



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIVASHA**

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

**CIVIL APPEAL NO. 41 OF 2016**

**PAUL CHEGE KABITA.....APPELLANT**

**VERSUS**

**JAMES GICHERU NGUBU & VIRGINIA NJERI**

**NYAMBURA (suing as the legal administrators of the**

**estate of STEPHEN MWANGI GICHERU.....RESPONDENT**

*(Being an appeal from the judgment delivered on the 31<sup>st</sup> July, 2013*

*in Naivasha CMCC 677 of 2011 – (E. Boke, PM).*

**JUDGMENT**

**Background**

1. The deceased on whose behalf the respondents sued in this case was a pillion passenger on a motorcycle when it was knocked down by the plaintiff’s vehicle on 13<sup>th</sup> August 2010. The evidence was that the deceased died in hospital six days later on 19th August, 2010. He was aged twenty three years.

2. On 12<sup>th</sup> June, 2013 parties recorded consent on liability in the ratio of 70:30 in favour of the plaintiff against the defendant. The deceased’s wife gave evidence as PW1. She was the only plaintiff’s witness. She testified that the deceased had a motorcycle spare parts shop which was taken over by someone else after his demise. According to her, the deceased was earning Kshs 10,000/= per month, all of which he gave to her. They had a daughter aged two years at the time he died. She had no documentation on the earnings, but produced

3. The defence did not call any witnesses. Although in the judgment there is a mere indication that the defence may have made submissions, there are no submissions contained in the lower court file although the record of appeal shows a copy filed on 17<sup>th</sup> July, 2013. The plaintiff filed submissions relying on two authorities: **Mayur Ramesh Gujar v Nairobi Deluxe Services Ltd Nbi HCCC** (no citation) and **Zakharia Bogonko nv Dhahir Liarsharma & Another Nbi HCCC No 2377**.

4. The trial court gave an award as follows:

<i>Pain and Suffering</i>	-	<i>Kshs.</i>	<i>70,000/=</i>
<i>Loss of expectation of life</i>	-	<i>Kshs.</i>	<i>100,000/=</i>
<i>Loss of dependency</i>	-	<i>Kshs.</i>	<i>2,040,000/=</i>
<i>Special damages</i>	-	<i>Kshs</i>	<i>.....25,000/=</i>
			<i>Kshs, 2,235,000/=</i>

Less 30% Contribution - Kshs. 670,000/=

Final Award Kshs 1,564,500/=

5. The appeal, which is on quantum, is based and the following grounds of appeal:

1. That the learned trial Magistrate erred in law in failing to consider the Appellant's submissions.
2. That the learned trial Magistrate erred in law and fact in awarding excessive and unrealistic damages under the head of loss of expectation of life.
3. That the learned trial Magistrate erred in law and fact in awarding excessive and unrealistic damages under the head of loss of dependency.
4. The learned trial Magistrate erred in in law and in fact using a multiplier and multiplicand which were inordinately high considering that the deceased had no fixed income.
5. That the learned trial magistrate erred in law and in fact in awarding loss of expectation of life in addition to loss of dependency and yet the same is not awardable in addition.

6. In his submissions on appeal the appellant complains that his submissions in the lower court were not taken into account, and that had they been noted it was clear that he submitted:

- That on pain and suffering, kshs 20,000/= was sufficient
- That loss of expectation of life would be no more than Kshs 70,000/= and the awarded amount is inordinately high;
- That there was failure to prove dependency especially since the deceased's wife had said that not much had changed since the husband's demise other than companionship. As such loss of dependency was exaggerated;
- That on failure to prove earnings, the amount of Kshs 8,500 was too high;
- That the trial court should have discounted the awards since they were being given to the same dependant which would amount to double awarding.

7. The respondent supports the award and argues that the same should not be disturbed. I will deal with the appeal under each head of the awards, noting that this court has a duty to assess and evaluate the evidence and reach its own conclusions noting that there should be no interference with the lower court's determination unless it had applied wrong legal principles or had reached unreasonable conclusions unsupported by evidence or the legal principle.

