Mwangi v Chepkong (Suing as the Legal Representative and Admnistrator of the Estate of the Late Edwin Kipkoegei Chepkonga) & another (Civil Appeal E060 of 2022) [2025] KEHC 2725 (KLR) (11 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2725 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E060 OF 2022

RN NYAKUNDI, J

MARCH 11, 2025

BETWEEN

ALEX KIOKO MWANGI ..... APPELLANT

AND

JUDITH CHEPKEMOI CHEPKONG (SUING AS THE LEGAL REPRESENTATIVE AND ADMNISTRATOR OF THE ESTATE OF THE LATE EDWIN KIPKOEGEI CHEPKONGA) ..... 1ST RESPONDENT

SMART AUTOS LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon.Richard O. Odenyo, Senior Principal Magistrate delivered in Eldoret CMCC No. 496 of 2020 on 7th April, 2022)

JUDGMENT

1. The instant appeal is only on quantum. At the trial court, the Respondent filed a claim against the appellant seeking general damages, special damages and costs and interests of the suit arising from road accident that occurred on 31.08.2019, wherein it is alleged that the defendants, their agents, drivers, servants, employees and/or assigns while in management and control of Motor vehicle registration No. KBZ 589U managed and/or drove to be driven the aforesaid motor vehicle so negligently, recklessly and carelessly when during along Eldoret-Nakuru road that near Suzzy Peacock junction that it cause an accident in consequence of which the deceased sustained fatal injuries.

2. The appellant in response to the claim denied that the alleged accident occurred as put by the Respondent. In the alternative, he blamed the Respondent for being negligent.

3. After trial Judgment was delivered on 7/04/2022 which adopted the consent on liability at 70% as against the defendant. The damages on the other hand were assessed as hereunder: -

a. General Damages for pain and suffering ..... Kshs. 50,000/=

b. Damages for loss of life ..... Kshs. 100,000/=

c. Loss dependency ..... Kshs. 4,872,000/=

d. Special damages ..... Kshs. 65,000/=

e. Total ..... Kshs. 1,292,532/=

f. Plus, costs and interests

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on grounds: -

i. That the learned trial magistrate erred in law and fact in awarding damages which were inordinately high and/or excessive in the circumstances as to amount to an erroneous estimate of the loss incurred and/or suffered by the deceased.

ii. That the learned trial magistrate erred in law and fact in awarding the 1st Respondent the sum of Kshs. 4,872,000/= as damages under *Fatal Accidents Act* which award was inordinately High and excessive in the circumstances.

iii. That the learned trial magistrate erred in law and fact in awarding loss of dependency on account of application of wrong principle of law as to dependency.

iv. That the learned trial magistrate erred in law and fact in applying a multiplicand of Kshs. 28,000/= per month without any evidence and/or proof of earning by way of documentary evidence.

v. That the learned magistrate erred in law and fact in failing to hold and apply the minimum wage in place at the time of the accident for want of proof of earnings.

vi. That the learned trial magistrate erred in law and fact in adopting the ratio of ½ instead of the applicable 1/3 in the absence of proof of dependency.

vii. That the learned trial magistrate erred in law and fact in adopting a multiplier of 29 years without taking into account the uncertainties of life and/or vissitudes of life hence an excessive award in the circumstances.

viii. That the learned trial magistrate erred in law and fact in awarding Kshs. 50,000/= for pain and suffering yet the deceased died on the spot contrary to the established legal practice and the law adopted by the courts.

ix. That the learned trial magistrate erred in law and fact in basing its decision on wrong principles of law thereby awarding damages which were excessively high and which do not reflect the actual loss suffered.

x. That the learned trial magistrate erred in law and fact in failing to analyse and consider the authorities cited by the appellant hence an erroneous award.

xi. That the learned trial magistrate erred in law and fact in failing to consider, evaluate and/or determine all issues raised in the pleadings, evidence and submissions by the Appellant hence an erroneous decision leading to a gross overstatement of the loss suffered by the deceased.

xii. That the learned trial magistrate erred in law and fact in failing to apply and consider the provisions of Order 21 Rule 4 of the Civil Procedure Rules in the judgment.

