



**CMO & another (Suing as Personal Representatives of the Estate of SOG - Deceased) v Asaga
(Civil Appeal E537 of 2022) [2024] KEHC 12225 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E537 OF 2022
MA OTIENO, J
SEPTEMBER 26, 2024**

BETWEEN

CMO 1ST APPELLANT

TNG 2ND APPELLANT

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF SOG -
DECEASED**

AND

JOHN ASAGA RESPONDENT

*(Being an appeal from the Judgment and Decree of the Hon. S.A. Opande,
SRM delivered on 7th June 2022 in MILIMANI CMCC E5126 OF 2010)*

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court delivered on 7th June 2022 in the Milimani CMCC No. E5126 of 2020 in which the Appellants, then Plaintiffs, sued the Respondent on behalf of the deceased seeking compensation for fatal injuries suffered in a road accident that occurred on 22nd August 2019 along Bomet-Narok Road involving the Respondent's motor vehicle registration No. KCR 571.
2. In the plaint, it was pleaded that the deceased was a fare paying passenger aboard the aforesaid motor vehicle registration number No. KCR 571 when the aforesaid vehicle was managed and controlled so carelessly and negligently thereby causing the accident in which the deceased suffered fatal injuries.



3. On 7th June 2022, the trial magistrate rendered its judgment in the dispute and apportioned liability in the ration of 80:20 in favour of the Appellant. The magistrate also awarded the Appellants a global sum of Kshs. 1,000,000/= for loss of dependency, Kshs. 80,000 for pain and suffering, Kshs. 100,000 for loss of expectation of life and special damages in the sum of Kshs. 550/=.
4. Aggrieved by the decision of the trial court, the Appellant vide his memorandum appeal dated 1st July 2022 lodged an appeal to this court, raising two grounds of appeal as follows; -
 - i. The learned magistrate misdirected himself 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.
 - ii. The learned magistrate erred in law and in fact in failing to appreciate the relevant principles, case laws and the submissions on record in assessing quantum of damages and thereby arrived at very low figures.
5. The appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 16th November 2023 whilst the Respondents filed theirs dated 7th March 2024.

Appellant's submissions

6. On liability, the Appellants submitted that the trial court acted on wrong principles in apportioning liability in the ration of 80:20 as it did. According to the Appellants, evidence submitted at trial was that the deceased was a mere paying passenger in the subject motor vehicle, and that in any event, there was no evidence submitted by the Respondent at trial controverting the Appellant's evidence on liability. The Appellants asserted that their evidence on liability went unchallenged and therefore the trial court ought to have found the Respondent 100% liable for the accident.
7. On quantum, the Appellants took issue with the trial court's award of a global sum of Kshs. 1,000,000 for loss of dependency. It was the Appellant's submissions that in reaching that decision, the trial court ignored the evidence submitted at trial that the deceased was a supervisor at a Kericho Tea Farm earning Kshs. 80,000 per month. Citing the decision in *Jacob Ayiga Maruja & Another Vs. Simeon Obayo* [2005] eKLR, the Appellant submitted that notwithstanding the failure by the Appellants to adduce the deceased pay slip at trial, the trial court ought to have used the Regulation of Wages (General) Amendment Order 2013, LN NO. 197 of 2013 as suggested by the Appellants at trial in determining the possible income of the deceased.
8. The Appellants further submitted that the trial court erred in failing to apply a multiplicand of Kshs. 12, 152.20 which they submitted at trial was the correct banding for the deceased in line with the aforesaid Regulation of Wages Order. According to the Appellants, the Respondent in his submissions at trial had conceded a dependency ratio of 2/3 and consequently the Appellant urged this court to interfere with the trial court's award of a global sum of Kshs. 1,000,000/= on loss of dependency and proceed to award a sum of Kshs. 3, 402,616.00 as computed hereunder; -
$$35 \text{ years} \times 12,152.20 \times 2/3 \times 12 \text{ months} = \text{Kshs. } 3, 402,616.00$$

Respondent's submissions

9. On his part, the Respondent's submissions on liability were that trial court was right in its finding on liability particularly taking into account that no eye witness was called by the Appellants to give first-hand account on how the accident happened.



