



Njiru v Manegene ((Appealing As Legal Representative Of The Estate Of Nicholas Manegene (Deceased)) (Civil Appeal 88 of 2019) [2023] KEHC 24819 (KLR) (3 November 2023) (Judgment)

Neutral citation: [2023] KEHC 24819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 88 OF 2019
LM NJUGUNA, J
NOVEMBER 3, 2023**

BETWEEN

JEREMIAH GACHOKI NJIRU APPELLANT

AND

**WANJIKU MANEGENE RESPONDENT
(APPEALING AS LEGAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS
MANEGENE (DECEASED))**

(Appeal arising from the decision of Hon. P.M. Mugure PM in Principal Magistrate's Court at Wang'uru Civil Case No. 31 of 2019 delivered on 11th November 2019)

JUDGMENT

1. The appeal herein has been filed vide memorandum of appeal dated 27th November 2019 wherein the appellant being dissatisfied with the above-mentioned decision, now seeks orders that:
 - a. The entire decision be set aside;
 - b. The court assesses afresh the damages payable to the deceased's estate;
 - c. Costs of the appeal be awarded to the appellant; and
 - d. Such other orders as this court shall deem fit.
2. This appeal is premised on the grounds that the trial magistrate erred in law and fact:
 - a. In dopting a multiplicand of Kshs. 30,000/= in arriving at her award on loss of dependency without any basis;
 - b. To find and hold that the multiplicand of Kshs. 30,000/= was not proved as is legally required;



- c. By applying 10 years as the multiplier which was unreasonable for a deceased person of 65 years;
 - d. By considering irrelevant factors and leaving out relevant ones in arriving at her award on loss of dependency;
 - e. By awarding Kshs. 50,000/= for loss of consortium and servitude;
 - f. In awarding kshs. 120,000/= for loss of expectation of life which figure was awarded without considering current authorities and the age of the deceased;
 - g. By disregarding the appellant's submissions and wholly relying on the respondent's submissions in arriving at her award as evidenced by the judgment appealed against; and
 - h. Arriving at the judgment in a cursory and perfunctory manner without properly analyzing the evidence presented in the suit altogether especially the issue of loss of dependency and the award on the same which is unjustified, excessive and oppressive to the appellant.
3. The plaintiff filed the plaint dated 09th April 2019 claiming special damages of Kshs. 143,900/=, general damages, costs and interests. The particulars of the tortuous claim are that on the 21st September 2018, the deceased was lawfully cycling his bicycle along the Research-Kandongu murrum road when the defendant or his lawful driver, drove motor vehicle registration number KCM 909F Toyota Axio so carelessly and recklessly that he knocked down the deceased, thereby inflicting fatal injuries on him. The plaintiff in the case is the widow and legal representative of the estate of the deceased. She stated that the deceased was working as a clinician at BCJ Medical Center, earning a salary of Kshs. 30,000/= per month and had 2 sons and 2 daughters. That the deceased died at the age of 65 years.
 4. The defendant/appellant filed his defence wherein he refuted the claims made in the plaint and stated that the accident was caused by negligence on the part of the deceased, wholly or substantially. He averred that inter alia, the deceased emerged suddenly from a feeder road without regard to other motorists or road users, cycling suddenly and without warning on the path of the motor vehicle thereby causing the accident and cycling in a zig-zag manner.
 5. In the trial, PW1 was the plaintiff/respondent who adopted her witness statement as evidence in chief and produced exhibits in support of her claim for damages. She stated that she has lost the breadwinner of the family who leaves behind four children all adults. That one of the children is employed but the others are not. PW2 was Patrick Munene who stated that he was cycling in the same direction and on the same road as the deceased on the fateful day. That the defendant/appellant was driving behind PW2 and there was an oncoming vehicle.
 6. He stated that the defendant/appellant overtook PW2 at very high speed and while attempting to return to his lane and make way for the oncoming vehicle, he knocked down the deceased, plunging the car into some rice fields. That he, in the company of other cyclists rushed to take the deceased to Whiterose hospital and then called the son of the deceased to inform him. That they received news about 2 hours later that the deceased had succumbed to the injuries. It was his evidence that the driver of the motor vehicle did not hoot at any point.
 7. The defendant/appellant did not testify, neither did he call any witnesses. The trial court delivered its judgment and found the appellant 100% liable for the accident. The plaintiff/respondent was awarded general damages as follows:
 - i. pain and suffering Ksh. 50,000/=;
 - ii. loss of expectation of life Kshs. 100,000/=;



