



Apondi (Suing as the Administrator and Personal Representative of the Estate of George Onyango Osando) v Crown Petroleum Kenya Limited (Civil Appeal E152 of 2023) [2025] KEHC 822 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E152 OF 2023
SC CHIRCHIR, J
JANUARY 30, 2025**

BETWEEN

**CHRISTINE ANNE APONDI APPELLANT
SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF
THE ESTATE OF GEORGE ONYANGO OSANDO**

AND

CROWN PETROLEUM KENYA LIMITED RESPONDENT

(Being from the Judgment of Hon.C.N Njalale (principal magistrate) in Butali chief Magistrate's court civil suit No. 149 of 2021 delivered on 21st September 2023)

JUDGMENT

1. The Appellant herein filed suit against the Respondent at the lower court, seeking for damages for loss occasioned to the Estate, and dependants of George Onyango Osando (Deceased) who died following a fatal Road Traffic accident. The accident occurred on 11th July 2021 along Eldoret- Webuye road, and was between motor vehicle KCN 778 M and a truck Registration No 325 M.
2. In a Judgment delivered on 21st September 2023 the trial court returned a verdict in favour of the Appellant, and awarded damages as follows:
 - a. Pain and suffering 10,000/=
 - b. Loss of expectation of life 100,000/=
 - c. Loss of dependency 5,673,600/=
 - d. Special damages 227,350/=Grand total= Kshs.6, 010,950/=



3. The appellant was however dissatisfied with the award on damages and proffered the present Appeal and set out the following grounds:
 - a. That the trial magistrate in law and in fact by adopting Kshs. 59,100/= as a multiplicand
 - b. That the trial magistrate erred in law and in fact by not appreciating what a statutory deduction is thereby arriving at a wrong decision.

Appellant's submissions.

4. It is the Appellant's submissions that the trial Magistrate misapprehended what constitute statutory deductions and consequently arrived at a wrong figure on the deceased's net pay. In buttressing her submissions on what constitutes net pay, she has relied on the decisions in the case of Hellen gesare Ayoti vs. P.N Mashru (2016) eKLR and Bungoma HCCA E011 of 2023 Ronald Asman Mukangai vs. Wycliff KipKorir Langat where both courts held that net pay is the net of statutory deductions only .
5. She urges the court to find that the deceased's statutory deductions only consisted of : NHIF at ksh. 1,700, NSSF at ksh. 200 and PAYE at ksh. 8000 , bringing the total deductions to ksh. 9,900 . She therefore states that then net pay was ksh. 208,066.

Respondent's submissions.

6. The respondent submits that the net pay of ksh. 59, 100 adopted by the trial court was correct ; that the statutory deductions include all the deductions as they appear in the deceased's payslip.
7. It is further argued that ,what constitute the net pay is what is available for use by an employee once all the necessary deductions have been factored in. In this regard the respondent has relied on the following decisions:
 - a. Chunibai Patel & Ano vs P.E Hayes(1957) E.A 749as cited in the case of Hellen Waruguru Vs Kiarie Shoe Stores Ltd(2015)e KLR, where the court held that what should be considered is the net earnings of the deceased.
 - b. DKM Vs Mehar Towoolde as cited in the case of Joshua Mulinge vsBash hauliers& Ano (2021) e KLR. In this case the court held that the court should not rely on the gross pay, as deductions do not necessarily go to the benefits of the dependants.
 - c. Mary Osano vs Simon Kimutai 920200 e KLR, where the court held that some of the deductions like savings and loan should not be factored in.

Analysis and determination.

8. An appeal to this court from the Magistrate's court is by way of a retrial and this court is mandated to review the evidence on record , evaluate it and arrive at its own findings . (ref: selle & Ano vs Associated Motor Boat Ltd (1968) EA 123).
9. I have considered the memorandum of Appeal , the trial court record and parties submissions. The only issue for determination is whether the multiplicand applied by the trial court in assessing the item on loss of dependency was correct.
10. The legal principles upon which this court can disturb an award of damages by a trial court are well settled. In the case Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) V Kiarie Shoe Stores LTD, Nyeri Civil Appeal No.22 of 2014 the Court of Appeal stated at para 10: "As a general principle, assessment of damages lies in the discretion of the trial court and



an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.

