



**Mugo & another (Suing as the Legal Representatives of the Late John Macharia) v Mweri
(Civil Appeal E057 of 2022) [2025] KEHC 734 (KLR) (14 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E057 OF 2022
GL NZIOKA, J
JANUARY 14, 2025**

BETWEEN

STEPHEN MACHARIA MUGO 1ST APPELLANT

JOHN KANYUIRA MACHARIA 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE LATE JOHN MACHARIA

AND

ELIJAH MWERI RESPONDENT

(Being an appeal from the decision of Honourable J. Ndengeri Senior Resident Magistrate delivered on 2nd, 2022 vide Naivasha CMCC No. 674 of 674 of 2019)

JUDGMENT

1. The plaintiffs (herein “the appellants”) commenced the suit herein vide a plaint dated 6th September 2019, seeking for judgment against the defendant (herein “the respondent”) and the following orders; -
 - a. Damages under Fatal Accident Act (Cap.32) of the Laws of Kenya) for the benefit of the Estate of the deceased and damages under Law Reform Act. (Cap 20) of the Laws of Kenya) and Special damages;
 - b. Costs of this suit;
 - c. Interest on (a) above from the date of judgement and on specials from the date of filing of this suit
2. The appellants’ case is that on 26th January, 2019 or thereabout the late John Kuria (herein “the deceased”) was lawfully standing along but completely off Nairobi-Naivasha Road at Soko Mjinga area, when the respondent servant, agent and /or employees negligently drove, managed and /or controlled motor vehicle registration number KBV 649G and knocked the deceased causing his death.



3. The appellants aver that the respondent was negligent as per the particulars thereof tabulated at paragraph 5 of the plaint, in a nutshell, that he did take care of other road users as he drove at an excess speed, and failed to brake, swerve, slow down or take any other measure to avoid the accident. Further that he was driving under the influence of alcohol.
4. It is averred that the deceased was survived by the father, Stephen Macharia Mugo, mother Julia Wambui Macharia and brother John Kanyuira Macharia. That the deceased was working as a hawker at the time of his death and earning Ksh. 30,000 per month which he used to support the family.
5. However, the respondent filed a statement of defence dated 7th January 2020 and denied that his driver drove the subject vehicle negligently and caused the accident. To the contrary the respondent blamed the deceased for solely causing and/or substantially contributing to the cause of the accident.
6. The appellants filed a reply dated 23rd January 2020 to the defence denying all averments in defence and particulars of negligence attributed to the deceased.
7. The matter was proceeded to full hearing with the appellants calling three (3) witnesses and the defence one (1) witness and subsequently the parties filed their respective submissions.
8. The appellants submitted that, they proved through the evidence of PW2 Samuel Mwaura Njoroge who was a hawker with the deceased and an eye witness that the subject vehicle lost control and hit the deceased severely injuring him. That his evidence was corroborated by the evidence of PW3 No. 80088 PC Meshack Ngugi who investigated the accident and found that the respondent was liable for causing the same. That PW3 preferred charge of causing death by dangerous driving against the respondent which was still pending court.
9. The appellants argued that, the respondent did not provide contrary evidence and therefore they had proved their case to the required standard and urged the trial court to find the respondent 100% liable for the accident.
10. On an award damages for pain and suffering, the appellants urged the court to award Kshs. 250,000 arguing that the deceased died on the same day of the accident. They further urged the court to award Kshs. 200,000 as general damages for loss of expectation of life arguing that the deceased was 30 years old and in good health at the time of his demise and would represent a fair compensation.
11. The appellants further submitted that the deceased was a hawker earning an income of Kshs 30,000 per month, albeit without any formal payment that would require the appellants adduce evidence of his earnings in support of the claim as his earnings were received in cash. Furthermore, production of documents is not the only way to prove earnings. That he used the income for his personal use and provided for his elderly parents. The appellants urged the trial court to adopt Kshs. 30,000 as reasonable in the circumstances.
12. However, the respondent submitted that apart from PW1's word of mouth, there is no documentary evidence to prove that the deceased was indeed earning Kshs 30,000 per month. Further if indeed the deceased was earning the said amount, then he would be banking the same and the appellants would have availed bank statements or Mpesa statement in proof of the alleged earnings.
13. That the appellants having failed to prove the deceased's occupation as well as his earnings, the court should adopt the minimum wage in calculating dependency.
14. The respondent further submitted that, it is settled law that where the deceased is not married a dependency ratio of 1/3 be used. That in this matter the deceased was unmarried and did not have any



children. The respondent argued that awards under the *Fatal Accidents Act* be calculated as follows: $12 \times \text{Kshs } 7,240.95 \times 15 \times 1/3 = \text{Kshs. } 434,457$

