



Njuguna & another (Suing as the Legal Representative of the Estate of the Late James Mbogua Njuguna) v Kamau (Civil Appeal 51 of 2020) [2024] KEHC 586 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 51 OF 2020
HM NYAGA, J
JANUARY 29, 2024**

BETWEEN

**PAUL KARANJA NJUGUNA 1ST APPELLANT
REHAB NDATA MBUGUA 2ND APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
JAMES MBOGUA NJUGUNA**

AND

JOHN WACHIRA KAMAU RESPONDENT

(Being an Appel from the Judgement by Honourable B. Mararo (Principal Magistrate) in Nakuru CMCC No.764 of 2016 delivered on 19th February, 2020)

JUDGMENT

1. The appeal herein arises from the suit no. CMCC NO.764 of 2016 which was filed in the magistrate's court at Nakuru by the Appellant herein.
2. The Appellants Vide a plaint dated 21st June,2016, as the plaintiff sued the Respondent as the Defendant claiming Damages under Fatal Accident Act for the benefit of the deceased's estate and damages under *Law Reform Act*, Special Damages and costs and interests of the suit.
3. The cause of action, according to the plaint, arose on or about 6th February, 2016 along Nairobi-Nakuru Highway at Free area. It was alleged that the deceased was lawfully walking completely off the road when the Respondent, his agents and/or employee negligently drove the Motor Vehicle Registration No. KBJ 704 C as a result of which it violently knocked the deceased occasioning him fatal injuries. The particulars of negligence, particulars pursuant to the estate and special damages were pleaded.



4. The Respondent denied the entire claim by the Appellants through his defence dated 4th August, 2016 and averred that if the accident occurred the same was caused by the sole or contributory negligence of the deceased.
5. The suit proceeded to full hearing during which evidence was adduced by the respective parties. In his judgment, the learned magistrate apportioned liability in the ratio of 50:50 and awarded the Appellants Kshs. 20,000/= for pain and suffering, Kshs. 100,000/= for loss of expectation of Life, Kshs. 900,240/= for loss of Dependency, Special Damages of Kshs. 117,359/= and costs and interest of the suit.
6. Being dissatisfied with the decision of the trial court on the apportionment of liability and quantum awarded, the appellants instituted this Appeal premised on the grounds THAT: -
 1. The learned trial magistrate erred in fact and in law in failing to find that the Appellant had proved her case on a balance of probability despite there being overwhelming evidence.
 2. The learned trial magistrate erred in fact and in law in disregarding the Appellant's testimony and evidence tendered during the hearing of the above suit.
 3. The learned trial magistrate erred in fact and in law in disregarding the Appellant's submissions on record and as result arrived at an erroneous award on loss of dependency which is inordinately low in the circumstances.
 4. The learned trial magistrate erred in fact and in law in apportioning liability in the ratio of 50:50 against the Appellant yet there was overwhelming evidence tendered to hold the Respondent 100% liable.
7. The Appellants thus prayed for orders THAT: -
 - i. The Appeal herein be allowed.
 - ii. The judgement/decree of the Honourable Magistrate delivered on the 19th of February, 2020, in Nakuru CMCC No. 764 of 2016 be set aside.
8. The appeal was canvassed via written submissions.

Appellants' Submissions

9. On Liability, the Appellants submitted that PW2 who was an eye witness testified that the deceased was hit while walking off the road. They discredited the respondent's case on the ground that it was uncorroborated and urged this court to find that they proved their case on a balance of probability and hold the respondent wholly liable for the accident.
10. With respect to quantum, the appellants' dispute only the figure used as multiplicand. According to them the court ought to have adopted the sum of Kshs. 25,495/=-, being the deceased's gross salary less statutory deductions only as the multiplicand. In this regard reliance was placed on the case of 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), Kisumu Civil Appeal Number 48 of 2016 - *Mary Osano (Personal Representative of the estate Charles Otworu Ogechi - Deceased) vs Simon Kimutai* [2020] eKLR and Machakos HCCC NO. 332 of 2012, *Janet Chonge Walumbe & 2 others vs Julius Mwaniki & Another* [2019] eKLR
11. The appellants thus urged this court to set aside the award under loss of dependency of Ksh. 900,240/= and substitute it with Ksh 2,039,600 to be arrived at as follows:-

$$(25,495 \times 10 \times 12 \times 2/3 = 2,039,600/=)$$



Respondent's Submissions

12. The respondent concurred with the trial court's finding on liability. He submitted that there was no conclusive evidence to show that he was to wholly blame for the accident. He contended that the deceased did not exercise caution while on the road and had he done so the accident would not have occurred. To buttress his submissions, he relied on Section 107 of the *Evidence Act* and the cases of *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* [2015] eKLR & *P W vs Peter Muriithi Ngari* [2017] eKLR.
13. On quantum, precisely on the sum adopted as a multiplicand which is in contention in this appeal, the respondent submitted that the same was justified in that the payslip produced in evidence showed the deceased, as a teacher, earned a net salary of Ksh. 11,253.85/=.
14. He urged this court to uphold the award on dependency and proceed to dismiss the appeal with costs.

