



**Abdullahi t/a Wajir Fresh Vegetables Enterprises v Kagendo (Suing as the legal representative of the Estate of David Muchiri Nyaki-Deceased) & another (Civil Appeal E121 of 2023) [2025] KEHC 3249 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3249 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E121 OF 2023  
EM MURIITHI, J  
FEBRUARY 13, 2025**

**BETWEEN**

**ABDI ABDULLAHI T/A WAJIR FRESH VEGETABLES  
ENTERPRISES ..... APPELLANT**

**AND**

**MARY KAGENDO (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF DAVID MUCHIRI NYAKI-DECEASED) ..... 1<sup>ST</sup> RESPONDENT  
MARY WANJIRU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. L. Mutai  
(CM) delivered on 18/7/2023 at Isiolo CMCC No. 25 of 2016)*

**JUDGMENT**

1. By an amended plaint dated 25/2/2022, the Respondents (the Plaintiffs in the trial court) sued the Appellant (the Defendant) for damages under the *Fatal Accidents Act* and the *Law Reform Act*, special damages and costs of the suit plus interest. They pleaded that on or about 20/3/2015, the deceased was driving Motor Vehicle Registration No. KBQ 911 C Mitsubishi Lorry as a driver of the Appellant along Kiganjo-Marua Road, when he was involved in a fatal accident. At the time of his death, the deceased was aged 30 years, enjoying good health, living a happy life and earning Ksh. 15,000 per month. As a result of his death, his wife, mother, child and siblings who depended on him, have suffered.
2. The Appellant denied either being the owner of the accident motor vehicle or the occurrence of the accident vide his statement of defence dated 6/6/2016 and prayed for the dismissal of the Respondents' suit.



3. Upon full hearing of the case, the trial court found the Appellant to have been wholly liable for the accident and awarded Ksh. 50,000 for pain and suffering, Ksh. 100,000 for loss of expectation of life and Ksh. 2,175,336 for loss of dependency together with costs and interests.

### **The Appeal**

4. On appeal, the Appellant filed his memorandum of appeal dated 27/7/2023 raising 8 grounds as follows:
  1. The learned trial magistrate erred in law and fact in assuming jurisdiction over a work injury and death related matter when she knew or ought to have known that, pursuant to the *Work Injury Benefits Act*, 2007 and previous decisions by superior courts, she had no jurisdiction to determine the case.
  2. The learned trial magistrate erred in law and fact in rendering a judgment per incuriam seeing as, before her, the following authorities, amongst others, were laid:
    - a. Attorney General –vs- Law Society of Kenya & Another (2017) eKLR.
    - b. Said Mohamed –vs- Diamond Industries Ltd (2018) eKLR.
  3. The learned trial magistrate erred in law and fact by holding the Defendant liable without proof of fault on his part.
  4. The learned trial magistrate erred in law and fact by holding that the Defendant failed to maintain the subject vehicle without any proof whatsoever.
  5. The learned trial magistrate erred in law and fact in ignoring and failing to advert to the motor vehicle inspection report which was put in evidence without objection and which was probative of the fact that the subject vehicle was mechanically sound at the time of the accident.
  6. The learned trial magistrate erred in law and fact in finding that the deceased was the Defendant’s employee without any evidence in proof of the fact.
  7. The learned trial magistrate erred in law and fact in failing to apply her mind to the relevant doctrines, principles and law these being, inter alia, the following:
    - a. Jurisdiction is a creature of the law and cannot be created through advocacy or draftsmanship or judicial craft.
    - b. The Plaintiff, in civil case, has the ultimate burden of proof to prove his case on a preponderance of evidence/balance of probabilities which burden does not shift.
    - c. In an adversarial system, the court ought not descend into the arena and argue any one party’s case.
    - d. The court, in rendering a judgment, is duty bound to outline all the issues on which a case must turn and decide each issue giving reasons for its decision.



8. The learned trial magistrate erred in law and fact in proceeding to assess and award damages when the same were not at all merited.

