Husaka Motors Limited & another (Suing as the Legal Representatives of Pricillah Asubila Makani - Deceased) v Indechi & another (Civil Appeal E829 of 2022) [2025] KEHC 2881 (KLR) (Civ) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2881 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E829 OF 2022

TW OUYA, J

MARCH 13, 2025

BETWEEN

HUSAKA MOTORS LIMITED ..... 1ST APPELLANT

ALICE ANINDO ODERA ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF PRICILLAH ASUBILA MAKANI - DECEASED

AND

VUNORO INDECHI ..... 1ST RESPONDENT

DAVID MWILITSA ..... 2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon. A.N Makau, PM, in Milimani CMCC Civil suit E9822 of 2021, delivered on the 23rd of September, 2022)

JUDGMENT

1. This appeal emanates from the Judgement and decree of the lower court in Milimani CMCC E9822 of 2021, delivered on the 23rd of September 2022. The suit was initiated by David Mwilitsa and Vunoro Indechi (Respondents herein) suing as the legal representatives of Pricillah Asubila Makani (Deceased) against Husaka Motors Limited and Alice Anindo Odera (1st Appellant and 2nd Appellant herein) arising out of an accident which occurred on the 14th of October 2019, involving the deceased as pedestrian and Motor Vehicle registration number KCV 260J belonging to the 1ST appellant and driven by the 2nd appellant.

2. The matter proceeded for full trial and the trial court found the appellants 100% liable for an accident that and awarded the respondents a total sum of Kshs. 3,722,385 as general and special damages.

3. Being dissatisfied with the trial court's decision on both liability and quantum, the appellants proffered the instant appeal through a Memorandum of Appeal dated the 17th of October, 2022. In their Memorandum of Appeal, the appellants faulted the trial court for failing to properly evaluate the evidence on record, thus reaching an erroneous decision on the issue of liability. They further faulted the learned trial magistrate for failing to base her decision on the facts and evidence on record, thereby arriving at an excessive award on the issue of damages.

4. The appellants also blamed the learned trial magistrate for failing to follow and to uphold the legal parameters and binding precedents on assessment of general damages under the Law.

5. The appeal was canvassed by way of written submissions following directions issued by the court on the 21st of June 2024. In their written submissions dated the 17th of June 2024, the appellants contended that the claims by the respondents that the accident was solely caused by the negligence of the appellants is unsubstantiated, considering that the police abstract issued by the police does not indicate who was to blame for the accident, and neither does it indicate whether any investigations were conducted by the police to ascertain who was responsible for the accident.

6. They submitted that whereas in cases of negligence, the standard of proof is on a balance of probabilities and the onus of proving who was to blame for the accident is on the party who alleges, the respondents have in this case failed to adduce any evidence that would assist this court make a determination on how the accident might have occurred or that they were to blame for the occurrence of the accident. As such, there is no conclusive evidence that they were negligent on the road or that they were to blame for the causation of the accident. The appellants therefore urge this court to apportion liability between them and the respondents at the ration of 50:50.

7. On the issue of general damages under the head pain and suffering, the appellants submitted that damages for pain and suffering are awarded on the basis of the time that the deceased suffered pain before her death. They contend that since the deceased died immediately after the accident, a sum of Kshs.10,000 would have been sufficient compensation for pain and suffering.

8. On damages for loss of expectation of life, the appellants concurred with the trial court for awarding the respondents a sum of Kshs. 100,000 under this head but added that the said sum should have been deducted from the award made by the trial court under the *Fatal Accidents Act*, so as to avoid the issue of double compensation under the Law Reforms Act and *Fatal Accidents Act*.

9. On general damages under the head loss of dependency, the appellants contend that the same is awarded to compensate the estate of the deceased for the loss in income it would have benefited from, if the deceased had lived. They submit that the respondents did not adduce any evidence to prove the income of the deceased or that she was engaged in any economic engagement, neither was there any evidence adduced to prove how the deceased supported her family if at all.

10. The appellants further submitted that given the income of the deceased was not ascertained, this court should be guided by the global sum approach to assess the damages under this head and award the respondents a sum of Kshs. 800,000 for loss of dependency, taking into account the current economic inflation. The appellant however contended that should this court be persuaded to adopt the multiplicand approach, then this court should use a sum of Kshs. 10,000 as the minimum wage applicable as at the date of the deceased's death.

