



Itumo & another (Suing as the Personal Representative of the Estate of the Late Kennedy Keli Philip) v Amaton Traders Limited (Civil Case 31 of 2020) [2025] KEHC 22 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 22 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE 31 OF 2020
FR OLEL, J
JANUARY 10, 2025**

BETWEEN

MARY MUENI ITUMO 1ST APPELLANT

CHARITY MWENDE 2ND APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE
LATE KENNEDY KELI PHILIP**

AND

AMATON TRADERS LIMITED RESPONDENT

JUDGMENT

A. Introduction

1. The Appellants in this case were the plaintiffs before the Trial Court where they had sued the respondent claiming Special damages in the sum of Ksh.227,950/=, General damages under the [law reform Act](#) & [Fatal Accidents Act](#), costs of the suit and interest from the date of filing. The cause of action is said to have arisen on 7th February 2016, where the deceased was lawfully riding his motor cycle registration Number KMCW 928N (hereinafter referred to as the suit motor cycle) along Machakos – Kitui road at Masii the Appellant’s motor vehicle registration Number KCB 969L (hereinafter referred to as the suit motor vehicle) driven by their authorized driver, agent and/or servant was so negligently and/ or carelessly driven managed and/or controlled that it was allowed to collide with the suit motor cycle, from behind thereby occasioning fatal injuries to the deceased.
2. The respondent upon service, filed their statement of defence denying all the contents of the Plaintiff and in the alternative did contend that if the accident did occur, it was as a result of the negligence, carelessness and/or recklessness of driver of the suit motor cycle and set out the particulars of negligence in the said defence. The respondent urged the court was to dismiss the claim with costs.



B. The facts of the case

3. PW1 Mary Mueni, the wife of the deceased adopted her witness statement, where she stated that on the material day, at about 8.00am, she was called by a friend called Reginah Kalewa who informed her that her husband had been involved in a road traffic accident along Kitui-Machakos road near Masii Market. She called a fellow teacher one Mr Ngulu to rush to Masii Hospital, to check on her husband's condition and they had him transferred to Machakos level 5 hospital. She also took a matatu to Machakos town and upon arrival at the hospital, was informed that her husband had unfortunately had died on the way to the said hospital.
4. She reported the incident at Machakos police station and later organised for the deceased funeral, where she spent Kshs.227,000/= to cater for the funeral expenses. Her deceased husband was at teacher at Kathama Primary school and earned a salary of Kshs.33,162/=. They were blessed with four children and her in-laws were still alive and depended on the deceased.PW1 proceeded to produce her exhibits and further stated that the deceased would give her Kshs.11,054/= monthly for family upkeep.
5. Under cross examination, PW1 confirmed that the deceased was a teacher at Kathama Primary school and would commute to school daily using his motorcycle. As per the payslip produced (Exhibit 11(a) to (c) his net pay was Kshs.7,947/=.
6. PW2 Patrick Mutuku Kilonzo also adopted his witness statement, where he stated that the deceased was riding the suit motor cycle from his home towards the main Machakos -Kitui Road, and found him walking and stopped to give him a lift. They reached the junction joining the main Machakos to Kitui road and after confirming it was safe to join the main road, the deceased proceeded to drive onto the said road, but no sooner had he done so, PW2 realised that there was a matatu (suit motor vehicle), which was speeding behind them.
7. On the opposite end, he also saw an oncoming lorry moving on its correct lane towards their direction. The suit motor vehicle attempted to overtake them, but realised it was dangerous to do so as the said oncoming lorry was close. The suit motor vehicle driver decided to revert to its correct lane, and as he did so hit the suit motor cycle from behind sending them crashing off the road. He fell unconscious and woke up the following day at Machakos level five hospital and later discovered that PW1's husband lost his life as a result of this accident.
8. PW2 blamed the driver of the suit motor vehicle for being negligent and trying to overtake without proper look out for other road users. He was also over speeding thus unable to control the suit motor vehicle in order to avoid the accident, which occurred. Under cross examination, PW2 confirmed that he did not know if the suit motor vehicle driver was ever charged with any traffic offence and blamed him for causing the said accident and being negligent as he hit the suit motor cycle from behind.
9. The Respondent closed their case without calling any witness.
10. The Trial court in her considered judgment awarded the Appellant damages under the following headings as a follows;Award under the *Fatal Accidents Act* Kshs 429,152/=Award under the *law reform Act* Kshs 250,000/=Special Damages Kshs126,000/=
Kshs 805,152/=
Less contribution under *law reform Act* Kshs 250,000/=
Net Total Kshs 555,152/=
11. The Appellants were also awarded costs and interest of the suit.



