



Kwamboka (Suing as a dependant and personal representative of the Estate of Albert Nyabongoye Onchiri) v Okiro & another (Civil Appeal E017 of 2023) [2024] KEHC 8442 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E017 OF 2023
WA OKWANY, J
JUNE 20, 2024**

BETWEEN

JUDITH KWAMBOKA (SUING AS A DEPENDANT AND PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERT NYABONGOYE ONCHIRI) APPELLANT

AND

**BENARD BOSIRE OKIRO 1ST RESPONDENT
CHARLES ROTICH 2ND RESPONDENT**

(Being an Appeal from the Judgment in the Chief Magistrate's Court at Nyamira in CMCC E146 of 2022 delivered by Hon. C.W. Waswa, Senior Resident Magistrate on 28th April 2023)

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where she sued the Respondent seeking damages under the Law Reform Act and the Fatal Accidents Act. The Appellant claimed that the deceased was, on or about the 28th February 2022, a lawful fare-paying passenger aboard motor vehicle registration No. KCZ 828V travelling along Kisii-Kericho Road when an accident occurred in which he sustained fatal injuries. The Appellant attributed the accident to the negligence of the Respondent's driver, servant and/or agent in driving the Appellants said motor thus allowing it to lose control and ram onto motor vehicle Reg. No. KAR 424B/ZA 0473 Mitsubishi Fuso trailer which had parked or stalled in the middle of the road.
2. The Appellant presented the evidence of No. 83327 PC Justus Koech who testified that the deceased died in an accident involving Motor Vehicle KCZ 828V and KAR 424B/ZA 0473 Mitsubishi trailer. He produced the Police Abstract (P.Exh 1).



3. The Appellant (PW2) adopted her witness statement dated 19th August 2022 as her evidence in chief. She also produced the following documents: -
 - i. Death Certificate – P.Exh 2
 - ii. Grant of Letters of Administration ad Litem – P.Exh 3
 - iii. Chief’s Letter – P.Exh 4
 - iv. Identity Card – P.Exh 5
 - v. Demand Notice – P.Exh 6
 - vi. Stationary Notice – P.Exh 7
 - vii. Receipts for Kshs. 150,550/= - P.Exh 8
 - viii. Receipts for Kshs. 103,000/= - P.Exh 9
4. DW1, No. 65548 Corporal Abere Micha, confirmed that the deceased died in the accident and produced the police OB No. 5 (D.Exh1)
5. In a judgment rendered on 28th April 2023, the trial court entered judgment in favour of the Appellant as follows: -
 - Liability at 100% against the driver of KCZ 828V
 - Pain and Suffering – Kshs. 50,000/=
 - Loss of Expectation of Life – Kshs. 100,000/=
 - Loss of Dependency – Kshs. 434,457/=
 - Special Damages – Kshs. 103,400/=
 - Total – Kshs. 687,857/=
6. Aggrieved by the trial court’s assessment of quantum of damages, the Appellant filed the present appeal through a Memorandum of Appeal in which she listed the following grounds of appeal: -
 1. The Learned Trial Magistrate erred in law and in fact by failing to consider and appreciate the applicable principle in assessment of damages and thereby arrived at an inordinately low award.
 2. The Learned Trial Magistrate erred in law and in fact by awarding general damages of Kshs. 434,457/= for loss of dependency, an award which was inordinately low as to amount to an erroneous estimate of loss or damages suffered by the Plaintiff.
 3. The Learned Trial Magistrate erred in law and in fact by adopting a minimum wage of Kshs. 7,240.95/= as the multiplicand, an amount which was erroneous and did not reflect the actual minimum wage applicable at the time of the deceased’s death (2022).
 4. The Learned Trial Magistrate erred in law and in fact by adopting a dependency ratio of 1/3 in total disregard of the fact that the deceased was married and had dependants thereby leading to an erroneous estimate of damages.
 5. The Learned Trial Magistrate erred in law and in fact by adopting a multiplier of 15 years and disregarding the fact that the deceased was aged 35 years and not in formal employment to retire at 60 years.



