



REPUBLIC OF KENYA



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**Maigwa (Suing as Legal Representative of the Estate of Ezekiel Katupa) v British Council
(Civil Appeal 178 of 2018) [2023] KECA 157 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 157 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 178 OF 2018
FA OCHIENG, LA ACHODE & WK KORIR, JJA
FEBRUARY 17, 2023**

BETWEEN

**ELIZABETH WANJIKU MAIGWA (SUING AS LEGAL REPRESENTATIVE OF
THE ESTATE OF EZEKIEL KATUPA) APPELLANT**

AND

BRITISH COUNCIL RESPONDENT

(An Appeal from the Judgment, Order and Decree of the High Court at Nakuru (A. Emukule, J) delivered on September 18, 2018 in High Court Civil Case no 45 of 2012)

JUDGMENT

1. The appellant, Elizabeth Wanjiku Maigwa (Suing as the legal representative of the estate of the late Ezekiel Katupa), is through this appeal challenging the judgment of the High Court in Nakuru Civil Case no 45 of 2012 in which she had sued the respondent, the British Council, for compensation as a result of the fatal injuries sustained by the deceased Ezekiel Katupa when he was knocked down by the respondent's motor vehicle registration number KAV 687B at Free Area along Nakuru-Nairobi highway. The appeal is limited to the quantum of damages awarded to the appellant by the trial court. Although the appellant listed two grounds of appeal, they boil down to one issue namely that the award of damages was inordinately low as the learned Judge erred in law by using the deceased's gross income less all deductions as opposed to the gross income less statutory deductions only in calculating the deceased's earnings.
2. The genesis of the cause of action is that the deceased, Ezekiel Katupa, who was the husband of the appellant was knocked down on November 18, 2011 by the respondent's motor vehicle. The deceased died on the spot. The appellant subsequently filed a suit on behalf of the estate of the deceased and sought damages under the *Fatal Accidents Act* and the *Law Reform Act*. The respondent filed a defence denying all the allegations and responsibility for the accident. In the course of the trial, the parties entered a consent on liability in the ratio of 70:30 in favour of the appellant.



3. The matter went to full hearing on the issue of the quantum of damages payable to the estate of the deceased. In determining the amount of damages to be awarded to the appellant, the learned Judge ruled that the net income of the deceased was kshs 9,960.64. This was the net income of the deceased after all the deductions from his gross salary. The learned judge rejected the appellant's submission that PAYE of kshs 2,629 which was a statutory deduction was the only amount to be subtracted from the gross salary of kshs 39,292.20 and hence the sum of kshs. 36,663.20 was the figure to be used in calculating the amount to be awarded for loss of dependency.
4. This appeal, was, by the consent of the parties, canvassed by way of written submissions. Mr Gekonga for the appellant filed submissions dated October 21, 2022. In his submissions, counsel submitted that the trial court erred in taking into account all the deductions from the gross salary as PAYE was the only deduction that was allowable. According to counsel, the approach adopted by the trial court was not in line with the decisions of the courts. Counsel relied on the High Court case of *Evaline Chepkirui (Suing as the Legal Representative of the Estate of the Late Kiprotich Cheruiyot) vs Stella Asuga & another* [2021] eKLR to submit that not all deductions in a payslip are discounted in the ascertainment of the multiplicand for purposes of calculating loss of dependency. He also relied on the High Court decision in *Beatrice Wanjiku Maina vs Mwangi Wilson* [2019] eKLR in support of the argument that the correct multiplicand is derived from the gross earnings less taxation.
5. Still on the mission to persuade this court that the wrong multiplicand was used by the trial judge, counsel cited this court's decision in the case of *The Board of Governors of Ekalakala Secondary School vs. Francisca Katumbi Ndwili (Suing as Legal Representative of the Estate of Shadrack Kyalo Mwanja)* Civil Appeal no 85 of 2010 to submit that the multiplicand that should have been used by the trial court was the deceased's total earnings less statutory deductions. He also submitted that other deductions including the loan deductions and the contributions to the SACCO were for the benefit of the deceased's dependants or family as the deductions went into the improvement of their living conditions and should therefore be exempted from the determination of the multiplicand.
6. On whether this court should disturb the trial court's award, counsel urged us to adopt the principles established in *Kemfro Africa Limited t/a Meru Express Services & Another vs A M Lubia and Another* (no 2) (1982-88) KAR 727 and find that the trial court in this instance applied a wrong principle and therefore this court can interfere with the award of damages for loss of dependency.
7. In summary, counsel for the appellant submitted that the award for loss of dependency by the trial court was inordinately low due to reliance on a wrong multiplicand. He therefore urged this court to find that the trial court ought to have used a multiplicand of kshs 36,663.20 instead of kshs 9,960.
8. Submissions for the respondent were filed through the firm of M/S Mukite Musangi & Co Advocates and are dated October 27, 2022. Counsel identified one issue for our determination, namely, whether the learned judge erred in law in assessing damages for loss of dependency. It was counsel's submission that the multiplicand is usually the annual portion of the deceased's income available for utilization by his dependants. Counsel argued that courts ought to take into account all deductions that the deceased's salary was subjected to in order to find the net salary. It is counsel's view that any benefits that the deceased may have received in advance ought to be considered as failing to do so is likely to lead to double compensation. According to counsel, loans are considered to be amounts that the deceased had already utilized and presumably for the benefit of the family. To this end, counsel relied on the High Court cases of *Janet Chonge Walumbe & 2 others vs Julius Mwaniki & another* [2019] eKLR and *D K M (Suing as Legal Representative to the Estate of J M M - Deceased) vs Mehari K Towolde* [2018]eKLR. Counsel therefore urged this court to uphold the awards of the trial court as it exercised its discretion judiciously when it used kshs 9,960 as the multiplicand.



