Kieni & another v Njuku & another (Suing as the Legal Representative of the Estate of Patrick Wachira Njuku - Deceased) (Civil Appeal E031 of 2020) [2025] KEHC 6705 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6705 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E031 OF 2020

DKN MAGARE, J

MARCH 20, 2025

BETWEEN

KIMOTHO KIENI ..... 1ST APPELLANT

GENDIKE ENTERPRISE KENYA LIMITED ..... 2ND APPELLANT

AND

MARY NJERI NJUKU AND HANNAH WANJIRU IRUNGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK WACHIRA NJUKU - DECEASED) ..... RESPONDENT

(An Appeal from the Judgment and decree of Hon. Wendy Kagendo Chief Magistrate given on 17.07.2020 in Nyeri CMCC No. 168 OF 2016)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Wendy Kagendo Chief Magistrate given on 17.07.2020 in Nyeri CMCC No. 168 OF 2016. The court awarded the respondent judgment for the respondent The appellant filed five grounds of appeal on quantum. the grounds are repetitive.

2. The main question is loss of dependency. the deceased was 35 years old at the time of his death on 21.05.2013. he had a wife and child. the deceased was a minibus driver. the deceased reportedly sent Ksh 15,000/= per month. He had pleaded Ksh 40,000/= as income. No other evidence was tendered.

Analysis

3. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand.

4. It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

5. This court is not bound necessarily to accept the findings of fact by the court below. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated 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..."

6. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

7. Cases are won on the basis of evidence and pleadings, as set out in sections 107-109 of the *Evidence Act*.

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

8. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

9. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

10. The court awarded Ksh 200,000/= for pain and suffering for a deceased who stayed for 12 days in Intensive Care Unit. On lose of dependency, the court adopted 12,000/= as multiplicand being the minimum wage. the court used a dependency ration of 2:3 and a multiplier of 17 years. this resulted in Ksh. 1,632,000/=. the court stated and rightly so, that dependency should be proved. they rely on Boru –vs-Onduu [1982-1988] KAR 299, where the Court posited as follows:

> " The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation.""

11. The court awarded Ksh 100,000/= for loos of expectation of life. The court also awarded special damages of Ksh. 13,150/=.

12. Parties did not find it necessary to file submissions in spite of chances to do so. Being an appeal on quantum only, i am aware of the remit of the first appellate court. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court. In Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method

approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

13. Further, the court of appeal held as follows in the case of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR, stated as follows:

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

14. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows:

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

15. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

16. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

17. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. There was no doubt that the deceased was a driver. The court used a minimum wage. A sum of 12,000/= is slightly less than the minimum wage of as at 2013. The absolute minimum wage was Sh 13,674, effective May 1, 2013. The deceased died on 9.5.2013. There is therefore nothing excess with the sum of Ksh 12,000/= awarded as the multiplicand. In that respect the appeal under the multiplicand is unsustainable. in the case of Karimba (Suing as the legal representative of the Estate of

Christopher Mutahi Mwangi – *Deceased) v Murigu & another (Civil Appeal 38 of 2022*) [2023] KEHC 20680 (KLR) (21 July 2023) (Judgment), L. Njuguna held as follows regarding dependency ration:

The deceased's widow was 36 years old as at the time of filing the suit in 2016, effectively meaning she was 33 years at the time of demise of the deceased. The deceased's son was 18 years. The court was correct in awarding the multiplier of 2/3. in In another case of John Simon Ashers & another Vs Nelson Okello Onjao [2020] eKLR the court held:"

> 18. In the absence of evidence of the deceased's earning, I find that in calculating loss of dependency, the trial court rightly applied the multiplicand of Kshs. 7,000/-which was the minimum wage for an unskilled worker and a multiplier of 10 years since the deceased died at the age of 45 years. The dependency ratio of 2/3 is normally applied in a case where the deceased has dependents such as the deceased in this case and I find that the same was correctly applied.

18. Further, the deceased left a very young widow. She will have depended on the deceased for over 25 years. the award of 17 years was thus within the range, though it is on the lower side. In 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), W. A. OKWANY J stated as hereunder:

> 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."

19. In the case of Catholic Diocese of Kisumu v Tete [2004] eKLR, the court of Appeal [TUNOI, O'KUBASU & GITHINJI JJ A] held as follows:

> 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 have awarded a difference figure if it had tried the case at first instance. The Appellate 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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985] KLR 470).

20. I do not find any error in the award of loss of dependency. no other question was raised as against the judgment.

21. The other issue raised was failure to consider submissions. the failure to consider submissions is not a ground that can be considered in an appeal. in the case of Lapana Limited v County Government of

Trans-Nzoia (Environment & Land Case 8 of 2023) [2024] KEELC 881 (KLR) (23 February 2024) (Ruling), DR. IUR FRED NYAGAKA, posited as follows:

> It is important for parties to underscore the place of submissions in the place of decision-making by a court or indeed any other body clothed with the power to make a decision over a dispute. It should go without saying that submissions are arguments which parties to a matter make in order to convince the Court to decide in their favour. They only constitute the maker's view of both the law and facts of the dispute. The Court is not bound to agree to the party's arguments because, more often than not, a party will identity the strengths of his case and maximize on them and the weaknesses of the adverse party and capitalize on them. At times it goes to the extent of skewing the facts and misinterpreting the law to his/her advantage. Thus, unlike the Court or arbiter who is obligated to analyze the issue before him/her with a balanced mind, in submissions, parties to a matter have often have a leaning toward their side of the case.

22. Mwera J, posited as follows when postulating on what is the role of submissions are. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

23. Submissions are not, strictly speaking, part of the case, the absence of which may do prejudice to a party. There precence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

24. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is

the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

25. The court comes to an inevitable conclusion that the Appeal lacks merit and is accordingly dismissed in entirely.

26. The next question will be who will pay for the costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

27. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

" It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

28. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

" (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

29. In the circumstances, the appeal is dismissed with costs of Kshs 95,000/= to the Respondent.

Determination

30. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is dismissed with costs of Ksh. 95,000/= to the Respondent.

    b. 30 days stay of execution.

    c. 14 days right of appeal.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Njuguna for the Appellant

MR. Kamande for the Respondent

Court Assistant – Michael