

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. 126 OF 2023

**MONICA KATUKU MUNYAO &
PATRICK NDANA MILELWE (Suing as the
administrators of the Estate of the deceased
CYRUS MUIITHI NDANA alias CYRUS MUIITHI NDAWA)....
.....APPELLANTS**

VERSUS

**GEORGE KIMOTHE ILEVE.....
.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.
O. Wanyaga (SRM) delivered on 30th May 2022 in Thika
CMCC No. 389 of 2019)**

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. 389 of 2019 a suit arising from a road traffic accident. The trial court found the appellant 100% liable and awarded the appellants general damages for pain and suffering at Kshs. 30,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 2,400,000/- and special damages at Kshs. 80,320/-.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 4 grounds of appeal summarized as follows:-

a) That the learned trial magistrate erred in law and in fact by adopting a multiplicand that was inordinately low in the circumstances.

3. Directions were issued that parties put in written submissions and the record shows that the appellants complied with the directions of filing their submissions on 21st February 2025. The respondent on the other hand, failed to comply.

The Appellants' Submissions

4. The appellants submit that the learned magistrate in his judgment held that the court did not have evidence of the deceased's earnings thereby failing to appreciate the applicable principles in proof of earnings. The appellants rely on the cases of **Jacob Ayiga Maruja & Francis Karani vs Simeon Obayo [2005] eKLR** and **Mahenzo Kathengi & Another Chambeyu (Suing as the legal representatives of the Estate of Hamisi Chambeyu Munyaka) vs Magunadu Company Limited & Another [2019] eKLR** and submits that it is settled law that proof of occupation and earnings depends on the circumstances of the case. The appellants argue that PW1's testimony was uncontroverted and thus the learned magistrate ought to have believed it. Further under the Regulation of Wages (General) (Amendment) Order 2017, the minimum

wage for an artisan grade I was Kshs. 29,169/- and therefore the Kshs. 30,000/- stated by PW1 was reasonable and a fair estimate of the deceased's earnings.

5. The appellants refer to the cases of **Vincent Kipkorir Tanui (Suing as the administrator and personal representative of the Estate of Samwel Kiprotich Tanui (Deceased) vs Mogogosiek Tea Factory Co. Ltd & Another [2018] eKLR** and **Wilson Ondicho Mboga vs Nicholas Maina Arisi & Another (Suing as legal administrators of the Estate of Alice Kwamboka (Deceased) [2022] eKLR** and submit that the trial court ought to have applied the applicable minimum wage as there was no dispute that the deceased was a trained electrician. Relying on the decision in **Nzioka Leah & Another vs Patrick Muindi Kisai & Another [2021] eKLR**, the appellants submit that the deceased can be regarded as an artisan grade I from his qualifications. The appellants argue that the multiplicand of Kshs. 15,000/- was inordinately low and there is sufficient basis to interfere with the decision of the learned magistrate. The appellants submit that Kshs. 30,000/- is reasonable bearing in mind the deceased had a family of three children and that his own father depended on him. Thus the appellants submit that the loss of dependency should work out as follows:-

Kshs. 30,000/- x 12 x 20 x 2/3 = Kshs. 4,800,000/-.

Issue for determination

6. The main issue for determination is whether the trial court erred in adopting a multiplicand of Kshs. 15,000/-.

The Law

7. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

8. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

9. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the trial court erred in adopting a multiplicand of Kshs. 15,000/-

10. The Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001**

[2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

11. The Court of Appeal in **Chunibhai J. Patel & Another vs P. F. Hayes & Others [1957] EA 748, 749** stated the law on assessment of damages under the Fatal Accidents Act and held:-

The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which

he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

12. In the instant case, the appellants fault the trial court for adopting a multiplicand of Kshs. 15,000/-. The appellants argue that the trial court ought to have considered the uncontroverted evidence of PW1 that the deceased was an electrician earning Kshs. 30,000/- or the trial court should have adopted the Regulation of Wages (General) (Amendment) Order 2017 where the minimum wage for an artisan grade I was Kshs. 29,169/-. The respondent did not file any submissions on the appeal but in his lower court submissions he proposed the use of minimum wage applicable at the time of death which was Kshs. 6,415.55/-.

13. The trial learned magistrate in his judgment adopted a multiplicand of Kshs. 15,000/- on the basis that the proposed minimum wage was too low considering the deceased was not an ordinary casual labourer and on the other hand that the appellants did not produce any evidence of the deceased's earnings.

14. On perusal of the court record, the deceased was working as an electrician and PW1 produced his artisan

certificate from Christian Industrial Training Institute. PW1 further testified that the deceased operated his own business in Nairobi trading as Cythin Smat Electricals as evidenced by the certificate of business registration dated 12th November 2014. Although PW1 testified that the deceased used to earn Kshs. 30,000/- she did not produce any evidence to that effect. Therefore in the absence of evidence of the deceased's earnings, the trial court ought to have applied the minimum wage. This principle was stipulated in the case of **Petronila Muli vs Richard Muindi Savi & Catherine Mwende Mwindu [2021] eKLR** where the court stated:-

On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income.

15. The Court of Appeal **in Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs Hellena Wanjiru Rukanga [2020] eKLR** held that minimum wage ought to be adopted as a multiplicand where monthly income could not be ascertained. It stated:-

We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin....

16. It is evident that PW1 produced the deceased's certificate showing that he was qualified as an electrical technician and was running an electrical business in Nairobi as well as a certificate of business installation. However, the evidence of income of the deceased was not produced before the court. This being the position, I find that the deceased's income was bound to be based on minimum wages guidelines of an Artisan Grade III in Nairobi. The minimum wage according to the Regulation of Wages (General) (Amendment) Order, 2017 was Ksh.21,942.35/-. The respondent proposed the minimum wage of a general worker of Ksh.6,425.55/- which was unacceptable since the deceased was a Grade III Electrician. It is noted that the appellants did not have any issue with the multiplier.

17. This position leads me to the conclusion that the minimum wage applicable in respect to the deceased's earnings ought to have been

Kshs. 21,942.35/-. Thus the loss of dependency will work out as follows:-

Kshs. 21,942.35/- x 12 x 20 x 2/3 = Kshs. 3,510,776/-.

18. It is my finding that the award of Ksh.2,400,000/- for loss of dependency was erroneous having been based on the wrong category of Wage Guidelines in regard to the deceased's occupation.
19. The award of Ksh.2,400,000/- for loss of dependency is hereby set aside and substituted with Ksh.3,510,776/-. The other awards shall remain undisturbed.
20. This appeal is hereby allowed with costs to the appellants.
21. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 30TH DAY OF APRIL 2026.***

**F. MUCHEMI
JUDGE**