



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CORAM: R. MWONGO, J.
CIVIL APPEAL NO. 30 OF 2014

JOHN GACHUNGI KIMANI.....1ST APPELLANT/RESPONDENT

KIBABU ELIZABETH.....2ND APPELLANT/RESPONDENT

VERSUS

**JOSPHAT AMOS NAMAYI (suing as the legal administrators of the
estate of (PAUL WAFULA AMOS).....RESPONDENT**

*(Being an Appeal against the Judgment of Hon P. Gesora, CM delivered on 11th September, 2014 in
Naivasha CMCC No 477 of 2011)*

JUDGMENT

Background

1. This is an appeal against the trial court's award on damages. They are tabulated in the subsequent decree as follows:

Pain and suffering	Shs	200,000.00
Loss of Expectation of life	Shs	70,000.00
Loss of dependency	Shs	<u>692,084.00</u>
	Shs	962,084.00
Less 25% Contribution	Shs	<u>240,521.00</u>
	Shs	721,563.00

Special Damages Shs 50,000.00

Total Shs 671,563.00

2. The parties in the lower court had recorded a consent on liability on a 75:25 basis in favour of the plaintiff.

3. The grounds of appeal are as follows:

a.) That the learned Trial Magistrate erred in Law and in fact in failing to consider the appellant's submissions.

b.) That the learned trial Magistrate erred in Law and in fact in awarding excessive and unrealistic damages under the head of loss of dependency.

c.) That the learned trial Magistrate erred in applying a dependency ratio of 2/3 when the deceased was unmarried.

d.) That the learned trial magistrate erred in law and in fact in failing to discount the award given under the Law Reform Act from the total award given

4. Parties were directed to file submissions to dispose of the appeal. The appellants/ defendants filed their submissions while the respondent did not. The appellants argue that the quantum awarded was inordinately high and represented an entirely wrong estimate as the respondent did not prove dependency by providing supporting documentation. Further, that in the event court does not agree with their sentiments then they submit that the trial court erred in applying a multiplicand of Kshs 3,460.42 instead of using Kshs 1500/=, the amount the Respondent said the deceased used to give him.

5. The appellants also submit that in applying a dependency ratio of 2/3 instead of 1/3 the trial court erred as the only person who depended on the deceased was the respondent since the deceased was neither married nor did he have any children. Finally, the appellant submitted that the trial court misapplied the law by duplicating awards under the Law Reform Act and the Fatal Accidents Act contrary to the well-established principles in the case of **Kemfro Africa Limited T/A Meru Express, Gathogo Kanini v A.M. Lubia & Another (1982-1988) 1 KAR.**

6. In the lower court, the respondent/plaintiff relied on the case of **Hellen Muhonja Maina v Peter Kinagi Gituka Nairobi HCCC No. 370 of 1990** where Ringera, J made an award for a specialized high school maths teacher earning a net income of 12,097/= damages on a multiplier of 5,000/= and a multiplicand of 29 years at a dependency ratio of ½. The plaintiff there was survived by a wife and two children.

7. In the present case the deceased was 21 years old when he died in the accident. He was unmarried but, as the breadwinner, he had seven family members that depended on him. He was employed as a general worker at Kantara Limited – Delamare Pivots earning a basic salary of Kshs 3460.42

Analysis and determination

8. Before proceeding to analyse the appeal, I note two points relevant for correction on the record. First, that the appellant asserts their dissatisfaction with the judgment of Hon E Kimilu in PMCC No 477 of 2011, whilst in fact the lower case in the present matter was not handled by Hon E Kimilu, but by Hon Gesora. Second, I note that the extracted decree at page 84 of the record and set out earlier herein, incorrectly captures the award in the judgment which was as follows:

Pain and suffering Shs 20,000.00

Loss of Expectation of life Shs 70,000.00

Loss of dependency	Shs <u>692,084.00</u>
	Shs 782,084.00
Less 25% Contribution	Shs <u>195,521.00</u>
	Shs 721,563.00
Special Damages	Shs <u>50,000.00</u>
Total	Shs <u>636,563.00</u>

Pain and suffering

9. On this head, the appellants suggested an award of 10,000/= in the lower court as the deceased died on the spot. The plaintiffs suggested an amount of Kshs. 100,000/=. The Magistrate awarded Kshs. 20,000/=:, and no arguments were made as why the award was thought to be excessive. I see no reason to disturb the same.

