



**IN THE COURT OF APPEAL**

**AT NYERI**

**CIVIL APPEAL NO.120 OF 2015**

**(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A)**

**ISAACK KIMANI KANYINGI & CATHERINE NJERI MUGO**

(Suing as the legal representative of the Estate of

**LOISE GATHONI MUGO (Deceased).....APPELLANT**

**AND**

**HELLENA WANJIRU RUKANGA.....RESPONDENT**

(Being an appeal from the judgment of the High Court of Kenya at Nakuru (**A. Mshila, J.**) dated 31st July, 2014

in

HCCC No. 205 of 2012)

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**JUDGMENT OF THE COURT**

1. This is an appeal arising from a suit that was filed by the appellants, **Isaac Kimani Kanyingi** and **Catherine Njeri Mugo** (Catherine) in their capacity as the legal representatives of the estate of **Loise Gathoni Mugo (deceased)**. In the suit the appellants sued **Hellena Wanjiru Rukanga** (respondent), seeking special damages of Kshs 86,960/- and general damages under the Law Reform Act and the Fatal Accidents Act, arising from the death of the deceased who died as a result of an accident involving the respondent's motor vehicle Reg. No. KYW 722 Isuzu Lorry (Motor Vehicle). The appellants claimed that the accident was caused by the negligence of the respondent and/or his driver.

2. By a defence dated 12th July, 2012, the respondent denied that she was the registered/beneficial and/or ostensible owner of the motor vehicle and further averred that if at all an accident occurred, then the accident was caused by the negligence of the deceased. In addition, the respondent contended that the deceased was an unauthorized passenger in the motor vehicle. The respondent denied the claim for damages under the **Law Reform Act** and the **Fatal Accidents Act**, and contended that the appellants' suit was incompetent and did not raise any triable issues.

3. On 1st January, 2013, the parties entered into a consent on liability, in which the respondent conceded to liability against her at 70%, while the appellants conceded to 30% contribution. On 17th June, 2014 the parties' counsel appeared before the court and a further consent was recorded, special damages being agreed at Kshs.58,910 and Kshs. 100,000 as damages for loss of expectation of life under the Law Reform Act. It was agreed that hearing proceeds only in regard to the issue of loss of dependency under the Fatal Accidents Act.

4. Upon hearing the evidence of Catherine, who is also a daughter to the deceased, and considering submissions filed by the parties' counsel, the learned Judge delivered a judgment in which she found that a multiplier of 9 years would be reasonable, given the undisputed age of the deceased of 47 years and the retirement age set by the government at 60 years. The court found that there was no proof of income of the deceased and that such proof being the cornerstone of a claim for loss of dependency, no award could issue without such proof. In addition, the dependency on the deceased by the deceased's children was not proved.

5. As regards special damages for funeral expenses in regard to which the parties had consented to Kshs. 58,901/-, the court allowed a sum of Kshs. 50,000/- as funeral expenses.

6. The appellants who are aggrieved by that judgment have filed an appeal in which they have raised four (4) grounds. They contend: that the learned Judge erred in finding that the dependency had not been proved when there was overwhelming evidence in support of the same; that

the learned Judge failed to appreciate the proof of income tendered by the appellants; that the learned Judge misdirected herself in failing to appreciate the respondent's submissions and proposal of dependency; and that the learned Judge considered extraneous issues in arriving at her findings.

7. During the hearing of the appeal, the appellants were represented by **Mr. Biko** who was holding brief for **Mr. Mukira**, while the respondent was represented by **Mr. Muriithi**. Both parties filed written submissions and authorities which they duly highlighted during the hearing.

8. The appellants submitted that evidence was adduced before the trial court by Catherine that the deceased had a timber workshop from which she was doing business and earning about Kshs. 20,000-25,000 per day, and Catherine produced a bank statement from Equity Bank which showed that the deceased earned about Kshs. 50,000 per month. The trial court was faulted for ignoring the testimony of Catherine that the deceased's business premises was broken into and that key documents relating to the business were missing as a result of the break-in.

9. In addition, the appellants faulted the trial judge for failing to take into account evidence of birth certificates that confirmed that the deceased was survived by her 3 children whom she was living with and taking care of, at the time of her death, as the father of the children had predeceased her. Also ignored was the evidence that was adduced before the trial court that two of the deceased's children were actually in training at the time of her death. The appellants faulted the finding that the deceased's children were not dependants because they were adults, and no receipts for tuition fees or any other form of document was produced to support the alleged dependency.

10. The appellants cited **Jacob Ayiga Maruja & anor vs. Simeon Obaya [2005] eKLR** for the proposition that documents were not the only way to prove the profession of a person; and also referred to **Rev. Fr. Leonard O. Ekisa vs. Major K. Birgen [2005] eKLR** for the proposition that dependency was a matter of fact which need not be proved by documentary evidence.