9. On a without prejudice basis, counsel for the respondent submitted that should this court be convinced by the appellant's submission, then the court should not double the compensation to the estate of the deceased. According to counsel, this court can achieve this by deducting the total amount of outstanding loans exhibited in the deceased's pays slip being kshs 501,525.50. To buttress this argument, counsel cited the High Court decision of *Joshua Mulinge Itumo (Suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) vs Bash Hauliers Limited & another* [2021] eKLR where the Judge adopted this approach.
10. This is a first appeal and our mandate as a first appellate court is to revisit the evidence presented before the trial court afresh, analyze it and draw our own conclusions. In doing so, we appreciate the fact that we do not have the advantage of the trial court which heard and saw the witnesses as they testified. See *Selle vs Associated Motor Boat Co* [1968] EA 123.
11. The contours of our mandate have been pronounced in several decisions of this court. For instance, in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd* [1985] eKLR it was stated that:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
12. We have carefully considered the record of appeal, the law, the submissions of the parties as well as all the authorities cited. In our view, the main issue for determination in this appeal is whether the learned judge applied the right principles before arriving at the award of damages for loss of dependency.
13. The appellant is aggrieved by the learned judge's decision to rely on the net salary as indicated in the deceased's payslip. Counsel urged us to find that in deciding on what to use as the multiplicand, the learned judge ought to have used the gross salary less statutory deductions as opposed to taking into consideration the loans that the deceased was servicing at the time. The respondent on the other hand urged us to affirm the learned judge's formula of adopting the deceased's net salary as depicted in his payslip. In the alternative, counsel for the respondent urged us to adopt the formula advanced by the appellant but then deduct the outstanding loan from the total award. Counsel argued that failure to deduct the outstanding loan would lead to double compensation of the deceased's estate since those loans were presumably taken for the benefit of his dependants and they had indeed benefited already.
14. We bear no doubt in our minds that the key question in this appeal is what should constitute the multiplicand of a salaried deceased person. Should it be the net salary after all deductions as depicted on his payslip or should it be the gross salary minus statutory deductions only? The learned judge in reaching at a multiplicand of kshs 9,960.65 stated at paragraph six of the judgment as follows:

“According to the evidence of the plaintiff, the deceased was earning a salary of kshs 39,292.20 which was subject to the statutory deductions and other deductions of kshs 29,330.55 which left him with a net salary of shs 9,960.64 at the time of this death. The plaintiff's counsel only considered the statutory deductions of PAYE of kshs 2,629.00. This is not



correct. In determining the deceased person's net earnings at the time of his death, all deductions must be considered in arriving at the person's net earnings at the time of his death. In this case, the net earnings were shs 9,960.65.”

