



**Italbuild Imports Limited v Mutinda & another (Legal Representatives
of the Estate of John Mwajanji Chinga - Deceased) (Civil Appeal
E084 of 2023) [2023] KEHC 26631 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E084 OF 2023
M THANDE, J
DECEMBER 18, 2023**

BETWEEN

ITALBUILD IMPORTS LIMITED APPELLANT

AND

MAUA JOHN MWAJANJI 1ST RESPONDENT

SELVIN MWAKA MUTINDA 2ND RESPONDENT

**LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN MWAJANJI CHINGA -
DECEASED**

*(An Appeal from the Judgment of Hon. James Ongondo S. P. M.
delivered on 17.5.23 in Malindi CM Civil Case No. E346 of 2022)*

JUDGMENT

1. The Respondent herein instituted a suit by way of a plaint dated 11.11.22 in the trial court against the Respondent, as legal representatives of the estate of John Mwajanji Chinga (the deceased) against the Respondents, under the *Fatal Accidents Act* and the *Law Reform Act* on their own behalf and on behalf of the deceased's dependents. They claimed both general and special damages arising from a road traffic accident. The Respondents' case was that the deceased was on 25.8.22 walking as a pedestrian in Muyeye, Malindi town when the Appellant's authorized driver so negligently drove motor vehicle registration number KAX 289S that he lost control, veered off the road and hit the deceased. As a result, the deceased sustained fatal injuries.
2. The appellant opposed the plaint vide a statement of defence dated 13.12.22 asserting that the accident was caused or substantially contributed to by the negligence and recklessness of the deceased.



3. By consent of the parties on 12.4.23, liability was set at 15:85% in favour of the Respondents which the trial court adopted. In the impugned judgment, the learned Magistrate awarded the Respondents the following sums:

Pain & suffering Kshs. 20,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency Kshs. 2,079,840/=

Burial expenses Kshs. 125,650/=

Special damages Kshs. 36,550/=

Total Kshs. 2,362,040/=

4. Being aggrieved by the quantum of damages which it termed excessively and inordinately high, and unsupported by evidence, the Appellant preferred the Appeal herein, the summarized grounds of which are that the Honourable Magistrate erred in fact and in law in:

1. Awarding the Respondents Kshs. 2,079,840/= as damages under the *Fatal Accidents Act*.
 2. Finding that the deceased was a taxi driver and adopting a minimum wage of Kshs. 17,332/= as per the Regulation of Wages Amendment Order, 2018 applicable to a taxi driver within Nairobi, Mombasa and Kisumu cities and the multiplicand for income applicable to the deceased.
 3. In adopting a multiplier of 15 years to the deceased aged 55 years without considering the vagaries of life.
 4. In adopting a dependency ration of 2/3.
 5. In awarding the sum of Kshs. 162,200/= as special damages.
 6. In taking into account irrelevant considerations while awarding general damages.
 7. In misapprehending the evidence and misapplying, misunderstanding and overlooking the correct legal principles and judicial precedent on the Appellants submissions.
 8. In making decisions on quantum that was erroneous, without proper basis and against the weight of evidence.
5. The Appellant prayed that the appeal be allowed and that part of the judgment delivered on 17.5.23 be set aside in favour of the Appellant with costs.
6. I have re-examined the entire record and given due consideration to the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another -vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123* by Sir Clement De Lestang, V. P. as follows:

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 made due allowance in this respect.

