



Karuku v Mwai & another (Suing as Personal Representatives and Administrators of John Muriuki Muceke - Deceased) (Civil Appeal E093 of 2022) [2023] KEHC 24803 (KLR) (3 November 2023) (Judgment)

Neutral citation: [2023] KEHC 24803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E093 OF 2022
LM NJUGUNA, J
NOVEMBER 3, 2023**

BETWEEN

NICHOLAS KIGOTHO KARUKU APPELLANT

AND

CONSOLATA WAMBUGI MWAI 1ST RESPONDENT

FAITH NJERI KARIUKI 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVES AND ADMINISTRATORS OF
JOHN MURIUKI MUCEKE - DECEASED**

*(Appeal from the Judgment of Hon. D.M. Ireri SRM Senior Principal
Magistrate's Court Baricho Civil Case Number 189 of 2021)*

JUDGMENT

1. The appellant, being dissatisfied with the decision of the above-cited decision, has filed memorandum of appeal dated 17th October 2022, seeking orders that the judgment on loss of dependency be set aside and costs of the appeal be awarded to the appellant. The appeal is premised on the grounds that the learned magistrate erred in fact and in law:
 - a. In the manner that he assessed damages under the *Fatal Accidents Act*;
 - b. In making a global award of Kshs. 1,200,000/= as loss of dependency despite the respondents failing to prove dependency as required by Section 4(1) of the *Fatal Accidents Act*;
 - c. In awarding the estate of the deceased damages for loss of dependency which were excessive, erroneous and incongruent with the evidence adduced and relevant laws; and



- d. In failing to consider the appellants submissions, thereby reaching an erroneous assessment of loss of dependency.
2. The respondents herein brought a tortuous claim against the appellant vide plaint dated 17th November 2021, seeking award of general damages under the Fatal Accidents Act and Law Reform Act, special damages of Kshs. 209,550/= costs of the suit and interests on monetary awards. The particulars of negligence were that on or about 28th June 2021 along Kenol Sagana Road at Kwa Muthike area, the deceased was a lawful passenger in motor vehicle registration number KCJ 643U when the appellant's authorized driver drove motor vehicle registration number KCV 145H recklessly and negligently that the motor vehicle lost control and hit motor vehicle registration number KCJ 643U, thereby occasioning the deceased fatal injuries. In his defense, the appellant denied the averments made in the plaint and stated that the suit is fatally defective and should be struck out. That the deceased was to blame for the accident.
3. At the trial, the respondents testified but the appellant did not testify nor did he call any witnesses.
4. pw 1, who is a niece of the deceased and one of the respondents herein stated that she received a phone call from the police informing her that her aunt had been involved in a road accident and had died. That she and pw 2 went to Makuyu Police Station. That she and her daughter were living with the deceased under her care for about 12 years prior to her death. That the deceased died at the age of 52 years and was a businesswoman making about Kshs. 50,000/= per month.
5. pw 2 who is also a respondent herein stated that the deceased was her sister. That she received a phone call from pw 1 informing her that the deceased had been involved in a road accident and had died. She stated that the deceased had no children but was living with pw 1 and pw 1's child as a guardian. That the deceased was a miraa vendor and was making Kshs. 50,000-60,000/= monthly. She added that sometimes, she depended on the deceased for help and is hoping that the court would compensate the estate of the deceased appropriately.
6. The parties also filed their written submissions. The trial court adopted the determination of liability at 100% against the appellant in Baricho Civil Suit No.188 of 2021 where the parties recorded a consent to that effect and where the appellant was the defendant. The trial magistrate noted that the deceased's income as claimed in the plaint was not proved and applied the global sum approach in determining loss of dependency. A global sum of Kshs. 1,200,000/= was awarded to the respondents. The trial magistrate relied on the cases of Moses Maina Waweru v Esther Wanjiru Githae (suing as personal representative of the estate of the late David Githae Kiririo Taiti) (2022) eKLR where the deceased died at 68 years and a global sum of Kshs. 800,000/= was awarded, and Hashi Hauliers & Another v Joel Songok & Another (2021) eKLR where the deceased died at 38 years and a global sum of Kshs. 1,000,000/= was awarded.
7. This appeal was canvassed by way of written submissions as directed by the court.
8. It was the appellant's submission that this court should consider the evidence adduced at the trial and make its own finding as was held in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123. The appellant contested the fact that the respondents did not prove their dependency on the deceased given that the deceased was not survived by any children per the definition of dependent under Section 4 of Fatal Accidents Act. For this argument, he relied on the cases of Kenya Power Limited v James Matata & 2 others (suing as the legal representatives of the Estate of Nyange Masaga (Deceased)) [2016] eKLR and Mohamed Hirbo Shande & another v George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena) [2021] eKLR. It was his argument that a niece and sister of the deceased are excluded from the definition of dependent under Section 4 of the Fatal



Accidents Act. That the alleged income of the deceased was not proved and that there is no legal basis for the award of Kshs. 1,200,000/= for loss of dependency.