11. The appellants argued that the trial judge misdirected herself in finding that the children were not dependants and that no dependency ratio was proved. They urged the Court to set aside the finding of the trial court in this regard and adopt a dependency ratio of two thirds.

12. In regard to the deceased's income, the appellants submitted that there was sufficient evidence in proof of the income, and that even if the court was of the view that the income could not be accurately determined, the court could adopt the minimum wage at the time of the deceased's death. The appellants cited **Mary Njeri Murigi vs. Peter Macharia & Anor [2016] eKLR** a High Court decision, urging that the court could in any case exercise its discretion and make a lump sum award.

13. The appellants maintained that though they were seeking damages under the Fatal Accidents Act and the Law Reform Act, the trial court dismissed their claim under the Fatal Accidents Act, and failed to award any damages. The appellants urged the Court to find that the learned Judge considered irrelevant issues which vitiated her judgment, and that the failure to award damages was a miscarriage of justice.

14. Finally the appellants dismissed the irregularity in the record of appeal in regard to the use of an uncertified copy of the decree, maintaining that the lack of certification did not in any way prejudice the respondent because the decree was a true reflection of the judgment which was attached. The appellants urged the Court to apply Article 159 (2)(d) of the Constitution and focus on substantive justice instead of procedural technicalities.

15. On her part, the respondent submitted that the appellants had the burden under Section 107 of the Evidence Act to prove dependency, and this could be done by either oral or documentary evidence that confirmed that the children of the deceased were indeed dependent on the deceased. The respondent maintained that the appellants failed to discharge this burden, as the birth certificates that were produced in evidence showed that the deceased's children were all adults who were each living independently at the time of the death of the deceased. Relying on **Hassan vs. Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457**, the respondent argued that in the African setting, it is expected that a child will assist his aging or aged parents and not vice versa. The relevance of the fact that the children were adults was therefore that it was the children, being adults, who were expected to assist their parent, the deceased.

16. The respondent urged the Court to uphold the finding of the trial judge on dependency, but if inclined to interfere, to find that a dependency ratio of one-third was sufficient as was held in **Chania Shuttle vs Mary Mumbi [2017] eKLR** and **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288** (cited in **Coast Bus Company vs. Joseph Maundu Mukusu suing as next of kin of Jane Paul Mang'eng'e, Tabitha Muthoki Mang'eng'e and Paul Mang'eng'e (deceased) [2019] eKLR**).

17. On the multiplicand, the respondent submitted that the court had the discretion to determine the multiplicand to be applied, though in exercising that discretion, the court had to bear in mind the expectation of earning life of the deceased vis-à-vis the expectation of life and dependency of the dependants. The respondent maintained that the multiplicand of 9 years adopted by the trial court was appropriate given the age of the deceased, and therefore, there was no justification for the Court to interfere.

18. With regard to proof of the deceased's income, the respondent submitted that the appellants had pleaded the deceased's income as Kshs. 50,000 per month, but that during the hearing, the appellants testified that the income was Kshs. 20,000 – 25,000. In addition, the statement of accounts which were produced by the appellants did not meet the threshold required, as there was no link between the business conducted by the deceased and her bank statements, and the court noted that the account statements showed a lot of irregularities.

19. The respondent argued that the appellants ought to have proved that the deceased's net income that she took home and shared with her dependants was Ksh. 50,000 per month, but this was not done. In addition, that the appellants failed to prove that the deceased was running a legitimate business enterprise; and that the allegation that the business premises was broken into and items stolen was not proved as there was no OB from the police to confirm such a report.

20. Further, the respondent submitted that the learned Judge could not be faulted for failing to adopt the minimum wage of a person in

Kenya, as the appellants' evidence was that the deceased was a business lady, and therefore, not an employee or wage earner. Finally, the respondent argued that the trial judge did not refuse to grant any award under the Fatal Accidents Act; that awards could not be duplicated under the two Acts; and that damages awarded under the Law Reform Act should be considered and re-proved under the Fatal Accidents Act, so that the estate does not benefit twice under the same cause of action. In this regard the respondent relied on *P. S. Atiyah in "Accidents Compensation and the Law", 2nd edition, p. 88.*

21. The respondent posited that the parties having consented to damages under the Law Reform Act, the court would have rightly deducted the amount from any award made under the Fatal Accidents Act, but the court could not engage in such deduction if it found that the claim under the Fatal Accidents Act was not proved. In this regard, *Kemfro Africa Limited t/a as Meru Express Services 1976 & Anor vs. Lubia & Anor [1987] KLR 30* was relied upon. The respondent urged the Court to find that the trial court did not err in dismissing the appellants' claim under the Fatal Accidents Act, and in failing to award the appellants damages under that Act as they had not proved their claim.