5. The appeal was canvassed by written submissions and at the time of drafting this judgment, no additional filings beyond the Respondent's submissions were visible on the Case Tracking System (CTS) filing platform. The court has therefore proceeded with its determination based solely on the available documentation referenced. The said submissions are highlighted as hereunder:

The Respondent's Submissions

6. Learned Counsel Mrs. Mbugua started by reminding this court of its duty as an appellate court and cited the case of Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus [2020] eKLR, where the Court held that an appellate court will only interfere with the conclusions and findings of a trial court if these findings were not supported by evidence or were premised on wrong principles of law, and that where the impugned judgment entails the exercise of discretion such as the award of damages, the appellate court would be slow to interfere unless satisfied that the discretion was not exercised judiciously.

7. Counsel proceeded to submit on the various limbs of the instant cause.

8. On multiplicand, learned counsel argued that the trial court adopted a multiplicand of Kshs. 28,000/= per month. That during the hearing, PW1 testified that the deceased was operating a kiosk with a daily income of about Kshs. 1,000/=. This evidence remained uncontroverted even on cross-examination, wherein PW1 confirmed that the deceased used to make between Kshs. 28,000/= to 30,000/= per month.

9. Counsel submitted that the fact that the deceased operated a kiosk and made the stated amount was not impeached, and the appeal had no factual or legal basis. In support of this position, counsel cited Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR, where the Court of Appeal held that it does not subscribe to the view that the only way to prove a person's profession must be by production of certificates or that the only way of proving earnings is through documentation, as this would do injustice to many Kenyans who are illiterate, keep no records, yet earn their livelihood in various ways.

10. Mrs. Mbugua thus argued that the multiplicand of Kshs. 28,000/= cannot be impeached.

11. On multiplier, counsel submitted that the deceased died aged 21 years and the trial court adopted a multiplier of 29 years, which counsel argued was very reasonable considering the retirement age in Kenya is 60 years and the deceased was in the private sector where there is no retirement age. In support of this argument, counsel cited Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another [2017] eKLR, where the court held that a multiplier of 30 years was reasonable for a 21-year-old in a fatal claim.

12. Regarding the dependency ratio, counsel argued that the deceased was single at the time of his demise and used to support his ailing mother and siblings. Given that he was taking charge of his ailing mother and assisting her in supporting his siblings, counsel submitted that a large amount of his income was spent on his family as opposed to himself, making the dependency ratio of 1/2 fair in the premises.

13. Counsel further submitted that this position is fortified by the decision in Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] eKLR, where the High Court adopted a dependency ratio of 1/3 where the deceased was unmarried and used to support her parents.

14. On the issue of pain and suffering, counsel noted that the trial court made an award of Kshs. 50,000/= under this head having been persuaded by the Plaintiff's submissions. Counsel reiterated that the said award is reasonable and there is no basis for interference even though the deceased died on the spot.

15. In support of this position, counsel cited Haji Ashraf & another v Sidi Masha Kalama & another (legal representative of the Estate of Kenga Fondo (Deceased) [2021] eKLR, where this court held that there is no automatic shutdown of the human organ system following an accident, and it's likely that though short-lived, the pain caused to an accident victim who soon thereafter succumbs to death can be of an excruciating nature with great shock on impact.

16. In conclusion, learned counsel Mrs. Mbugua submitted that the appeal before the court is bereft of merit and should be dismissed with costs to the 1st Respondent. Counsel also prayed for interest on decretal sums and costs from 7th April, 2022, when the trial court rendered its judgment.

Analysis & Determination

17. This being the first appeal and on the authority of the decision in Peters Vs Sunday Post Ltd. [19581 EA 424 my function and duty as an appellate court is to subject the evidence to fresh and exhaustive review and draw inferences and conclusions making allowance only for the fact that I have not had the advantage of seeing and hearing the witnesses. The Court in held as follows:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

18. As stated above the appeal is only on quantum. This court is guided by the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR where the Court set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

> " An appellate court will not disturb an award for general 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..."

19. In the case of Southern Engineering Co. Ltd vs. Musungi Mutia [1985] KLR 730, the court held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case..."

Whether the trial court erred in awarding an inordinately high award for loss of dependency

20. On this head, the Court of Appeal in Chunibhai J. Patel and Another vs. P. F. Hayes and Others [1957] EA 748, 749, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

> " The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the

deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."

21. The Appellant challenges the trial magistrate's computation of damages, specifically contesting the application of a Kshs. 28,000/- multiplicand in conjunction with a 29-year multiplier. The Appellant argues that this calculation methodology fails to incorporate the inherent uncertainties and vicissitudes of life, resulting in what the Appellant characterizes as an excessive compensatory award given the circumstances of the case.

