



REPUBLIC OF KENYA



KENYA LAW

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Dominic v Muiyenda (Suing as the Personal Representative and Administrator of the Estate of the Estate of Nicholas Maraga Makori - Deceased) (Civil Appeal E049 of 2023) [2025] KEHC 1505 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E049 OF 2023
WA OKWANY, J
FEBRUARY 13, 2025**

BETWEEN

NYATUNDO ORWOBA DOMINIC APPELLANT

AND

VIOLET NYAKEBATI MUYIENDA RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR
OF THE ESTATE OF THE ESTATE OF NICHOLAS MARAGA MAKORI -
DECEASED**

*(Being an Appeal from the Judgment in the Senior Principal Magistrate's
Court at Keroka CMCC No. E180 of 2021 delivered by Hon. B.M.
Kimitai, Senior Principal Magistrate on 8th September 2023)*

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court where she sued the Appellant, in her capacity as the personal representative of the estate of Nicholas Maraga Makori (Deceased) for, inter alia, compensation under the [Fatal Accidents Act](#) and [Law Reform Act](#) and Special Damages in the sum of Kshs. 220,550.
2. The Respondent's case was that the deceased was on or about 19th June 2021 travelling as a fare paying passenger in the Defendant's motor vehicle registration No. KCW 035D along Keroka-Sotik road when at Rianyandoro area, the Defendant's driver so negligently, carelessly and/or recklessly drove, controlled and/or managed the said motor vehicle that he permitted it to lose control, veer off the road, and overturn thereby causing an accident in which the deceased suffered fatal injuries.
3. The Appellant/Defendant filed his Statement of Defence dated 15th January 2022 wherein he denied the Respondent's entire claim.



4. The Respondent's witness No. 69256 Cpl. Prisca Nyanchama (PW1) confirmed that the deceased died in the accident in question. She produced the Police Abstract dated 23rd June 2021 as (P.Exh 1). The Respondent testified as PW2 and produced the following exhibits:-
 - i. Her National Identity Card (P.Exh2)
 - ii. Motor vehicle Search and Receipt (P.Exh 3a and 3b)
 - iii. Post Mortem Report (P.Exh 4)
 - iv. Certificate of Death (P.Exh 5)
 - v. Grant Ad Litem (P.Exh 6)
 - vi. Children's Birth Certificates (P.Exh 7a, 7b, and 7c)
 - vii. The Chief's Letter (P.Exh 8)
 - viii. Special Damages (P.Exh10)
 - ix. Bundle of receipts (P.Exh 12)
5. The Appellant/Defendant did not present any evidence before the trial court. The said court rendered judgment as follows: -

Liability at 100% against the Defendant in favour of the Plaintiff

Pain and Suffering – Kshs. 50,000

Loss of Expectation of Life – Kshs. 120,000

Loss of Earnings – Kshs, 3,776,242

Special Damages – Kshs. 215,000

Costs of the Suit

Interest on the above.
6. Aggrieved by the trial court's decision, the Appellant filed the instant appeal in which he listed the following grounds: -
 1. The Learned Trial Magistrate erred in law and in fact in finding that the Defendant was 100% liable for the accident which was the subject matter of this suit.
 2. The Learned Trial Magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.
 3. The Learned Trial Magistrate erred in law and in fact by awarding Kshs. 3,776,242 as General Damages under the *Fatal Accidents Act*, an amount that was inordinately high, unjustified and contrary to the evidence on record.
 4. The Learned Trial Magistrate erred in law and in fact in awarding the Estate of the deceased a sum of Kshs. 50,000 for pain and suffering while not considering the deceased died shortly after the accident.



5. The Learned Trial Magistrate erred in law and in fact in awarding the Estate of the deceased a sum of Kshs. 120,000 for loss of expectation of life, an amount which was excessive and unjustified.
 6. The Learned Trial Magistrate erred in law and in fact by awarding the Estate of the deceased a sum of Kshs. 2,400,000 for loss of dependency that was so excessive as to amount to an erroneous estimate of loss or damages suffered by the Estate of the deceased.
 7. The Learned Trial Magistrate erred in law and in fact by adopting a multiplicand of Kshs. 50,000 as proof of earnings when no evidence was adduced to prove the same thus arriving at an excessive and erroneous estimate of damages.
 8. The Learned Trial Magistrate erred in law and in fact in awarding Special Damages of Kshs. 215,000, an amount which was not pleaded and strictly proved.
 9. The Learned Trial Magistrate erred in law and in fact by ignoring and/or failing to consider the Appellant's submissions on quantum and legal authorities relied upon in support thereof.
 10. The Learned Trial Magistrate erred in law and in fact in relying on extraneous circumstances not supported by the evidence on record.
 11. The Learned Trial Magistrate erred in law and in fact by overly relying on the Respondent's submission which were not relevant and without addressing his mind to the circumstances of the case.
 12. The Learned Trial Magistrate erred in fact and in law in failing to consider conventional awards in cases of a similar nature.
7. The Appellant sought orders to set aside the said judgment or in the alternative, the re-assessment of the damages awarded by the trial court.
 8. The Appeal was canvassed by way of written submissions. As at the time of writing this judgment, only the Respondent had filed her submissions.
 9. The duty of the first appellate court was explained in the case of Kenya Ports Authority vs. Kusthon (Kenya) Limited 2000 2EA 212, the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