10. The Respondent further submitted that the evidence submitted at trial was that the deceased jumped from the subject motor vehicle and he was subsequently hit by another motor vehicle registration number KCH 136B. According to the Respondent, the Appellants did not satisfactorily dislodge this piece of evidence from the Respondents.
11. On quantum, the Respondent submitted that apart from the general allegation by the Appellants that the deceased was a supervisor in a tea estate in Kericho, no payslip was availed by the Appellants at trial as proof of the deceased income. It was therefore the Respondent's position that the global figure of Kshs. 1,000,000/= awarded by the trial court for loss of dependency was inordinately high.
12. The Respondent further submitted that in this case there was double award under the Law Reform Act and Fatal Accidents Act since there is no indication in the trial court's judgment that it took into account or considered the award under the Fatal Accidents Act vis-à-vis the award under the Law Reform Act. Relying on among others, the decision of the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR, the Respondent submitted that the trial court was at fault for failing to deduct the award under the Law Reform Act from the award under the Fatal Accidents Act.

Analysis and determination

13. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion on the issue of liability and on quantum. I am however aware to the fact that unlike the trial court, I did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. I will therefore give due allowance for this. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

“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.....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...”
14. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

“...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial courtis 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...”
15. I have perused the memorandum of appeal and submissions by the parties in this appeal and note that there are only two issues for determination in this appeal, that is, the issue of liability and that of quantum of damages.

Liability

16. I have considered respective parties' arguments in this appeal. There is no denial that the deceased was a passenger in the Respondent's motor vehicle registration No. KCR 571M travelling along Bomet-



Narok Road and that the said motor vehicle caused an accident in which the deceased sustained fatal injuries.

17. From the proceedings, I note that it is only the wife of the deceased Ms. C M O who testified as PW1. The Respondent took issue with her evidence on the basis that she did not witness the accident happened and therefore her testimony could not be relied on to place blame or liability on the Respondent. The Appellants on the other hand submitted that the Respondent having failed to call any evidence in support of their defense, then plaintiff's case remained uncontroverted.
18. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both parties. See *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal stated that: -

“As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”
19. In situations like this where the victim of the accident perished as a result of the accident, it would in my view be foolhardy to insist that a Plaintiff produces an eye witness to give a first account of how the accident happened. Once the Appellants adduced the evidence that the accident happened on the day in question and that it involved the Respondent's vehicle in which the deceased lost life, it is was therefore then incumbent upon the Defendant to adduce evidence to the contrary. The Defendant, the Respondent herein chose not to.
20. It is settled that where a party fails to call evidence in support of its case, that party's pleadings remain to be unsubstantiated statements of facts and this failure to produce countering evidence renders the opposing party's pleadings uncontroverted. See the decision in *Mary Njeri Murigi Vs Peter Macharia & Another* 2016 eKLR.
21. Despite the failure by the Respondent to adduce any evidence to controvert the Appellant's case, I note that the trial court still went ahead and apportioned liability in the ration of 80:20 in favour of the Appellant. In reaching that conclusion, the court stated at paragraph 5 of the judgment that “In absence of any witness to rebut the evidence of the plaintiff, the court can only infer that liability is partly admitted. Given that a defense and submissions were in liability denied (sic), I shall apportion liability at 80:20 in favour of the plaintiff”.
22. I have reviewed the trial court's decision liability against the evidence tendered by the parties and note that the same was not supported by evidence and therefore erroneous. A mere statement of defence and submissions cannot be a basis of apportioning liability. There must be some evidence by a defendant controverting the case by the plaintiff. Where no contrary evidence is adduced, then the plaintiff's case is wholly conceded.
23. In the circumstances and bearing in mind the applicable principles on apportionment of liability see the case of *Khambi and Another vs. Mahithi and Another* [1968] EA 70, I believe that this is a proper case where this court, exercising its appellate jurisdiction, can interfere with the trial court's discretion on the apportionment of liability.
24. Consequently, I set aside the trial court's finding on liability and find the Respondent 100% liable for the accident.



Quantum

25. The general rule is that assessment of damages is at the discretion of the trial court, and that this court cannot interfere with the exercise of such discretion except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd Vs Gathogo Kanini vs A.M.M Lubia & Another* where the court stated that: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

26. Again, in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that: “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 arrived at a figure which was either inordinately high or low.”

27. On quantum, the trial court awarded Kshs. 80,000 for pain and suffering; Kshs. 100,000 for loss of expectation of life and Kshs. 1,000,000/- for loss of dependency. The appellant did not challenge the awards for pain and suffering and loss of expectation of life. Further, no cross- appeal was filed by the Respondent on the two heads and therefore the finding of the trial court remains.