11. In their written submissions dated the 12th of July, 2024, the respondents supported the findings of the learned trial magistrate that the appellants were 100% liable for the accident that occurred on the 14th of October, 2019. They submitted that the 2nd appellant had indicated before the trial court that she was a qualified driver, and that she was familiar with the road where the accident occurred; As such, the fact that the vehicle she allegedly was driving at a moderate speed hit the deceased is a clear indication that she was not in control of the vehicle, or was not observant or that she was reckless while driving on a public road.

12. As regards the general damages of Kshs. 20,000 and 100,000 awarded by the trial court under the head pain and suffering and loss of expectation of life respectively, the respondents submitted that the said awards were not only appropriate but also reasonable, as the learned trial magistrate considered the evidence adduced before the court as well as comparable authorities before awarding the. The respondents in their submissions also concurred with the award made by the learned trial magistrate under the head loss of dependency; and stated that the same was awarded based on the appropriate principles of law and the evidence adduced before the court.

13. They urged this court to dismiss the present appeal for being fatally defective and unsustainable.

14. Having carefully considered the grounds of appeal, the appellants written submissions together with all the authorities cited, I find that the issues arising for determination are twofold, namely;

    a. Whether the trial court erred in finding the appellants 100% liable.

    b. Whether the general damages awarded by the learned trial magistrate under the head of pain and suffering and loss of dependency were manifestly excessive under the circumstances.

15. This being a first appeal to the High Court, the duty of this court as a first appellate court was well articulated by the Court of Appeal in the case of Abok James Odera T/A A.J Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR as follows "…. to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way……"

16. Starting with the issue of liability, the court record shows that the respondents called a total of three witnesses to testify on their behalf whereas the appellants called only one witness.

17. From the evidence on record, it is not disputed that an accident occurred on the 14th of October, 2019, along Mombasa Road, near Imara Daima involving the deceased, who was at the time a pedestrian crossing the said road and the appellant's Motor Vehicle registration no. KCV 260J which was being driven by their authorised driver, who testified as DW1.

18. It is also clear from the record that the only witnesses who gave material evidence on the issue of liability were Mr. Lucas Ogega, who testified as PW2, as he was an eye witness to the occurrence of the accident and the appellants' witness (DW1); as the other witnesses called by the respondent who did not witness the accident.

19. PW1, PC Jackeline Naeku, a police officer stationed at Embakasi Police station, testified that she was assigned to investigate the accident, and that she prepared a report and forwarded it to the ODPP. She also produced a copy of a police abstract whose contents only confirmed occurrence of the accident, as it did not have any finding regarding who among the deceased and DW1 was to blame for the accident.

20. PW3, David Mwilitsa Mukavali Makani, the father of the deceased gave evidence to the effect that the deceased was a business lady earning about Kshs. 60,000 per month, and that she used to support him and her two children.

21. In the premises, the evidence on record on the issue of liability amounted to the word of PW2 against that of DW1 and therefore, the trial courts determination on the issue of liability largely depended on its finding regarding the credibility of either of the witnesses.

22. The difficulty in determining liability was well captured in the case of Michael Hubert Kloss & another V David Seroney & 5 others (2009) eKLR where the court stated as follows:

> "…. The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows: "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

23. In this case, PW2 testified that he was driving along Mombasa road heading towards town, and on reaching near Liberty Plaza, he stopped at a usual pedestrian crossing point to give way to crossing pedestrian; when Motor Vehicle KCV 260J, came from behind him over speeding and upon reaching at the designated pedestrian crossing point, the driver failed to stop or slow down like other motorists who had stopped to give way to the crossing pedestrians, and as a result, the driver ended up knocking down the deceased, and occasioning serious bodily injuries to her. PW2 blamed the occurrence of the accident on DW1.

24. DW1 on the other hand blamed the occurrence of the accident on the deceased. She testified that the deceased was negligent and reckless on the road, given that she was crossing the road while running and on phone without adherence to traffic rules which required her to cross the road at the foot bridge. She further testified that there were no traffic lights or designated crossing areas at the scene where the accident occurred.

