



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL CASE NO. 60 OF 2013**

NJUE GITONGA NTHIGA..... APPELLANT

VERSUS

EDWARD NYAMU KIBUNYU.....RESPONDENT

(Suing as the Legal Rep. of the Estate of PETER NJINJU NYAMU)

***(An Appeal from Judgment and decree of the Chief Magistrate Embu dated 17th October, 2013 in Embu CMCC No. 195 of 2011)***

**J U D G M E N T**

This appeal arises from the judgment of the Chief Magistrate Embu delivered on 17/10/2013 in CMCC No. 195 of 2011 where the respondent was awarded Kshs.580,567/= after 35% contribution plus costs of the suit. The appellant was dissatisfied with the award and lodged this appeal. The parties had entered into a consent judgment on liability on the 2/7/2013 at the ratio of 65:35 for the plaintiff against the defendant.

The facts leading to this appeal were that the suit was filed by the respondent in his capacity as the legal representative of the estate of the deceased Peter Njinju Nyamu who died in a road traffic accident on 26/4/2011. The respondent was the mother of the deceased and had obtained a grant of representation ad litem for authority to file the suit.

The appellant put forth several grounds which are condensed as follows:-

- (a) *For loss of dependency, it was argued that the multiplier of 30 years and the ration of 2/3 in computing the lost years was unfair.*
- (b) *The court did not take into consideration the fact that the deceased was not married and that his dependants were not fully dependent on him.*
- (c) *That the award of damages was not in conformity with the laid down principles and that the comparable decisions of high courts were not considered.*
- (d) *That the court ignored the principles of awarding special damages.*

(e) *That the award was manifestly excessive.*

The appellant argued that since the deceased was aged 28 years, a multiplier of 10 years would have been appropriate. The appellant cited three decisions where the courts adopted lower multipliers in situations where the deceased were aged 23 and 27 years respectively.

- i. *RONGER DAINTY VS MWINYI HAJI & ANOTHER [2004] eKLR*
- ii. *NEW KENYA CO-OPERATIVE CREMERIES LTD & ANOTHER VS CHEVUSIT ARAP LANGAT [2013] eKLR*
- iii. *MARY KERUBO MABUKA VS NEWTON MUCHEKE MBARU & 3 OTHERS [2006] eKLR*

The guiding principles which the court should consider before disturbing an award of damage were set out in the case of *ARROW CAR LIMITED VS BIMOMO & 2 OTHERS [2004] 2 KLR 101* where the case of *KEMFRO AFRICA LTD VS GATHOGO KANINI VS A.M.M. LUBIA & ANOTHER [1982-1988] KLR 927* was cited. The court of Appeal held that before disturbing an award of damages:-

*“The appellate court must be satisfied that the judge in assessing damages took into account an irrelevant factor or left out of account a relevant one or that the amount is so inordinately high or low that it must be a wholly erroneous estimate of the damages”.*

The appellant relied on the case of *BUSTRACK LTD VS WILFRIDA ACHOLA OMONDI & ANOTHER [2010] eKLR* where it was held that dependency was a matter of fact and must be proved. It was alleged that the plaintiffs' 2/3 salary went to him and other family members but there was no evidence to support the allegation. The ratio of 1/3 was what should have been adopted considering that the deceased had no spouse and child. In the *BUSTRACK CASE (SUPRA)* the court adopted the ratio of 2/3 where there was a spouse and five children.

The appellant cited 3 decisions where ½ and 1/3 were adopted in circumstances similar to this case. The appellant faulted the case the magistrate relied on *HCCC NO. 1681 of 1999 JAMES GICHURU KIUNJURU VS MAINYO INVESTMENTS LTD* arguing that the rationale of for the dependence ratio of 2/3 was not laid out.

The appellants proposal on loss of dependency is  $3597 \times 12 \times 10 \times 1/3 = 429,480 =$  which he urges the court to award and set aside the award of the trial court.

As for special damages the appellant urges the court to set aside Shs.9,400/= awarded for mortuary fee since it was not pleaded.

The respondent submitted that there was sufficient evidence on loss of dependency in that the siblings of the deceased and the respondent were dependent on him. The ratio of 2/3 was therefore reasonable.

