



Mbogori & another (Suing as the Legal Representatives of the Estate of Peter Mbogori Murungi (Deceased)) v Pan Africa Chemicals Limited & another (Civil Appeal E022 of 2023) [2025] KEHC 5481 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEHC 5481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E022 OF 2023
GL NZIOKA, J
FEBRUARY 24, 2025**

BETWEEN

MARY WANGECI MBOGORI 1ST APPELLANT

LUCY WANJIRU WAGURA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER
MBOGORI MURUNGI (DECEASED)**

AND

PAN AFRICA CHEMICALS LIMITED 1ST RESPONDENT

WILLIS OUMA 2ND RESPONDENT

(Being an appeal from the decision of Honourable N. S. Lutta Chief Magistrate delivered on 30th November 2022 vide Naivasha CMCC No. 536 of 2020)

JUDGMENT

1. By a plant dated 24th August 2020, the plaintiffs (herein “the Appellants”) sued the defendants (herein “the Respondents”) seeking for judgment for: -
 - a. General damages under the statutes aforesaid
 - b. Special damages pleaded at Kshs 74,500
 - c. Costs of the suit plus interest
 - d. Any other or further relief that this Honourable court may deem fit and just to grant
2. The brief facts of the appellants case are that on the 3rd day of May 2018, the deceased Peter Mbogori was walking along Gilgil-Naivasha road and at Sogea area when motor vehicle registration No. KCH



284 G/ZF 4582M-Benz Axor driven by the 2nd respondent and owned by the 1st respondent hit him and fatally injured him.

3. The appellants blame the 2nd respondent for negligently driving the subject vehicle and hold the 1st respondent vicariously liable. The particulars of negligence attributed to the 2nd respondent are tabulated at paragraph 6 of the plaint.
4. The appellants plead at paragraph 5 that, the deceased was survived by family members, whose particulars are stated in the plaint and who include, his two (2) wives, two (2) sons and four (4) daughters. It is further averred that the deceased was aged 53 years at the time of his death and was working as a driver earning Kshs 15,000 per month. Further that, he was in extremely good health and of great assistance to his family.
5. However, the claim was denied vide a statement of defence dated 11th January 2021, wherein the respondents denied being responsible for the accident and/or the particulars of negligence attributed to the 2nd respondent. The 1st respondent equally denied owning and/or being the registered owner of the subject motor vehicle.
6. However, without prejudice and in the alternative the respondents blamed the deceased for causing the accident based on the particulars of negligence attributed tabulated at paragraph 8 of the statement of defence.
7. Be that as it may the parties subsequently recorded a consent on liability in the ratio of 80:20% in favour of the appellants and as against the respondents. The appellants case on quantum was supported by the evidence of (PW1) Mary Wagechi who adopted her statement and produced the documents filed by the plaintiff. The police abstract was produced by consent of the parties. The defendant did not adduce any evidence. The parties then filed their respective submissions on quantum.
8. By a judgment dated 30th November 2022, the court entered judgment in favour of the appellants as against the respondents as follows: -
 - a. Pain and suffering.....Kshs. 200,000
 - b. Loss of expectation of life.....Kshs. 200,000
 - c. Loss of Dependency
Kshs. 15,000x2/3x17x12.....Kshs. 2,040,000
 - d. Special damages.....Kshs. 74,500
Total.....Kshs. 2,514,500
Less 20%.....Kshs. 502,900
 - e. Balance.....Kshs. 2,011,600
9. However, the appellants are aggrieved by the decision of the trial court on the following grounds: -
 - a. That the Learned Trial Magistrate erred in law and in fact in awarding a sum of Kshs 30,000/= for pain and suffering in disregard to the evidence on record.
 - b. That the Learned Trial Magistrate erred in law and in fact in adopting a multiplicand of Kshs 5,844.20/= as the deceased monthly earnings and which amount is not provided for in law and in failing to consider that the deceased was earning more as a driver.
 - c. That the Learned Trial Magistrate erred in law and in fact in applying a multiplier of 9 years



