Case Number:	Civil Appeal 13 of 2020
Date Delivered:	25 Jun 2021
Case Class:	Civil
Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Gilbert Kimatare Nairi & another (suing as personal representatives of the Estate of Lemayian Richard Kimatare (Deceased) v Civiscope Limited [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. Nthuku, SRM
County:	Kajiado
Docket Number:	-
History Docket Number:	SRMCC No. 21 of 2019
Case Outcome:	Appeal dismissed
History County:	Kajiado
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 13 OF 2020

GILBERT KIMATARE NAIRI & LILIAN

NAPUDOI NAIRI (Suing as personal representatives

of the Estate of LEMAYIAN

RICHARD KIMATARE (DECEASED).....APPELLANTS

VERSUS

CIVISCOPE LIMITED..... RESPONDENT

(an appeal from the Judgement and decree (Hon. Nthuku, SRM) delivered on 25th February 2020 in SRMCC No. 21 of 2019 at the Senior Resident Magistrate's Court, Loitokitok.)

JUDGMENT

1. **LEMAYIAN RICHARD KIMATARE (**deceased), was involved in a road traffic accident on 13th March 2019, along Loitokitok-Emali road. He was riding motor cycle registration No. KMCT 263V when it collided with motor vehicle registration Number KCN 504G, owned by the respondent. He died on the spot. The appellants then filed a suit on behalf of the deceased's estate before the trial court being SRMCC No. 21 of 2019, through a plaint dated 8th April 2019, blaming the driver of the motor vehicle for the accident.

2. The respondent filed a statement of defence dated 9th September 2019, denying the appellants' claim, particulars of negligence and loss. The respondent pleaded, in the alternative, that the deceased was to blame for the accident and set out particulars of negligence attributable to the deceased.

3. The suit was heard by **Hon. N. Nthuku (SRM),** and in a judgement delivered on 25th February 2020, the trial magistrate made a key finding of fact that both the deceased and the driver of the motor vehicle were equally to blame for the accident. The trial court, therefore, apportioned liability at 50:50.

4. On quantum, the trial court awarded Kshs. 20,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life. Under the head of loss of dependency, the trial court made a global award of Kshs. 600,000, holding that there was no evidence of earning and dependency. The court also awarded special damages of Kshs. 50,000/=. After applying 50% contribution, the net award came to Kshs. 385,000/=. The court awarded costs and interest to the appellants.

5. The appellants were aggrieved with the judgment and filed a memorandum of appeal dated 18th March 2020 and raised two grounds of appeal, that;

1. The learned magistrate misdirected herself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgment on liability yet the eye witness gave clear account of the occurrence of the accident in question.

2. The learned magistrate erred in law and fact in failing to appreciate the relevant principles, case law and the submissions on

record in assessing quantum and thereby arrived at a very law figure.

6. Parties agreed to dispose of this appeal through written submissions.

7. The appellants filed their written submissions dated 10th September 2020. They submitted that the trial court was wrong in adopting the global award approach for dependency on a 42 years old deceased who had a family that he was supporting. According to the appellants, there was evidence that the deceased used to grow tomatoes and maize on a 4-acre farm. They also blamed the trial court for disregarding submissions in favour of adoption of the minimum wage of Kshs. 12,000/= which would have brought the award to Kshs. 1,728,000/= applying a multiplicand and multiplier (12,000x18x2/2 x12).

8. It was the appellants' case that the trial court failed to consider the decisions they cited, namely; ***Commercial Transporters Ltd v Dorcas Adoyo Owiti & Another*** (CA No. 159 of 2015-Msa) and ***Samson Mwaura Mburu & Another v Regina Okoth & Another*** (Bungoma HCCC No. 27 of 2014.)

9. The appellants submitted that the trial court should have applied the well-known and established principles and practices of multiplicand, multiplier and the ratio, more so when parties to the suit had submitted on that mode. They relied on ***Jacob Ayiga Maruja & Another v Simeon Obayo*** [2005] eKLR to argue that it is not necessary to prove earning through documentary evidence.

10. The respondent filed written submissions dated 24th January 2021. It submitted that liability was apportioned at 50:50 and that the deceased was the rider of the motor cycle when the accident occurred. The respondent argued that according to PW2, (who testified in SRMCC No. 19 of 2019 and whose evidence was to apply to the suit herein), there was darkness and, therefore, the witness could not see where the impact of the accident was. The respondent also argued that the investigating officer was not called to produce a sketch plan to assist the court determine the point of impact.

11. The respondent argued that the driver of the motor vehicle testified that he was on his lane when the motor cycle rammed onto his vehicle. It relied on ***Teresia Sabastian's Massawa suing as the legal representation of the estate of Silvia Massawa v Solidarity Islamic (Kenya) Office & Another*** [2015] eKLR where liability was apportioned at 50:50 because the accident occurred in the middle of the road. The respondent agreed with the trial court that both the rider and driver were equally to blame for the accident.

