



David Sakari Wasike (Suing as the Legal Representative of the Estate of the Late Jentrix Nakhumicha Simiyu v Barisi & another (Civil Appeal 146 of 2017) [2021] KECA 145 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 145 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 146 OF 2017
RN NAMBUYE, MSA MAKHANDIA & S OLE KANTAI, JJA
NOVEMBER 19, 2021

BETWEEN

DAVID SAKARI WASIKE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JENTRIX NAKHUMICHA SIMIYU APPELLANT

AND

MAKO ROBA BARISI 1ST RESPONDENT

IBRAHIM ABDI 2ND RESPONDENT

(An appeal against the judgment and decree of the High Court of Kenya (H. A. Omondi, J.) dated 18th December, 2014 in Nakuru HCCC No. 169 of 2012)

JUDGMENT

1. The appeal arises from the judgment of the High Court of Kenya at Nakuru (H. A. Omondi, J) dated at Bungoma on 18th December, 2014 and delivered at Nakuru on 21st January, 2015 by J. Mulwa, J.
2. A brief background to the appeal is that the appellant filed a suit in his capacity as a legal representative of the estate of the deceased, (Jentrix Nakhumicha Simiyu) in the Senior Principal Magistrate's Court at Molo, being SPMCC No. 89 of 2011 vide a plaint dated 8th April, 2011 subsequently transferred by consent of the parties dated 13th March, 2012 to the High Court of Kenya at Nakuru, and allocated Case No. HCCC No. 169 of 2012. The appellant amended his plaint on 3rd March, 2014 claiming both for special and general damages, costs and interest at court rates.
3. Appellant's brief averments were that the deceased who was then aged 26 years, employed as a registered community nurse at the Aga Khan Hospital Mombasa, earning a salary of kshs.31,500.00 per month, was on the material day lawfully travelling in motor vehicle Reg. No. KBK 731D along Nakuru - Eldoret road when the said motor vehicle owned and or insured by the 1st respondent was negligently



driven, controlled and or managed by the 2nd respondent causing it to violently collide with motor vehicle Reg. No. KBB 653D.

4. The deceased sustained fatal injuries triggering the suit giving rise to this appeal. Particulars of negligence attributed to the respondents jointly and severally were set out in the plaint.
5. In rebuttal to the appellant's claim, the respondents filed a defence dated 5th June, 2011 denying the appellant's claim in toto and put him to strict proof, to which the appellant filed a reply joining issue with the respondents on their averments in their said joint defence.
6. Both parties gave oral testimony and filed submissions in support of their rival respective positions. The trial court upon evaluating the record pinned 100% liability for the death of the deceased on the respondents jointly and severally and awarded damages as follows:

1)Pain and suffering kshs. 20,000.00

2)Loss of expectation of life kshs. 150,000.00

3)Special damages kshs. 25,000.00

Total kshs, 195,000.00

The court declined to make any award under the *Fatal Accidents Act*, for loss of dependency, citing lack of proof of this item of the appellant's claim.

7. The appellant was aggrieved and filed the appeal under consideration raising only one ground of appeal in his Memorandum of Appeal dated 2nd October, 2017 contending that the learned trial judge erred and misdirected herself in law by failing to award damages for loss of dependency.
8. The appeal was canvassed virtually via Go-To-Meeting platform due to the ongoing Covid-19 pandemic challenges through written submissions in the absence of counsel for the respective parties and without oral highlighting.
9. The appellant relies on the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another vs. Lubia & Another (No 2) [1985] eKLR* and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123* as approved and followed in *Techarad Steam & Power Limited vs. Mutio Muli & Mutua Ngao [2019] eKLR* to remind the court firstly, on the court's mandate as a first appellate court and second, on principles that guide the court on interference or otherwise with an award of damages arrived at by a court appealed from.
10. Supporting the appeal, the appellant has invited the court to set aside the trial court's finding on this item which according to him went contrary to the evidence adduced in proof of this claim and then assess an appropriate award under this claim, using a multiplicand of kshs. 27,079.00 representing the salary the deceased was earning at the time of her death, a multiplier of 39 years taking into consideration the fact that the deceased would have worked upto the retirement age for civil servants of 60 years, applying dependence rate and ratio of kshs. 20,000.00 and 1/3 respectively which according to him would work out to kshs. 4,219,644.00 as damages for loss of dependency.
11. To buttress the above submissions, the appellant cited, *P N M & Another (the legal personal Representative of estate of L M M vs. Telkom Kenya Limited & 2 Others [2015] eKLR* and *Isbmael Nyasimi & Another vs. David Onchangu Orioki (Suing as personal representative of Antony Nyabando Onchango) [2018] eKLR* for the proposition that when choosing a multiplier, the court must bear in mind the expectation of the earning life of the deceased and the expectation of life and dependency of the dependants.



12. In rebuttal, the respondents relying on the case of cited *Gerald Mbale Mwea vs. Kariko Kihara & Another* [1997] eKLR and *James Mukolo Elisha & Another vs. Thomas Martin Kibisu* [2014] eKLR submit that the appellant failed to prove the existence of the alleged mother and brother of the deceased as they were neither included in the chief's letter as dependants nor called as witnesses to prove their existence but also their alleged dependence on the deceased and therefore urged the court to dismiss the appeal in its entirety with costs to them.
13. This being a first appeal, it is the duty of this court to reconsider and reevaluate the evidence that was adduced before the trial court and come to its own conclusion, bearing in mind that the trial court had the advantage of seeing and assessing the demeanor of the witnesses. See *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2EA 212. We also reiterate what was stated in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [supra] that:
- “...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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
14. It is trite law that an appellate court can only interfere with an award of damages by a trial court if it is satisfied that the award is so inordinately low or high as to represent an erroneous estimate, or if it is demonstrated to the satisfaction of the court that the trial Judge acted on wrong principles of law, or misapprehended some facts such as to arrive at an erroneous estimate. See *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another vs. Lubia & Another (No 2)* [1985] eKLR and *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47
15. We have applied the above threshold to the rival position highlighted above. The position in law as to who a dependant is under the *Fatal Accidents Act* and which we fully adopt is as set out in section 4(1) of the Act. It provides as follows:
- “Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ... be brought by and in the name of the executor or administrator of the person]
- ...”
16. In light of the above provision, the appellant was obligated to prove the existence of the alleged deceased's mother which in our view, the appellant failed to establish by failing to call the alleged mother to appear in court to testify to prove her dependency on the deceased. Neither was she named as a dependant in the chief's letter tendered in evidence and appraised by the trial court. The trial Judge cannot therefore be faulted for holding and correctly so in our view that dependency in favour of the alleged mother as the only person who qualified as a dependant under the law had not been proved to the required threshold.
17. We associate ourselves fully with the position taken by the court in the case of *Gerald Mbale Mwea vs. Kariko Kihara & Another* [supra] wherein it was stated, *inter alia*, that:
- “The issue of dependency is always a question of fact to be proved by he who asserts it.”



18. See also the case of *James Mukolo Elisha & Another vs. Thomas Martin Kibisu* [*supra*] where this court stated:

“The respondent did not adduce any documentary evidence to show that any of the persons listed under paragraph 6 of the Plaint were actually dependants of the deceased.

In the result, we allow the appeal and set aside the judgment of the trial court dated 29th November, 2001, as far as the award for general damages under the *Law Reform Act* and *Fatal Accidents Act* is concerned.”

19. The upshot of the above assessment and reasoning is that we find no merit in the appellant’s appeal. The same is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