- iii. loss of dependency Kshs. 2,400,000/= using a multiplier of 10 years, multiplicand of Kshs. 30,000/= and 2/3 ratio;
 - iv. loss of consortium and servitude Kshs. 50,000/=
 - v. special damages Kshs. 143,900/=
8. In this appeal, the court directed that the parties file their written submissions. Both parties complied.
 9. The appellant, in his written submissions, proposed that the award for loss of expectation of life be reduced to Ksh. 100,000/= based on the decision in the cases of *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased))* (2021) eKLR and *Philip Musyoka Mutua v Veronica Mbula Mutiso* (2013) eKLR. That according to the case of *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & Another* (2015) eKLR, the damages for loss of consortium are wrongly awarded and should only be sought where the claimant has lost amenities as a survivor of the accident.
 10. That on the award for loss of dependency, the trial court did not pay attention to the age of the deceased before applying a multiplier of 10 years. He relied on the cases of *Joseph Mwangi Kanyeki v Alex Muriithi Mucoki & Another* (2019) eKLR and *James Njiiri & 2 Others v FPU & Another* (2019) eKLR where the courts noted that life dependency in Kenya stands at 64-69 years. That the trial court should have considered that the deceased was survived by adult children. He proposed a multiplier of 5 years and relied on the case of *Hardev Kaur Dhanoa v Multiple Hauliers (EA) Ltd* (2013) eKLR where the court used a multiplier of 6 years where the deceased was 62 years old.
 11. That since the deceased was working past the retirement age and his income was not proved, this court should consider applying the global sum approach and he proposed a sum of Kshs. 200,000/= . For this argument, he relied on the cases of *Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased)* (2020) eKLR and *Susan Njoki (suing as administrator of the estate of Francis Mwaniki Theuri) v Joseph Kiiru & Another* (2017) eKLR. He also suggested to the court that if the earnings of the deceased remain unascertainable and the court insist on applying the multiplier method, then the minimum wage should be used as the multiplicand. Further, that a dependency ratio of 1/3 should be used since the deceased was survived by adult children.
 12. The respondent submitted that the deceased did not die on the spot but rather, he died while undergoing treatment at Whiterose hospital, therefore the award of Ksh. 50,000/= for pain and suffering is fair and reasonable. That the trial court referred to a similar case 17 years prior where the court had awarded Kshs. 25,000/=. She submitted that under loss of expectation of life, the prevailing range is between Ksh. 10,000/= and Ksh. 150,000/= and therefore an award of Kshs. 120,000/= is reasonable in the circumstances. She argued that loss of consortium can be safely awarded in a fatality claim and not only survivors with loss amenities as was discussed in the case of *Abdalla Issa & Another v Leonida Alus & Another* (2019) eKLR. That on loss of dependency, the trial court rightly applied the multiplier of 10 years as the deceased was healthy and would have worked as a clinician until the age of 75 years. That he surely was earning a salary of Ksh. 30,000/=. That a dependency ratio of 1/3 is mostly used where the deceased is a bachelor, not being survived by nuclear family. That the global sum should not apply in this case because the requirements of the multiplier method have been met.
 13. From all the foregoing, the issues for determination are:
 - a. Whether damages for loss of consortium can be awarded in this claim;
 - b. Whether the award of general damages is fair and just.



14. This being a first appeal, I am cautious of the role of this court as stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where it was held thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

15. On the first issue of damages for loss of consortium, the appellant relied on the 2015 case of *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & Another* (2015) eKLR (*supra*) where the court held these damages are only awarded where the accident survivor has lost certain amenities. In the latter case of *Abdalla Issa & Another v Leonida Alusa & Another* (2019) eKLR (*supra*) the court relied on the case of *Ruth Chepngeno Mutai v Patrick Wajero Oloo & Anor* (2016) eKLR where it was held:

“As a result of the death of the Deceased, the Plaintiff lost a husband. She told this court that she had no intention to remarry. Taking into account the cited authorities and the circumstances of the Plaintiff in particular, I award her Kshs. 100,000/= for loss of consortium.”

