs. 1,300,000/-

b) Special damages - KShs. 191,000/-

Total - KShs. 1,541,000/-

Less 20% - KShs. 308,200/-

Balance - KShs. 1,232,800/-

c) Interest from date of judgment before the trial Court.

d) Since the appellant was only partially successful, parties will bear own costs of the appeal.

DATED and DELIVERED at Meru this 21st day of May, 2020.

A. MABEYA

JUDGE