Issues For Determination

15. Upon perusing the Record of Appeal and Parties rival written submissions, the following issues arise for determination: -
 - i. Whether the appellant proved liability to the desired threshold.
 - ii. Whether the trial court erred in adopting a multiplicand of Ksh. 11,253.85/= per month

Analysis

16. The Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123 held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect; in addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also *LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO* [1983] KLR, 403-415, AT 403)

Whether the appellant proved liability to the desired threshold

17. In *Henderson vs Henry E Jenkins & Sons* [1970] AC 282 at 301 Lord Pearson at letter D stated:

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.

But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be



decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

18. In the instant case, three witnesses testified on liability.
19. PW2 testified that on 6th February, 2016 he left free area with the deceased. They were heading to Nakuru. The deceased was walking ahead of him and he saw a motor vehicle that was over speeding that hit the deceased and threw him off the road. He said there was a zebra crossing and they wanted to cross the road. He stated that the deceased died on the spot and he blamed the driver of the subject motor vehicle for over speeding. He said after the accident he remained at the scene up to midnight.
20. In cross examination, he confirmed that he was not listed in the police abstract as a witness. He said the accident occurred at 7.30 p.m. and he witnessed it. He said Zebra crossing was ahead and that the road where the accident occurred is a dual carriage way. He said the deceased was not crossing the road.
21. PW3 was PC Okello from Nakuru Police station. It was his evidence that the Subject Motor vehicle that was being driven on Nairobi-Nakuru Highway knocked down the deceased who was crossing the road and he died on the spot. He stated that the investigating officer visited the scene and met the driver and his wife who told her how the accident occurred. It was his testimony that there was no independent eye witness and that no one was blamed for the accident as per the police file.
22. In cross examination, he confirmed he was not the investigating officer and reiterated that there was no independent eye witness. He said the driver and his wife were the only witnesses to the accident. He did not have a copy of sketch plan or the police file.
23. DW1 was the respondent. He adopted his written statement. In that statement he stated that on the material date he was in company of his wife driving from Shemeji Shopping centre to his residence at Shabab Estate. He said the visibility was clear and the vehicle traffic flow was low as well as human traffic. He stated that he was driving parallel to another motor vehicle which was on the outer lane when he suddenly saw a male adult pedestrian emerge at a very close range and attempted to cross the road from the left side towards the right side of the road. He stated that he applied emergency brakes to avoid hitting him but due to short distance the deceased was hit by the front side of the Motor Vehicle and unfortunately he died on the spot. He said there was no zebra crossing in that area and wholly blamed the deceased for the accident.
24. In cross examination, he confirmed the road was straight and that he could see far ahead. He said the accident happened between Shemeji and Free area. He reiterated that he was driving on the inner lane and there was a lorry that was parallel to his motor vehicle. He said the deceased emerged from the outer lane, passed the lorry and run unto his car. He confirmed there was speed bump in that area and he was careful.
25. From the above summary of the evidence presented before the Lower Court, it is patent the evidence of PW2 contradicted that of PW3 in that PW2 stated that he witnessed the accident whereas PW3 stated that there was no independent eye witness. PW2 also stated that the deceased attempted to cross the road when he was hit by the subject Motor Vehicle whereas PW3 stated that the deceased was knocked down while crossing the road. In addition PW2 stated that there was zebra crossing at the scene while PW3 stated the contrary.
26. It is trite law that parties are bound by the pleadings. A perusal of the plaint indicates that the deceased was hit while walking completely off the road. This statement was not in tandem with the evidence of the Appellants' witnesses. There is no concrete evidence to determine who was to blame between



the deceased and DW1 as no proper investigation was conducted into this matter. However, I note that the circumstances of how the accident occurred as per the police records were based solely on the information given by DW1.

27. So who was to blame for the accident?

Aburili, J in *Mary Njeri Murigi vs. Peter Macharia & Another* [2016] KLR that:

“A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.”

28. In *Peter Okello Omedi vs Clement Ochieng* [2006] eKLR the court stated that the plaintiff being a pedestrian owes a duty of care to other road users to move with due care and in a manner that would not endanger the safety of other road users.

