



**Telkom Kenya Ltd v Kinoti & 2 others (Civil Appeal 121 of 2018)
[2020] KEHC 10490 (KLR) (21 May 2020) (Judgment)**

Neutral citation: [2020] KEHC 10490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 121 OF 2018**

**A. ONG'INJO, J
MAY 21, 2020**

BETWEEN

TELKOM KENYA LTD APPELLANT

AND

EDWARD KINOTI 1ST RESPONDENT

KINDARUMA COMPANY LTD 2ND RESPONDENT

JOSIAH NTHIGA GACHITHIRE 3RD RESPONDENT

*(Being an appeal from the judgement of Hon. H. N. Ndungu (Ms) Chief
Magistrate delivered on 30th May 2018 in CMCC No.372 of 2014)*

JUDGMENT

1. The 1st Respondent Edward Kinoti sued the Appellant together with the 2nd and 3rd Respondents in his capacity as Legal Representative of the Estate of Mary Magdaline Igoki Kiaira seeking general and special damages under the Law Reform Act and Fatal Accidents Act together with cost of the suit and interest.
2. The cause of action arose on or about 16th January 2004 when the deceased was hit with a telephone post when she was walking along the Meru-Maua Road at Ruiru Market. The telephone post was said to have been hit by motor vehicle RegNo.KAD 464 W ZB 8524 NECO semi-trailer which was being driven and /or controlled by the 2nd Defendant an employee of the 1st Defendant.
3. The Appellant was joined as a party to the suit vide a 3rd party notice dated 15th April 2005.
4. The cause herein was initially filed as Cause No.532 of 2004 at the Chief Magistrate's Court at Meru subsequently vide Misc Civil Application No.42 of 2007 the same was transferred to the High Court and registered as Civil Case No.135 of 2007.Upon enhancement of the jurisdiction of the Magistrate's



Court an application dated 23rd May 2012 was filed seeking that the suit should be transferred to the Chief magistrate's Court for hearing and determination and the same was registered afresh as Civil Case No.372 of 2014. Evidence of the Plaintiff was taken afresh on 21st March 2018 and closed. The 3rd party closed its case without calling any witnesses. The 1st and 2nd Defendants though served did not make appearance and the advocates were also not in court and their case was closed at the instance of the Plaintiff's advocate and directions taken that submissions to be filed within 15 days for each party starting with the Plaintiff and thereafter third parties.

5. From the record it is indicated that on 16th March 2009 consent on liability was entered into as follows :
 - a. Plaintiff 10%
 - b. Defendants 30%
 - c. 3rd Party 60%
6. The Plaintiff and the 3rd party filed their written submissions and based on the pleadings the testimony in court, the submissions of the Plaintiff and the 3rd Party the trial Magistrate assessed damages as follows;
 - a. Damages under the Law Reform Act
 - i. Pain and suffering Ksh.50,000
 - ii. Loss of expectation of life Ksh. 100,000
 - b. Under Fatal Accidents Act
 - i. Loss of dependency Ksh 8000000
 - ii. Less loss of expectation of life 100,000
 - iii. Total award Ksh 7,950,000
 - iv. Add Special damages Ksh. 10,350
 - v. Total Ksh. 7,960,350
7. This award was subject to the consent on liability entered into by the parties.
8. The Appellants /3rd Parties were aggrieved by the trial Magistrate's assessment of damages and they lodged the appeal herein based on 16 grounds and the major dispute is that the 60% of the Chief Magistrate's court judgement should not have exceeded Ksh.2,000,000 which amount the Appellants already disbursed to the advocate for the 1st Respondent and the dispute Ksh 2,493,950 which is in dispute was deposited in the joint interest account of both advocate as security by consent dated 1st February 2019 and filed on 8th February 2019.
9. Directions were taken on 15th November 2019 that the appeal be canvassed by way of written submissions and the Appellants file their submissions on 12th February 2020 and submitted that the general damages on all heads were unreasonable excessive against reason and precedent. They relied on HCCA No.21 of 2015 Akamba Road Public Road Services Vs Abikadir Adan Galgalo where the High Court in reducing damages in similar circumstances quoted Kigaraari Vs Aya 1982-1988 IKAR 768 where it was observed;