- d. That the Learned Trial Magistrate erred in law and in fact for discounting the sum of Kshs 100,000/= awarded under the head loss of expectation of life from the amount awarded under the head of loss of dependency.
10. As a result, the appellants pray for the following orders: -
- a. The appeal be allowed
- b. The judgment delivered on the 30th November 2022 be set aside and the same be substituted with the following award
- Pain and suffering-----Kshs 200,000/=
- Loss of expectation of life-----Kshs 200,000/=
- Loss of dependency
- Kshs 15,000x2/3x17x12----- Kshs. 2,040,000/=
- Special damages-----Kshs. 74,500/=
- Total-----Kshs 2,514,500/=
- Less 20% -----Kshs 502,900/=
- Balance-----Kshs 2,011,600/=
11. The appeal was disposed of vide filing of submissions. The appellants in submissions dated 5th June 2023 argued that, the award of Kshs. 30,000 for pain and suffering was inordinately low and in clear disregard of their exhibits, submissions and authorities, which showed that the deceased died while undergoing treatment at St. Mary's Hospital, and that the cause of death was a head injury with multiple skull fractures of the optical and temporal bones.
12. That, the High Court in the case of, David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR considered the worth of pain and suffering and cited with approval an article in the International Review of Law and Economics {1988}, 8 (203-220) entitled "Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards" where W. Kip Viscussi states that pain and suffering is not a negligible component of awards, and that the general implication is that awards are not random or capricious.
13. The appellants proposed an award of Kshs. 200,000 for pain and suffering arguing that the award was adequate after considering inflation, the high cost of living and the serious head injuries leading to the death of the deceased. They relied on the case of Rose vs Ford {1935} 1 KB 99 cited in the case of David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another (supra) where it was stated that where the period of suffering is short, only nominal damages are awarded, and awarded 500 pounds for a two days suffering in 1935.
14. On loss of dependency, the appellants faulted the trial Magistrate for adopting Kshs. 5,844.20 per month as the multiplicand arguing that the same was too low considering that drivers are paid a daily wage and that would translate to only Kshs, 194.81 per day. Further, the trial Magistrate relied on government wage guidelines that was not supplied and/or annexed to the judgment.
15. That, despite the fact that the appellants had not produced documents in proof of earning, the trial court ought to have been guided by Legal Notice No. 2 the Regulation of wages (General) (Amendment) Order 2018 which provides the minimum wage for drivers of medium sized vehicles like a matatu as Kshs. 18,881.21 per month, and urged the court to adopt Kshs. 15,000 as the multiplicand.



16. They relied on the case of, David Kimathi Kaburu vs Gerald Mwobobia Murungi (Suing as Legal Representative of the Estate of James Mwenda Mwobobia (Deceased) [2014] eKLR where the High Court stated that it was alive to the fact that earnings may not be proved by production of documents such as bank statements, payment vouchers of payslips but with modern technology payments may be offered through mobile money.
17. On the multiplier, the appellants submitted that the trial Magistrate erred in adopting nine (9) years for the deceased who was working in the informal sector and would have therefore worked past the government retirement age of 60 years old. They quoted the case of David Kimathi Kaburu vs Gerald Mwobobia Murungi (Suing as Legal Representative of the Estate of James Mwenda Mwobobia (Deceased) (supra) where the High Court noted that in the private sector a person can work beyond the retirement age of 60 years depending on the nature of work and health of the business.
18. The appellants submitted that the deceased was 53 years old and in good health and would have worked past 60 years old and proposed a multiplier of 17 years.
19. Furthermore, the appellants submitted that the trial Magistrate erred in deducting the sum of Kshs. 100,000 awarded for loss of expectation of life from the award under the head of loss of dependency. That section 4(2) of the Fatal Accidents Act (Cap 32) Laws of Kenya provides for taking into account and not deduction and therefore it would have been sufficient for the trial court to state in its judgment that it had considered what had been awarded rather than engaging in a mathematical deduction.
20. That, the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenje (deceased) vs Kiarie Shoe Store Limited [2015] eKLR explained the issue of double compensation and stated that duplication occurs when the beneficiaries of the estate of the deceased under the Law Reform Act and dependents under the Fatal Accidents Act are the same and consequently the claim for lost years and dependency will go to the same person.
21. The appellants argued that, the issue of duplication does not arise as the beneficiaries under the two heads are different. That, the appellants as the legal representatives of the deceased's estate are solely entitled to the awards under the Law Reforms Act, while both the appellants and their children are beneficiaries under the Fatal Accidents Act.
22. However, the respondents in submissions dated 6th July 2023 argued that on the award of damages for pain and suffering, PW1 Mary Wangechi Mbogori adopted her witness statement where she averred that the deceased died on the spot and in the circumstances, the award of Kshs. 30,000 by the trial court was reasonable and does not warrant setting aside. They relied on the case of Hyder Nthenya Musili & Another vs China Wu Yi & Another [2017] eKLR where the High Court stated that the conventional award for pain and suffering ranges from Kshs. 10,000 to Kshs. 100,000 with the higher damages awarded if pain and suffering was prolonged before death.
23. On the loss of dependency, the respondents submitted that the appellants did not adduce any evidence to prove the occupation of the deceased either through a letter from his employer or payslips. They cited the case of Nairobi City Council vs Thabiti Enterprises Limited (1997) eKLR where the Court of Appeal stated that, a claimant can only raise issues for determination through pleadings after which he will be allowed to prove them
24. They argued that, the trial court was therefore correct in holding that there was no evidence the deceased was gainfully employed and adopting the minimum wage of a general labourer of Kshs. 5,8842.20.