7. A look at the brief judgment will show that no rationale was given by the learned Magistrate for the awards he gave. It would appear that he took the Respondents' submissions at face value and adopted the same. The learned Magistrate ought to have, particularly for the benefit of the Appellant against whom the awards were made, analyzed the evidence and assigned reasons for his conclusions. To the extent that there is no analysis of the evidence in the judgment, I find that the learned Magistrate erred.
8. On the ground that the award for loss of dependency under the *Fatal Accidents Act*, was excessive, the Appellant submitted that there was no evidence to demonstrate that the deceased was a taxi driver and secretary at World Bank or indeed how much the he was earning. Further, that the learned Magistrate misdirected himself by adopting the minimum wage of a taxi driver of Kshs. 17,332/= on the multiplicand, when in fact such figure does not exist. Relying on the case of *Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi* (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] eKLR, it was submitted that where there is no proof of income, the Court will apply the minimum wage or adopt a global sum. The Appellant submitted that Row 1 Column 4 of the Regulation of Wages (General)(Amendment) Order, 2022 should be applied given that there was no proof of occupation. As such, the Court was urged to adopt the minimum wage of Kshs. 8,109.90 for a labourer in areas outside cities or former municipalities and town councils
9. For the Respondents, it was submitted that the Appellant did not object to production of statements or seek to cross examine the witnesses on the assertion that the deceased was a taxi driver or that he was married and had children, the youngest being 14 years. As such, the evidence on dependency was not challenged and admitted as evidence. It was thus proper for the learned Magistrate to rely on the same to determine dependency. The same cannot now be challenged on appeal. To buttress this submission, the Respondents relied on the cases of *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others* [2012] eKLR and *Karuru Munyororo v Joseph Ndumia Murage* [1988] eKLR.
10. The Respondents claimed that the deceased was 55 years old and was survived by a widow aged 55 years and 7 children whose ages ranged from 14 years to 30 years. To support their claim, the Respondents filed the death certificate to prove the age of the deceased and a letter from the chief of Shella sublocation showing the heirs of the deceased and their respective ages. As regards the claim that the deceased was a taxi driver earning Kshs. 2,000/= daily and a secretary with the World Bank, no evidence was availed to the trial court. One would have expected the Respondents to place before the trial court, documents to support this claim. Such documents could include the deceased's driver's licence and the log book, search of the motor vehicle he drove as a taxi and bank or mobile money statements to moneys he received in the course of his business. Indeed, no details were given of the area within which he operated his taxi business, were given to the court. Additionally, a letter of employment from the World Bank ought to have been exhibited. Without such documentary evidence and notwithstanding that the fact that this was not opposed by the Appellant, the Court would not be persuaded that the claim is true.
11. It can also be seen that in the *Kenya Akiba Micro Financing Limited* case (*supra*), the affidavit in support of the motion therein unlike in the present case, set out in detail the nature of the business carried on. Mabeya, J stated:

The Plaintiff has in paragraphs 12 to 15 of the Affidavit of Gideon Mwiti Irea sworn in support of the motion set out in detail the nature of the business it was carrying on prior to November, 2005. I have already set out these details at the beginning of this ruling. To



begin with, the Defendants did not specifically or otherwise deny that the Plaintiff's business was carried out as set out in those paragraphs. Further, none of the Defendants stated or submitted that the business of the Plaintiff as set out in those paragraphs of the Affidavit amount to banking business or financial business. In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.

12. And in the case of Karuru Munyororo (*supra*), the learned Judge found that the plaintiff therein proved the case on a balance of probability. The learned Judge stated:

The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.

13. While it is true that an uncontroverted statement remains a fact and truth of the matter in question, such statement must have sufficient details to persuade the Court that it is the truth. It is observed from the cited authorities that a party is still required to prove the facts alleged, notwithstanding that there is no opposition to the same. Indeed, the provisions of Sections 107-109 of the *Evidence Act* are clear that he who alleges must prove.

14. In the impugned judgment, the trial Magistrate while considering loss of dependency stated:

Under this head the plaintiff submitted that the minimum wages of a taxi driver is KES. 17,332/= per month wherein I have been urged to apply the ration of 2/3 as the deceased had dependants. Further, it has been submitted for the plaintiff that in his work as a taxi driver, he would have worked for more than 15 years.

15. I have carefully looked at the record. There is no evidence to support the Respondents' claim and indeed the trial Magistrate's finding that the deceased was a taxi driver. In the premises, the learned Magistrate misdirected himself by applying a multiplicand of Kshs. 17,332/= as the minimum wage for a taxi driver. when no evidence was tendered as to the occupation of the deceased.

16. Where a deceased's occupation and earnings cannot be ascertained the trial court may at its discretion, adopt the global sum approach as Mabeya, J. did in the case of Frankline Kimathi Baariu. The trial court may also adopt a multiplier approach. In the case of *Dickson Simon Nyambori v Justus Omondi Obura [2018]* eKLR, Mrima, J. stated:

I have previously dealt with this issue and held that whenever a court is charged with the duty of assessing general damages for loss of future earnings and the claimant fails to prove the income relied on, the court should be guided by the requisite wages approved by the Ministry of Labour and duly gazetted. I still hold that position. In this case there was no proof of income.