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public,



the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

10. The Appellants submitted that since the deceased died immediately after the accident no award should have been made in the heading of pain and suffering and in any case the award should not exceed Ksh.10,00 for instant death. They relied on the case of Elizabeth Mary Wairimu Kibandi and Another Vs Kisumu Banco Manufacturers Ltd and Another HCCC No.1565 of 1999.
11. On loss of expectation of life, the Appellant submitted that the award was unreasonable and excessive considering the deceased was already aged 55 years of age. It was urged that Ksh. 70,000 would have sufficed.
12. On loss of dependency they argued that a multiplier of 5 years would have sufficed and that the multiplicand of Ksh. 100,000 alleged as the deceased earnings per month in the year 2004 was not properly proved and tax deductions were not factored. It was submitted that even the learned trial Magistrate was aware that the amount was not specific and proceeded to adopt the unproven and unspecific sum without taking into account tax deductions. The Appellant submitted that by law and precedent alleged gross earnings of that magnitude (if properly proven) are normally reduced by a third (33%) to cater for tax and statutory deduction as evidence in High Court as evidence in HCCC No,2 of 2003 Leonard Ikisa Vs K.Birgen .
13. The Appellants argued that there was no strict proof of earnings by the deceased and the applicable multiplicand should be statutory minimum wage prevailing at the time of death. The court’s attention was drawn to the statutory minimum wage for a shop keeper for the 2017 Regulations of Wages Order which was Ksh. 18,201.95.
14. The Appellant relied on the case of Comply Industries Ltd Vs Daniel Kiprotich Busienei Civil Appeal No.142 of 2009 where it was held that where the exact amount was not ascertainable she ought to have adopted the amount payable to a casual labourer at the time according to [Legal Notice No 36 of 2004](#) which was 3999. In the case of Monica Muthoni Mwangi Vs Peterson Wanjohi and Another HCCC No 633 of 2001, it was held that the deceased was though working as a self-employed person in would have allowed 2 years as a multiplier and the multiplicand as Ksh.3000 being the minimum wage. The Appellant also relied on the case of Yusuf Abdala Vs Mombasa Liners Ltd HCCC No.1700 of 2002 in which it was held;
15. “There was no evidence given as to the wage factor on multiplicand of the deceased. I would therefore base the wage factor to the minimum wage the same being Ksh 3000.”
16. The Appellants also submitted that general damages for loss of dependency was based on a wrong excessively high dependency ratio of 2/3 for a person of advanced age who had no true of lawful dependants while there was no evidence or basis at all in support of such a high ratio as the deceased had no valid dependants as those listed at paragraph 6 of the plaint were adults between the age of 27 and 34 years earning their own living and none of them was dependant on their mother who was advanced in age. On this ground the Appellants relied on the case of Leonard Ekisa Vs K.Birgen where the High Court quoted Ringera J in Beatrice Wangui Thairu Vs Hon Ezekiel Bargetuny and Another where it was held that the extent of dependency is a question of fact to be determined in each case. The Appellant submitted that the ration for dependency should be 1/3 and not 2/3
17. On special damages while relying on the case of Elizabeth Mary Kibandi and another (Supra) the Appellants submitted that the trial Magistrate misdirected herself and erred in law and fact by awarding special damages that were neither pleaded nor proved. The holding in Delta Haulage Services Ltd Vs



Complast Industries Ltd and Another HCCC No.1058 of 2006 was also used to fortify the submission that special damages must be pleaded and also proved specifically.

18. The Appellants urged the court to find that the sum of Ksh. 2,000,000 already paid was more than adequate to compensate the 1st Respondent and order that the disputed balance of Ksh2,493,950 which is subject of the Appeal be released back to the Appellant. They urged that the judgement and decree of the subordinate court against the Appellant be set aside on the issue on quantum and be replaced by reasonable damages and that the Ksh.2 million already paid to the 1st Respondent was more than adequate to compensate the 1st Respondent for both general and special damages, cost of the suit and interest. The Appellants also sought that cost of the appeal be awarded to them.
19. The Respondent's in their submissions in the issue of multiplier relied on the case of Chania Shuttle Vs Francis Karanja HC at Voi Civil Appel No 60 of 2014 where the court found that the Appellant did not rebut the Respondent's evidence that the deceased was a business man who could have worked beyond 60 years and that an average Kenyan man can engage in economic activity up to about 70 years or even beyond especially where he/she is engaged in business. Indeed, there is no retirement age for business men or business women.
20. Concerning the multiplicand used by the trial court to compute general damages for loss of dependency the Respondents submitted that documents were produced in support of their claim including business permits, statements of account and financial statements which showed the deceased was very successful in her business and would make ultimately Ksh.100,000 on several months within that year out of which she could use 2/3 for the family upkeep as a single parent.
21. The Respondents argued that the Appellants did not adduce any evidence to controvert the Respondents testimony that the deceased could make up to Ksh. 100,000 on several months and that it is only fair and just that the multiplicand adopted by the trial court should not be interfered with.
22. It was also argued by the Respondents that the evidence in respect of Dependants was unshaken and that one of the Dependants was completely relying on the deceased at the time of her demise as he was still in school.
23. The Respondent argued that there was no double compensation in respect to the award as Ksh.100000 for loss of expectation of life was deducted from damages for loss of dependency and the trial court considered binding case law in delivering its judgement in accordance with the law.
24. On the award of funeral expenses, it was argued that the trial court awarded Ksh. 10,350 after considering several precedents which concluded that where there are no receipts produced for burial expenses the court took note that Ksh. 10,000 was awarded by other courts and therefore that amount was reasonable in the circumstances.
25. The 1st Respondent urged the court to dismiss the appeal with costs as it has no reasonable grounds.
26. The duties of a first appellate court were explained in the case of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] Ea 123 as follows;

