

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MURANG'A LAW COURTS

CIVIL APPEAL NO. HCCA E037 OF 2023

SAMWEL GACHERU NGUNJIRI..... APPELLANT

=VERSUS =

NJOROGE KAMAU & PETER MAGUA NJOROGE

(Suing as the administrator and Legal

Representative of the estate of STEPHENE

WAITARA NJOROGE (Deceased)..... RESPONDENTS

JUDGMENT

Brief background

1. The Respondents had instituted a road accident suit being case Number CMCC No. E179 of 2020 vide a Plaint dated 10th March, 2020 in the Principal Magistrate's Court at Kigumo for damages under the Fatal Accidents Act and Law Reform Act, Special damages, Costs of the suit and interest for the demise Stephene Waitara Njoroge.
2. The Respondents proceeded to enumerate the particulars of negligence at paragraph 4, which were expressly denied by the Appellant vide the

Statement of Defence dated 10th December, 2020 denying all the allegations of negligence and consequently averred that the accident was not in any way due to the negligence of the Appellant but it was wholly and/ or substantially caused by the Deceased.

3. The court delivered Judgment on 17th May 2023 holding that the Appellant was 60% liable for the accident.
4. The court awarded the following general damages in favour of the Respondent; Kshs. 800,000/ = for pain and suffering, Kshs. 100,000/ = for loss of expectation of life, Kshs. 868,914/ = for loss of dependency and Special damages of Kshs. 528,484/= all totaling to Kshs. 1,378,438.80/ = which is less 40% Contribution.
5. The Appellant, being aggrieved by the said Judgment, lodged the instant Appeal vide a Memorandum of Appeal dated 13th June, 2023 on the grounds that;
 - 1) THAT the learned Magistrate erred in fact and in law in holding that he deceased suffered pain and awarding Kshs. 800,000/=for pain and suffering.

2) THAT the learned Magistrate erred in law and in fact in awarding duplicated damages for loss of expectation of life and loss of dependency of life.

3) THAT the magistrate erred in law and in fact in adopting a multiplier of 30 years which was erroneous multiplier and excessive in the circumstances.

The Appellants' case;

6. The Appellant briefly summarized the Respondents' case and pointed out that the deceased's father, in his witness statement, and in his testimony before the court, did not mention anything about the deceased's occupation. Further, that the deceased's brother did not mention the deceased's occupation in his witness statement. However, during testimony he said that the deceased was a mason and was not sure about his income but capped it at Kshs. 1,000/= a day. Counsel urged that no documentation was filed to support this claim. The deceased is survived by his father and brother.

7. According to the Appellant, the deceased died on the following day after the accident and it reasonably follows an award of Kshs.20,000.00 is

reasonable for the pain & suffering. He placed reliance on the case of Marion Njeri Kago v Kenya Railways Corporation [2014] KEHC 7669 (KLR).

8. Counsel submitted that the court awarded Kshs. 800,000/= under this header with no basis known in law. That in James Mukolo Elisha versus Thomas Martin Kibisu (Nairobi civil appeal No. 31 of 2006, the trial Court had awarded Kshs. 60,000/= for pain and suffering and the High Court confirmed that award. Further, that in Chepkorir & another (Suing as the Legal Representatives and Administratrix of the Estate of Edwin Kipngeno Chepkwony) v Hari Oum Autospares Limited (Civil Suit E004 of 2021) [2023] KEH 26434 (KLR) (14 December 2023) the court awarded Kshs. 50,000/= for pain and suffering. Counsel also cited the case of Sukari Industries Limited v Clyde Machimbo (2016) eKLR, where the court awarded 50,000 for Pain and Suffering.

9. Counsel urged that the appellant had no opposition to loss of expectation of life award.

10. On the loss of dependency, the Appellant is submitted that the deceased was 29 years old at the time of the accident. The Plaintiff's witness

statement stated that the deceased was a mason with an income of Kshs. 1,000 per day, though he was not sure. That in a claim for loss of dependency, the plaintiff bears the burden to prove that the deceased was employed or earning some income ,the level of income, the age of the deceased and extent of dependency.

11. Counsel posited that the averments alone - with no contract, no employer confirmation, and no oral evidence - is generally not sufficient proof of long-term or stable income. He cited Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya in this regard.

12. Counsel urged that Section 4(1) of the Fatal Accidents Act provides that a claim for damages under the Fatal Accidents Act can only be made for the benefit of the wife, husband, parent or child of the deceased. As such, one Peter Magua Njoroge who is enlisted as a brother to the deceased cannot benefit under the Fatal Accidents Act. He urged that the only persons qualified to benefit from the deceased's estate is the deceased's father and that is only upon proof of dependency.