25. On my part, after my own independent appraisal of the evidence on record, I cannot blame the learned trial magistrate for concluding that the appellants were 100% liable for the accident. I say so because, contrary to the appellants assertions, there is evidence on the court records to prove that other than the footbridge, there was also a designated crossing area, on the section of the road where the accident occurred which pedestrians could use while crossing the same road.

26. PW1, a police officer stationed at Embakasi Police station performing traffic duties, and who was familiar with the said road, testified before the trial court that at the time of the accident, in as much as there was a footbridge on the road, there was also a zebra crossing at the said road, where pedestrians could also use to cross the road. This evidence in my view, corroborated the testimony of PW2, that there was a designated pedestrian crossing area at the road where the accident occurred.

27. It is common knowledge that where there is a Zebra Crossing, or designated pedestrian crossing area on a road, vehicles are supposed to stop and allow pedestrians walk across the said road. The appellants

therefore owed a duty to the pedestrians on the said road, including the deceased, to slow down or stop once at a designated pedestrian crossing point.

28. Furthermore, the 2nd appellant had indicated in her witness statement that at the time the accident occurred, there were some constructions going on the road. It is expected that in a road where constructions are ongoing, vehicles would be guided to slow down so as to allow contractors carry on with their construction work without much interference from oncoming vehicles.

29. Based on the above, I am of the considered view that evidence tendered by the respondents on liability is credible and believable. The respondents proved on a balance of probabilities that there was a designated pedestrian crossing area on the section of the road where the accident occurred, and the appellants were therefore required to slow down or stop to allow pedestrians cross to the other side of the road, which they did not do. I therefore see no need to interfere with the trial courts findings on liability, the same should consequently be upheld.

30. Regarding the appeal on quantum, it is a well settled principle of law, that an appellate court will not easily interfere with the damages awarded by the trial court, because such awards are at the discretion of the said court. An appellate court can only interfere with that discretion when it is satisfied that the trial court acted on wrong principles, or misapprehended the evidence on record in some material respect, and so arrived at a figure that was either inordinately high or low. An appellate court can also reverse the awards made by the trial court where the damages are so inordinately high or low, as to represent an entirely erroneous estimate.

31. This principle was restated in the Court of Appeal case of Butt V Khan (1978) eKLR; as follows:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

32. Again, the Court of Appeal in the case of Gitobu Imanyara & 2 others versus Attorney General [2016] eKLR; stated thus:

> " ....it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

33. In the instant case, the appellants had alleged that the trial courts award of Kshs. 20,000 as general damages under the head pain and suffering was excessive in the circumstance, considering that the deceased died on the spot after the accident, as such, this court should substitute the same with an award of Kshs. 10,000.

34. I have perused the evidence on record, and whereas the death certificate of the deceased indicates that she died on the same day the accident occurred, there is evidence on record to prove that the deceased did not die on the spot. PW2, who was an eye witness, in his witness statement indicated that immediately the accident occurred, he went to assist the deceased before the police came to take her to hospital, and in the process the deceased gave him a friend's number, which he called and informed them of what had transpired.

35. This is a clear indication that the deceased did not die immediately after the accident occurred and she definitely endured some pain and suffering before her death. Based on the above, and considering the rate of inflation in the country, I am of the considered view that the sum of Kshs. 20,000 awarded by the trial court was not excessive in the circumstances and find that the same should be upheld.

36. Turning now to the award under the head loss of dependency; PW3, the father of the deceased, had in his witness statement indicated that the deceased was a business lady dealing in the selling of second-hand clothes, and earning a monthly income of Kshs. 60,000 per month. There was however no evidence presented before the said court, to prove that the deceased was at the time of her death earning an income of Kshs. 60,000 from her business. In my view, the respondents should have adduced evidence in the form of a bank or M-pesa statement, or any other evidence to prove that the deceased was earning the said income at the time of her death.

37. A perusal of the trial court's judgement reveals that the learned trial magistrate in arriving at the award of Kshs. 3, 257, 280, as general damages for loss of dependency, used the multiplier approach, and applied the dependency ratio of 2/3 and a multiplicand of 30 years. The learned trial magistrate also adopted a figure of Kshs. 13,572 as earning for an unskilled worker, she however did not explain how or what guided her to use the said figure as the wage applicable to the deceased.