“ An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence



or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

27. The issues for determination are whether:
- a. The award of general damages is inordinately high in the circumstances and represents an entirely erroneous estimate
 - b. Whether the trial Magistrate proceeded on the wrong principles to determine the multiplier and multiplicand
 - c. Whether the trial Magistrate misapprehended the evidence in some material respect and so arrived at a figure which is inordinately high
28. The principles governing the appellate court in interfering with a trial Magistrate’s assessment of general damages are well enunciated in the landmark case of *Butt vs. Khan* (1978) eKLR Court of Appeal No. 40/1977 where the court said;
- “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 is either inordinately high or low.
29. In determining the multiplicand of Ksh. 100,000 per month the trial Magistrate had this to say;
- “Although this amount is not specific, I have looked at the financial statement and I can see there were some frequent deposits on a balance of possibilities I am satisfied that the same could amount to about Ksh. 100,000 monthly.”
30. The documents produced to show that the deceased was a shop keeper are a single business permit, statement of bank account from Co-operative Bank where Edward Kinoti and Mary.M.Igoki held a current account and financial statement. The financial statement prepared by Ndumbi Kagereki Mugambi and Company C.P.As shows that profit after taxation for the year ended 31st December 2003 was Ksh.228,004.It was therefore erroneous for the trial Magistrate to say that the financial statement showed frequent deposits The deposits are made in the current account by the 1st Respondent herein and the deceased and the deposits were taken into account when the Certified Public Accountants hired by the 1st Respondent prepared the financial statement that was produced herein as exhibit .
31. The view of this court is that the proper computation for the multiplicand would have been to divide the profits for the year 2003 by 12 months to come up with the deceased’s monthly income.
32. For the multiplier the deceased was not in formal employment and as submitted by the 1st Respondent in *Chania Shuttle Vs Francis Karanja HC at Voi Civil Appel No 60 of 2014* the could have engaged in economic activities up to 70 years and beyond. The circumstances in *Kiarie Shoe Stores Ltd Vs Hellen Waruguru Waweru*[2015]eKLR and in *Monica Muthoni Mwangi Vs Peterson Wanjohi and Another* [2004]eKLR are distinguished from the current circumstances. In the 1st authority the deceased was in formal employment as a teacher and in the 2nd authority the deceased was self-employed although his business was different from the one herein. In arriving at the multiplier of 10 years the trial Magistrate relied on the case of *Pole Bwana Abo Shee Vs Swale Said And Another HCCC No.405 of 1989* at Mombasa where Justice Wambilianga in employing a multiplier of 16 years held that the work of a driver is an occupation in which people remain in employment beyond the age of 60 years. In consideration that the assessment of a multiplier as well as multiplicand is an exercise of the trial



Magistrate's discretion, this court finds that there is no good reason to warrant interfering with the same.

33. The Appellant's arguments that the deceased was of advance age and had no valid dependents is not supported by the law. Section 4 of the *Fatal Accidents Act* provides for who should sue for loss of dependency as follows:

Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

34. The age of dependents of a deceased person under the Fatal Accident's Act is not a criteria to be used in making a claim for loss of dependency.
35. In conclusion I do find that the appeal succeeds to the extent that the trial Magistrate misapprehended the evidence while assessing general damages for loss of dependency by erroneously stating that there were deposits made in the financial statement which made her believe that the income 'could amount to a sort of Ksh. 100,000 per month'.
36. In consideration that assessment of damages for death arising from fatal accidents calls for consideration of highly speculative factors as held by Lord Diplock in *Cookson Vs Knowles* (1978) 2 ALL ER 604 and in consideration of the deposits made in the current account by the deceased and the 1st Respondent herein and in consideration of the financial statement prepared by Ndubi Kageriki Mugambi and Company Certified Public Accountants on behalf of the 1st Respondent as well as the submissions of the Appellants at page 5 paragraph 6 I do find that Ksh.50,000 would be a reasonable figure for the deceased person's monthly income.
37. General damages for loss of dependency assessed by the trial Magistrate is therefore set aside and substituted as follows;
- a. Ksh 50,000 x 12 x 10 x 2/3 = 4,000,000/=
 - b. Pain and suffering = 50,000/=
 - c. Loss of expectation of life = 100,000/=
 - d. Special damages = 10,350
 - e. Total = 4,160,350/=
 - f. Less loss of expectation of life = 100,000
 - g. Totals = 4,060,350/=
38. The award to be subject to the consent on liability entered into by the parties on 16th March 2009.
39. The cost of the appeal to be borne by each party.



DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONGINJO

JUDGE

