



Warui v Thimbui (Suing as Legal Representatives of the Estate of Rachel Wambui Ngari - Deceased) (Civil Appeal E005 of 2022) [2024] KEHC 15349 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E005 OF 2022
AK NDUNG'U, J
NOVEMBER 20, 2024**

BETWEEN

SUSAN WANGECHI WARUI APPELLANT

AND

BERNARD NGARI THIMBUI (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF RACHEL WAMBUI NGARI - DECEASED) RESPONDENT

*(Appeal from original Decree passed in Nanyuki
CM Civil Case No 81 of 2020 – A.R Kithinji, CM)*

JUDGMENT

1. The appeal herein is on the quantum of damages awarded in the judgment of the lower court. The parties herein consented on liability in the ratio of 85:15 in favour of the Respondent. The trial court awarded the Respondent damages in the following terms;

Pain and suffering- Kshs.50,000/-

Loss of expectation of life Kshs.100,000/-

Loss of dependency- Kshs.4,685,340/-

Special damages- Kshs.88,850/-

Total- Kshs.4,774,190/-

Total less 15% contribution- KShs.4,058,061/-

2. Being dissatisfied with the trial court assessment of damages, the Appellant filed the memorandum of appeal dated 25/04/2022 and raised the following grounds;



- i. That the learned magistrate erred by adopting a multiplicand of Kshs.25,190/- without any sufficient basis thereby arrived at an award for loss of dependency that was inordinately excessive thus a wholly erroneous estimate of the damages payable.
 - ii. The learned magistrate erred by adopting a dependency ratio of $\frac{1}{2}$ which was not proved thereby arriving at award that was inordinately excessive.
 - iii. The learned magistrate erred by failing to subject the awards for pain and suffering and loss of expectation of life to the agreed apportionment of liability without giving reasons of departing from the consent.
 - iv. That the judgment of the learned magistrate is against the law and weight of evidence on record.
3. The Appellant submitted that the Respondent pleaded that the deceased had two dependants who were her parents. PW1 testified that he was a farmer which was prove enough that he did not wholly depend on the deceased. That the respondent produced an offer letter Pexhibit 8 and an appointment letter Pexhibit 9 from county government of Nyandarua to show that the deceased was employed as a registered nurse iii earning Kshs.50,000/-. He submitted that the two letters only indicated that the deceased was offered an appointment which was subject to her reporting to work and the Respondent failed to show that she ever reported to work. Further, the letters did not mention her salary. The payslip was not produced and therefore the deceased was not gainfully employed at the time of her death.
4. He further submitted that the Respondent produced copies of pay slips from Benedict XVI Catholic Hospital for 30/04/2020 and 31/05/2020 which were not produced as evidence since they were not part of the documents in the list of documents hence the trial court erred relying on the documents that were not placed before it as evidence. Therefore, since there was no prove that she reported to county government of Nyandarua, the deceased was unemployed and her earnings was unascertainable.
5. He urged the court to abandon the multiplier approach and adopt a global sum of Kshs.1,000,000/- as sufficient award for loss of dependency as the deceased died aged 24 years. Reliance was placed on the case of Teresiah Wanjiru Githinji vs Lucy Kanana M'rukaria& another (suing as legal representative of Ernest Gutuura Nabea (deceased) [2021] eKLR and Elvina Nyevu Garama & another v Samson Kahindi Kitsao & another [2020] eKLR where in both cases a global award was awarded. He prayed that the award on loss of dependency be set aside and allow the appeal as prayed.
6. The Respondent on the other hand submitted that the trial court considered the issue of multiplicand at length and was properly guided by decided cases. The trial court also found that there was proof of earning based on payslips produced as evidence from Benedict XVI catholic Hospital where she earned a sum of Kshs.25,190/-. That the deceased had transited from the said hospital to county government of Nyandarua but she died before receiving her first salary. Therefore, the deceased was employed and earning and this is supported by documentary evidence. That this was not a proper case to apply the global figure approach since it was possible to deduce the deceased's earnings through the material placed before the court. Further, the deceased was 24 years old and had just completed her diploma course in Kenya registered Community Health Nursing (Basic) at PCEA Tumutumu Hospital Training College.
7. I have considered the rival submissions together with the authorities relied thereon. The only issue for determination is whether good ground has been laid for this court's interference with the damages awarded by the trial court more specifically on damages for loss of dependency.



8. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of *Butt v. Khan* *Civil Appeal No. 40 of 1997* thus: -

“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 arrive at a figure which was either inordinately high or low.”

9. The Appellant’s concern is only on the assessment of damages in respect of loss of dependency. It appears that he abandoned the other grounds he had raised in the memorandum of appeal. His concern is that the trial court adopted a sum of Kshs.25,190/- whereas the deceased’s earnings were unascertainable. He further submitted that the pay slips produced were not listed in the list of documents filed in court. He further stated that since there was no proof that she had reported to Nyandarua County Government, she was therefore unemployed at the time of her death. He urged the court to adopt the global sum approach.

10. The Respondent on the other hand submitted that the trial court found that there was proof of earning based on the pay slips that were adduced which sufficed as a basis on which the court could arrive at the multiplicand.

11. It is therefore the law that this court will only interfere with the trial’s court award of damages if the Appellants demonstrate that the same was inordinately high or inordinately low or that the trial court proceeded on wrong principles.

12. The trial court while awarding damages for loss of dependency only stated that;

‘I proceed to adopt Kshs.25,190/- as the amount the deceased was earning on the monthly basis as there is proof of the same.’

13. I have perused the record and noted that contrary to the Appellant’s contention that the pay slips were not listed as part of the Respondent’s list of documents, they were actually listed as number 11 in the list of documents. The Respondent testified and produced the Plaintiff’s documents as Pexhibit 1-15. There was no objection to the production of the said documents. It is thus wholly erroneous to maintain that the deceased’s earnings were not known.

14. Thus the authorities in *Gilbert Kimatare Nairi & Another vs Civiscope Ltd* [2021]eKLR and in *Frankline Kimathi Maariu & Another vs Philip Akungu Mitu Mborothi* [2020]eKLR relied on by the Appellant are not applicable in this appeal.

15. As to what was the deceased salary at the time of death, the last pay slip attached is dated 31/05/2020 which reflects an amount of Kshs.24, 890/- as the net pay for the said month. The Respondent testified that at the time of the accident, the deceased had already reported at Nyandarua County government but was yet to receive her first salary. She died on 02/06/2020 so going with the said pay slip, her last salary was on 31/05/2020. It therefore shows that the deceased was at least working immediately before her death.

16. In *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, the Court of Appeal stated that:

“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)

17. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. The trial court adopted Kshs.25,190/-. Whereas there is prove that she earned the said amount in the month of March and April, her last net salary was Kshs.24,890/- in the month of May and the trial court should have adopted this.

18. There is evidence of earnings from employment by the deceased. This was a proper case for adoption of the multiplicand approach and the trial court cannot be faulted on its finding on this aspect. However, the calculations ought to have based on the net earnings of 24,890 thus;

$$24,890 \times 31 \times 12 \times 1/2 = 4,629,540$$

19. As other damages remain undisturbed, the appeal herein succeeds only to the extent that damages under the head of Loss of Dependency reduce to 4,629,540.

20. Final award is in the following calculations

- a. Pain and suffering 50,000
 - b. Loss of expectation of life 100,000
 - c. Loss of Dependency 4,629,540.
 - d. Special damages 88,850
 - e. Total 4,868390
- Less 15% 730258.50
- Net 4,138,131.50

21. Interest on the damages at court rates shall be from the date of judgment by the trial court. The Respondent shall have half the costs of the appeal.

DATED SIGNED AND DELIVERED THIS 20TH DAY OF NOVEMBER 2024

A.K. NDUNG’U

JUDGE