38. Being that as it may, it is well settled that proof of income forms the basis of assessing damages under the head loss of dependency, and where there is absence of proof of any income, the best approach to use in determining the damages due under this head would be the global sum award.

39. This position was restated by the court in Mwanzia Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another; which was cited with approval by the court in Albert Odawa v Gichimu Gichenji (2007) eKLR as follows:

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy 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."

40. Again, the court in Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR); stated thus:

> " ...where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

41. Guided by the above authorities, and considering also that it is not possible for this court to ascertain the monthly earnings of the deceased together with the expected length of dependency, without resorting to speculations; I am of the considered view that the best approach would have been for the learned trial magistrate to use the global sum approach in assessing damages for loss of dependency. I will therefore proceed to use the global sum approach to determine whether the award of Kshs. 3, 257, 280 by the trial court should be set aside or upheld.

42. In Kirimi & another (Suing as the *Administrators and Legal Representatives of the Estate of Agnes Ntinyari Murungi - Deceased) versus Kithinji & another (Civil Appeal E042 of 2021*) [2023] KEHC 17732 (KLR) (23 May 2023) (Judgment); the high court set aside the award of Kshs. 900,000 that had been awarded by the trial court as damages for loss of dependency and substituted it instead with a global sum of Kshs. 2,000,000, for a deceased who was 32 years old at the time of her death and whose income could not be ascertained. The deceased in this case had left behind three school going children and a husband.

43. Additionally, the high court in Khalif versus M'Kirea & another (Suing as the legal representative of the estate of JMM (deceased)) [2022] KEHC 15932 (KLR); upheld the global sum of Kshs. 2,000,000, that had been awarded by the trial court as damages for loss of dependency for a deceased who died aged 35 years old and had left behind two minor children aged 11 and 8 years respectively, in the care of his aged parents.

44. Guided by the above authorities, I am of the considered view that the sum of Kshs. 3, 257, 280, awarded by the trial court as damages under this head was excessive and the same should be set aside and substituted instead with a sum of Kshs. 2,000,000, which in my view is reasonable given the circumstances of the case.

45. The appellant in his written submissions, had indicated that the learned trial magistrate should have deducted the award made under the Law reforms Act from the award made under the *Fatal Accidents Act*; as failing to deduct the same would amount to double compensation.

46. The Court of Appeal in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) versus Kiarie Shoe Stores Limited [2015] KECA 318 (KLR); expressed itself as follows regarding this issue: "This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

47. Based on the above explanation from the Court of Appeal, it is clear that a trial court is not required to deduct an award it has made from the Law Reforms Act from an award that it has made under the *Fatal Accidents Act*. What the law requires, is that when accessing damages under the *Fatal Accidents Act*, the court should have in mind and take into consideration the award that it had made under the Law Reforms Act.

48. I am therefore of the considered view that the trial court was not in error for not deducting the award made under the Law Reforms Act from that made under the *Fatal Accidents Act*.

49. Furthermore, it is evident from the record, that the deceased was survived not only by her two children, but also by her father and step-mother, as such it is evident that the beneficiaries of the deceased under the Law Reforms Act and those under the *Fatal Accidents Act* are different and the issue of double compensation does not arise.

50. Flowing from the foregoing, the appellants' appeal partially succeeds, to the extent that the award of Kshs. 3,257,280 by the trial court as general damages for loss of dependency is hereby set aside and instead substituted with a global sum of Kshs. 1,800,000. Considering that the appeal has partially succeeded, each party shall bear their cost for the appeal.

Determination

51. Judgement is hereby entered for the respondents against the appellants as follows:

    i. Liability- 100%;

    ii. General damages for pain and suffering- Kshs. 20,000

    iii. Loss of expectation of Life-Kshs. 100,000

    iv. Loss of dependency- Kshs. 1,800,000

    v. Special damages-Kshs. 345, 105.

    vi. Each party to bear their own costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025

HON. T. W. OUYA

JUDGE

For appellant.....Okemwa

For Respondent.....No appearance

Court Assistant.....Jackline