Analysis and Determination

10. I have considered the Record of Appeal and the Respondent's submissions. I find that the main issue for determination is whether the trial court arrived at the correct findings on liability and quantum.
11. In Kamau vs. Mungai & Another [2006] 1LR 150 the Court of Appeal established the principles to be applied when determining whether or not to interfere with the trial court's award on damages: -

“.....A Court on Appeal will not normally interfere with a finding of fact by the trial Court in a civil or criminal case unless it is based on evidence or on a misapprehension of the



evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

12. The trial court apportioned liability at 100% against the Appellant. It was not disputed that the deceased lost his life while travelling as a passenger aboard the Defendant’s Motor Vehicle. It was the duty of the driver of the said motor vehicle to drive and control it at a reasonable speed so as to avoid causing the fatal accident altogether. I find that in the circumstances of this case, the deceased had no control over the manner in which the motor vehicle was being driven.
13. I also find that the Respondent established that the Appellant was the registered owner of the motor vehicle that was involved in the fatal accident through the Certificate of Motor Vehicle Search (P.Exh3). I therefore find that the trial court arrived at the correct finding on liability at 100% in favour of the Respondent.
14. On quantum, it is trite that an appellate court will not ordinarily interfere with the trial court’s assessment of damages unless it is shown that the same was based on an erroneous estimate or where the court did not apply the correct legal principles. In *Arrow Car Ltd vs. Elijah Shamalla Bimomo & 2 Others* (2004) eKLR it was held thus: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ...”

15. Similarly, in *Khambi & Another vs. Mahithi & Another* [1968] EA 70, it was held that: -

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

Damages under the *Law Reform Act*

a. Pain and Suffering

16. The Respondent submitted that since the deceased died on the spot, an award of Kshs. 50,000 was adequate for pain and suffering. She cited the case of *Acceler Global Logistics vs. Gladys Nasambu Waswa & Another* (2020) eKLR where the court awarded a similar amount.
17. The principles governing the award of damages for pain and suffering under the *Law Reform Act* were well-settled in the case of *West Kenya Sugar Co Limited vs. Philip Sumba Julaya* (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR thus: -

“...As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle



is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident...”

18. In *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed that:-

...The conventional award for loss of expectation of life is Ksh 100,000/- while for pain and suffering the awards range from Ksh 10,000/= to Ksh 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

19. In the case of *Acceler Global Logistics vs. Gladys Nasambu Waswa & another* [2020] eKLR, Mativo, J (as he then was) upheld an award of Kshs. 50,000 where the deceased died on the spot; In *Sukari Industries Limited vs. Clyde Machimbo Juma* (2016) eKLR Majanja J. made a similar award and in *Mosonik & another vs. Cheruiyot* (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) Sewe J. reduced an award of Kshs. 150,000 to Kshs. 50,000 for pain and suffering where the deceased died on the spot.

20. In light of the above cited cases, I find no reason to interfere with the trial court’s assessment of damages for pain and suffering.

b. Loss of Expectation of Life

21. The Respondent’s case was that the deceased was 33 years old at the time of his death. She stated that the deceased enjoyed good health and had a promising future. The Respondent proposed an award of Kshs. 150,000 for loss of expectation of life. She cited the case of *Jackson Kariuki Ndegwa* (Suing as the Administrator of the Estate of Fabius Munga Kariuki) vs. *Peter Kung’u Mwangi* (2016) eKLR where the court awarded Kshs. 150,000 under this heading. The Appellant on the other hand proposed an award of Kshs. 80,000 in his submissions before the trial court. Reference was made to the decision in *James Gakinya Karienyé & Another* (Suing as the Legal Representative of the Estate of Kelvin Gakinya – deceased vs. *Perminus Kariuki Githinji* (2015 eKLR) where the court awarded Kshs. 80,000 for loss of expectation of life.

22. I note that the trial court relied on the case of *Wesley Kipyegon Mutai vs. Kipkelion Town Council and Another* [2009] eKLR where an award of Kshs. 80,000 was made in respect of a deceased who was aged 40 years at the time of his death. The trial court considered the inflationary trends and awarded the sum of Kshs. 120,000.