9. The respondents submitted that the trial court gave cogent reasons for awarding the global sum of Kshs. 1,200,000/= for loss of dependency and that the same should be upheld. They relied on the cases of Milicent Atieno Ochuonyo v Katola Richard (2015) eKLR and FMM & Another v Joseph Njuguna Kuria & Another (2016) eKLR. They submitted that the multiplier method was also applicable as the deceased died at 52 years and 8 months, being in good health and would have lived a productive life until the age of 70 years. That the testimonies of the respondent were sufficient to establish the multiplicand of Kshs. 50,000/=.
10. They relied on the case of Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita (Suing as the Personal Representative of Mary Nyaboke Keraita Deceased) (2011) eKLR where the court held that it was enough that the spouse of the deceased had testified of the earnings of the deceased and so there was no need to apply the minimum wage. Reliance was also placed on the case of Jacob Ayigo v Simon Obayo (2005) eKLR. In making their argument on the suitable multiplier, they relied upon the cases of Beneta Wanjiku Kimani v Changwon Cheboi & Another (2013) eKLR, and Board of Governors Kangubiri Girls high School & Another v Jane Wanjiku & Another (2014) eKLR. They urged the court not to disturb the finding of the trial court on damages under this head while citing the cases of Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR and Kemfro Africa Ltd T/A Meru Express Services v Lubia & Another No. 2 (1987) KLR 30.
11. From the foregoing, the issues for determination are:
 - a. Whether the respondents are proven dependents of the deceased and whether they can claim; and
 - b. Whether the award for loss of dependency is justified.
12. On the first issue, dependency is a matter of fact and should be proved through evidence. pw 1 and pw 2 both stated that the deceased was living with and taking care of pw 1 prior to her death. They stated that the deceased took pw 1 through school and has been living with her and her child for about 12 years until the time of the accident. This evidence was not controverted at trial as the appellant did not testify, neither did he call any witnesses. When the court is faced with a matter of fact, it is imperative that evidence be adduced by the party alleging the facts and, in this case, on a balance of probabilities. In my view, the respondents discharged the burden of proof as required to the satisfaction of the court. Additionally, the respondents produced a limited grant of letters of administration ad litem for purposes of this suit. This means that the respondents were rightly appointed as administrators of the estate of the deceased.
13. The argument on dependency in the strict meaning of section 4(1) of the Fatal Accidents Act was demystified by the courts as to also mean persons beyond the nuclear family, so long as they can prove that they depended on the deceased immediately prior to their death. In the case of Leonard O. Ekisa & another v Major K. Birgen (2005) eKLR it was held:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”



14. In another case namely *Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another* [2019] eKLR, court stated as follows:

“Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents.....”

In the case of *Ursular Mulandi v Kyalo Mutunga & Others* (2017) eKLR the court awarded damages for loss of dependency to a brother of the deceased.

15. It is my view that the appellants have proved dependency on the deceased prior to her death. Therefore, the trial court rightly held them as dependents, hence awarded damages as appropriate.
16. On the second issue of the award of a global sum of Kshs. 1,200,000/= as damages for loss of dependency, the trial court considered the age of the deceased, age of the referenced authorities and the rate of inflation. The deceased is said to have been netting an income of Kshs. 50,000/= monthly from her business as a miraa vendor. pw 1 stated that she knew that the deceased used to bank the proceeds of the business but she did not have bank statements showing the bank account activity. pw 2 also stated the deceased’s income was between Kshs. 50,000 – 60,000/= but did not produce proof of these earnings. In awarding damages for loss of dependency, the trial court had the option of applying the multiplier-multiplicand method or to take the global sum approach.
17. The trial court awarded the global sum on the basis that the earnings of the deceased could not be proved. The appellant submitted that the multiplier-multiplicand method ought to have been applied using the minimum wage as the suitable multiplicand. In the instant case, there is surely no proof of earnings of the deceased and so the court has no choice but to abandon the use of the multiplier-multiplicand method. This means that the most appropriate method to use is to apply a global sum. This was the position in the case of *Risbi Hauliears Limited v Josiah Boundi Onyancha* (2015) eKLR where the court held;

“This was a proper case for the court to have awarded a global sum in view of the age of the deceased and the scanty evidence provided by the Respondent. In this regard I adopt the reasoning by Ringera J., in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* quoted by Koome J., in *Albert Odawa v Gichimu Gichenji* NKU HCCA No. 15 of 2003 (2007) eKLR where he expressed the following view;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”

18. Further in the case of *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* (1999) eKLR the court held thus;

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that



will be mere conjuncture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

19. In the cases of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the Personal representative of the estate of Mercy Nzula Maina (Deceased))* [2016] eKLR, *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* [1999] eKLR and *Eston Mwirigi Ndege v Patrick Gitonga* [2018] eKLR the courts commonly held that where the earnings of a deceased person were unknown or could not be ascertained, then a global award/sum ought to be adopted.
20. Regarding the global sum of Kshs. 1,200,000/= the court gave its reasons for arriving at the sum. The global sum is not a figure given arbitrarily but rather, it is an award based on the circumstances of the case and similar decisions by courts in the past. In the case of *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* (2020) eKLR where the court was dealing with a similar issue, it stated:

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”
21. The circumstances of the case before me are ripe for application of a global sum approach. Comparatively, in the case of *John Wamae & 2 Others v Jane Kituku Nziva & Another* (2017) eKLR, the court awarded a global sum of Kshs. 400,000/- to a deceased farmer and guard aged 61 years. In the case of *Moses Wetangula & another v Eunice Titika Rengetiang* (2018) eKLR the court awarded a global sum of Kshs. 500,000/= to a 42-year-old retired KDF officer. As observed by the trial court, in the case of *Hashi Hauliers & another v Joel Songok & another* (2021) eKLR the court awarded a global sum of Kshs. 1,000,000/= being damages for loss of dependency.
22. In awarding damages, economic inflation is a factor that cannot be ignored. In the case of *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR, where it was held that the court in making an award for general damages must always consider the prevailing inflation.
23. In the upshot, I do not think that the award of a global sum of Kshs. 1,200,000/= is extraneous and I will therefore not disturb the award of the trial court. I am guided by the sentiments of the court in the case of in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR where it was held thus:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.



This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘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.’”

24. Having considered the arguments made by counsel and the relevant caselaw, I find that the appeal is devoid of merit and is hereby dismissed with no order as to costs.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 3RD DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

