



**Momanyi & 2 others v Rapemo & another (Suing as a legal representatives  
of the Estate of Kennedy Ogweno Odongo-Deceased) (Civil Appeal  
E073 of 2021) [2022] KEHC 13060 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13060 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E073 OF 2021  
KW KIARIE, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**JOSEPH MIRERA MOMANYI ..... 1<sup>ST</sup> APPELLANT  
CHINA OGETO ENOCK ..... 2<sup>ND</sup> APPELLANT  
EQUITY BANK LIMITED ..... 3<sup>RD</sup> APPELLANT**

**AND**

**LONNIE OLUOCH RAPEMO ..... 1<sup>ST</sup> RESPONDENT  
JOYCE ADHIAMBO OGOLA ..... 2<sup>ND</sup> RESPONDENT  
SUING AS A LEGAL REPRESENTATIVES OF THE ESTATE OF KENNEDY  
OGWENO ODONGO-DECEASED**

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's  
SPMCC no 143 of 2019 by Hon Celesa Okore-Principal Magistrate)*

**JUDGMENT**

1. Joseph Mirera Momanyi, China Ogeto Enock and Equity Bank Limited the appellants herein, were the defendants in Oyugis Principal Magistrate's SPMCC no 143 of 2019. This was a claim that arose from a road traffic accident involving motor vehicle registration number KAR 044K owned by the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants. The 1<sup>st</sup> appellant was the driver of the said motor vehicle at the time of the complained of accident. The deceased was a passenger therein. The 1<sup>st</sup> appellant veered off the road. This is when the deceased was fatally injured. The respondents sued on behalf of his estate. The learned trial magistrate delivered judgment dated August 5, 2021. She held the appellants 100% liable. She awarded kshs 1,631,000.00 in general damages and kshs 71,000.00 special damages in favour of the respondents.



2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Kimondo Gachoka & Company Advocates. They raised grounds of appeal as follows:
  - a. The learned trial magistrate erred in fact and in law in finding that the plaintiff was entitled to general damages that were excessive as to amount to a wrong estimate.
  - b. The learned trial magistrate erred in law and fact in finding and adopting multiplicand of 20,000/- in the assessment of damages for Loss of Dependency without evidential proof of earnings hence making an excessive award in the circumstances.
  - c. The learned trial magistrate erred in law and in fact in adopting an excessive multiplier thus arriving at an excessive award in the circumstances.
  - d. The learned trial magistrate erred in law and fact in finding that the deceased earned kshs 20,000/- per month when there was no proof of the same without basis and without any evidence to proof of earnings and disregarding the well-established principles in law on how to calculate earnings of a deceased person in the event the same is not proved by the plaintiff.
  - e. The learned trial magistrate erred in law and in fact by relying on the sole testimony of the deceased's wife as proof of the deceased occupation and earnings.
  - f. The learned trial magistrate erred in law and in fact in awarding general damages of kshs 1,651,000/- an amount that was excessive and unjust in the circumstances considering the evidence adduced before court and principles of law.
  - g. The learned trial magistrate erred in law and in fact and her decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law which have occasioned a miscarriage of justice.
  - h. That the learned trial magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the appellants and by instead relying on the authorities cited by the respondent which were excessive in the circumstances.
3. The appeal was opposed by the respondent through the firm of Nyatundo & Company Advocates.
4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co Ltd* [1965] E A 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The respondents contended that the driver of motor vehicle registration number KAR 044K was to blame for the accident. The accident was self-involving and the 1<sup>st</sup> appellant did not testify or call any evidence as to how the accident occurred. Since the deceased was a passenger in the said vehicle, there is no way he could have contributed to the accident. In the circumstances of this case, since accidents do not just happen, the trial court was justified to infer that without an explanation from the appellants, they were 100% liable.
6. In their plaint, the respondents pleaded kshs 71,000.00 special damages. At the trial the same was proved by production of receipts. The special damages awarded were proved.
7. The respondents contended that the deceased was earning kshs 20,000.00 per month. This was however not proved. In absence such a proof, the correct approach would have been that of a global award. When Ringera J (as he then was) was confronted by a similar issue he opined, in *Kwanzia vs*



*Ngalali Mutua and cited D M M (Suing As The Administrator And Legal Representative Of The Estate Of L K M vs Stephen Johana Njue & another* [2016] eKLR as follows:

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 facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of 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.

8. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs Khan* [1981] KLR 349 at page 356 Law JA stated:

...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 a figure which was either inordinately high or low.

9. In this submissions on appeal, the appellants have proposed a sum of kshs 500, 000.00. They relied on the decision in *Gilbert Kimatare Nairi & another (suing as personal representatives of the Estate of Lemayian Richard Kimatare (Deceased) v Civiscope Limited* [2021] eKLR where a global sum of kshs 600, 000.00 was given for there was no prove of earnings. The deceased was aged 42 years and was said to be a farmer. In the instant case though earnings were not proved, the 1<sup>st</sup> appellant in his statement to the police indicated that the deceased was his fellow artisan. The age of the deceased is given as 47 years. Whereas I agree that the award of kshs 1,631,000.00 was on higher side, this case cannot be treated as that of Gilbert Kimatare Nairi & another (*supra*). This was an artisan and both parties acknowledged so. I will therefore set aside the award of kshs 1,631,000.00 and substitute it with a global award of kshs 1,000,000.00.

10. Since the appeal has partially succeeded, the respondents will bear half the costs in this court.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