11. The issue in this case, in particular, is what ought to have been the statutory deductions and hence the appropriate net pay of the deceased. In other words, in calculating the benefits to a deceased's dependants, what items in the deceased's earnings can be said to have gone to the benefit of his dependants?
12. The evidence of Pw4, the Human resource manager at KPLC, western region, is relevant. She told the court that the deceased was an employee of the company and worked as a technician; that he earned a gross pay of Kshs. 217,965.99, less PAYE of Kshs. 44,307.33, NHIF of ksh. 1700 and NSSF of ksh. 200/= and that the net pay was Kshs. 171,758.66. She produced a payslip for June 2021 which showed the deceased's net pay at Kshs. 59,100/=
13. The trial court, in its judgment however adopted the net pay of ksh. 59,100 in calculating the loss of dependency. A look at the payslip shows that this net pay was net of all deductions, not just the ones that was pointed out by PW4.
14. Thus the pertinent question is; what is the net pay for purposes of ascertaining the income that went to the benefit of the deceased, and hence his dependants? Is it the one net of statutory deductions or the one net of all deductions?
15. In Nyeri Civil Appeal Number 22 of 2014 - Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal expressed itself as follows:

“In this case, there was no complicated record of evidence to evaluate. Only Hellen testified and produced documentary evidence. On the issue of the salary, the deceased's last pay-slip was produced and it showed clearly his gross earnings of Sh. 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Sh. 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error. 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)



16. Similarly, in Kisumu Civil Appeal Number 48 of 2016 - Mary Osano (Personal Representative of the estate Charles Otworu Ogechi - Deceased) vs. Simon Kimutai [2020] eKLR, the same court stated :

“ Counsel for the appellant submitted that the deceased’s net pay as evidenced by a copy of his payslip was Kshs 53,550 per month, with a house allowance of Kshs 45,000 per month which totals to Kshs 98,550. The statutory deductions as contained in the payslip are; P.A.Y.E at Kshs 23,947; NHIF at Kshs 320 and NSSF at Kshs 3748 which totals to Kshs 28,015. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.” (Emphasis added)

17. The court of appeal in civil appeal 1178 of 2018 KECA 157 KLR Elizabeth Wanjiku Maigwa (suing as Legal representative in the estate of Ezekial Katupa vs. British counsel stated as follows,” 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.

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.

18. The above cited Authorities are among the many that the superior courts have made in settling the question of what constitutes statutory deductions. The statutory deductions, then, in Kenya consisted of the PAYE NSSF, NHIF. At the present, the housing levy would be on that list.

19. The trial Magistrate therefore erred in taking into considerations all the deductions appearing in the deceased’s payslip when calculating the multiplicand. All the deductions appearing as :- domestic App repayment car insurance loans and savings were all for the benefit of the deceased and hence his dependants . Subject to the usual factors, that is the loss that the deceased’s dependants have suffered as a result of the deceased’s demise.

20. From the payslip produced (Exb 12), the deceased earned a gross salary of 217,957. The statutory deductions were: PAYE – Kshs 44,307.33, NSSF Kshs. 200, NHIF Kshs. 1700/= amounting to ksh.46,207.33. This left a net of Kshs. 171,749.67 for his benefit, either directly or indirectly.

21. The Appeal therefore has merits and it succeeds. The correct multiplicand ought to have been ksh. 171,749.67. The rest of the factors are not an issue in this appeal.

22. I have taken note however that in their submissions the respondent had discredited the authenticity of the payslip and has also cast doubts on whether PW4 was an officer at KPLC. However there was no cross- appeal challenging the lower court findings on this aspect and therefore there is no basis upon which this court can determine the said issue .

23. In the end, the award on loss of dependency works out as follows: (kshs.171,749.67x 12x12x 2/3) totalling to Kshs. 16,487,968.32/=

24. Consequently the total award is as follows;



- a. Pain and suffering Kshs. 10,000/=
 - b. Loss of expectation of life Kshs. 100,000/=
 - c. Loss of dependency Kshs. 16,487,968.32
 - d. Special damages 227,350/=
- Grand total= Kshs.16,825,318.32.

25. In the end :

- a. The lower court Judgment on the award of damages is hereby set aside and substituted with an award of ksh. 16, 825,318.32
- b. Costs of this Appeal as well as the suit are awarded to the Appellant.
- c. The award will attract interest at court rates from the date of judgment at the trial court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

