



Case Number:	Civil Appeal 103 of 2018
Date Delivered:	12 Nov 2020
Case Class:	Civil
Court:	High Court at Kitui
Case Action:	Judgment
Judge:	Robert Kipkoech Limo
Citation:	Ndungu Wambui Christine & 2 others v Muusi Nzivo Maingi aka Muusi Uzivo & another [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kitui
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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4. The **Appellant** were dissatisfied with the above decision and filed this appeal raising the following grounds namely:-

**a. That the learned trial Magistrate erred in law and fact in failing to appreciate and consider the pleadings and evidence adduced on quantum of damages.**

**b. That the trial court failed to consider the submissions filed and authorities cited.**

**c. That award given lacked basis and was an erroneous estimate of damages and excessive.**

5. In their written submissions through counsel, the **Appellants** have submitted that the award given on the pain and suffering was excessive and contend that an award of **Ksh.50,000/=** could have been fair as the deceased died a day after the incident. They have relied on the decision of D.M.M. (suing as the legal representative of **L.K.M –vs- Stephen Johana Njue and Another [2015]eklr** where the deceased died after four days and the estate was awarded **Ksh.50,000/=** for pain and suffering.

6. On loss of dependency, the **Appellants** have faulted the trial Magistrate for adopting a Multiplier of 30 years without taking into consideration vicissitudes of life. In their view a multiplier of 20 years would have been reasonable and have relied on the decision of the Estate of the late **Jane Wanjiru Maina –vs- Lilian W.Macharia & Another [2019] eKLR**.

7. The **Appellants** have also contended that the dependency ratio of 2/3 was a bit high given that the deceased's husband had also perished in the same accident and a dependency ratio of 1/3 awarded. In their view a dependency ratio of 1/3 would have been fair and have relied on the case of **Benedeta Wanjiku Kimani –vs- Changwony Chebol & Another [2013] eKLR**.

8. The **Respondents** have opposed this appeal through written submissions by their learned counsel. They contend that in computing loss of dependency the courts should take into account deceased income, age and whether he had dependants. They submit that the deceased worked at **EPZ Ltd Athi River** earning a salary of **Ksh.14,436.75**. They aver that she could have retired at 60 years and that they tendered her payslip in evidence which confirmed what the income the deceased received from her employment. In their view the trial court gave a proper award using a proper multiplier of 30 years.

9. They submit that special damages of **Ksh.46,500/=** were proved to the required and that the award given of **Ksh.100,000/=** for loss of expectation of life was justified given that the deceased died at young age of 30 years.

10. On the award of pain and suffering, the **Respondents** have supported the award of **Ksh.150,000/=** submitting that the deceased died after 2 days. They have further supported the dependency ratio of 2/3 given by the trial court and have cited the decision in **Rosemary K. Kasina –versus- Kenblest Ltd.(Nbi HCC No.587 of 2003)** to buttress their contention.

#### **Analysis and Determination**

11. This appeal is basically about quantum. The issue of liability is not contested in this appeal.

12. The **Appellants** have in their first ground of appeal alleged that the trial court did not consider their pleadings, evidence adduced and the submissions filed. I have looked at the pleading and in their joint defence, the Appellants denied liability to the accident that caused fatal injuries to the deceased. However in their submissions herein, they appear to have abandoned that ground and instead put weight to their grievance about the quantum awarded.

13. To begin with the award on pain and suffering, there is a contest as to whether the deceased died after one day or two days. The **Appellants** insist that she died after a day but the **Respondents** contend that she died after 2 days. This court has looked at the evidence tendered in court both orally and through documents (exhibits). It is quite apparent that the accident occurred on 30<sup>th</sup> April, 2017 the deceased died on 1<sup>st</sup> May 2017 while undergoing treatment. The trial appears to have misapprehended this material fact by holding that the deceased died on 2<sup>nd</sup> May, 2017. The award of Ksh.150,000/= appears to have been based on that error. This court finds that the Appellant's grievances on that regard are founded. This court finds that the award of Ksh.150,000/= on that head was based on an erroneous estimate on when the deceased passed on. This court finds that the award was excessive and the same is set aside. An award of Ksh.100,000/= in my view is fair in the circumstances.

14. On the multiplier used by the trial court, it is not contested that the deceased was aged 30 years. The documentary evidence to wit the Death Certificate (Ex.2), showed that she was 30 years old. The payslip tendered [P. Ex. 4 (a)] showed that her net pay was Ksh.14,435/=. The Appellants have taken issue with the multiplier used by the trial court and have contended that a multiplier of 20 years should have been used instead. This court has considered the fact that though currently retirement age for civil servants is begged at 60 years, at private sector given the vicissitudes of life, and periodic economic upheavals it is rather too much to expect one to retire age of 60 years I am persuaded by authority of **Kenya Power & Lighting Co.Ltd. –versus- Benard Kilonzo** (suing as the administrator of the Estate of the late **Maurice Mutinda Kilonzo (deceased) [2012] eklr** where the court adopted a multiplier of **25** years where the deceased died at **21** years old. This court finds that on the basis of the above a multiplier of 25 years would have been fair and appropriate.

15. On the question of dependency ration of 2/3 I am not persuaded that the trial court fell into error in arriving at that ratio. I am also not persuaded by the **Appellants'** contention that the ratio should have been reduced to 1/3 on ground that the husband and the father of the dependant also died during the accident. The principle applicable on the ration applicable do not change in such circumstances. The Appellants have no basis to be dissatisfied in that regard.

In the premises this appeal is partly allowed for the reasons aforestated. For purposes of (clarity the Respondents are awarded as follows:

- i. Pain and Suffering - Ksh.100,000/=
- ii. Loss of expectation of life - Ksh.100,000/=
- iii. Loss of dependency at the ratio of 2/3:  $14,435 \times 25 \times 2/3$  –  
Ksh.2,165,250/=
- iv. Special damages - **Ksh. 46,500/=**
- Total** - **Ksh.2,411,750/=**

The Appellants are awarded half costs of this appeal. The orders given by the trial court or how the amount shall be administered for the benefit of the minor shall be maintained.

**Dated, Signed and Delivered at Kitui this 12<sup>th</sup> day of November, 2020.**

**R. K. LIMO**

**JUDGE**



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