22. This being a first appeal, it is the duty of this Court to reconsider and re-evaluate 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 versus Kuston (Kenya) Limited (2009) 2EA 212*). We also reiterate what was stated in *Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123* 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."***

23. It is common ground that the issue of liability is not in dispute as the parties came to an agreement and a consent was recorded before the trial Judge in that regard. As regards special damages, the record of proceedings of the trial court also reveals that the parties settled the issue by agreeing on a figure of Kshs 58,910 and this was signed before the court by both parties' advocates. The learned Judge awarded a further sum of Kshs. 50,000 as funeral expenses. As there is no cross-appeal regarding that award, we have no jurisdiction to address it further.

24. The main issue in contention in this appeal is the failure by the trial court to award damages for loss of dependency under the Fatal Accidents Act. It is trite law that an appellate court can only interfere with an award of damages by the 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 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 Ltd t/a Meru Express Service, Gathogo Karimi v. A.M. Lubia & another [1982 - 88] 1 KAR 727*; and *Jane Chelagat Bor v. Andrew Otieno Onduu* (supra). However, the issue here is not the amount awarded but the total failure to award any damages for loss of dependency notwithstanding the parties' consent on liability.

25. As stated by the former Court of Appeal for Eastern Africa in *Chunibhai J Patel & another v. PF Hays & others [1957] EA 748* followed by this Court in *Vincent Sululu & another v. Rose Wanjiru [2016] eKLR* the formula for assessing damages under the Fatal Accidents Act is as follows:

***"The court should find the age and expectation of the working life of the deceased and consider the ages and expectation 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."***

26. Three things are therefore relevant, that is the age of the deceased, income of the deceased and the level of dependency on the deceased by the dependents, if any. These are the factors that assist the court in arriving at the multiplier and the multiplicand which are used in assessing the loss of dependency. It was not disputed that the age of the deceased was 47 years. The learned Judge settled for a multiplier of 7 years taking into account the government retirement age of 60 years. However, the deceased was a self-employed person and the government retirement age was irrelevant to her business. Her ability to continue in business depended on her good health and there was no evidence that she had any health problems that could have made it impossible for her to continue with her business well beyond the age of 60 years. We find that a multiplier of 15 years would have been fair and reasonable taking into account the deceased's age and the vagaries and uncertainty of life.

27. As regards the deceased's income, Catherine testified that the deceased had a furniture and timber yard from which she used to sell furniture and timber. While she had no evidence regarding the income from the timber, she estimated the income from the furniture at between Kshs. 20,000 - 25,000 and could not give any estimate of the timber business. The only evidence she could produce in support of the income was the deceased's bank savings account. She explained that the deceased's premises had been broken into after her death and she was unable to trace most of the relevant documents.

28. In assessing the evidence regarding the deceased's income, the learned Judge stated as follows:

***"12. On the issue of income, the plaintiff adduced evidence that her deceased mother had a timber business and also a furniture business by the name Songa Songa.***

***13. Assuming that the timber business involved the logging, cutting and ferrying of timber, at best, the plaintiff would have produced a permit for the same. As for the furniture business, no registration of business name certificate was produced or a license from the council to show the existence of such a business.***

***14. The court has had the occasion to peruse the statement from Equity Bank, produced by the plaintiff to prove the deceased's income. The credit entries are irregular. There are instances where the amount deposited is the same amount withdrawn, leaving a negative balance.***

15. ***This court states that if the business was legitimate and registered, it was incumbent upon the plaintiff to show that the statements were for her business account and also to produce documents or evidence such as licences, receipts, receipt books, books of accounts, audited reports. These documents could have corroborated the evidence relating to the deposits made into the bank and reflected in the bank statements.***

16. ***Counsel for the defendant urged the court to adopt the minimum wage of Kshs. 11,995. This cannot be adopted because the evidence on record adduced by the plaintiff was that the deceased was a business lady, and was therefore in essence not an employee or a wage earner.***

17. ***This court makes a finding that there was no proof of income and adds that proof of income is a cornerstone for a claim of “loss of dependency”. No award on dependency can issue without proof of income...***

29. As the respondent did not call any evidence, Catherine’s evidence regarding the fact that her mother was a business lady, operating a timber and furniture workshop, was not controverted. What was in issue was actually the income that the deceased derived from the business. In our view, the trial judge misdirected herself in questioning whether the deceased actually had a business.