25. The respondents joined issue with the appellants to the fact that the trial Magistrate erred in adopting a multiplier of nine (9) years. However, the respondents proposed the court adopt a multiplier of two (2) years arguing that, life expectancy in Kenya was 45 years old or less while the retirement age for all civil servants was pegged at 55 years old. Additionally, the court ought to consider the uncertainties and vicissitudes of life and give an allowance for that.
26. That in the case of *Rose Munyasa & Another vs Daphton Kirombo & Another* (2014) eKLR the High Court took judicial notice that life expectancy in Kenya had reduced due to an increase of incidences of poverty, HIV/AIDS pandemic and other diseases and there was no guarantee that the deceased would have lived to the retirement age of 60 years
27. Further, in the case of *Marion Njeri Kago vs Kenya Railways Corporation* (2014) eKLR the High Court recognised the retirement age as 55 years and adopted a multiplier of two (2) years for the deceased who 53 years old at the time of his death.
28. Lastly, on whether the trial Magistrate erred in discounting the sum of Kshs. 100,000 from the award of loss of dependency, the respondents submitted that, the beneficiaries under the Law Reform Act and the Fatal Accidents Act were the same thus allowing a claim on both loss of dependency and lost years will amount to double compensation.
29. That, the High Court in the case of *Caleb Jumah Nyabuto vs Evance Otieno Magaka & another* [2021] eKLR associated itself with the decision of the Court of Appeal in *Hellen Waruguru Waweru* (suing as the legal representative of Peter Waweru Mwenje (deceased) vs Kiarie Shoe Store Limited [2015] (supra).
30. Furthermore, in *Paul Ouma vs Rosemary Atieno Onyango & another* (suing as the legal Representatives in the Estate of Joseph Onyango Amollo (deceased) [2018] eKLR the High Court considering the issue of duplication of awards referred to *Kemp & Kemp on Damages* and stated that where a claimant succeeds under both the Fatal Accidents Act and Law Reform Act, the award under the Law Reform Act must be deducted in full from the award under the fatal Accidents Act.
31. At the conclusion of hearing of appeal, I note 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.
32. 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.”
33. Be that as it may from the ground of appeal it is clear that, the appeal herein is basically on quantum.



34. The law on the circumstances under which the court will interfere with an award of quantum by the trial court is settled that the appellate court will only interfere with the award of damages if; in exercising its discretion the trial 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 Mkube -vs - Nyamuro 1983 KLR 403.
35. Furthermore, 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 the instant matter the main issues in dispute are: -
- a. The sum of Kshs 30,000 awarded for pain and suffering
 - b. The multiplicand of Kshs 5,844.20 adopted by the court
 - c. A sum of Kshs 100,000 awarded for loss of expectation of life
37. As regards the award for pain and suffering, PW1 Mary testified that, the deceased died on the spot. The appellants sought for a sum of Kshs 200,000 and relied on the authority cited in their submissions. On the other part, the respondents proposed a figure of Kshs 10,000 relying on the authorities similarly cited in their submissions. The trial court awarded a sum of Kshs 30,000 relying on the authority indicated in the judgment.
38. Notably the decision relied on by the trial court is current, having been rendered in the year 2021 and therefore more reliable. The appellants did not advance the reasons why the trial court should have departed from the conventional figures of Kshs 10,000 to at least Kshs 50,000 awarded by the court where a victim of an accident dies on the spot and/or immediately thereafter. The trial court was well guided and even enhanced the figure of Kshs 10,000 proposed by the respondents to Kshs 30,000 and I find no justifiable cause to interfere with that award.
39. As regards, the multiplicand I note from the appellants evidence that PW1 Mary Wangechi in her statement stated that: -
- “He was very hard working and earned approximately Kshs 15,000 per month from his job as a driver.”
40. The documents produced by the plaintiffs at page 12 of the record of appeal did not have any documents in support of the deceased’s earning. The appellants submitted that, a sum of Kshs 15,000 did not require any documentary proof, as production of documents is not the only way to prove income and relied on the case of Titus Ndungu Njuguna & Another –vs- Hannah Waruguru Gichuhi & Another (2019) eKLR.
41. The respondents on their part argued that at the expense of repeating what is already said, the income of Kshs 15,000 was not proved by production of payslips or any other documentary evidence and therefore the trial court could not speculate as to the deceased’s earnings.