17. Without proof of the occupation of the deceased, the Court will consider him a general labourer, as set out in the Regulation of Wages (General)(Amendment) Order, 2022, which makes provision for minimum wages payable to workers.. The deceased resided in Muyeye in Malindi town. Malindi, though not a city is a former municipality. Accordingly, the applicable minimum wage is Kshs. 14,025.40

18. On the ground that the multiplier of 15 years applied by the trial court was excessive, the Appellant submitted that given that the deceased was 55 years old, a multiplier of 8 years is more modest in the



circumstances, taking into account the vagaries and vicissitudes of life. Reliance was placed on the case of *Allan Owiti Awuor & another v Tabitha Micere Mathu (Suing As Personal Representative of The Estate Of Peter Math Ng'ang'a)* [2021] eKLR, where Mwita, J. found that a multiplier of 8 years for the deceased who died at 57 years was more appropriate than the 13 years applied.

19. Further the Appellant submitted that the dependency ratio of 2/3 was high and that 1/3 would be more applicable as the deceased's occupation was uncertain. For this submission, the Appellant relied on the case of *James Mutunga Mbinda v Stephen Mwalula Mulwa & another (Suing as the Legal Representatives of the Estate of Winfred Mbatha Mwalula (Deceased))* [2021] eKLR, where Kemei, J. reduced the dependency ratio from 2/3 to 1/3 on the ground that there was no evidence that the deceased was the sole bread winner for the family.

20. In the case of *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another* Nairobi HCCC No. 1638 of 1988(UR), Ringera, J. (as he then was) had this to say on the formula for computation of dependency:

The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents.

21. It is not disputed that the deceased was 55 years at the time of his demise. No evidence was adduced to show that he was not in good health and that he would not have worked for another 15 years. Accordingly, I do not consider a multiplier of 15 years to be unreasonable. Additionally, the deceased was survived by a widow 7 children, 2 of which are minors aged 16 and 14 years. Clearly, they were dependent on him. In this regard I find that a dependency ratio of 2/3 is fair.

22. Having found as I have that the multiplicand of Kshs. 14,025.40 ought to have been applied, the award under the *Fatal Accidents Act* ought then to have been Kshs. 1,683,048/=, made up as follows:

$$14,025.40 \times 15 \times 12 \times 2/3 = 1,683,048/=$$

23. I now turn to the ground that special damages were not sufficiently proved. According to the Appellant, the Respondents are only entitled to Kshs. 1,550/= for special damages, based on the receipts availed in court. Further that burial expenses of Kshs. 125,650 was erroneous as tabulation of the expenses total Kshs. 123,650/=. For their part, the Respondents submitted that they specifically pleaded and proved the special damages of Kshs. 36,550/= and urged the Court not to disturb the award.

24. It is well settled that for special damages to be awarded, they must be specifically pleaded and also strictly proved. In the case of *Maritim & Another -v- Anjere* (1990-1994) EA 312 at 316, it was held as follows:

It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.

25. In their plaint, the Respondents specifically pleaded both special damages and burial expenses. A calculation of the burial expenses based on the receipts produced, shows that contrary to the Appellant's contention, the sum of Kshs. 125,650/= awarded is arithmetically correct.



26. As regards special damages, the record contains a receipt of Kshs. 1,000/= being court fees on the limited grant and another for Kshs. 550/= for motor vehicle search. Although the advocates fees of Kshs. 35,000/= was pleaded and a receipt in respect thereof indicated in the Respondents list of documents, I do not see the said receipt. Accordingly, I agree with the Appellant that the proven special damages are Kshs. 1,550/=. Any other amount must be disallowed.
27. The upshot is that the Appeal partially succeeds. The learned Magistrate's award on loss of dependency and special damages are hereby set aside. This Court hereby enters judgment for the Appellant against the Respondent as follows:
- Loss of dependency Kshs. 1,683,048/=
- Special damages Kshs. 1,550/=
- All other awards remain unchanged. Each party shall bear own costs.

DATED AND DELIVERED IN MALINDI THIS 18TH DAY OF DECEMBER, 2023.

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondents

..... Court Assistant