30. The fact that no licences or books of accounts were produced, was explainable by the fact that the deceased was operating her business as a sole proprietor. In any case, the business appears to have been a small business enterprise carried out by an individual who may not have had the necessary acumen for keeping proper records. The bank account statement that was produced clearly showed that there were monies going into and out of the deceased’s account, and this is normal for a business enterprise as new stock has to be purchased even as sales are made. The court had no reason to question the propriety of the deceased’s bank statement. Catherine explained that some of the records appeared to have been lost following the break-in into the business premises after the deceased’s death. In our view, there was sufficient evidence that the deceased was a business lady. All that was required of the court was to assess the net income of the deceased, given the business enterprise that she was undertaking and the evidence that was available before the court.

31. In **Jacob Ayiga Maruja & Anor vs. Simeon Obayo [2005] eKLR**, this Court dealing with a similar situation in which a plaintiff had no documentary proof of the deceased’s earning, stated as follows:

***“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”***

32. We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.

33. In **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR**, this Court dealing with a similar situation regarding paucity of evidence of loss of income observed as follows:

***“...We appreciate the expectation of Mr. Inamdar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there is dicta in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult. Apaloo J (as he then was) considered such difficulties in the case of a village-man in his mid- fifties dealing in cattle trade, who was injured in a road traffic accident. He stated:***

***‘I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is, the Kenya Meat commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods.’***

***That case was Wambua v. Patel & Anor [1980] KLR 336.***

34. 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 because the deceased being a business lady carrying out a timber and furniture business, she must at least have employed a carpenter for the business and was unlikely to earn less than the carpenter. In our view given the evidence before the trial Judge including the bank statement showing monies going into and out of the deceased’s account, a sum of Kshs 30,000/= would have been appropriate as the net monthly income of the deceased.

35. As regards the level of dependency, it is not disputed that the deceased had three children, the issue is whether the three were dependent on the deceased. In this regard the trial judge rendered herself as follows:

**“no receipts for tuition fees were produced or any other form of documentation was tendered to prove dependency particularly for these adult children. This court would not have needed any documentation if the children were minors”.**

36. The trial judge appeared to be of the view that adult children are only dependants when they are still in school or college. The learned Judge appeared to have ignored the evidence that was adduced by Catherine, who stated that at the time the deceased died, the deceased's son Moses Gachanja had just joined college, while her daughter Grace had just finished and started a salon business, and that their mother was the main breadwinner. It is evident that these two were completely dependent on their mother, notwithstanding the fact that they were above 18 years of age. The fact that there were no receipts for payment of tuition for Moses does not change that fact. As we have already noted documentary evidence is good evidence, but it is not necessarily the only evidence by which dependency or income may be proved. In this case the uncontroverted evidence of Catherine was sufficient.

37. We find that a dependency ratio of 2/3 was in the circumstances of this case justified. Using the multiplier of 15 and the multiplicand of 30,000 we find that the loss of dependency was as follows:  $30,000 \times 12 \times \frac{2}{3} \times 15 = 3,600,000$ . Having discounted this figure in recognition of the fact that the damages will be paid in lump sum, and also taking into account the damages that were agreed under the Law Reform Act, we award a sum of Kshs 3,400,000 as damages for loss of dependency.

38. As was explained by this Court in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR, this Court is not obliged to engage in a mathematical deduction exercise in a bid to avoid the deceased dependents benefitting twice through awards made both under the Law Reform Act and the Fatal Accidents Act. All that is required is for the Court to take into account the award made under the Law Reform Act whilst making the award under the Fatal Accidents Act.

39. For the reasons stated herein we are satisfied that there is justification for this Court to interfere with the judgment of the trial judge in regard to special damages and damages for loss of dependency as clearly the learned Judge misdirected herself by considering irrelevant matters and failing to consider relevant matters. Accordingly, we allow this appeal to the extent of setting aside the additional amount of Kshs 50,000 awarded by the trial Judge as special damages for funeral expenses. We set aside the order of the trial Judge awarding nil for loss of dependency and award an amount of Kshs 3,400,000 as damages for loss of dependency.

**The final award shall therefore be as follows:**

***Damages under the Law Reform:***

<b>Pain and Suffering</b>	<b>Kshs. 20,000</b>
<b>Loss of expectation of life</b>	<b>Kshs. 100,000</b>

***Damages under the Fatal Accidents Act:***

<b>Loss of Dependency</b>	<b>Kshs. 3,400,000</b>
<b>Special Damages</b>	<b>Kshs. 58,910</b>
<b>Sub Total</b>	<b>Kshs. 3,578,910</b>
<b>Less 30% contribution</b>	<b>Kshs. 1,073,673</b>
<b>Total Award</b>	<b>Kshs. 2,505,237</b>

39. The appellants shall have costs of this appeal, and interest on general damages from the date of the judgment of the High Court. Those shall be the orders of the Court.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**