



**Fredrick Rasugu t/a Refuge Travel Ltd v Onyango (Suing as the Legal Representatives of the Estate of Kevin Otieno Onyango - Deceased) (Civil Appeal 7 of 2019) [2023] KEHC 17961 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17961 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL 7 OF 2019  
RL KORIR, J  
MAY 30, 2023**

**BETWEEN**

**FREDRICK RASUGU T/A REFUGE TRAVEL LTD ..... APPELLANT**

**AND**

**NANCY ATIENO ONYANGO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KEVIN OTIENO ONYANGO - DECEASED) .... RESPONDENT**

*(Being an Appeal from the Judgment of the Senior Resident Magistrate, B. K. Kiptoo at the Magistrate's Court at Sotik, Civil Suit Number 90 of 2018)*

**JUDGMENT**

1. The Respondent (then Plaintiff) as the Legal Representative of the estate of Kevin Otieno Onyango, sued the Appellant (then Defendant) for General and Special Damages that arose when her husband, the deceased while riding Motor Cycle Registration Number KMCN 425N was allegedly knocked down by Motor Vehicle Registration Number KCK 962E that allegedly belonged to the Appellant.
2. The trial court conducted a hearing where both parties' witnesses testified and produced evidence in the form of exhibits.
3. In its Judgment dated 19<sup>th</sup> March 2019, the trial court awarded Kshs 2,412,000/= as General and Special Damages to the Respondent (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 26<sup>th</sup> March 2019 appealing against the quantum of damages and relied on the following grounds:-



- I. That the learned Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
  - II. That the learned Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
  - III. That the learned Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
  - IV. That the learned magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis a vis the Respondent's claim.
  - V. That the learned Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
5. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123.

#### **The Plaintiff's/Respondent's Case.**

6. This was the Plaintiff/Respondent's case before the trial court. The Respondent stated that on 11<sup>th</sup> February 2018, the deceased while riding Motor Cycle Registration Number KMCN 425N was hit by Motor Vehicle Registration Number KCK 962E along Bomet-Kaploug road.
7. The Respondent stated that the Appellant being the owner of Motor Vehicle Registration Number KCK 962E, was negligent in causing the accident and particularized the negligence in paragraph 4 of the Plaintiff. It was the Respondent's further case that the deceased had dependants and the said dependants were listed in paragraph 6 of the Plaintiff.
8. It was the Respondent's case that at the time of the death of the deceased, he was aged 29 years and that he was a businessman who earned approximately Kshs 20,000/= per month which he used to support his family. That by his demise, the deceased's estate and dependants suffered grave loss.
9. The Respondent's claim against the Appellant was for Special and General Damages under the *Law Reform Act* and *Fatal Accidents Act*.

#### **The Appellant's/Defendant's Case**

10. In the trial court, the Defendant/Appellant denied that it was the registered owner of Motor Vehicle Registration Number KCK 962 and further denied that the said Motor Vehicle was under his management and control.
11. The Appellant denied the particulars of negligence levelled against him. That if any accident happened, it was caused solely by the negligence of the deceased. He particularized the negligence in paragraph 17 of his Defence.
12. The Appellant stated that the particulars pursuant to the *Fatal Accidents Act* and *Law Reform Act* were not applicable in this case.



13. It was the Appellant's case that if any accident occurred (which he denied), then it occurred outside his scope and control and even if he exercised reasonable diligence, skill and care, the accident was caused by the sole negligence of the Respondent.
14. On this Appeal, parties were directed to file submissions to canvass the Appeal.

#### **The Appellant's Submissions.**

15. In submissions dated 6<sup>th</sup> March 2023 and filed on the same day, the Appellant faulted the quantum of damages. The Appellant submitted that damages should represent a fair compensation and should not be excessive. He relied on *Joseph Musee Mua vs Julius Mbogo Mugi & 3 others* Nairobi HCCC No. 86 of 2008.
16. It was the Appellant's submission that the Respondent failed to prove that the deceased earned Kshs 20,000/= per month. He urged the court to adopt the Regulation of Wages (General) Amendment Order 2015 which provided the minimum wage at Kshs 5,436.90/=
17. The Appellant submitted that the trial court erred when it adopted a multiplier that was excessively high. He submitted that a multiplier of 20 years was reasonable. He relied on *Vincent Sululu & another vs Rose Wanjiru* (2016) eKLR, *Board of Governors of Kangubiri High School & another vs Jane Wanjiku & another* (2014) eKLR, *Bayusuf Freighters Limited vs Patrick Mbatha Kyengo* (2014) eKLR and *Sammy Kipkorir Kosgei vs Edina Musikoye Mulinya & another* – Kisumu HCCA No. 92B of 2016.
18. The Appellant submitted that the amount of Kshs 467,942/= based on his computation would be a sufficient award.

