



**Muita v Njoroge & another (Suing as the Administrators of the Estate of George Njoroge Mumbi - Deceased) (Civil Appeal 121 of 2023) [2024] KEHC 6305 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 121 OF 2023  
FN MUCHEMI, J  
MAY 30, 2024**

**BETWEEN**

**HUMPREY NJOROGE MUTTA ALIAS HUMPREY NJOROGE  
MUTTA ..... APPELLANT**

**AND**

**LUCY NJOKI NJOROGE ..... 1<sup>ST</sup> RESPONDENT  
HANNAH NJERI NJOROGE ..... 2<sup>ND</sup> RESPONDENT  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF GEORGE NJOROGE  
MUMBI - DECEASED**

*(Being an Appeal from the Judgment and Decree of Hon. H. M. Ng'ang'a  
(PM) delivered on 6th July 2022 in Gatundu SPMCC No. 89 of 2020)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Gatundu Principal Magistrate in SPMCC No. 89 of 2020 a claim arising from a road traffic accident. Parties by consent apportioned liability at the ratio of 85:15 with the appellant bearing 85%. The respondents were awarded damages for pain and suffering of Kshs. 20,000/-; loss of expectation of life Kshs. 100,000/-; loss of dependency Kshs. 2,640,000/- and special damages at Kshs. 273,550/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in awarding damages for loss of dependency at Kshs. 2,640,000/- which amount is manifestly excessive;



- b. The learned trial magistrate erred in law and in fact by adopting a multiplier of 11 years for the deceased who was 54 years old at the time of his demise causing the award on loss of dependency to be too high, erroneous and unfair;
  - c. The learned trial magistrate erred in law and in fact in applying a multiplicand of Kshs. 30,000/- where there was no documentary evidence adduced as proof of earnings.
3. Parties put in written submissions to dispose of the appeal.

### **Appellant's Submissions**

4. The appellant relies on the cases of *Peter Omolo vs Match Masters Limited* [2017] eKLR and *Cecilia Mwangi & Another vs Ruth Mwangi* (1997) eKLR and submits that the award of damages for loss of dependency ought to be interfered by this court as the same is manifestly high and was made without due regard to material facts, evidence, submissions and precedents.
5. The appellant submits that the deceased was 54 years old at the time of his demise and his exact income at the time of death remains unknown and unproven. Although the respondents claimed that the deceased was a carpenter earning Kshs. 30,000/-, there is nothing to prove the deceased's income as alleged in form of any letters of employment or payslips. The appellant relies on the case of *Janet Kathambi vs Charity Kanja Njiru* [2021] eKLR and urges the court to adopt a multiplicand of Kshs. 15,000/- as a fair minimum wage given that a carpenter is a semi-skilled trained person, an artisan whose skills are comparable to that of a tailor, welder or mason.
6. The appellant contends that the deceased died at the age of 54 years as confirmed in his death certificate and thus a multiplier of five (5) years would be fair. The appellant further submits that the vagaries and vicissitudes of life would put the deceased's retirement at approximately 60 years. To support his contentions, the appellant relies on the cases of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoes Stores Limited* [2015] eKLR and *Rebeccah Everline Ariri vs Mary Gwaro & Another* [2018] eKLR.
7. The respondent contends that the award on loss of dependency would be computed as follows:-  
$$\text{Kshs. } 15,000/- \times 5 \times 12 \times 2/3 = \text{Kshs. } 600,000/-.$$

### **The Respondent's Submissions**

8. The respondent relies on the case of Catholic Diocese of Kisumu vs Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001 and submits that the court ought not to interfere with the decision of the trial court as the trial court neither misapprehended the evidence adduced nor applied the wrong principles.
9. On the issue of multiplier, the respondent submits that it relied on the cases of *Cornella Elaine Wamba vs Shreeji Enterprises Ltd & Others* [2012] eKLR and *Board of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku Muriithi & Another* [2014] eKLR and thus the multiplier of 11 years was justifiable. The respondent further relies on the case of *James Maluu Kiilu (suing on his own behalf and on behalf of the Estate of Fredina Museveki Maluu (Deceased) vs Lawrence Gitthinji & Another* [2015] eKLR where the court adopted a multiplier of 12 years for a 54 year old deceased.
10. The respondent submits that the appellant relied on the case of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited* [2015] eKLR however the said decision is not applicable as the deceased in the said case was a civil servant working as a teacher who was to retire at the age of 60 years. In the current case, the deceased was in the informal sector and would have continued to work until the age of 70 years.



11. The respondent relies on the case of *Jacob Ayiga Maruja & Francis Karani vs Simeon Obayo* [2005] eKLR and submits that documentary evidence is not the only proof of earnings. The respondent urges the court to take into consideration that the deceased was a carpenter, a bodaboda operator and he was into the soap making business.
12. The respondent contends that the trial magistrate in applying a multiplicand of Kshs. 30,000/- took into account that the deceased had several sources of income and the number of children (12) which in his own reasoning was of the view that indeed the deceased would require Kshs. 30,000/- pre month or even more to maintain the minors (6) in school and provide for other basic needs. Thus, the respondent contends that the learned trial magistrate did not err in adopting Kshs. 30,000/-.
13. The respondent submits that the learned trial magistrate took into account all the relevant facts, evidence and law in assessing damages. The award made was reasonable in the circumstances and the respondent prays that the court uphold the award of the lower court.