#### **Pain and suffering**

8. The trial Magistrate awarded an amount of Kshs. 70,000/= after taking into account the cost of inflation and the time that had passed since the decision the case of **Mayur Ramesh Gurjar v Nairobi Deluxe Services Ltd** in which Bosire, J as he then was, on 12<sup>th</sup> October, 1988 an amount of 75,000/= was awarded for pain and suffering for a deceased who died 14 days after the accident. Both parties had relied on that case. In this case, the deceased died 6 days after accident. At the lower court the Plaintiffs submitted that an award of 100,000/= would be sufficient while the appellant was of the opinion that an amount of Kshs. 20,000/= would suffice.

9. The question is whether the amount awarded by the trial court is so unreasonable or inordinately high as to warrant interference by this court. She pointed out that the case was a 1988 case. At the time of judgment, fifteen years had elapsed, and that could account for the inflation cost. The plaintiff has not shown why the amount cannot be awarded. Accordingly, I am not convinced that the trial court exercised its discretion of court erroneously, or that this court should interfere with the amount awarded under this head.

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

10. The appellant suggested that that an amount 70,000/= would suffice under this head relying on the case of **Ali Saney v Mohamed Bakari & Another NRB HCCC No. 2225 of 1997**. There the court awarded Kshs. 70,000/= for loss of expectation of life for a deceased person who was 14 years old. The plaintiff had relied on the case of **Zacharia Bogonko v Dhahir Liarshama & Another NRB HCCC. No. 2377 of 1991** where court awarded 80,000/= for a 22 year old deceased, and had suggested an amount of Kshs. 100,000/=. The Magistrate noted that the deceased died at the age of 23 years and was married with a child. She also took into account that the deceased died in good health according to the plaintiff's evidence.

11. I note that the case that most resembles the present case was the **Zacharia Bogonko case**. The deceased in this case was 23 years old and 22 years in the **Bogonko case**. It is a trite principle in the award of damages that similar circumstances should be treated in as like a manner as possible and awards should reflect a uniformity demonstrative of such circumstances, noting that damages cannot adequately replace the lost life. No reasons have been advanced to show that the trial magistrate's exercise of discretion was injudicious. Accordingly, I see no reason to interfere with the decision reached in the lower court judgment.

## On the issue of loss of dependency

12. Under this head, the trial magistrate made an award using 8,500/= as the earning of the deceased. The evidence was that the deceased was 23 years old; operated a motorcycle spares shop; and allegedly earned 10,000/= per month which was not proved; and that he contributed substantially to the family's financial needs. The plaintiffs suggested that the **Regulation of Wages (General) (Amendment) Order, 2012** be applied to determine the wage of the deceased at Kshs 8,834.20/= as a multiplicand and that a multiplier of 2/3 be used. On his part, the defendant submitted that the plaintiffs had not proved the income of the deceased and that life had not changed for them therefore an award was not needed under this head.

13. It is true that the court indicated that the defendant had not filed submissions. As such it only noted the submissions of the plaintiff, and stated:

*“I find that Kshs 8,500/= as an average earning per month will be fair and a multiplier of 30 years after taking into account the uncertainties in life and since deceased was married with a child, dependency should not be in dispute hence dependency ratio 2/3 is adopted. Therefore the award under the head is as follows:*

*Ksh 8,500/= x 12 x 30 x 2/3 = 2,040,000/=.”*

14. This holding was erroneous in that there is no explanation for the figure of Kshs 8,500 other than that it is close to that in the 2012 **Regulation of Wages (General) (Amendment) Order**. I am satisfied that the Magistrate erred by not showing or explaining how she came up with the figure Kshs. 8,500/= hence applying the wrong multiplicand.