#### **The Respondent's Submissions.**

19. The Respondent urged this court not to interfere with the award. The Respondent submitted that the evidence that the deceased was a welder was not controverted and that welding was a skill which required training. That a welder could not be classified as an unskilled labourer. That the trial court was correct in adopting the multiplicand of Kshs 20,000/=. She relied on *Richard Matheka Musyoka & another vs Susan Aoko & another (suing as the administrators as litem of Joseph Onyango Owiti (Deceased))* (2016) eKLR. The Respondent submitted that even if the court was to resort to the applicable regulation of wages, it should use the Regulation of Wages (General Amendment) Order 2018 where a welder was classified as earning between Kshs 18,845/= to Kshs 27,024/= and thus the multiplicand of Kshs 20,000/= adopted by the trial court was within the range and could not be said to be too high.
20. It was the Respondent's submission that the multiplier of 25 years was appropriate. That the deceased died aged 29 years. It was the Respondent's submission that the deceased was not in formal employment and that his retirement age could not be limited to 60 years. She relied on *Mildred Aori Odunga vs Hussein Dairy Limited* (2010) eKLR and *Janet Syokau Okoye (legal representative of the estate of Julius Mutune) vs James Ithae Mathendu* (2016) eKLR.
21. The Respondent submitted that the Appeal lacked merit and urged the court to dismiss it with costs as there was no basis to fault the court's finding on quantum.
22. I have gone through and carefully considered the Record of Appeal dated 21<sup>st</sup> October 2020, the Appellant's Written Submissions dated 6<sup>th</sup> March 2023 and the Respondent's Written Submissions dated 9<sup>th</sup> March 2023 and the only issue for my determination was to determine the amount of damages payable to the Respondent



23. For this court as an appellate court to interfere with the award by the trial court, it must be convinced that the trial Magistrate acted upon some wrong principle of the law or that the award was extremely high or extremely low so as to make it erroneous. The same was espoused in the case of *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR, where 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.’

24. In regard to the pain and suffering, the trial court awarded Kshs 10,000/=. The Police Abstract produced by PW2 (No. 65597 CPL Daniel Ngeiywa) and marked as P.Exh 1 stated that the accident occurred on 11<sup>th</sup> February 2018 at around 12.29 p.m. The Post Mortem Report produced by PW1 (Nancy Atieno Onyango) and marked as P.Exh 6 indicated that the deceased died on 11<sup>th</sup> February 2018 at around 4 p.m. The same was supported by the Death Certificate that was produced by PW1 and marked as P.Exh 2 which indicated that the date of death was 11<sup>th</sup> February 2018. It was therefore clear that the deceased died on the same day which means his pain was not prolonged.
25. In addition to the above, both parties did not submit under this head and it is my conclusion that they did not object to the trial court’s award of Kshs 10,000/= for pain and suffering. I therefore adopt the award of Kshs 10,000/= awarded by the trial court and I am guided by the persuasive case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (2017) eKLR, where Nyamweya J. (as she then was) held that:-

“As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

26. On the issue of the loss of expectation of life, the trial court awarded Kshs 100,000/=. Both parties did not submit under this head and it is my conclusion that they did not object to the trial court’s award of Kshs 100,000/= for pain and suffering. I therefore adopt the award of Kshs 100,000/= awarded by the trial court and I am persuaded by the case of *Mercy Muriuki & Another vs Samuel Mwangi Nduati &*



*Another (suing as the Legal Administrator of the estate of the late Robert Mwangi)* (2019) eKLR where Muchemi J. stated:-

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000 while for pain and suffering the awards range from Kshs 10,000 to Kshs 100,000 with higher damages being awarded if the pain and suffering was prolonged before death”.

27. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

28. The claim for loss of dependency constitutes the multiplicand, the dependency ratio and the multiplier. (See *Melbrimo Investment Company Limited vs Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased)* [2022] eKLR).

29. Nancy Atieno Onyango (PW1) testified upon cross examination that the deceased worked as a welder and would earn Kshs 20,000/= per month. I have gone through the trial court proceedings and there was no evidence on record to sustain that claim. It was evident that the deceased's income was unknown. In such circumstances, courts are minded to use the minimum wage as the base income when calculating the loss of dependency.

30. The Court of Appeal in the case of *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs Hellena Wanjiru Rukanga* (2020) eKLR held that a minimum wage ought to be adopted as a multiplicand where monthly income could not be ascertained. It stated:-

“We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs.11,995/- was an appropriate place to begin.....”