12. Regarding quantum, the respondent submitted that the award of Kshs. 20,000 for pain and suffering, was inordinately high. It relied on ***Harjeet Singh Pandal v Hellen Aketch Okudho*** [2018] eKLR and ***Florence Awour Owuoth v Paul Jackton Ombayo*** [2020] eKLR where Kshs. 10,000/= was awarded for pain and suffering.

13. On loss of expectation of life, the respondent again argued that Kshs. 100,000/= was inordinately high. It relied on ***Abdalla Issa & Another v Lesmida M. Alusa & Another*** [2019] eKLR and ***Chetunda Moraa Nyamwamu v Philip Kipkemboi Chelule*** [2003] eKLR where awards of 80,000/= were made.

14. Regarding loss of dependency, the respondent submitted that the deceased, 42 years old, was said to be a farmer but there was no evidence that he was making Kshs. 150,000/= a month. The respondent submitted that the trial court correctly analysed the evidence and adopted the global figure as the best approach in awarding damages under this head.

15. The respondent however argued that an award of Kshs. 500, 000. would be appropriate under this head. It relied on ***Moses Wetangula & Another v Eunice Titika Rengetiang*** [2018] eKLR where Kshs. 500,000/= was awarded to a 42 years old deceased. It also relied on ***Mbogo & Another v Shah*** [1965] EA 93 and ***Butt v Khan*** [1977] eKLR to argued that an appellate court should only interfere with exercise of discretion by a trial court where it is shown that the discretion was not properly exercised. It urged this court to dismiss the appeal with costs.

16. I have considered this appeal, submissions by parties and the decisions relied on. I have also gone through the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's decision on the evidence on record. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

17. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal held that:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High 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 allowances in this respect.

18. Similarly, in ***Nkube v Nyamiro*** [1983] KLR 403, it was held that:

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

19. The 1st appellant testified, adopting his witness statement dated 8th April 2019 filed together with the plaint, that the deceased, his son, was a farmer aged 42 years. The deceased used to support him financially and also supported his own children, He produced letters of administration, and other documents in his list of documents as exhibits.

20. According to the witness statement, the 1st appellant that stated that on 13th March 2019, the deceased was lawfully riding motorcycle registration No. KMCT 263V along Emali-Loitokitok road. The respondent's motor vehicle registration No. KCN 504G was negligently and carelessly driven and caused an accident and as a result, the deceased sustained fatal injuries. The witness further stated that the deceased was a farmer and a businessman earning Kshs. 150,000 per month. He led a happy life which was prematurely shortened by the accident. According to the witness, the deceased left behind two daughters he used to take care of and himself. He produced grant of letters of administration, demand letter, death certificate, police abstract, post mortem report and receipts for burial expenses as exhibits.

21. **PW2 David Mungai Mundia** testified also adopting his witness statement dated 26th September 2019, that on 13th March 2019 at about 7.15 Pm, the lorry was being driven at a high speed from Loitokitok to Kimana direction. It was to overtake another lorry but it did not manage. It collided with the motor cycle which was on the last lane and was being ridden by the deceased who was carrying pillion passengers. The lorry hit the deceased, his wife and their child. The deceased was thrown to the roadside while the front wheel of the lorry crushed the deceased's wife and their child. The driver of the lorry alighted and ran away.

22. The witness who was about 50 meters away rushed to the scene and identified the victims. He called the police from Kimana police station and the accident was reported at Loitokitok police station. The driver of the lorry was arrested and placed in the cells. He told the court that it was the driver of the lorry who caused the accident.

23. In cross examination, the witness admitted that there were other vehicles on the road and that there was darkness at the time of the accident though it was not very dark.

24. On liability, the trial court found that although the eye witness (PW2) blamed the driver of the motor vehicle for the accident, there was no independent evidence to show the court with precision, who caused or to what degree each contributed to the accident. The trial court therefore apportioned liability at 50;50 between the driver of the motor vehicle and the deceased who was riding the motor cycle.

25. On quantum, the trial court awarded Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life. It awarded a global figure of Kshs. 600,000 for loss of dependency. The court cited the decisions in ***Mary Khayesi Awalo & Another v Mwilu Mulungi Another*** (ELD. HCCC No. 19 of 1997) and ***Albert Odawa v Gichimu Gichenji*** (NKR HCCA 15 of 2003 [2007] eKLR for the holding that the multiplier approach is just a method of assessing damages and not a principle of law. It can and should be abandoned where the facts of the case do not favour its application. The trial court also awarded Kshs 50,000 special damages.

26. The awards were then subjected to percentage contribution bringing the net award to Kshs. 385,000.

27. The appellant faulted the trial court on two grounds. First, that it failed to give due and proper consideration to the pleadings, evidence on record and submissions, thereby made an erroneous determination on liability. Second, that the it did not appreciate the relevant principles, case law and submissions assessment of damages thereby arrived at a very law award.

