

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. E032 OF 2023

MARY MUKAMI KIBE & STEPHEN MUHINJA KIMWAKI

(Suing as the legal representatives of the Estate of

SAMUEL NDIRITU KIMWAKI)

.....APPELLANT

VERSUS-

TOSHA HOLDINGS.....

.....RESPONDENT

(Being an appeal against the entire Judgment of the Hon. S.K NYAGA Senior Resident Magistrate Law Courts delivered on 15th May, 2023 in Civil Suit No. E002 Of 2023 Kenol).

JUDGEMENT

1. The appellant, vide memorandum of appeal dated 30th May 2023, the Appellant is seeking that this court sets aside and/or review the lower court judgement upwards, any other relief that this court may deem fit to grant and costs of this appeal.
2. The Appeal is premised on the grounds that the trial court wrongly assessed the damages in respect of loss of dependency thereby arriving at an inordinately low award, by adopting a multiplication of Kshs.7,240 whereas the deceased was domiciled at Thika Municipality prior to his death whose multiplicand was Kshs.12,522.70 as per the applicable Order dated 2018 and by adopting a multiplier of 9 years for the deceased who was a businessman having no underlying health conditions. That the trial Court failed to award the Plaintiff for loss of consortium and servitude and to consider issues which it was enjoined to give due attention.

3. The background to this matter is that judgment was delivered in favor of the appellant as against the respondent who were found to be 100% liable for causing the accident that occurred on 20.03.2022 and therefore liable to pay general damages under the law Reform Act for pain and suffering, kshs.50,000, for loss of expectation of life kshs.100,000 under the Accident Act, loss of dependency kshs 521,348.40 and special damages of kshs.176,550 plus costs and interest.
4. The appeal was canvassed through written submissions by parties through their counsel.
5. The Appellant, through written submissions dated 5th December 2024, argued that Thika being a former municipality and the deceased's place of work and residence at the time of death, the multiplier is Kshs.12,522.70 applies as per the **Regulation of Wages (General) (Amendment) Order, 2018**, as opposed to the trial Court's award of Kshs.7,240. Reliance was placed on the holding of the Court in **Muiruri & Another (Suing as the administrators of the Estate of John Mwirigi Karanja) v Muka (Civil Appeal 41 of 2019) [2022] [KEHC] 12460 (KLR) (16 June 2022) (Judgment)**; and, **Oduor v Njagi (Civil Appeal 100 of 2020) [2024] KEHC 12437 (KLR) (26 September 2024) (Judgment) Neutral Citation: [2024] KEHC 12437 KLR** to underpin the argument.
6. On the question of choice of multiplicand, the Appellant cited the reasoning of the Court in **Board of Governors of Kangubiri Girls High School & Another V Jane Wanjiku (court of appeal sitting at Nyeri in Civil Appeal No. 35 of 2014 eKLR)**, in support of the proposition that the Court's discretion with regard to choice of multiplicand has to be exercised judiciously with a reason.

7. It was submitted that the deceased was in good health and would have worked till the age of 65 years, whereas the trial Court awarded a multiplier of 9 years only. Reliance was placed in the decision of the Court in **Italbuild Imports v Mutinda & Another (Legal Representatives of the Estate of John Mwangi Chinga - Deceased) (Civil Appeal E084 of 2023) [2023] KEHC 26631 (KLR) (18 December 2023)**; and, **Karimba (Suing as the legal representative of the Estate of Christopher Mutahi Mwangi - Deceased) v Murigu & Another (Civil Appeal 38 of 2022) [2023] KEHC 20680 (KLR) 21 July 2023 (Judgment)** to buttress the preceding submissions.
8. With respect to the award of consortium, it was submitted that the trial Court failed to consider the same despite the Appellant having claimed the same in the amount of Kshs.200,000.
9. The Respondent filed written submissions dated 14th February, 2025 and upheld the trial Court's decision with regard to the minimum wage award of Kshs.7,240 on grounds that the Appellants failed to present any evidence attesting to the business carried out by the deceased prior to his death.
10. It was argued that the trial Court in awarding the deceased a multiplier of 9 years took to account the vicissitudes and uncertainty of life as held by the Court in the case of **Patricia Mona & Another V Samuel Opot Omondi & Another (2014) eKLR**.
11. On the issue of damages for loss of consortium, it was argued that damages under the heading of loss of consortium are not anchored on any law hence, ought not be awarded. Reliance was placed in the holding of the court in **Gitee & Another v Njeri (Suing as the Administrator of the Estate of James Kimulu Mwangi - Deceased) Civil**

Appeal E003 of 2022) [2024] KEHC 4722 (KLR) (6 May 2024); and, Karimba (Suing as the legal representative of the Estate of Christopher Mutahi Mwangi - Deceased) v Murigu & Another (Civil Appeal 38 of 2022) [2023] KEHC 20680 (KLR) 21 July 2023) in support of the foregoing submissions. The Respondent urged the court to dismiss the instant appeal as it is devoid of merit.