Loss of expectation of life

10. On this issue the appellants proposed an amount of Kshs. 70,000/= whilst the respondent suggested an amount of Kshs 80,000/=. The magistrate awarded Kshs 70,000/=. Here, again I will not disturb the award.

loss of dependency

11. Under this head, the appellant argued that the respondents did not prove dependency either by a marriage certificate, chief's letter or other document. All that the plaintiff produced an employment contract for the deceased showing that he was working for Kantara Limited Delamere Pivots. The evidence however, was that the deceased's monthly salary was Kshs. 3,460.42/= per month.

12. The respondent gave evidence as PW1. He stated that the deceased used to maintain him and send him 1,500 shillings per month. No evidence to controvert this was given by the defence. In cross examination, PW1 stated that the deceased was a bachelor with no children. In the absence of contrary evidence, the court accepts the evidence that the deceased maintained the respondent as testified.

13. The appellant proposed an amount of 120,000/= calculated using a multiplier of 20 years, a multiplicand of Kshs1,500/= and a dependency ratio of 1/3 since the deceased was unmarried. The trial magistrate's approach was on the basis of a multiplier and multiplicand, which is apt and is used in practice in courts. The magistrate used a multiplier of 25 years, a multiplicand of Kshs 3,460.42/= and ratio of 2/3. The trial magistrate gave no reason or explanation for using a ratio of 2/3.

14. Going by the uncontroverted evidence that the monthly amount paid to the respondent by the deceased was 1500/=:, which is 43% of the deceased's salary, I find that the trial court was not entitled to use a ratio of more than 1/2. Thus the calculation should have been: **3460.42 x 12 x 25 x 1/2 = 519.063.00**

15. To the extent that I find the calculation erroneous, I set aside the awarded amount.

Duplication of Awards under the Fatal Accidents Act and Law Reform Act

16. With regard to the claim that there was duplication in the awards under the Fatal Accidents Act and the Law Reform Act, the courts have different approaches in dealing with that aspect. Some courts are inclined to the formulae proposed by Ringera J (as he then was) in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** while others prefer global awards.

17. In the case of **Kenya Wildlife Services v Geoffrey Gichuru Mwaura [2018] eKLR** the court relied on the Barngetuny case 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.”

18. In the case of **Kwanzia v Ngalah Rubia and another Ringera J.** added as follows:

“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 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”

19. In the cases of **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku the Court of appeal sitting at Nyeri in Civil Appeal No. 35 of 2014** 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. In light of the **Kwanza** decision above and the evidence, the age of the deceased, the amount of pay and or annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation.

21. In **Hellen Waruguru Waweru (Suing as legal representative of Peter Mwenja Vs Kiarie Shoe Stores Limited and Appeal no. 22 of 2014** where the court of Appeal sitting in Nyeri made a finding that damages should be awarded under both heads and the court should not discount an award under the Law Reforms Act. As recently as 2018, in the **Kenya Wildlife Services case (supra)**, the Court of Appeal awarded pain and suffering, loss of expectation of life, loss of dependency and special damages in addition without discounting any amount.

22. On the issue of multiplier, the court in the case of **Yh Wholesalers Ltd & Another v Joseph Kimani Kamau & Another [2017] eKLR**, after considering the vagaries of life, held that a multiplier of 30 years would be reasonable where the deceased died at the age of 21years. Here the multiplier was 29 years.

Disposition

23. The parties consented to a 75:25 liability contribution. That ratio should cut across all amounts in the award. Accordingly, and for all the reasons given herein, the award of the trial court is set aside and substituted with the following award:

Pain and suffering	Shs	20,000.00
Loss of Expectation of life	Shs	70,000.00
Loss of dependency	Shs	519,063.00

Special Damages Shs 50,000.00 Shs 659,063.00

Less 25% Contribution Shs 164,765.75

Total Award Shs 494,297.25

24. Each party to bear own costs in light of the fact that respondents did not contest the appeal.

25. Orders accordingly.

Dated and Delivered at Naivasha this 4th Day of November, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu holding brief for Ombui for the Appellants
2. No representation for the Respondent
3. Court Clerk - Quinter Ogutu