15. At the conclusion of the case the trial court delivered a judgment dated 2nd August 2022 and held that although the defendant's servant was in control of the motor vehicle and owned a duty care to the deceased and other road users, the deceased contributed to his own misfortune and apportioned contributory liability against the deceased at 30%.
16. Subsequently the trial court awarded Kshs. 100,000 for pain and suffering, on the ground that the deceased passed on nine (9) days after the accident and Kshs. 200,000 for loss of expectation of life stating that no compensation can replace a life once lost.
17. The trial court also stated that to properly assess damages under the *Fatal Accidents Act*, it is necessary to determine the deceased's income, the dependency ratio of his dependents and multiplier to be used, and held that in this subject matter it was not proved. The trial court then awarded a global figure of Kshs. 700,000.
18. As regards special damages, the trial court observed that the amount specifically pleaded was Kshs 334,332.50 and that three (3) sets of invoices were produced. That it is standard practice that invoices and receipts represents two distinct set of circumstances and that the court only considers what was specifically proved.
19. In conclusion the trial court made its finding on quantum as follows:
 - a. Pain and suffering –Kshs. 100,000
 - b. Loss of expectation –Kshs. 200,000
 - c. Loss of dependency – Kshs. 700,000
 - d. Special damages - Kshs. 334,332
 - e. Total Ksh.1, 334,332.50
 - f. Less 30% (Ksh.400 ,299.75) Ksh. 934,032.75
 - g. Costs and interest are awarded to plaintiff.
20. The trial court ordered that special damages would earn interest from the date of filing of the suit while the rest of the sums will earn interest from the date of the judgement at court rates till payment in full.
21. However, the appellants are aggrieved by the decision of the trial court, on the ground that the learned trial Magistrate erred and misdirected herself in law by awarding a global sum under the limb of loss of dependency and as a result reached an erroneous amount which is inordinately low in the circumstance of this case.
22. As a result, the appellant prays for the follows orders:
 - a. That the appeal be allowed and judgement in Naivasha CMCC No. 674 of 2019 be set aside and/reviewed and award on loss of dependency be re-assessed
 - b. That the cost of this appeal be borne by respondent
23. The appeal was disposed of by way of written submissions. The appellants in submissions dated 5th July 2023 argued that, the trial Magistrate erred by finding that the appellants did not prove the earnings of the deceased, dependency, and the multiplier and adopted the global sum approach and awarded of Kshs. 700,000 under loss of dependency which was inordinately low.



24. The appellants reiterated their submission in the trial court that, the deceased earned about Kshs. 30,000 per month as a hawker selling tomatoes. That, production of documents was not the only way prove earnings and relied on the case of *Jacob Ayiga Maruja & Another vs Simeon Obayo* [2005] eKLR where the Court of Appeal rejected the contention that only documentary evidence can prove a person's professions arguing that it would lead to injustice to the many Kenyans who are illiterate and do not keep records yet they earn a livelihood in various ways.
25. The appellants submitted that, the deceased was a businessman in private business and was therefore not limited to the normal retirement age of 60 years and tha would have worked into his 70's. The case of; *Violet Jeptum Rahedi vs albert Kubai Mbogori* (2013) eKLR was relied on where the High Court stated that a private business cannot be limited to a formal retirement and held that the deceased therein could have carried on his business into his late 60's or early 70's.
26. The appellant further argued that, the respondent did not prove any vicissitudes of life that would have shortened the deceased's work. That the deceased was thirty (30) years old at the time of his demise as indicated in the death certificate produced in the trial court and therefore a multiplier of forty (40) years was reasonable and relied the case of *Julian Njeri Muriithi vs Veronicah Njeri Karanja Nairobi HCC No. 932 of 2000* where the High Court adopted a multiplier of thirty (30) years for the deceased who was thirty-eight (38) years old.
27. Lastly, the appellants submitted that the deceased was survived by two parents who depended on him and urged the court to adopt dependency ratio of 2/3 and award for loss of dependency as follows: Kshs. $30,000 \times 40 \times 12 \times \frac{2}{3} = 9,600,000$.
28. However, the respondent in response submissions dated 29th August 2023, cited the case of *Kemfro Africa Limited t/a Meru Express Services (1976) & Another (No. 2) Civil Appeal No. 21 of 1984* [1985] eKLR where the court outlined the factors an appellate should considers before interfering with an award of damages issued by a trial court.
29. That the afore factors are; that appellant court is satisfied that the trial court took into account irrelevant factors or left out relevant ones, or that the amount was too inordinately low or high to be an erroneous estimate.
30. The respondent submitted that, the trial court was justified in adopting a global award under loss of dependency. That, the appellants failed to prove the earnings of the deceased through production of Mpesa statement. Further, there was no evidence such as production of a trading license to prove of the kind of business the deceased carried on prior to his death. The case of, *John Mwangi Macharia vs Jennifer Keiya Mutegi* [2020] eKLR was cited where the High Court stated that where a deceased's earning was uncertain, the court should award a global sum approach.
31. The respondent further submitted that, the deceased was not married and did not have children, thus a global sum approach was justified and urged the court to affirm the award of Kshs. 700,000 for loss of dependency and dismiss the appeal with costs to himself.
32. Having considered the appeal in light of the materials placed before the court, I note that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.