28. In his submissions, the Respondent complained that there was double award under the [Law Reform Act](#) and [Fatal Accidents Act](#) since there is no indication in the trial court’ judgment that the court took into account or considered the award under the [Fatal Accidents Act](#) vis-à-vis the award under the [Law Reform Act](#). However, to the extent that there was no cross-appeal taken by the Respondent on the issue, the arguments by the Respondent has nothing to stand on and cannot therefore succeed.

29. In this case the challenge on quantum as far as it can be gleaned from the grounds of appeal and submissions, was on the award for loss of dependency. The Appellant argued that the trial court erred in awarding a global sum of Kshs. 1,000,000/=. According to the Appellant, the court ought to have adopted a multiplier approach instead of a global or lump sum amount in awarding damages for loss of dependency.

30. In arriving at the award of Kshs. 1,000,000 for loss of dependency, the trial court took relied in the decision in the case *Stanwel Holdings Limited & another v Rachel Haluku Emanuel & another* [2020]



- eKLR and took into account the fact that the Plaintiff merely claimed that the deceased was a supervisor earning Kshs. 80,000/= per month but failed to tender any proof of employment or income.
31. The Appellant complained that the trial court's award of a global sum of Kshs. 1,000,000/= for loss of dependency ignored her submissions that in the absence of proof of income by the deceased, the provisions of the Regulation of Wages (General) Amendment Order 2013, LNNO. 197 of 2013 which was applicable then ought to have been applied. The Appellant submitted that the Order provided that the monthly minimum then was Kshs. 12,152.20.
 32. The Appellant therefore urged this court to set aside the global sum of Kshs. 1,000,000/= awarded by the trial court as damages for loss of dependency and instead apply the Kshs. 12,152.20 as a multiplicand with a dependency ratio of 2/3 as follows; -

$$35 \text{ years} \times 12,152.20 \times \frac{2}{3} \times 12 \text{ months} = \text{Kshs.} 3,402,616.00$$
 33. The question for determination therefore for this court therefore is whether the trial court erred by adopting a global sum instead of employing the multiplicand approach in awarding damages for loss of dependency.
 34. In the case of Board Of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku [2014] eKLR the Court of Appeal stated the following in relation to the issues; -

“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason”
 35. Further, in Seremo Korir & Another vs SS (Suing as The Legal Representative of the Estate of MS, Deceased) [2019] eKLR, the court stated as follows: -

“In the lower court's judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased's school and that the deceased was 12 years old, a fact that was not contested. It was the appellants' submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method.

In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the 'global sum', 'separate heads', or 'mixed' approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach”
 36. From the above analysis, it is clear that the choice of whether to adopt a multiplier or make a global award or apply a mix of the approaches in awarding damages for loss of dependency is entirely a matter of discretion of the trial court, provided that the discretion is reasonably exercised.
 37. In this case, it was alleged that the deceased was a supervisor in a tea estate in Kericho earning a monthly salary of Kshs. 80,000/- no proof of income was availed in evidence by the Appellants. Consequently, it was then left to the trial magistrate's discretion to estimate the possible income for the deceased. The magistrate in exercising this discretion chose the lump sum route, which in the opinion of this court was not erroneous. In Mary Khayesi Awalo & Another -vs Mwilu Malungu & another ELD HCCC



NO. 19 OF 1997 [1999] eKLR, Nambuye J. had the following to say as to when a court may opt for a lumpsum award; -

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court’s opinions that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

38. Having reviewed the proceedings and the trial court’s judgment on the award of damages for loss of dependency and taking into account the applicable principles, I find no reason to interfere with the trial court’s adoption of the global sum approach in awarding for loss of dependency.
39. In any event, I find that the sum of Kshs. 1,000,000/= awarded by the trial court for loss of dependency to be reasonable in the circumstances of the case. I will therefore uphold the same.
40. In the end, the appeal partially succeeds. The trial court’s finding on liability is hereby set aside and substituted with a finding of this court holding the Respondent 100% liable for the accident.
41. Save for the finding on liability, the rest of the trial court’s judgment is upheld. The Appellant shall have the costs and interest as awarded by the trial court.
42. Each party shall bear own costs of the appeal since the Appeal has only partially succeeded.
43. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS; 26TH DAY OF SEPTEMBER 2024

ADO MOSES

JUDGE

In the presence of: -

C/A – Moses

.....N/A.....for Appellant

.....N/A.....for Respondent.