12. Having carefully analyzed the pleadings and parties' rival submissions, the Court identified the following question for determination, *whether the damages awarded by the trial court were reasonable in the circumstances and whether this appeal is merited?*

13. This Court, exercising its mandate as the first appellate court has re-evaluated and re-assessed the entire evidence supplied in the proceedings giving rise to the subject appeal. The trial Court delivered itself on paragraph 25 of the impugned Judgment as follows:

“In this case, I note that it was pleaded that the deceased was a businessman. I note that the earnings of the deceased were not proved. PW2 stated that the deceased supported her...As for the multiplicand the deceased herein was a businessman however, the minimum wage shall be used as at the time as at 2018...”

14. The Appellants' main contention in these proceedings is that the trial Court erred in awarding the deceased a multiplicand of Kshs.7,240 whereas the deceased worked and was domiciled within THIKA municipality therefore, the Court ought to have awarded Kshs.12,522.70 applies as per the **Regulation of Wages (General) (Amendment)**

Order, 2018. The Appellants further faulted the 9 years multiplier awarded by the trial Court and submitted that the deceased being in good health at the time of death aged 46 years, would have lived to 65 years.

15. It is apparent that the damages under the Law Reform Act that is, pain and suffering and loss of expectation of life and special damages are not contested and will therefore not be disturbed by this court.

16. The appellant and respondent have on the one hand belabored the issues of multiplier and multiplicand which are said to be too low. The trial court relied on the facts that the deceased died at the age of 46 years leaving behind a wife and four children as dependents, and taking into account the vicissitudes and uncertainties of life, settled on a multiplier of 9 years. The trial court also noted that the deceased's income was not proved and therefore settled on the minimum wage of 2018 for KShs. 7,240.95 which was in place as at the time.

17. The Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR)** held as hereunder:

“As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

18. The Court is satisfied that the issue of the deceased’s place of residence was not contested before the trial Court. Page 74 of the record of Appeal contains a copy of letter dated 24th June 2022 issued by *Joshua K. Kungu* in his capacity as the Senior Chief Gathaite Location addressed to the Principal Magistrate Gatundu Law Court wherein it is indicated on the first paragraph that the deceased was a resident of Gathaite Location prior to his demise. Because the parties did not canvass the issue of the deceased’s residence in the proceedings before trial Court, the Court is not persuaded to entertain the aforesaid issue on appeal.

19. On the question of multiplier, this Court is guided by the dictum of the Court of Appeal in **Muthini v Kenya Bus Service Limited & another [1994] KECA 118 (KLR)** where it was held as hereunder:

“The annual loss of dependency must be multiplied by a figure representing a reasonable number of years purchase. In considering that reasonable figure, commonly known as the multiplier, regard must be had to the personal circumstances of both the deceased and the dependents such as the deceased’s age, his expectation of working years, the ages of the dependents, and length

of the dependent's expectation of dependency. The chances of life of the deceased and the dependents should also be borne in mind."

20. The deceased was a businessman aged 46 years at the time of his death as indicated in the Post-Mortem Form at pages 71-73 of the record, dated 28th March 2022 and signed by Dr. Mathaiya (Pathologist). The deceased died on the spot following the accident which the trial Court adjudged the Defendant (now Respondent) 100 percent liable.

21. In instances where the deceased earnings have not been proven, the decision in **Mary Khayesi Awalo & Another v Mwilu Malungu & another [1999] Eklr**, Nambuye J. (as she then was) stated that:

"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. Similarly in **Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi** (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR where the court stated:

" 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. 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. In the present case, the deceased was aged 36 years and had two young children aged 8 and 16 years respectively. A global award of kshs. 1,300,000 would be reasonable.”

23. Guided by the authorities cited above, I will deviate from the route taken by the trial court of multiplier, multiplicand and the minimum wage and adopt the global sum approach which the courts have since guided to be the most practical in instances where the income of the deceased is not proved.

24. Based on the dictum of the Court in **Mary Khayesi Awalo & Another v Mwilu Malungu & another [1999] Eklr** and **Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR**, I am inclined to set aside the trial court award and substitute it with a global sum award of kshs.1,300,000 for loss of dependency.

25. The claim for loss of consortium is declined as it is already catered for above in the global sum.

26. ***Final Orders:***

(i) The Appeal partially succeeds. The trial court award of kshs.521,348.40 on loss of dependency is hereby set aside and substituted with a global sum award of kshs. 1,300,000.

(ii) Awards on special damages, pain and suffering and loss of expectation of life are upheld.

(iii) Each party to bear their respective costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF MARCH, 2026.

**HON. T. W. Ouya
JUDGE**

**For Appellant.....Ms Njuguna
For Respondent.....Ontegi
COURT ASSISTANT.....Brian**

ORIGINAL