31. On the failure to have documentary evidence as proof of income, the Court of Appeal in the case of *Jacob Ayiga Maruja & Another vs Simeon Obayo* (2005) eKLR addressed itself as follows:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand will do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the



respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

32. As I have earlier indicated, PW1 stated that the deceased worked as a welder. Because the accident occurred on 11<sup>th</sup> February 2018 I will use the Regulation of Wages (General) (Amendment) Order, 2017 which came into force on 1st May, 2017. The Appellant proposed the amount of Kshs 5,436/= as the multiplicand and the Respondent stated that the trial court was correct in awarding the Kshs 20,000/=. The Respondent further stated that if the court was inclined to use the Regulation of Wages (General Amendment) 2018 then the multiplicand should range between Kshs 18,845/= to Kshs 27,024/=.
33. It is salient to note that the Regulation of Wages (General Amendment) 2018 is not applicable in this case as it came into force on 1<sup>st</sup> May 2018, two or more months after the accident herein happened.
34. I find that the deceased being a welder, he was classified under Artisan Grade 3 in the Regulation of Wages (General) (Amendment) Order, 2017. It is unknown where the deceased worked but from the pleadings, the accident along Kaplong – Bomet road in Bomet County now is classified as a former municipality. Doing the best I can, I find that the multiplicand to be Kshs 20,166.80/=
35. The trial court used a multiplier of 25 years. The Appellant urged this court to adopt a multiplier of 20 years while the Respondents stated that the multiplier of 25 years that the trial court adopted was proper. In the case of *Roger Dainty vs Mwinyi Omar Haji & another* (2004) eKLR, the Court of Appeal held that:-
- “To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life.”
36. Taking into account that the deceased was not employed and was engaged in the business of welding, I find the trial court’s adoption of 25 years as reasonable.
37. On the issue of the dependency ratio, the deceased had four dependants, a widow and three children who were aged between 2 years to 6 years. This was a young family and it is reasonable to state that the deceased would spend 2/3 of his earnings to support his family. I am persuaded by the case of In *Gordon Ouma Sunda & Another vs Adan Abdikadir Omar & Another* (2019) eKLR, where Cherere J. stated as follows:-
- “Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents. From the foregoing, I am persuaded that a dependency ratio of 2/3 is warranted.”
38. In summary therefore, the loss of dependency comes to Kshs 20,166.80 X 12 X 25 X 2/3= Kshs 4,033,360/=
39. With regard to Special Damages, the Respondent stated that they had incurred Kshs 20,000/= as legal fees to procure the Letters of Administration ad litem. They produced the receipt and the same was marked as P. Exh 3. I find that the Respondent has proved this expenditure.



40. The Respondent testified that she had incurred Kshs 50,000/= as funeral expenses. They also stated that they could not keep the receipts because they were concerned with giving the deceased a befitting send off. Section 6 of the *Fatal Accidents Act* makes provision for funeral expenses as follows:-

In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.

41. In the case of *Premier Dairy Limited vs Amarjit Singh Sagoo* (2013) eKLR, the Court of Appeal stated that:-

“We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issue of record keeping when their primary concern is that a close relative has died”.

42. Similarly, the Court of Appeal, in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* (2016) eKLR, stated that:-

“We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, . . .”

43. Guided by the precedents above, it is my finding that an award of Kshs 50,000/= for funeral expenses would be reasonable. In totality, it is my finding that the Special Damages awardable are Kshs 70,000/=

44. I have noted that the trial Magistrate subtracted Kshs 110,000/= being the award for pain and suffering and loss of expectation of life. I suppose this was done as it was seen as a duplication of awards under the *Fatal Accidents Act* and the *Law Reform Act*. The Court of Appeal has been clear on this issue that a party who had sued under the *Fatal Accidents Act* still had the right to sue under the *Law Reform Act* in respect of the same death. In the case of *Hellen Waruguru Waweru (suing as the legal representative of peter Waweru Mwenja (deceased) )vs Kiarie shoe stores limited* (2015) eKLR, the Court of Appeal stated:-

“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.

The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kenfro*



*Africa Ltd t/a Meru Express Services 1976 & Another v Lubia & Another* (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death .....

45. The above authority has therefore put paid the Appellant's submission on double compensation.
46. The issue of liability was not contested. The trial court found liability at 60:40 in favour of the Respondent. I see no reason to interfere.
47. In light of the foregoing, the amount awarded to the Respondents is as follows: -
  - i. Pain and Suffering Kshs 10,000
  - ii. Loss of expectation of life Kshs 100,000
  - iii. Loss of dependency Kshs 4,033,360  
Kshs 4,143,360  
Less 40% Contribution Kshs 1,657,344  
Kshs 2,486,016  
Add Special Damages Kshs 70,000  
Total Kshs 2,556,016.
48. In the final analysis, the Appeal dated 26<sup>th</sup> November 2019 fails in totality and is dismissed. The amount awarded to the Respondent is increased from Kshs 2,412,000/= to Kshs 2,556,016/=
49. The Respondent is awarded the costs of the Appeal while the costs of the suit shall remain as awarded by the trial court.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

.....

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Mr. Otieno for the Appellant, Mr. Kusa for the Respondent and Siele (Court Assistant)