29. The above cases demonstrate that both the driver and a pedestrian owe a duty of care to other road users.

30. The trial court held as follows on the issue of liability:

“From the evidence on record the plaintiff alleged that the deceased was about to cross the highway at a designated zebra crossing a fact that was denied by the defendant and PC Okello who produced the relevant police abstract testified that there was no zebra crossing people were still crossing the road at that place while the Defence went ahead to producing photograph of that particular section of the road and it showed that there was no zebra crossing. In view of the above I find the deceased was not as mindful of his welfare as he ought to have been and must shoulder a substantive portion of the blame for the accident. I also find that though there may have or may have not been zebra crossing pedestrians were crossing the road at that point of the road and as a driver he had a duty of care towards pedestrian crossing the road. I therefore apportion liability at 50:50 against the plaintiff and the defendant”

31. The Respondent in his testimony confirmed that the accident occurred between Shemeji and Free Area. This is an area within a trading centre and there are residential houses and business premises. Indeed from the evidence, this is a busy centre. Under the *Traffic Act* at section 42, there is a requirement that a speed limit of 50 KPH in such areas, provided that such limit is indicated. In the instant case, there was no indication if there was a speed limit imposed. Although there is no zebra crossing at the scene of the accident, the respondent appeared to be well conversant with that area as he confirmed that people were crossing the road. Therefore, he ought to have been on lookout, maintain a reasonable speed and exercise extra caution at that point of the road. If indeed the deceased dashed onto the road as he alleged then it is highly probable the respondent was speeding and could not stop his vehicle in time, so he hit the deceased who died on the spot.

32. Having stated the above I note that there is no indication that the Respondent’s vehicle veered off the road. There would have been signs of this on the road and off it. I would therefore take the evidence of John Mwangi Kiboi (PW2) on the occurrence of the accident with a pinch of salt.

33. I am thus in agreement with the findings of the trial on the apportionment of liability between the parties. The evidence adduced by both sides show that there was an element of blame on the part of the Respondent and the deceased. It is not possible to apportion liability with surgical precision and so the trial court was right to find both sides equally to blame.



34. In light of the above I find no good reason to set aside the trial court's finding on liability at the ratio of 50:50 and I uphold the same.

Whether the trial court erred in adopting a multiplicand of Ksh. 11,253.85/= per month

35. PW1 testified that the deceased was a teacher at Hyrax Primary School and produced his pay slip of January, 2016 as Exhibit 9. According to that payslip the deceased total earnings was Kshs. 36,496/=. The deductions as contained in the pay slip are; WCPS contribution at Kshs.493/=; InsP: Pan African in (2,000.00) at Ksh. 2000/= P.A.Y.E at Kshs 5001/=; NHIF at Kshs. 950/=; and Cosmopolitan Sacco at a total sum of Kshs. 16,797.9/= and which totals to Kshs. 25,242.15 leaving a net pay of Kshs. 11,253.85/=
36. The Appellants submitted that the trial court ought to have only deducted the statutory pay being P.A.Y.E only of Ksh. 5,001 from the gross salary leaving a multiplicand of Ksh. 25,495/=.
37. It was argued that net pay is gross pay less statutory deductions only. The Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited(supra) supported this position. The court stated 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”.

38. In my view the statutory pay herein is the PAYE, NHIF and any other deductions that the deceased would have continued to pay until his exit from employment.
39. It is in evidence that the deceased had taken advances/ loans which the Respondent argues that they must be factored in also so as to avoid double compensation.
40. I am aware of the decision in Joshua Mulinge Itumo (suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) v Bash Hauliers Limited & another [2021] eKLR . The court stated as follows:-

“In the Appellant's view, the decision in Machakos HCCC NO. 332 of 2012, Janet Chonge Walumbe & 2 Others vs. Julius Mwaniki & another [2019] eKLR where the court held that not including the loans with the other deductions would lead to a double compensation to the plaintiffs since the loan money had already been used was contrary to the above holdings.

In my respectful view there is no substance in that submission. What the Court of Appeal has held is that net pay is gross pay less statutory deductions while the High Court holding is that the Court ought to take account of any benefits that the deceased may have received in



advance and which if not taken into account is likely to lead to double compensation. That is my understanding of the holding in *D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde* [2018] eKLR where the court stated that,

“..... The plaintiff had urged the court to use a multiplicand of Ksh.56,235 which was the gross pay. The payslip annexed shows there were some deductions and the defendant urged the court to use the net salary of Ksh.28,726. The letter from the Ministry of Medical Services showed total earnings as Ksh.56,235. The net pay for February 2005 indicates Ksh. 29578 as net salary. The court cannot calculate the loss of dependency based on the total pay as the deductions do not necessarily go to the benefit of the dependants. The court adopts Ksh.29,534 as per the multiplicand.