6. The Learned Trial Magistrate erred in law and in fact by failing to address itself on the issue of loss of consortium despite the same having been specifically pleaded and submitted for.
 7. The Learned Trial Magistrate erred in law and in fact by overly relying on the Respondent's submission which were not relevant and disregarding the Plaintiff's submissions and authorities in support thereof, thereby arriving at an erroneous award.
 8. The Learned Trial Magistrate erred in law and in fact in failing to consider conventional awards in cases of similar nature.
7. The Appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

- The Appellant submitted that the trial court's adoption of 1/3 ratio as the dependency ratio was erroneous because it implied that the deceased expended 2/3 of his income on himself yet the Appellant testified that he was his family's sole breadwinner. For this argument the Appellant cited the decision in *Chania Shuttle v Mary Mumbi* (2017) eKLR where the court held that a dependency ratio of 2/3 could still apply where there is only one dependant as long as evidence is presented to show that the dependant relied on the deceased.
9. It was submitted that since the deceased was only 35 years old at the time of his death, was in good health and in informal employment, a multiplier of 20-30 years should have been adopted. Reference was made to the cases of *Joseph Kabiga and Paul Mathaiya Kabiga (Suing as the Administrators of the Estate of the Late Lydia Wanjiku Kabiga and Elizabeth Murugi Kabiga –both deceased- v. World Vision Kenya and 2 Others* (2014) eKLR and *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as the Persina Representatives of the Estate of Stephen Sinange alias Reuben Sianange –deceased- (2022) eKLR* where the deceased persons were aged 35 years and a multiplier of 20 years was applied.
 10. The Appellant urged the Court to apply the minimum wage of a bakery worker (Kshs. 14,315.30/=) under the *Regulation of Wages (General) (Amendment) Order*, 2018 because the deceased was engaged in the business of supplying bread.
 11. It was submitted that the trial court should have addressed the issue of loss of consortium because the Appellant, the deceased's widow herein, had not remarried. The Appellant cited the decision in *Salvatore de Luca v Abdullahi Hemed Kablil* (1994) eKLR, for the argument that damages for loss of consortium is payable in certain instances.
 12. The Respondents did not participate in this Appeal.
 13. The duty of a first appellate court was explained in the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* Civil Appeal No. 161 of 1999, where it was held thus: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”



Analysis and Determination

14. I have considered the record of appeal and the Appellant's submissions. The main issue for determination is whether the trial court erred in its findings on quantum under the *Fatal Accidents Act* and loss of consortium.

Damages for Loss of Dependency

15. Dependency is a matter of fact which must be proved by evidence. This is the position that was taken in *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* [2017] eKLR where it was held as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

16. It is trite that an appellate court will not ordinarily interfere with the trial court's assessment of damages unless it is established that the said court applied the wrong principles such as taking into account an irrelevant factor or omitting some relevant factors or misapprehended the evidence and made an award so inordinately high or low as to represent an entirely erroneous estimate. (see *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2KLR 55.)
17. The Appellant argued that the assessment of damages under the *Fatal Accidents Act* was inordinately low. She proposed a dependency ratio of 2/3, a multiplier of 20 years and a multiplicand of Kshs. 14,315.30/= be applied to calculate the said award.
18. I have considered the Appellant's statement wherein she stated, at paragraph 5 thereof, that the deceased's family lost his love. On cross-examination, however, she stated that she did not have any children and that she depended on the deceased as the sole breadwinner.
19. Having noted that the deceased and the Appellant did not have any children, I find that the trial court should have considered a higher dependency ratio in light the circumstances. I therefore revise the same to ½. In *Rodgers Kinoti v Linus Bundi Murithi & another* [2022] eKLR the court discussed the applicable dependency ratios in different instances as follows: -

“19. It is clear that opinion is divided among High Court judges on whether dependency ratio where the deceased is unmarried ought to be ½ or 1/3. I have reviewed other cases where dependency ratio for unmarried persons were considered. In *Joseph Ndirangu Thuo & Another v Kamau Ngugi (Suing as legal representative and administrator of the estate of Peter Waweru)* (2019)eKLR Mwongo J. used a dependency ratio of ½ for an unmarried lady and cited the cases of *Mary Kerubo Mabuka v Newton Mucbeke Mburu & 3 others* (2006) eKLR where the court used a dependency ratio of ½ on a 26 year old unmarried lady; *Alice O. Alukwe v Akamba Public Road Services Ltd* (2013) eKLR where the court used a dependency ratio of 1/2 on an unmarried lady aged 24 years and *Lucy Wambui Kihoro (Suing as Personal Representative of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong* [2015] eKLR where the Court similarly used a dependency ratio of ½ on an unmarried son aged 30 years.