15. Perhaps, it is prudent that we revisit a few of the decisions of this court on the issue in question. With regard to the formula to be adopted in arriving at a multiplicand, this court in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited* [2015] eKLR cited the case of *Chunibhai J Patel and Another vs P F Hayes and Others* // [1957] EA 748, 749 and held as follows:

“In the case of *Chunibhai J Patel and Another v P F Hayes and Others* [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the *Fatal Accidents Act* which we cite in part as follows:

“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 dependants, 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 dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. (Emphasis added)

As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions...”

16. In *Rosemary Mwasya vs Steve Tito Mwasya & another* [2018]eKLR, this court again addressed the manner of determining the multiplicand as follows:

“As for the multiplicand, the only guide the learned judge had before him was the survey on salaries. The judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of kshs 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as kshs 118,546/=x 1/3=39,512. When factored into the figure chosen as the multiplicand, it gives a final figure of shs 79,034/=.”

17. From the cited authorities, it is evidently clear that in arriving at a multiplicand, this Court has always adopted the formula proposed by the appellant. That is to say, the multiplicand should be a deceased person's gross income less statutory deductions.

18. The learned judge, however, in his judgment deducted both statutory and other deductions. This can be clearly read out of the judgment. It is evident that even in the mind of the trial court, there were other deductions that did not qualify as statutory deductions. We find that it is erroneous for the trial judge to assume that other deductions such as loan repayments or contributions to a savings society are deductions that the deceased would pay for the rest of his life. Apart from not qualifying as statutory deductions, loan repayments are always deducted for a limited time and should not be construed as permanent deductions that will exist for the working life of the deceased. We therefore hold the view that this is a case that warrants this court's intervention because a wrong principle was applied by the trial judge. In this case therefore, the deceased earned a total monthly income of kshs 39,292. From the payslip, the only statutory deduction was the PAYE which was deducted at the rate of kshs 2,629.



In the circumstances, the right multiplicand to use was kshs 36,663 and not the kshs 9,960 which was relied on by the trial court.

19. Before we pen down on this issue, we have to deal with the proposal by the respondent that we should consider deducting the total amount of loan balances so as to avoid double compensation to the deceased's estate. It is the respondent's case that the loans were taken for the benefit of the dependants and they had already benefited from them. In our view, this argument sounds reasonable. Whatever the purpose of the loans, the same either benefitted the deceased or his dependants during his lifetime. The payslip also reflects an overpayment recovery meaning that the deceased had already used the money that was being recovered. We do not know where the respondent got the figure of kshs 501,525.50 as the outstanding loan. Our own calculation, using the deceased's payslip of December, 2011 which was produced as an exhibit at the trial, shows that the outstanding loans and overpaid salary was kshs 418,295.50. This is the amount that will be deducted from the award for loss of dependency that will be made to the estate of the deceased.
20. Based on our finding above, the appeal succeeds to the extent that the award made by the trial court for loss of dependency is set aside and substituted with the following award:

Loss of dependency $(36,663 \times 30 \times 12 \times 2/3)$ kshs 8,799,120.00 Less outstanding loans & salary overpayment kshs 418,295.50 Net sum payable for loss of dependency kshs 8,380,824.50

21. Considering that the awards on the other heads were not challenged, the amount payable to the appellant will therefore be as follows:

i. Loss of dependency $(36,663 \times 30 \times 12 \times 2/3)$ kshs 8,799,120.00 Less outstanding loans & salary overpayment kshs 418,295.50

Net sum payable for loss of dependency kshs 8,380,824.50

ii. Loss of expectation of life kshs 100,000

ii. Pain and suffering kshs 20,000

ii. Special damages kshs 25,700

Total kshs 8, 526,524.50

Less 30% contributory negligence kshs 2,842,174.80

Total Payable shs. 5,684,349.70

22. The last issue is who should bear the costs of this appeal. The costs for the proceedings before the trial court were awarded to the appellant. We find no reason for interfering with that decision. As for the costs of the appeal, we note that the appellant has emerged successful. She is entitled to costs in line with the doctrine that costs follow the event as no reason has been advanced by the respondent to make us exercise our discretion on the issue of award of costs in any other way. The appellant is therefore awarded the costs of this appeal.

23. Those then are our orders.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023.

F OCHIENG

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JUDGE OF APPEAL



L ACHODE

.....

JUDGE OF APPEAL

W KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