Therefore the multiplicand will be a proportion of the deceased’s net income as was also held in the case of *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, quoted in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR where 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 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.”

The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency were enumerated by Ringera, J (as he then was) in *Grace Kanini vs. Kenya Bus Services* Nairobi HCCC No. 4708 of 1989 where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case.”

The same Judge in *Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another* – Nairobi HCCC. No.1638 of 1988 (unreported), held that:

“ The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased... I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It



takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in *Boru Onduu* [1982-1992] 2 KAR 288...”

In my view, where the deceased had taken some temporary advance or loan, the same ought to be taken into account for the period covered by the facility and not for the entire period which the Court finds as regards the reasonable figure representing so many years purchases, otherwise known as the multiplier. I therefore agree with the Appellant that the learned trial magistrate erred in applying the amount stated in the payslip for the whole period of the multiplier. I agree that the prudent thing to do would have been to apply the net salary (gross salary less only statutory deductions) to get the total dependency sum, then deduct the total sum of the loan balances being the 3 SACCO loans with balances of Kshs. 50,000, Kshs. 657,325/- and Kshs. 251,650/-), a total of Kshs. 958,975/-. If that is done the amount due under the head of loss of dependency would be Kshs. 7,011,840/- less total of the loan balances amounting to Kshs. 958,975/- leaving the net balance as Kshs. 6,052,865/-. The appeal therefore succeeds on that ground to that extent.”

41. Having looked at the authorities that have discussed the issue, I will now determine whether the trial court was correct in applying the net pay for the entire multiplier.
42. Looking at the deceased’s payslip it is easy to discern that he had taken several loan facilities. For example he was paying a sum of Kshs. 4,583 to offset a loan whose balance as at January 2016 was Kshs. 32,085/-. In around 7 months he would have completed payment. I think that it would be wrong to include such deductions for the rest of the time the deceased would have worked. For the other loans, looking at the balances, I am also of the view that the payments would have been completed long before the deceased retired. It must also be remembered that the fact that the deceased would have retired did not mean he would no longer support his family. He was expected to do so. Also a teacher he would have been entitled to a pension.
43. Needless to state, the question of the multiplicand and multiplier to be used is not a precise or scientific procedure. It is just an approximation, based on the facts available, enabling the court to arrive at a reasonable figure.
44. My view is that the Court ought to take account of the statutory deductions and those which would not have reached the deceased’s pocket at the end of each month even if he had worked until retirement. The court therefore erred by adopting a multiplicand of Ksh. 11,253.85/= after taking into account the temporary deductions.
45. Guided by the above principles, I find that the loans to the Sacco, being temporary, ought not to have been deducted when calculating the income of the deceased. I would therefore reinstate the same and consequently adopt a Multiplicand in this matter is Kshs. 28,052/= which is worked out as Gross pay of Kshs. 36,496/=, less statutory deductions of PAYE Ksh. 5001/=, NHIF Kshs. 950/=, WCPS Contribution of Kshs. 493/=. I would also deduct the insurance policy payment of Ksh. 2,000/= because it would be assumed that this was paid upon the death of the deceased.
46. I therefore set aside the award under Loss of Dependency of Ksh. 900,240/= and substitute it with an award of Ksh 2,244,160/= that works out as follows;
$$28,052 \times 10 \times \frac{2}{3} \times 12 = 2,244,160/=.$$
47. The appeal therefore succeeds to that extent.
48. There being no appeal or cross appeal on the other awards the same are upheld.



49. In conclusion, I enter judgement for the appellants as follows:-

1. Liability- 50:50%
2. General Damages
 - a. Pain and Suffering..... Ksh 20,000/=
 - b. Loss of Expectation of Life-Ksh.100, 000/=
 - c. Loss of Dependency..... Ksh. 2,244,160/=
 - Sub Total.....Ksh.2,364, 160/=
 - Less 50% contribution(Sub Total).....= Ksh. 1,182,080/=
 - d. Special Damages-..... Ksh. 117,359/=
 - TOTAL..... Ksh. 1,299,439/=

50. The appellants shall have half the costs of the appeal since they were partly successful and costs of the suit in the lower court. They shall also have interest on the decretal sum from the date of judgment of the lower court and the date of filing suit on the general damages and special damages respectively.

51. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JANUARY, 2024.

H. M. NYAGA,

.....

JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

C/A Jeniffer

Ms Kemboi for Respondent

N/A for Appellant