The multiplier of 30 years according to the respondent was based on evidence and was comparable to decisions of higher courts including the case cited by the appellants which gives guiding principles, that of *JAMES GICHURU KINYANJUI (SUPRA)*.

As for the special damages the respondents argued that the same were pleaded in the plaint and were rightly awarded. The respondents referred to the court to the case of *SHABAU VS CITY COUNCIL OF NAIROBI & ANOTHER Civil Appeal No. 52 of 1984* on principles guiding an appeal court in disturbing an award of damages.

I have looked at the authorities relied on by the parties in this appeal and the evidence on record regarding the assessment of damages.

In determining the multiplier the court must take into consideration the age of the deceased, the nature of his trade or occupation and the period which he was expected to work on the job assuming he remained in good health. The court may take into consideration the retirement age in public service in permanent

employee. The respondent was not an employee in the public service on permanent terms. He was to be a farmer and operated a motor cycle business earning about Shs.20,000/= a month. He also did casual jobs in construction sites.

In the case of **BUSTRACK (SUPRA)** the superior court confirmed a multiplier of 17 years adopted by the magistrate court where the deceased was aged 38 years and where the retirement age was pegged at 60 years. The proposal of a multiplier of 10 years proposed by the appellant in this case is on the lower side and cannot reasonably facilitate adequate compensation to the estate of the deceased in this case.

I have also considered the other authorities relied on by the parties in this regard. Considering that the deceased was aged 28 years and looking at comparable decisions, I find that the magistrate erred in adopting a multiplier of 30 years which was on the higher side based on the circumstances of this case.

It is my considered opinion that a multiplier of 25 years is reasonable which I hereby adopt in substitution of that of 30 years.

In the **BUSTRACK CASE** the court adopted the dependency ratio of 2/3 on very sound reasons that the deceased had a widow and five children aged between 1 and 12 years who were dependent on him. In the case of **MAINA KAMARU AND JANE WAHITO VS JOSPHAT MURIUKI WANGONDU Civil Appeal No. 14 of 1989** where court of appeal confirmed a dependency appellate ratio of ½ as appropriate in case of a widow and father of the deceased as dependants.

In the case of **WANDII KIMEU & CHARLES KILONZI KIMEU VS EVANSON WAMUTI NJENGA & THIONGO WAINAINA Nairobi HCCC No. 1019 of 2005** the appellate confirmed the ratio dependency of ½ where the deceased who was unmarried maintained his siblings and parents. The deceased in this case was not married and it is unlikely that 2/3 of his income went to his mother and siblings.

Considering that the deceased in this case paid school fees for his siblings and maintained his parent, I am of the considered opinion that the ratio dependency of ½ is appropriate in place of the 2/3 adopted by the magistrate. It is hereby adopted in substitution of the 2/3 ratio.

I note that there was issue raised on the multiplicand in this case by the appellant. The magistrate indeed adopted the appellant's proposal of Shs.3,597/= being the minimum wage in rural areas.

The damages for loss of dependency will be computed on the basis of the multiplier of 25 years, the ratio dependency of ½ and the multiplicand of 3,597/=

$(3597 \times 25 \times 12 \times \frac{1}{2} = 539,550)$

As for the special damages the plaintiff, pleaded for funeral expenses of Shs,20,000/= in addition to other items. However the mortuary fees was not pleaded although the court awarded Shs.9,400/= which was a misdirection by the magistrate. This award was based on the wrong principles. I agree with the appellant that on special damages of Shs.20,500/= ought to have been awarded. It was held in the case of **KAMPALA CITY COUNCIL VS NAKAYE [1972] EA 446** that “*the law on special damages is that they must be pleaded and strictly proved*”.

I therefore set aside the special damages of Sh.29,900/= and substitute it with KShs.20,500/=

The total award is Shs.539,550/= plus Shs.20,500/= (less 35% 196,017) amounts to Shs.364,032/= payable to the respondent by the appellant.

The appeal is therefore allowed in the foregoing terms. In essence the award of the court below is hereby set aside. The appellant is awarded half costs in this appeal since his appeal is only partly successful.

**DELIVERED,SIGNED AND DATED AT EMBU THIS 12TH DAY OFMARCH, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Nganga for Kihumba for the Appellant**