23. I have considered the cases of *Citi Hoppa Bus Limited & Another vs. Maria Clara Rota* [2021] eKLR where an award of Kshs. 200,000/= was made for loss of expectation of life in respect to a 33-year-old deceased and *West Kenya Sugar Co. Limited vs. Philip Sumba Julaya* (Suing as the administrator and personal representative of the estate of *James Julaya Sumba* [2019] eKLR where the court upheld an award of Kshs. 200,000 under this heading.

24. Guided by the holding in the above cited cases, I find that there is no justification in upsetting the trial courts award of Kshs. 120,000 for loss of expectation of life.

Damages under the Fatal Accident Act

25. The Respondent submitted that the deceased was a qualified PSV driver and estimated his monthly earnings at Kshs. 23,039.40 based on the wages for drivers under the Regulation of Wages (General) Amendment Order 2018.



26. The Appellant, on his part, proposed that the deceased be considered as a general labourer or gardener earning a monthly wage of Kshs. 8,109/=. The trial court adopted Kshs. 18,881.21 as the monthly wages for drivers.
27. The Respondent further submitted that the deceased would have worked for a further period of 27 years before reaching the official retirement age of 60 years. The Appellant, on the other hand, was of the view that the deceased would have worked for a further 10 years. The Appellant cited the decision in the case of *Rodgers Dainty vs. Mwingi Omar Haji & Another* CACA No. 59 of 2004 (2004) eKLR where a multiplicand of 10 years was used in respect to a deceased aged 27 years.
28. I note that the trial court applied a multiplicand of 25 years and adopted a multiplier ratio of 2/3.
29. I have considered the evidence presented before the trial court and the Respondent's claim that the deceased worked as bus driver earning Kshs. 50,000. I however note that the Respondent did not produce any proof of employment such as a driver's license, PSV licence or payslip to confirm the deceased's alleged job or earnings. I therefore find that the trial court erred in adopting the multiplicand method when the Respondent did not prove the deceased alleged employment or earnings. I find guidance in the decision in *Mwanzia Ngalali Mutua vs Kenya Bus Services (Msa) Ltd & Another* where it was held that: -
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the 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”.
30. My finding is that the most appropriate approach for assessing damages under *Fatal Accidents Act* is the Global Sum approach. In the case of *Michael Rimiri M'ingetha & another vs. Zipporah Mukomua M'ituri* [2020] eKLR, Mabeya J. reduced an award of Kshs. 3,000,000 to Kshs. 2,000,000 in respect to a deceased who died at the age of 32 years and was survived by two children and a mother who depended on him.
31. In the case of *Ainu Shamsi Hauliers Limited vs. Moses Sakwa & another* (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased)) [2021] eKLR the Court upheld an award of Kshs. 2,000,000 where the deceased died at the age of 40 years.
32. Taking a cue from the above cited cases, I find that an award of Kshs. 2,800,000 for loss of dependency would be a fair assessment under the Global Sum approach as the deceased, who was survived by 4 dependents, died at age 33 years.

Special Damages

33. It is trite that Special Damages must be not only be specifically pleaded but must also be strictly proved. The Respondent claimed the sum of Kshs. 220,550 for special damages. I have carefully perused the Record of Appeal and I note that the Respondent pleaded and proved special damages as follows: -
- i. Search Fees for copy of Motor vehicle records – Kshs. 550
 - ii. Food and Miscellaneous Funeral Expenses – Kshs. 120,000
 - iii. Transport for the Deceased's body – Kshs. 15,000



- iv. Coffin – Kshs. 30,000
- v. Post-Mortem and Mortuary Fees – Kshs. 30,000
- vi. Cost of succession cause – Kshs. 25,000

Total – Kshs. 210,550

34. I note that the Respondent attached receipts in the sum of Kshs. 50,000 for tents and chairs but did not plead the same in the Pleat. I also note that while the Respondent pleaded kshs. 30,000 for post mortem and mortuary fees, the receipts produced in court were for Kshs. 20,000 only. I will therefore not award the special damage for the claims that were not proved.

35. Having regard to the findings that I have made in this judgment, I find that the appeal is merited and succeeds, albeit only in part, in respect to the claim for loss of dependency and items particularized under special damages. I therefore set aside the decision by the trial court and substitute it with judgment in favour of the Respondent as follows: -

Liability at 100% against the Defendant in favour of the Plaintiff

- a. Pain and Suffering – Kshs. 50,000
 - b. Loss of Expectation of Life – Kshs. 120,000
 - c. Loss of Dependency – Kshs, 2,800,000
 - d. Special Damages – Kshs. 210,550
- Total = Kshs. 3,180,550
- e. Since the appeal is partly successful, I will make no orders as costs but I award the Respondent interest on the total sum awarded at court rates till payment in full.

36. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 13TH DAY OF FEBRUARY 2025.**

W. A. OKWANY

JUDGE