16. The court further relied on the case of *Paul Kioko v Samuel G. Karinga & 2 Others* [2012] eKLR where the court awarded Kshs. 100,000/= to a widower and the case of *Rose Adisa Odari v Wilberforce Egesa Magoba* (2009) eKLR where the court awarded Ksh. 50,000/= to the widow of the deceased who was 35 years old at the time of death. In the case of *Micah Nyolei & Stanley Kiplagat Milgo v Bonventure Anthony Okumu & Another* (Eldoret HCCC No. 183 of 2011) the court awarded Ksh. 200,000/= under this head.

17. According to the Black’s Law Dictionary 9th Edition, Consortium means:

“The benefits that one person, especially a spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support.....”

18. In my view, the position taken by the court in the case of *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & Another* (2015) eKLR (*supra*) as submitted by the appellant, suffices. Damages for loss of consortium can only be awarded to survivors of a road traffic accident. I do not agree with the trial magistrate on the award of damages under this head as the case involves a fatality.

19. On the issue of damages for loss of expectation of life, the trial court awarded Ksh. 120,000/=. I do appreciate that this award must be modest and based on the reasoning that the deceased would have had a fruitful life into the unforeseeable future, which life had been cut short by the accident. This was established in the case of *Benham v Gambling*, (1941) AC 157 where it was held:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period



of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

With this in mind, I find an award of Ksh. 100,000/= to be modest given the circumstances.

20. On the award of damages for pain and suffering, the trial court awarded Ksh. 50,000/=. PW2 testified that he received the sad news of the death of the deceased two hours after the accident occurred. This means that the deceased suffered a while before he died, that is, he did not die on the spot. The usual range for this award is Kshs. 10,000/= to Kshs. 100,000/= where the maximum is awarded where the pain and suffering is prolonged. In my view, an award of Ksh. 30,000/= would suffice given the circumstances of this case.
21. On the general damages for loss of dependency, the court applied the multiplier method using a multiplicand of Ksh. 30,000/=. The figure was derived from the claim in the plaint and in PW1’s statement who stated that the deceased was working as a clinician for the claimed salary per month. However, no documentary evidence was adduced in support of this figure. The alleged profession of the deceased is a structured one and if he was employed there should have been proof from the employer. The deceased is alleged to have been working as a clinician even after retirement and I do not think that this is unusual in the medical profession. Regardless, this court would be comfortable in applying the multiplier method if there was proof of earnings. Therefore, in my view, the facts of the case do not support application of the multiplier method and so the same shall not apply herein. On this, I am guided by the case of *Albert Odawa v Gichimu Gichenji* (2007) eKLR where it was held;

“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 dependancy, and the expected length of the dependancy 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.” Emphasis mine

22. In the case of *Moses Wetangula & another v Eunice Titika Rengetiang* (2018) eKLR, the court awarded a global sum of Kshs. 500,000/= where the deceased was a 42-year-old retired Kenya Defence Forces officer. In another case of *Risbi Hauliears Limited v Josiah Boundi Onyancha* (2015) eKLR the court awarded a global sum of Kshs. 500,000/= where the deceased had reached retirement age. I am alive to the rate of inflation and this court will not look the other way in considering a global sum that encompasses inflation since the time of the accident until the time of this award. In the case of *Ugenya Bus Services v Gachoki* (1982) eKLR the court of appeal held thus:

“We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives.”

23. Therefore, I find that a global sum of Kshs. 800,000/= will suffice in the circumstances, keeping in mind the rate of inflation.
24. Consequently, having considered the arguments by counsel and relevant case laws, I find that the appeal herein succeeds save for the finding of the trial court on the award of damages for loss of consortium. The following orders shall issue:
- a. Liability Ratio 100%
- General damages



- b. Pain and suffering Kshs. 30,000/=
- c. Loss for expectation of life Kshs. 100,000/=
- d. Loss of dependency Kshs. 800,000/=
- e. Total damages payable to the appellants: Kshs. 930,000/=
- f. General damages to attract interest from the date of the judgment of the trial court until payment in full;
- g. Each party to bear its own costs of the appeal.

25. It is so ordered.

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

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