20. I have also considered the multiplier approach adopted by the trial court in assessing damages under loss of dependency. In determining multiplicand, the trial magistrate categorized the deceased as a general labourer and applied the sum of Kshs. 7,240.95/= in line with the *Regulation of Wages (General) (Amendment) Order*, 2018.
21. The Appellant submitted that the deceased was a businessman engaged in the distribution of bread and that he earned Kshs. 60,000/= per month. I however note that the Appellant did not produce any documentary of the deceased's alleged monthly earnings. She urged the court to apply the minimum wage of a bakery worker being Kshs. 14,315.30/=.
22. I note that the evidence on record only indicates that the deceased was a businessman who distributed bread. There was no evidence to show that he was employed by any bakery. I therefore find that in the circumstances of this case, the deceased cannot be categorized as a bakery worker.
23. It is my finding that in the absence of tangible proof of earnings, the trial court should have adopted a global sum approach in assessing damages for loss of dependency instead of the multiplier method. I am guided by the decision in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the Estate of Mercy Nzula Maina (deceased))* [2016] eKLR, where the Court held as follows: -

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

24. In assessing damages under for loss of dependency using the global sum approach, I will consider the awards made in the following similar past awards: -
 - a. In *Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another* [2020] eKLR the court reduced an award of Kshs. 2,000,000.00/= for Loss of Dependency (a global sum) to Kshs 1,000,000/= for the Estate of a 23-year-old deceased.
 - b. In *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased))* [2021] eKLR, the court on appeal upheld an award of Kshs. 2,000,000/= for loss of dependency where the deceased was 40 years old and had left behind a wife and two young children.
25. Having regard to the decisions in the above cited cases, I find that a global sum of Kshs. 1,000,000/= will be adequate compensation for the Appellant under loss of dependency since the deceased died at a young age, had a wife and was not survived by any children.
26. Turning to the claim for loss of consortium, I note that courts have held varied opinions on the subject have struggled to find a clear stand on the same. For example, in *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another* [2015] eKLR, the court was of the view that: -

“With respect to the award of KShs. 150,000/- for loss of consortium, I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law. There is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. The *Law Reform Act* and the *Fatal Accidents Act* which are the two statutes which govern the award of damages in fatal accident claims recognize



only three heads of general damages and loss of consortium is not one of them. These are damages for pain and suffering, damages for loss of expectation of life and damages for loss of dependency. In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own. In light of the foregoing, the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law by the trial magistrate. The award was obviously made contrary to the law and cannot be allowed to stand. It is consequently set aside..."

27. In HCCC No. 85 of 2000 *Ruth Chepngeno Mutai v Patrick Wajero Oloo & Another*, however, the court was of the view that: -

"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."

28. Similarly, in *Paul Kioko v Samuel G. Karinga & 2 Others* [2012] eKLR, Kshs. 100,000/= was awarded to a widower for loss of consortium and servitium; while in *Rose Adisa Odari v Wilberforce Egesa Magoba* [2009] eKLR, an award of Kshs. 50,000/= was made to the widow for loss of consortium in a case where the deceased was aged 35 years at the time of his death.

29. In the case of *P B S & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others* [2016] eKLR, the Plaintiff was awarded Kshs. 800,000/= for loss of consortium by Hon. Aburili, J.

30. From the above cited cases, it is clear that there is valid basis for the claim and award of damages for loss of consortium in fatal accident matters. Indeed, in the Court of Appeal case of *Salvadore De Luca v Abdullabi Hemedi Khalil & Another* (*supra*) it was held that:-

"So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife's companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full."

31. Taking a cue from the above decisions, I find that the trial court should have exercised its discretion in making an award for loss of consortium. I find that an award of Kshs. 70,000 will be adequate compensation under this heading.

32. In the end, I find that the instant appeal is merited and I therefore allow it and set aside the judgement of the trial court and in its place enter judgment for the Appellant as follows: -

Liability remains at 100% against the Respondents

Damages for Pain and Suffering – Kshs. 50,000/=



Loss of Expectation of Life – Kshs. 100,000/=

Loss of Dependency – Kshs. 1,000,000/=

Loss of Consortium – Kshs. 70,000/=

Special Damages – Kshs. 103,400/=

Total – Kshs. 1,323,400/=

33. I also award the Appellant the costs of the appeal and interest on both the total award and costs at court rates till payment in full.

34. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20TH JUNE 2024.

W. A. OKWANY

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