### **Duty of the Court**

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

### **Evidence**

6. PW1 Mary Kagendo, the 1<sup>st</sup> Respondent herein testified that, “I am the Plaintiff. The deceased David Muchiri is known to me. On 11.5.2016 I did file my statement. I do urge the court to rely on it as my evidence. I did file my supporting documents dated 11.5.2016 and I wish to rely on them as my evidence. P. Exhibit 1-9. I urge court to allow my claim and award me costs.”
7. On cross examination, she stated that, “I have sued Abdi Abdullahi. The Wajir Fresh Vegetables Enterprises is the owner of the motor vehicle. Abdi Abdullahi owned the motor vehicle. I know there was an objection from the deceased mother and brother about me and the deceased relationship. They impugned our union. I knew the mother went all the way to Meru High Court. The relatives of the deceased brought in fake documents. Mary Wanjuki Nyaki is mother to the deceased. Isaac is brother to the deceased. I never witnessed the accident. I know the driver of the vehicle was careless. I don’t know whether the motor vehicle was inspected and the outcome. I did visit the scene of the accident. The motor vehicle was from Nanyuki direction towards Nyeri. The area has corners and its sloppy. The motor vehicle rolled towards the left side. I and my child depended on the deceased. I don’t know about the other 10 dependants seeking same award. I have filed documents to prove that deceased was my husband. I have filed affidavit of marriage and I have child birth certificate. I have filed records to prove ownership of the motor vehicle – copy of records – exhibit 6. I have police abstract to prove that the defendant was to blame for the accident – police abstract.”
8. In re-examination, she stated that, “Nobody has impugned my capacity to file the suit before the court. Mary Nyaki is my mother in law.”
9. DW1 Abdi Abdullahi, the Appellant herein testified that, “I did sign the witness statement. I urge the court to adopt it as my evidence. Its dated 5.6.2016. The deceased in this case was my driver. I had given him work on casual basis to drive my vehicle to Nairobi. The motor vehicle involved was inspected. The inspection report is filed with the court. It’s in the list of documents dated 5.6.2016. Inspection report D-exhibit 1.”
10. On cross examination, he stated that, “The deceased died while driving my motor vehicle. I haven’t compensated the family, but I assisted with the burial arrangement. Insurance company is yet to compensate the deceased family because he drove the motor vehicle carelessly. The deceased was to blame for the accident. I know the deceased was drunk before the accident but I have no proof. There were Tusker bottles in the vehicle which deceased was driving. I didn’t witness the accident.”

### **Submissions**

11. The Appellant urges that the provisions of the *Work Injury Benefits Act* make it clear that the magistrate’s courts have no jurisdiction to hear and determine claims arising out of occupational accidents, and cites *Bloomingdale Roses (K) Ltd v Gladys Kathure Nteere* (2018) eKLR and *Attorney General v Law Society of Kenya & Another* (2017) eKLR.



12. He faults the trial court for concluding that he was to blame for the accident, by failing to maintain the accident vehicle without any evidentiary basis despite the production, without any objection, of the inspection report. He urges that there was no evidence on record to prove that he had employed the deceased, and cites *Kiganjo Bakery Limited v Jackson Ndwaru* (2019) eKLR. He urges that the Respondents were not entitled to any form of compensation because they not only went into a forum without jurisdiction, but failed to prove any negligence or other actionable fault on his part.
13. The Respondents urge that the suit was not brought under the *Work Injury Benefits Act*, but rather under the *Fatal Accidents Act* and the *Law Reform Act*, and it is clear from the pleadings that the Appellant was sued as the registered owner of the accident vehicle. They urge that since the Appellant failed to raise a preliminary objection on jurisdiction during the trial, he submitted to the jurisdiction of the said court, and he is therefore precluded from raising the issue herein, and cite *Adan Chuda Sode v Madina Oshe Jira & another* (2021) eKLR. They allude to the insignificance of the 2 cases cited by the Appellant, to this appeal, and maintain that the suit herein was for compensation under the *Fatal Accidents Act* and the *Law Reform Act*. They urge that the Appellant was duty bound to ensure that the accident vehicle was in good condition, and cite *Kenya Bus Services Ltd & Dina Kawira Humphrey C/A 295/2000*. They urge that the inspection report was not specific in its details, which is why the trial court felt it would be prudent if its maker was called to testify. They urge that they proved their case by uncontroverted evidence and pray for the dismissal of the appeal with costs.