13. Counsel further submitted that this position has not changed citing the Court of Appeal decisions of James Mukolo Elisha versus Thomas

Martin Kibisu (Nairobi civil appeal No. 31 of 2006 and Gerald Mbale Mwea versus Kariko Kihara and Another (Civil Appeal No.112 of 1995) in this regard.

14. Counsel urged that the claim for dependency has not been properly established and proved and, therefore, cannot be relied upon by the court. Further, that in the absence of proof of dependency then no award for loss of dependency can be made and the trial magistrate thus erred in making an award under this header.

15. Counsel urged that courts may apply a global award (also called a lump sum award) instead of using the multiplicand-multiplier approach in certain circumstances. That a global award is applied where there is insufficient or uncertain evidence on the deceased's income, dependency, or earning capacity, just as it is in the instant case. He urged that the court should adopt the global award approach to achieve a fair and reasonable compensation without speculating on figures.

16. On the issue of the Multiplier applicable counsel maintained that no proof was availed to confirm that the deceased was indeed in employment at the time of death. He stated that the vicissitudes of life

however do potentially curtail such working period; any vicissitudes that afflict the daily lives of humans as may well shorten the working life prescribed under private contract or statute regulations.

17. Counsel urged that this Honourable Court should not therefore mechanically adopt mathematical approach which would be a plastic and unreflective of the reality of life where a person's journey is fraught with many uncertainties, unknown unforeseen occurrences which may well shorten the expected working life of the employee so that the contractual or statutory age of retirement is an unrealistic quotient. He maintained that this court is better placed to adopt a figure of the multiplier which is reasonable and in tune with realities of life.

18. It was argued that courts have developed guidelines on multiplier and multiplicand, and that the multiplier is the number of years the deceased would have been in gainful employment, he cited the case of Kenya Wildlife Services vs. Geoffrey Gichuru Mwaura [2018] eKLR. Further, that in arriving at the multiplier, the court takes into the consideration the uncertainty of life. He cited the cases of David Kajogi M'mugaa v Francis Muthomi Civil Appeal 118 of 2010 [2012] eKLR and Petrocity Enterprises (U) Ltd v Roselina Sikudi suing as legal representative of the

Estate of Pascal Ngadi (deceased) & 2 others Civil Appeal No. 39 of 2015 [2017] eKLR and posited that a multiplier of 25 years would be reasonable consideration of vicissitudes & vagaries of life.

19. Counsel submitted that the appellant prays that;

- a) The award for pain and suffering be substituted from Kshs. 800,000/= to Kshs. 20,000/=,
- b) The multiplier of 30 years be set aside and be substituted with 25 years.
- c) The award of loss of expectation of life be deducted from the award on loss of dependency.

The Respondents' case;

20. According to the respondents, the court should not to interfere with the decision of the trial court on the damages awarded. It is the Respondents' case that the Learned Trial Magistrate took into account all the relevant facts, evidence and law in accessing damages in Pain and suffering, Loss of expectation of life, Multiplier and the Dependency ratio. Further, that the award was reasonable and the Appellate court can only interfere with the Quantum damages awarded by the trial Court only if it is satisfied that the trial court applied the wrong principles.

21. According to the respondent, The Appellant has not demonstrated any error and no application of wrong principles has been pointed out to warrant interference by this court. Counsel placed reliance on the decision of Court of Appeal in Catholic Diocese of Kisumu vs Tete (2004) KLR wherein the circumstances under which an appellate Court can interfere with an award of damages were set out.

22. Counsel pointed out that the Appellants submitted that the Deceased died the following day after the accident which they strongly disagreed with. That according to the sworn testimonies of the Plaintiff witnesses and the Police investigations as captured in the police abstract dated 5th January 2020, the accident involving the deceased occurred on 13th June, 2019. The Death Certificate and the Post Mortem Report shows the Deceased died on the 14th October, 2019 which is approximately 4 months after the occurrence of the accident. Counsel reiterated that the learned Magistrate did not err either in law or in fact in assessing and awarding Kshs. 800,000/ = under the head of pain and suffering. Counsel urged that it is well established in law that where a person succumbs to the injuries few months after they were involved in an

accident, the award made under this limb should be higher than a nominal sum. He cited the case of Mercy Muriuki & another vs Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the Late Robert Mwangi) [2019] eKLR in this regard.

23. Counsel urged that in making an award of Kshs. 800,000/= for Pain and Suffering, the trial court took into consideration the fact that the deceased had endured pain for a longer period before he succumbed to his injuries.