15. In **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR**, this Court held that there were multiple ways of proving income or profession other than by documents and certificates. The court went further in **Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR** where Asike-Makhandia J., stated:

*“In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005 ....”*

16. Since the deceased died in the year 2010, the **Regulation of wages that therefore applies in this case is the Regulation of Wages (General) (Amendment) Order, 2010** which was published in 18<sup>th</sup> June, 2010, a month before the deceased passed on, that Order should have been applied. It provides for a minimum monthly wage of Kshs. 6,221/= for general labourers in municipalities, which includes Naivasha.

17. It may be noted as stated by Ringera J., in **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** quoted by Koome J., in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** that:

*“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.”*

18. In light of the above, I would substitute the award of the trial court by applying the minimum wage under the **Regulation of Wages (General) (Amendment) Order, 2010** in the amount of 6,221/= per month. The calculation will therefore be:

$6,221 \times 2/3 \times 37 \times 12 = 1,841,416$

## Loss of dependency and the Fatal Accidents Act

19. Claims under the Fatal Accidents Act are dealt with in different ways by the courts. The method applied is a matter of the discretion of the court (See **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku** where court of appeal sitting at Nyeri in **Civil Appeal no. 35 of 2014 eKLR** pronounced itself as follows:

*“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason”*

20. An instructive approach is that set out in the case of **Kenya Wildlife Services v Geoffrey Gichuru Mwaura [2018] eKLR** where the court relied on **Beatrice Wangui Thairu -Vs- Hon. Ezekiel Barnetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where Ringera J had stated:

*“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. 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.”*

21. In the case of **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** quoted by Koome J (as she then was), in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003 [2007] Ringera J.** stated:

***“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. Can and must be abandoned where facts do not facilitate its application. It is plain that it is useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency 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”***

22. In the present case the learned trial magistrate applied the multiplier and multiplicand approach. There was no error in the age of the deceased, expected length of the dependency and the dependency ratio. The error, as earlier pointed out, was in the amount of monthly salary and in not considering the defendant’s submissions. That is correctable. In addition, there is nothing to prevent the awarding of pain and suffering, loss of expectation of life, loss of dependency and special damages all in the same suit as seen in the Court of Appeal decision in the **Kenya Wildlife Services case**.

#### **Failure of trial Magistrate to consider the Appellant’s submissions**

23. I now deal with the issue as to the failure of the trial court to consider the submissions of the appellant and what effect this had. The appellant’s submitted and referred the court to the judgment on page 76, paragraph 3-4 of the record of appeal where the Magistrate stated that the Defendant did not file submissions. Whilst reference to the omission to file is accurate, the quotation is actually at page 75 paragraph one of the record. It was improper for the trial court not to consider a party’s submissions. Since, however, the trial court applied the correct legal principles with the exception of the use of the multiplicand – which is correctable, as has been done by this court – no real prejudice has been suffered by the appellant.

#### **Disposition**

24. In conclusion, the appeal succeeds to the extent that the award of the trial court was erroneous in applying the **Regulation of Wages (General) (Amendment) Order, 2012** instead of the **Regulation of Wages (General) (Amendment) Order, 2010** in the the calculation of loss of dependency. The calculation will therefore be:

$$6,221 \times 2/3 \times 37 \times 12 = 1,841,416$$

25. The final award hereby granted is therefore as follows:

Pain and Suffering	-	Kshs.	70,000.00
Loss of expectation of life	-	Kshs.	100,000.00
Loss of dependency	-	Kshs.	1,841,416.00
Special damages	-	<u>Kshs</u>	<u>25,000.00</u>
			Kshs, 2,036,416.00
Less 30% Contribution	-	<u>Kshs.</u>	<u>610,924.80</u>
<b>Final Award</b>		<b><u>Kshs</u></b>	<b><u>1,425,491.20</u></b>

26. The appellant shall have the costs in the lower court and costs of the appeal.

27. Orders accordingly.

**Dated and Delivered at Naivasha this 7<sup>th</sup> Day of March, 2019**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mukungu holding brief for Juma for the Appellant
2. No representation (Gekong’a) for the Respondents

3. Court Clerk - Quinter Ogutu