



Mathenge (The legal representative of Estate of the Late Christiano Muiruri Njau (Deceased) & another v Kamau & another (Civil Appeal 61 of 2016) [2024] KEHC 6286 (KLR) (Civ) (31 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 61 OF 2016

JN NJAGI, J

MAY 31, 2024

BETWEEN

LYDIA MUTHONI MATHENGE (THE LEGAL REPRESENTATIVE OF ESTATE OF THE LATE CHRISTIANO MUIRURI NJAU (DECEASED)) .. 1ST APPELLANT

HENRY KARU NJAU (THE LEGAL REPRESENTATIVE OF ESTATE OF THE LATE CHRISTIANO MUIRURI NJAU (DECEASED)) 2ND APPELLANT

AND

JOSEPHINE KAMAU 1ST RESPONDENT

BITA CHRISTOPHER 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. Chesang, RM, in MCC Civil Case No.7188 of 2012 delivered on 1/2/2016)

JUDGMENT

1. The appellants brought suit against the respondents seeking compensation in damages for their kin who was killed in a road traffic accident in which the respondents were held 80% liable vide a consent recorded in court by the parties. The trial court assessed damages due to the appellants. The appellants were dissatisfied with the award made by the trial court and filed the instant appeal.
2. The grounds of appeal are that:
 - a. The trial magistrate erred and misdirected herself on the applicable law;
 - b. The trial magistrate made errors of facts and law and arrived at conclusions therein which were not manifest from pertinent facts in evidence;



- c. The trial magistrate failed to take into account the age of the deceased and therefore used the wrong the multiplier;
 - d. The trial magistrate erred in using a multiplier of 3 years for a 42 years old man whereas the retirement age is pegged at 60 years in Kenya;
 - e. The the trial magistrate court erred in awarding a low figure on the multiplicand which was not based on the evidence or minimum age applicable.
3. The facts of the case are that the deceased died at the age of 42 years. He was a businessman. The learned magistrate in her award on loss of dependency adopted a multiplier of 5 years and multiplicand of Ksh. 10,000/=. The appellants had in their plaint pleaded that the deceased was earning Ksh.20,000/= per month. The trial magistrate in her judgment held that there was no evidence adduced in proof of the deceased's earnings. She adopted a multiplier of Ksh.10,000/=.
 4. The learned magistrate stated that the common retirement age is 55 years and considering that there was no guarantee that the deceased would live up to old age, she adopted a multiplier of 5 years.
 5. The appeal was disposed of by way of written submissions.

Appellants Submissions.

6. The appellants submitted that the retirement age in Kenya is 60 years and therefore the magistrate got it wrong in setting it at 55. That considering the statutory retirement age, the best multiplier for a 42-year-old deceased is 18 years. Reliance was placed in the cases of *John Gacheri v Sabina Mwombari* (2018) eKLR where the court used a multiplier of 18 years for a 42-year-old deceased and *Brenda Wanjiku Kimani v Changwon Cheboi & another* (2013) eKLR (2013) eKLR where a multiplier of 16 years was used for a 44-year-old.
7. The appellants submitted that the trial court failed to show the basis for the use of Ksh.10,000/= as the multiplicand. They submitted that a multiplicand of Ksh.20,000/= would have been appropriate.

Respondents Submissions

8. The respondents submitted that the quantum of damages made by the trial magistrate is not inordinately low as to warrant interference by this court. That the multiplicand adopted by the court in its judgment is 5 years and not 3 years as submitted by the appellant. It was submitted that the learned magistrate was well guided in law in determining the multiplier applied.
9. It was submitted that there is no guarantee that the deceased could have lived up to 60 years and beyond. That anything including a terminal disease can unexpectedly end someone's life.
10. The respondent proposed a multiplier of 5 years and relied on the case of *Kenya Power & Lighting Co. Ltd v Martha Kerubo Kianga & another (Suing as legal administrator of the Estate of Peter Kianga Okoth (deceased))* (2021) eKLR on the principles applicable in determining the multiplier.
11. On multiplicand it was submitted that Ksh.10,000/= was appropriate and fair. The appellant made reference to the case of *Moses Mairuua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* (2016) eKLR on the principles applicable in determining the multiplicand.



Analysis and Determination

12. The issue for determination is whether the learned trial magistrate was right in applying a multiplier of 5 years and a multiplicand of Ksh.10,000/= to the deceased who was 42 years at the time of death.
13. This being a first appellate court, the duty of the court is as was laid out in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the 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. The formula for assessment of the above loss was ably stated by Ringera J, in *Beatrice Wangui Thairu v Hon. Ezekiel Bangetuny & Another* Nairobi HCC No. 1638 of 1988 (UR) – 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 called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life of the dependants and the chances of life of the deceased and dependants.

The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature”.

15. The 1st appellant testified that the deceased was a businessman at Kenyatta Market and used to earn Ksh. 20,000/= per month. There was no evidence adduced to support that. It is however trite that there is no rule that a person’s earnings have to be proved by production of documents. Makau J in *David Kimathi Kaburu v Gerald Mworobia Murungi (Suing as legal representative of the estate of James Mwenda Mworobia (deceased))* (2004) eKLR held that;

“The court is alive of the fact that in Kenya Society, that most of the individual’s earnings need not be proved by production of documents such as banking statements or payment vouchers or pay slips...”

16. This does not lessen the duty to prove the income of a person through credible evidence. Mere assertion that the deceased earned the sum stated did not make it gospel truth. The appellant has not shown that the trial magistrate erred in adopting a multiplicand of Ksh.10,000/=. In my view the figure used by the trial court is not too low as to invite this court to disturb it.
17. The trial magistrate adopted a multiplier of 5 years but did not cite any cases that guided it in arriving at that. I have considered the authorities cited by the appellant on the issue of multiplier. They were



very relevant on the appropriate multiplier. To those authorities I can add the case of *Sarah Naitore M'ikunyua v Geoffrey Mwangi Bor & another* [2021] eKLR, where the court used a multiplier of 13 years for a deceased who died at the age of 43 years. In *Samuel Kuria Kubunya v Laura Wangui Kabuho & another* [2020] eKLR, the court adopted a multiplier of 15 years where the deceased died at the age of 43. I am convinced that had the trial court considered such comparative cases on multiplier, it would not have adopted a multiplier of 5 years for a 42-year-old. The multiplier adopted by the trial court was inordinately low as to warrant this court to interfere with it. I consider a multiplier of 16 years to be appropriate in this case.

Disposition

18. The result of the appeal is therefore as follows:

1. The appeal on multiplicand of Ksh. 10,000,000/= used by the trial court is dismissed.
2. The multiplier of 5 years used by the trial court is set aside and replaced with a multiplier of 16 years.

As the appeal has partially succeeded, each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST MAY 2024

J. N. NJAGI

JUDGE

In the presence of;

No appearance for appellants

Amolo holding brief for Respondents

Court Assistant – Amina

30 days Right of Appeal