24. On the issue whether the Trial Court duplicated damages for loss of expectation of life and loss of dependency, Counsel urged that the court awarded the Respondent Kshs. 100,000/= under loss of expectation of life this head. That the award was supported with the decision in Mercy Muriuki & another V Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the Late Robert Mwangi) [2019] eKLR and the case of Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (Suing as the administrators and Personal Representatives of the estate of Josephine Weyanga Tsuma-Deceased), which counsel also sought to rely on.

25. On loss of dependency, counsel urged that the Chiefs' Letter dated 23rd December, 2019 indicated that the deceased father Njoroge Kamau was his dependent which shows proof of dependency. He cited Section 4 of the Fatal Accidents Act and pointed out that the trial court observed that the deceased was not married and did not have any children but he left behind his elderly father who he used to support. Therefore, the court adopted a 1/3 dependency ratio and held that it was appropriate in the circumstances as the deceased must have used 1/3 of his income on his father and himself. He urged that the high court ought not to interfere with the decision of the trial court.

26. On whether the learned Magistrate erred in law and in fact in adopting a multiplier of 30 years, Counsel urged that the same was reasonable and that the trial court took into account the facts and evidence.

27. Further, that the deceased died at the age of 29 years as per the death certificate produced during the hearing by the Respondent. No evidence was brought to the contrary to show the Deceased had any illnesses and in fact the deceased was in good health. The Respondents had proposed a multiplier of thirty years and after taking into account the vagaries of

life, the Trial Court applied a multiplier of thirty 30 years as had been proposed by the Respondents herein.

28. Counsel cited the decisions in Peter Ngigi Kuria & another (Suing as the legal representatives of Estate of Joan Wambui Ngigi) V Thomas Ondili Oduol & another 120191 eKLR in support of the submission that the multiplier was appropriate in the circumstances.

Analysis and determination

29. The following are the issues for determination:

1) Whether or not the appeal has merit.

2) Whether or not the appeal has merit.

3) Who should be the costs.

30. **In Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA**, it was held that;

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..”

The undisputed facts:

31. The Respondents and the Appellant on 29th March, 2023, recorded a consent on liability in the ratio of 60:40 in favor of the Respondent as against the Appellant. The court will not disturb the consent.

Whether the learned Magistrate erred in law and in fact in adopting a multiplier of 30 years.

32. The Respondents submitted that the multiplier of 30 years applied by the learned trial magistrate was reasonable and that the trial court took into account the facts and evidence.
33. The deceased died at the age of 29 years as per the death certificate.
34. In my opinion the trial court arrived at the right multiplier and I find no reason to disturb the finding.

Loss of Dependency

35. Section 4 of the Fatal Accidents Act limits the beneficiaries of a deceased to the wife, husband, parent and child.

36. In the Judgement of the Trial Court, the Court indicated that the only person being considered as a dependent was the deceased's father.
37. This court is satisfied that the trial court arrived at the right finding that the deceased had only one dependent who was his father. This was proven through The Chiefs' Letter dated 23rd December, 2019.
38. The court finds that the trial Magistrate did not fall into error in this header and I find no reason to disturb the finding.

Pain and suffering

39. In order to ascertain whether the amount awarded by the trial Magistrate was within the principles that guide the award of damages under this header, the court has to look at how long the deceased remained alive after the accident.
40. The date of the accident is as pleaded in the plaint and as established in the police abstract dated 5th January 2020. The accident occurred on 13th June, 2019.
41. The court has thereafter established from the death certificate and the Post Mortem Report that the Deceased died on the 14th October 2019.

42. The Appellants argument that the death occurred the following day after the accident is misplaced and inaccurate. The respondent died after approximately 4 months after the occurrence of the accident.
43. The court is of the opinion that the learned Magistrate did not err either in law or in fact in assessing and awarding Kshs. 800,000/ = under the head of pain and suffering.
44. In the case of Mercy Muriuki & another V Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the Late Robert Mwangi) [2019] eKLR the court observed that higher damages are awarded if the pain and suffering was prolonged before death.
45. This court is of the view that award of Kshs. 800,000/ = for Pain and Suffering, was arrived after the court considered the fact that the deceased had endured pain for a longer period before he succumbed to his injuries.
46. The trial magistrate did not fall into error.
47. The special damages are not challenged.

Determination;

48. The appeal lacks merit.

Costs

49. **In Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR** Odunga, J. thus observed:-

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

50. The Appellant shall bear the cost.

Orders:

The appeal is dismissed with costs.

**Dated, signed and delivered virtually at Eldoret this 30th day
of April, 2026.**

.....

J. M. CHIGITI (SC)

JUDGE