33. The Court of Appeal thus observed: -

“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 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 make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

34. As regards quantum, the law is settled that the appellate court will not interfere with the decision of the trial court on the same unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another Vs Shah* (1968) EA and *Mkubé -vs - Nyamuro* 1983 KLR 403.

35. In that regard the Court of Appeal in *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* [CA 142/2003](#) (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs Musila* [1984] KLR 257).”

36. In this matter, the appeal is only in relation to the award for loss of dependency. I note from the trial court proceedings that the appellants conceded that, no documents were produced to prove the deceased’s income. Thus the figure of Kshs 30,000 suggested was not tenable. In my considered opinion, the court had to adopt either a global figure or rely on the minimum wages Regulations.

37. The respondent submitted in the trial court that as appellants had failed to prove the income alleged to be Kshs 30,000, the court should adopt Kshs 7,240.95 being the minimum wage for a general labourer under the column of “All other area” of the minimum Wages (General) Amendment Order, 2018.

38. However, in the submission filed on appeal, the appellants maintain that production of documents is not the only way to prove income. But the appellants do not submit on any other form of proof that would substitute documentary of income.

39. It is not tenable to argue that while recognizing that proof of income need not be through documentary evidence, that the Court of Appeal in *Yacob Ayiga Maruja & another -vs- Simeon Obayo* (2005) eKLR relieved a plaintiff of the burden of proof of income.

It suffices to note that the provision of section 107 of the [Evidence Act](#) is clear, that, he who alleges must prove the facts alleged.

40. It is also noteworthy that at the appeal stage the respondent supports the trial court’s finding and departs from its submissions on application of the minimum wage.



41. Be that, as it were, it is not clear in the trial court judgment, why the proposed minimum wage was not considered. Furthermore, the figure of Kshs 700,000 is not substantiated. To adopt a global figure, approach the court must justify it and more so where both parties have varying submissions and have not conceded to application of global figure.
42. Pursuant to the aforesaid I hold the view that the figure of Kshs 700,000 awarded herein needs to be re-evaluated and/or the entire claim of loss of dependency must be re-assessed.
43. In that regard, I find that in the absence of proof of income minimum wage regulations is preferably as it is transparent and reliable. I shall adopt the figure of Kshs 7,240.95 suggested by the respondent. The ratio of one third (1/3) is not in dispute. As regard the years applicable, the appellants suggested forty (40) and respondent proposed fifteen (15).
44. I note that the appellant was thirty (31) years old. It is not clear and evident what he was doing in life save for evidence orally in court that he was a hawker. If he was in civil service, he would retire at sixty (60) years. Thus a further twenty (29) years. As such forty (40) years suggested is not tenable. On the other part fifteen (15) years is too low as he would still be of prime age. Taking into account the vicissitude of life I adopt a figure of twenty-eight (28) years.
45. The award will thus be as follows: -
$$\text{Kshs } 7,240.95 \times 12 \times 28 \times \frac{1}{3} = 810,980.80$$

The rest of judgment remains as delivered in the trial court.
46. The total sum awarded shall attract interest and costs to the appellant from the date of judgment in the trial court until payment in full and each party to bear costs of appeal.
47. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF JANUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Kiberenge for the appellant

Mr. Kariuki for the respondent

Mr. Komen: court assistant