42. That the trial court in adopting the minimum wage stated there was no proof of income of the deceased and therefore the court would adopt the government wages guidelines.
43. Having considered the aforesaid on multiplicand, I find that first and foremost, the law is settled that he who alleges proves. The afore proposition is supported by the provision of section of 107 of the Evidence Act which states: -
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
44. In that regard, it was up to the appellants to prove the income of the deceased as pleaded. It is not for the court to take judicial notice of previous precedent as argued. Even then, it cannot be argued that the Court of Appeal in the case of Titus Ndungu (Supra) dispensed with the burden of a claimant to prove its case on the required standard. The understanding of what the Court of Appeal stated in that case is that there are very many ways of proving income other than production of the documentary evidence, and the fact that the respondents did not rebut the appellants' evidence on the same did not exonerate the appellants from its burden of proof.
45. The appellants did not tell the trial court whether the deceased was employed as a driver and/or was self-employed. Furthermore, if he was employed nothing would have been easier than produce evidence of such employment.
46. Furthermore, it is not clear as to whether the deceased was earning the money through any payslip or otherwise and whether he ever deposited the same in a bank account, Mpesa or otherwise to support income.
47. In my considered opinion, the appellants were casual in adducing evidence to support the income of the deceased and the trial court was therefore well guided in adopting the minimum wage regulation. The issue is not whether the deceased was a driver but the amount of money he was earning, if any. I therefore decline to interfere with the finding of the trial court in that regard.
48. As regards, the award for loss of expectation of life the appellants proposed a sum of Kshs 200,000 on the ground that, the deceased had no pre-existing health condition and that the court do consider current living conditions. The respondents on their part proposed a sum of Kshs 100,000 arguing that, life expectancy in modern times is 55 years and retirement age is 60 years for civil servants. That, the court also considers vicissitudes of life and gives due allowance for the same. The respondents cited cases where the court awarded Kshs 100,000 for loss of expectation of life where the deceased were aged 53 years as the deceased herein. The trial court on its part awarded Kshs 100,000 on the ground that, it is the conventional award for loss of expectation of life.
49. I have considered the argument on this claim and I do concur with the arguments advanced by the respondents and the court that, the conventional figure for this kind of claim is generally Kshs 100,000. The appellants in seeking for Kshs 200,000 did not substantiate why the court should adopt that figure and it is notable that, even the case of; Coast Bus (Mombasa) Ltd –vs Fatimabhai Osman Suleiman & Another (Suing as the legal representatives of the Estate of Aslam Juma (2020) eKLR, the court acknowledged that, the conventional figure for loss of expectation of life is Kshs 100,000. Consequently, I find no justifiable reason to interfere with the award of Kshs 100,000 for loss of expectation of life.



50. The upshot of the aforesaid is that, the appellants appeal on the grounds stated in the memorandum of appeal dated 14th March 2023, has no merit and is therefore dismissed with costs to the appellants.
51. Finally, as a matter of observation, in seeking any prayers in a pleading, and more so where the quantum is assessed by the court, all that the appellant(s) can pray for is that the court set aside the judgment and make its own award. The prayers cannot seek for a certain determined sum as pleaded at paragraph 4 of the memorandum of appeal.
52. Be that as it were, the judgment of the trial court is upheld in its entirety.

DATED, DELIVERED AND SIGNED THIS 24TH DAY OF FEBRUARY 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

N/A by the appellants

Mr. Karanja for the respondents

Mr. Komen: court assistant