### **Analysis and Determination**

14. Before delving into the merits of the appeal, an objection has been raised on the trial court’s jurisdiction to handle a work injury related claim.
15. The jurisdiction of the courts in relation to the *Work Injury Benefits Act* matters has been fully settled by the Supreme Court in *Law Society of Kenya v Attorney General & another* (Petition 4 of 2019) [2019] KESC 16 (KLR) (3 December 2019) (Judgment) as follows:

“(69) We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in Court.

(70) Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers’ compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to result to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court. We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already



efficient system. It is our finding, therefore, that neither Section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or the Constitution 2010.”

16. The Work Injury Benefits Act provides for compensation to employees for work-related injuries and diseases contracted in the course of employment.
17. The Appellant’s position is that the claim is work-injury related because the deceased was casually working as his driver when he met his death, and thus the same ought to have been, in the first instance, referred to the Director of Work Injury Benefits.
18. Section 5 of the Work Injury Benefits Act defines an employee to mean a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner.
19. Section 5 (3) of the Act excludes the following persons from being regarded as employees —
  - (a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business;
  - (b) any person employed outside Kenya save as provided in section 11 of this Act;
  - (c) a member of the employer’s family dwelling in the employer’s house or cartilage thereof and not for the purpose of employment; or
  - (d) a member of the Defence Forces as defined in the Kenya Defence Forces Act (Cap. 199).
20. In their amended Complaint, the Respondents expressly sought damages under the Law Reform Act and the Fatal Accidents Act, and not damages for an injury the deceased sustained during the course of his employment. In addition, the accident occurred outside the workplace thus falling outside the purview of an occupational hazard, and therefore effectively divesting the Director of Work Injury Benefits of jurisdiction to hear and determine it.
21. Moreover, on proper apprehension of the Supreme Court decision in the WIBA decision, supra, the Court’s jurisdiction is not ousted; it is merely preserved as secondary and reversionary. A determination by the Court cannot, therefore, in the respectful view of this court, be barred. The jurisdiction of the Director is in the words of the Supreme Court “in fact merely facilitative of what may eventually end up in Court.”
22. On the facts of this case, this court finds that the Respondents’ claim for damages as a result of the Appellant’s negligence fell squarely within the jurisdiction of the trial court. On the merits, the 2 issues that arise for determination are whether the Respondents proved their case on a balance of probabilities and whether the awards made were merited.

### **Proof of the case**

23. The undisputed facts in this case are that on the material day, the deceased was working on casual basis, as the Appellant’s driver, when the ill-fated accident occurred. What is in contention is who was to blame for the accident. Whereas the Appellant maintained that the deceased was solely to blame for the accident, as there were tusker bottles in the accident vehicle, connoting to his drunkenness, the Respondents wholly apportioned blame on the Appellant for breaching his duty of care, of ensuring the accident motor vehicle was at all times in a road worthy state.
24. The 1<sup>st</sup> Respondent recorded in her statement, which was adopted as her evidence in chief that, “I am informed that the Defendant forced my husband to drive a motor vehicle that he was not used to



driving which was mechanically defective...At the time of his death the deceased was aged 30 years, he enjoyed good health and lived a healthy and happy life. He was earning more than Kshs. 15,000/= per month as an employee of the Defendant. The deceased had prospects in life and assisted his wife (plaintiff herein), child and other dependants.” She restated on cross examination that, “Abdi Abdullahi owned the motor vehicle...Mary Wanjuki Nyaki is mother to the deceased. Isaac is brother to the deceased. I never witnessed the accident. I know the driver of the vehicle was careless. I did visit the scene of the accident. The motor vehicle was from Nanyuki direction towards Nyeri. The area has corners and its sloppy. The motor vehicle rolled towards the left side. I and my child depended on the deceased. I have filed documents to prove that deceased was my husband. I have filed affidavit of marriage and I have child birth certificate.”