28. I have considered the arguments by parties and perused the evidence on record. Two issues arise for determination in this appeal. Whether the trial court erred on liability and whether the awards were inordinately low or high.

Liability

29. The trial court held that both the driver of the motor vehicle and the deceased were equally responsible for the accident. According to the trial court there was no independent evidence to assist it determine the point of impact or the extent to which each party contributed to the occurrence of the accident. The appellants have faulted this arguing that there was an eye witness who testified that the driver of the lorry caused the accident.

30. Both the appellants and the respondents called one eye witness to the accident. The appellants called PW2 who testified that he witnessed accident. According to him, the lorry was trying to overtake another lorry when the accident occurred. this was between 7.15 and 7.30pm. He was about 50m away and there was a bit of darkness. On the other hand, the driver of the lorry testified that he was on his lane when the deceased's motorcycle rammed onto his lorry and that there was another vehicle which was trying to overtake him at the time. The vehicles headlights and those of the motorcycle were on signifying that darkness was setting in. The driver of the motor vehicle blamed the deceased for the accident.

31. There was no doubt that the accident was as a result of a collision between the lorry and the motorcycle. Each side blamed the other for the accident. PW2 was a distance away from the scene of the accident and there was darkness setting in at the time. There were other vehicles on the road with headlights on which might have impaired the witness' view of the events depending on the spot where he was and the distance in relation to the scene of the accident.

32. As also correctly pointed out by the trial court, there was no evidence from the traffic police on the possible point of impact to assist the trial court make a determination on who caused the accident. It was not clear if the investigating officer visited, examined the scene and talked to the driver as well as other witnesses to determine that if both the driver and the deceased were negligent or any of them and to what extent. This is because the police abstract indicated that he case was pending under investigations.

33. In the circumstance, the trial court was in order to split liability equally between the deceased and the driver of the motor vehicle. Both played a role in causing the accident and this court cannot fault the trial court for that.

Quantum

34. The appellants also blamed the trial court for awarding inordinately low awards. The trial court awarded Kshs. 20,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life and a global figure of Kshs. 600,000 for loss of dependency. The appellants argued that Kshs. 50,000 and 100,000 for pain and suffering and loss of expectation of life respectively should have been appropriate. On loss of dependency, the urged this court to apply the multiplicand, multiplier and ration instead of the global figure approach.

35. The respondent wanted the two awards reduced to Kshs. 10,000 and 80,000 respectively. And although it agreed with the trial court on the global approach, it however wanted the award of Kshs. 600,000 reduced to Kshs. 500,000.

36. An appellate court will only interfere with the sum awarded by the trial court where an appellant demonstrates that the award is too high or so low as to amount to an outright error in the assessment of damages, or that in coming to that award, the trial court took into account an irrelevant matter or it failed to take into account a relevant matter.

37. In ***Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company Advocates*** [2013] eKLR, the Court of Appeal stated:

The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice.

38. The test in assessment of damages is not that the award must be that in the past cases. It is that there is need for the award to be comparable with the post awards so that comparable loss attracts comparable awards. see ***Elizabeth Bosibori v DamarisMoraaNyamache*** **[2017]** eKLR citing ***Sofia Yusuf Kanyore v Ali Badi Sabre*** **& Another [2008] eKLR** that past decisions are guidelines only and each case should depend on its circumstances.

39. As this court has already held on pain and suffering as well as loss of expectation of life, in **CA No. 11 and 12 both of 2020** (same parties), I do not find reason to interfere with the awards made by the trial court. They were neither too high nor so low as to amount to an injustice.

40. Regarding loss of dependency, the trial court applied the global approach and awarded Kshs. 600,000. The court relied on binding decisions in ***Mary Khayesi Awalo & Another v Mwilu Mulungi & Another*** [1999] eKLR cited in ***Albert Odawa v Gichimu Gichenji*** [2007] eKLR, the court stated with regard to multiplier application:

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 dependency and the expected length of the dependency 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.

41. In the present appeal, there was no concrete evidence what the deceased's earnings were. It was merely stated that he was a farmer earning Kshs. 150,000 a month. That was not an employment where the minimum wage could be applied as the appellants suggested.

42. In ***Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased*** [2020] eKLR where the court was dealing with a similar issue, it stated:

[23] In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

43. In ***John Wamae & 2 Others v Jane Kituku Nziva & Another*** **[2017] eKLR,** the court awarded a global sum of Kshs. 400,000/- to a deceased farmer and guard aged 61 years with children aged between 13 and 17 years.

44. As **Kneller J.A,** stated in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia*** [1985]:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, 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 the damage.

45. See also ***Gicheru v Morton & another*** **[2005] 2 KLR 333.**

46. **Taking the above principles in mind and applying them to this appeal and the fact that multiplier would not be appropriate to this case, I find no reason to interfere with the trial court's award.**

47. **Consequently, this appeal is declined and dismissed with no order as to costs.**

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 25TH DAY OF JUNE, 2021.

E. C. MWITA

JUDGE