C. The Appeal

12. Dissatisfied by this judgment, the appellant filed a memorandum of appeal dated 22.05.2020, premised on the grounds that;
 - a. The learned Trial Magistrate erred in law and in fact by applying the wrong principles in assessment of the General damages under the fatal accident Act and *law reform Act* and arriving at the wrong figure.
 - b. The learned Trial Magistrate erred in law and in fact by using the wrong salary amount to assess the net salary of the deceased.
 - c. The learned Trial Magistrate erred in law and in fact by distributing the award amongst the deceased children which did not take into account the youngest minors of the deceased who needed to be shared more money than the eldest children of the deceased.
13. The Appellant urged this court to find that this Appeal was merited, proceed to set aside the entire award of the trial court made and substitute it with an award that it deems fit and just to grant.

D. Analysis And Determination

14. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. See Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR & Coghlan vs. Cumberland (1898) 1 Ch. 704.
15. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316
 - i. Appeal on Quantum
15. The Appellant has only challenged the quantum awarded and did submit that the trial magistrate erred in law and used the wrong principal of law in making an award of Kshs.429,152/=, which was manifestly low. The trial Magistrate ought to have used the deceased net earning proved to be Kshs.33,162/= and not net earnings of Ksh.7,947.25/=. The court had further erred to use a multiplier of nine (9) years when the deceased would have retired and should have used a multiplier of twelve (12) years as the deceased would have worked until 65 years. The dependency ration of $\frac{1}{2}$ instead of $\frac{2}{3}$ was an error as it was shown that the deceased family and elderly parents entirely depended on him for upkeep and sustenance.
15. The final issue raised by the Appellant was that the trial magistrate erred in law in deducting the sum of Kshs.250,000/= awarded under *law reform Act* from the award made under *Fatal Accidents Act*. Section 4(2) of the said *Fatal Accidents Act* did not provide for the said sum to be deducted and this too was an error they sort to have this court correct.
15. It is now a well-established principle of law, that before the court can interfere with trial magistrate assessment of damages awarded, it must be shown that the said court proceed on wrong principles or that he/she misapprehended the evidence in some material aspect and that lead to an inordinately



high or low award as to represent an erroneous estimate of damages. See Kenya Breweries Ltd vrs Saro (1991) Eklr , Butt Vrs Khan (1981) KLR 349 & Jane Chelagat Vrs Andrew Otieno Onduu (1988-92) 2 KAR; (1990-1994) EA 47.

15. With regard to the award under loss of dependency, this court is guided by the finding of Ringera, J (as he then was) in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), held that:

“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... I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288...

.....

When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected”

15. The same court in the case of Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case.

15. It was proved that the deceased was a teacher at Kathana AIC Primary school, was aged 51 years at the time of his untimely demise and earned a gross salary of Kshs.33,162.00/= and a net salary of Kshs.7,94725/=. His dependants included his wife and four daughters were confirmed by letter dated 03.05.2016 from the area chief Mbooni location. As stated in the Grace Kanini (Supra) case referred to above the net pay is what is considered, when calculating loss of dependency and not gross pay as alleged by the Appellant.



16. On ration of dependency, I do concur with the Appellant that the dependency ration should have been calculated at $\frac{2}{3}$ of the deceased salary and not $\frac{1}{2}$ as was calculated by the trial court. This is justified by taking judicial notice of the fact that three of the deceased children were still in school and also due to the fact that the deceased parents too still depended on him for subsistence. The award then should be adjusted accordingly. (kshs.7,947.25/= x 9 x 12 x $\frac{2}{3}$ = Kshs.572,202/=).
15. The trial Magistrate too erred in law in deducting the sum of Kshs.250,000/= awarded under *law reform Act* from the decretal sum. The words, “to be taken into account” under section 4(2) of the *Fatal accidents Act*, does not imply that the award under *law reform Act* is to be deducted. The mathematical deduction made was thus made in error. See Court of Appeal in Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] eKLR & Techard steam & Power Limited Vrs Mutio Muli & Mutua Ngao (2019) eKLR).

E. Disposition.

15. The upshot having made the above analysis on the evidence adduced, I do find that this appeal is partially successful and the trial court award is adjusted as follows;Award under the *Fatal Accidents Act* Kshs 572,202/=Award under the *law reform Act* Kshs 250,000/=Special Damages Kshs 126.000/=Total Kshs 948,202/=
30. The Appellant shall have the costs of primary suit and this Appeal. The Appeal costs are assessed at Kshs.150,000/= all inclusive.
31. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH DAY OF JANUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 10th day of January, 2025.

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam/ Susan Court Assistant