25. The Appellant herein testified that, “The deceased in this case was my driver. I had given him work on casual basis to drive my vehicle to Nairobi. The motor vehicle involved was inspected.” On cross examination, he stated that, “The deceased died while driving my motor vehicle. I haven’t compensated the family, but I assisted with the burial arrangement. The deceased was to blame for the accident. I know the deceased was drunk before the accident but I have no proof. There were Tusker bottles in the vehicle which deceased was driving.”
26. It is irrefutably clear that the Respondents proved their case against the Appellant on a balance of probabilities. The fact that the accident motor vehicle had no pre-accident defects does not in itself absolve the Appellant from any blameworthy. The 1<sup>st</sup> Respondent’s testimony that the accident motor vehicle was mechanically defective, was not meaningfully challenged on cross examination. In the absence of an eye witness account on the circumstances surrounding the causation of the accident, this court must infer that the Appellant was wholly to blame for the accident.

### **The award of damages**

27. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”



28. The fact that the deceased herein died on the spot cannot be construed to mean that he did not suffer much pain. The court notes the persuasive case of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, where the court (D.S Majanja J) said that:
- “It is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation.”
29. This court is minded that even where the death is instantaneous, some form of pain is still endured. Therefore, the award of Ksh.50,000 made by the trial court under this head was fair.
30. It is trite law that loss of dependency is a question of fact which needs to be proved by evidence. The 1<sup>st</sup> Respondent’s evidence was that the deceased was her husband who supported her and their child. It is further pleaded that the deceased was also supporting his mother and his 8 siblings.
31. Section 4 (1) of the *Fatal Accidents Act* does not recognize siblings as dependants, as follows:
- “Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was 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 costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”
32. The court finds that the deceased was survived by the Respondents and his child. In arriving at the award of Ksh.2,175,336 under this head, the trial court adopted the minimum wage of a driver of Ksh.10,071, as the multiplicand, a multiplier of 27 years and a dependency ratio of  $\frac{2}{3}$ .
33. Admittedly, the 1<sup>st</sup> Respondent and the Appellant confirmed in their respective testimonies that the deceased was a driver, although no evidence was led on how much he earned therefrom. The fact that no documentary evidence of income was led cannot be the only reason to decline awarding damages where loss and support from the deceased is proved. It would be untenable to assess at zero the deceased’s contribution to support his mother, his wife and his child, merely because there is no record of his earnings.
34. As held by the Court of Appeal in *Jacob Ayiga Maruja & anor v Simeon Obayo* (2005) eKLR that the absence of proof of the deceased earnings in form of receipts cannot be construed to mean he was not working for gain, the trial court aptly adopted the minimum wage as the multiplicand.
35. The Respondents have satisfactorily established that the deceased used to support them and his child and this court finds that the dependency ratio of  $\frac{2}{3}$  adopted by the trial court was justified.



36. The deceased was aged 30 years at the time of his untimely death, and he enjoyed healthy life. The multiplier of 27 years was within the permissible period of his working life, and therefore reasonable as guided by *Roger Dainty v Mwinyi Omar Haji* (2004) eKLR, where the Court of Appeal said 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.”

37. With regard to loss of expectation of life, the conventional figure awardable under this head is Ksh.100,000, is what the trial court properly awarded, and this court finds no justification to interfere.

### **Orders**

38. Accordingly, for the reasons set out above, the Court finds the Appellant’s appeal herein to be without merit and it is dismissed.

39. The appellant shall pay the costs of the appeal to the respondents.

Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Applicant Present in person.

Ms. Adhi for DPP.