### Issues for determination

14. The main issues for determination are:-
  - a. Whether the trial court erred in adopting a multiplier of 11 years.
  - b. Whether the trial court erred in adopting a multiplicand of Kshs. 30,000/-.

### The Law

15. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this 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,, 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 into account of particular circumstances or probabilities materially to estimate the evidence.”
16. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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.
17. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
  - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and



- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
- Whether the trial court erred in adopting a multiplicand of Kshs. 30,000/-.
18. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-
- “It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellat court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
19. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-
- “The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”
20. The Court of Appeal in *Chunibhai J. Patel & Another vs P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-
- 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 dependents, 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 dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.
21. In the instant case, the appellant faults the lower court for adopting a multiplicand of Kshs. 30,000/-. He argues that the respondents did not prove the deceased’s occupation or his earning and thus the court ought to have been guided by the minimum wage as per the *Regulation of Wages (General) (Amendment) Order* 2018 as Kshs. 15,000/- for a tailor, welder and mason which is comparable to a carpenter. The respondent relies on the case of *Jacob Ayiga Maruja & Another vs Simeon Obayo* (2005) eKLR and argues that the production of documents is not the only way to prove earnings. The respondent further submits that the deceased was a carpenter, a bodaboda operator and ventured into the soap making business and therefore the sum of Kshs. 30,000/- is reasonable.



22. The magistrate in his judgment noted that there was no proof of earnings. However, the court used Kshs. 30,000/- taking into consideration that the deceased had 12 children 6 of who were school going and thus it was likely that the deceased was earning more than Kshs. 30,000/- to take care of his children.
23. In the case of *Jacob Ayiga Maruja & Another vs Simeon Obayo* (2005) eKLR this court dealing with a similar situation in which the plaintiff had no documentary proof of the deceased's earnings. The court 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 Kshs. 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.

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.

24. In the above cited case, the Court of Appeal observed that there was sufficient evidence from the respondent on the earnings of the deceased. In the instant case, the respondent only produced a copy of driving license which showed that the deceased was licensed to ride a motorcycle but did not produce any other proof of earning. The burden of proof is always on the plaintiff to prove her case on a balance of probabilities. In the absence of the said evidence, the court is guided by the *Regulation of Wages Order*. It is trite law that where there is no evidence of income, the court is free to resort to minimum wage as was stipulated in the case of *Petronila Muli vs Richard Muindi Sayi & Catherine Mwendu Mwindu* (2021) eKLR.
25. The deceased died 16/12/2018 and thus the applicable guidelines are as per the *Regulation of Wages (General) (Amendment) Order*, 2018. From the burial permit, the deceased resided at Ng'enda and the chief's letter dated 11/2/2019, Kiamwangi location which falls under the column for "all other areas". The minimum statutory wage for a carpenter is not expressly provided for but the court takes cognizance that a carpenter is a semi-skilled trained person like a tailor. Thus the minimum statutory wage for a tailor was Kshs. 18,881.21/- as per the *Regulation of Wages (General) (Amendment) Order* 2018.
26. Therefore upon re-evaluation of the evidence tendered, it is my considered view that the minimum wage applicable in respect to the deceased was Kshs. 18,881.21/-.

#### **Whether the trial court erred in adopting a multiplier of 16 years.**

27. The appellant contends that the multiplier of 11 years adopted by the trial court is on the higher side as the learned magistrate did not factor in the vicissitudes and vagaries of life which could have shortened the life of the deceased and placed his retirement age at 60 years. As such, he proposes the court adopts a multiplier of 5 years. The respondents argue that the deceased was 54 years at the time of his demise



and he was in good health and that the deceased who was working in the informal sector would have continued working until the age of 70 years.

28. The Magistrate court in adopting the multiplier of 11 years took into consideration that the deceased died at the age of 54 years, he was in good health and he would have properly continued to work up to the age of 65 years taking into account the uncertainties of life.
29. Of relevance are the authorities cited by the appellant and noted that in the cases of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited* [2015] eKLR and *Rebeccab Everline Ariri vs Mary Gwaro & Another* [2018] eKLR. The respective courts adopted a multiplier of 5 and 6 years for the deceased persons who were 54 and 52 years old and was a teacher and plant operator/engineer respectively. I have further perused the case cited by the respondent of *James Maluu Kiilu (Suing on his own behalf of the Estate of Fredina Museveki Maluu (Deceased) vs Lawrence Githinji & Another* [2015] eKLR where the deceased was a farmer and business lady aged 54 years. The court adopted a multiplier of 10 years. In the consideration that the respondent would have worked up to the age of 65 years. In the case before me, it is important to consider the nature of the job of a motor bike operator which is quite hustling and may be limiting to a person at the age of 65 years. However, the deceased would have worked actively in that capacity up to the age of 62 years. I therefore adopt a multiplier of eight years.
30. As such, the award of loss of dependency shall work out as follows:-  
Kshs. 18,881.21/- x 8 x 12 x 2/3 = Kshs. 1,208,397.44/-

### **Conclusion**

31. In view of the foregoing, I find that the appeal is partially successful and is hereby allowed to that extent.
32. The award of Kshs. 2,640,000/- is hereby set aside and substituted with an award of Kshs. 1,208,397.44/- which is subject to the ratio of liability agreed by the parties.
33. The respondent shall be paid half costs of the appeal.
34. It is hereby so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 30TH DAY OF MAY 2024.**

**F. MUCHEMI**

**JUDGE**