22. At the trial court I took note of the 1st defendant's/Appellant's submissions where counsel argued that there was nothing produced to establish the earnings of the deceased and therefore there was no award available for him under this head. The trial court in awarding this limb acknowledged the fact that the deceased was a petty businessman earning between Kshs. 28,000/= and Kshs. 30,0000/=.

23. The Court of Appeal in Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga [2020] eKLR observed that:

> " In our view, there was sufficient evidence that the deceased was a business lady. All that was required of the court was to assess the net income of the deceased, given the business enterprise that she was undertaking and the evidence that was available before the court."

24. In Jacob Ayiga Maruja & Anor vs.Simeon Obayo[2005]eKLR, this Court dealing with a similar situation in which a plaintiff had no documentary proof of the deceased's earning, stated as follows:

> " In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."
>
> 32. We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.
>
> 33. ....
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> 34. We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin because the deceased being a business lady carrying out a timber and furniture business, she must at least have employed a carpenter for the business and was unlikely to earn less than the carpenter. In our view given the evidence before the trial Judge including the bank statement showing monies going into and out of the

deceased's account, a sum of Kshs 30,000/= would have been appropriate as the net monthly income of the deceased."

25. In Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, it was held as follows-

> " It has been held elsewhere that 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."

26. Similarly, in Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR, where the court made the following observation;

> " 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 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."

27. According to the respondent, during the hearing, PW1 testified that the deceased was operating a kiosk and his daily income was about Kshs. 1,000/=. That the evidence remained uncontroverted even on cross-examination wherein PW1 confirmed that the deceased used to make Kshs. 28,000/= to Kshs. 30,000/= per month.

28. Given the forgoing analysis, I find no reason to interfere with the said award, some of the Kenyan citizen many at times might fall short of the required standard of producing the requisite documents in such scenarios and by all standards this cannot be used against them. Some of them make a living without formal employment. We just can't assume that it is everybody who is privileged to maintain a meticulous record on every transaction or business dealings.

29. Based on the preceding analysis and jurisprudential framework, I find no sufficient grounds to disturb the trial court's award. It goes without saying that many Kenyan citizens operate outside formal employment structures and cannot be reasonably expected to maintain comprehensive documentation of their income. The court recognizes that the inability to produce formal financial records should not prejudice individuals who earn their livelihood through informal business activities. It would be inequitable to impose a standard of documentary evidence that fails to acknowledge the economic realities faced by many citizens who legitimately sustain themselves and their dependents through small-scale entrepreneurship without maintaining meticulous transaction records.

30. On the dependency ratio, the trial court adopted a ratio of ½ since the deceased was not married but her mother depended on him and the same was proved on a balance probability. The guiding factor in determining the dependency ratio where the deceased is unmarried is the re-statement by the Court of

Appeal in Dickson Taabu Ogutu (suing as the legal representative of the estate of Wilberforce Ouma Wanyama v Festus Akolo & Another (2020) eKLR that:

> " The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyse the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation."

31. In Steve Ongingo & Another v Susan Adongo Otieno & Another (2018) eKLR Cherere J. used a dependency ratio of ½ where the deceased was unmarried. Also in Attorney General v Savinah Francis (Suing as the personal representative of the estate of Peter Muse Muema (2020) eKLR Ong`undi J. used a dependency ratio of ½.

32. Regarding the dependency ratio determined by the trial court, I find the adoption of a 1/2 ratio entirely appropriate given the specific circumstances of this case. When evaluating dependency ratios, particularly where the deceased was unmarried, courts must conduct a careful assessment based on the unique family dynamics and financial responsibilities of the deceased. The guiding principle remains that the extent of family support must be determined on a case-by-case basis through thorough analysis of available evidence regarding the deceased's earnings and the proportion allocated to supporting dependents. In this instance, the evidence clearly established that the deceased, though unmarried, bore significant financial responsibility for his ailing mother and siblings. This arrangement is not uncommon in many Kenyan households where unmarried adult children often assume substantial financial obligations toward parents and younger siblings. The trial court's determination that approximately half of the deceased's income was directed toward these family obligations represents a balanced and fair assessment of the dependency relationship. I therefore see no justifiable basis to disturb the trial court's finding on this aspect, as it reflects a reasonable application of established principles to the particular family circumstances presented in evidence.

33. On multiplier, the deceased aged 21 years. The respondent urged the court to maintain the trial court's finding of 29 years considering that the retirement age in Kenya is 60 years and the deceased was in the private sector where there is no retirement age. The appellant on the other hand in his memorandum of appeal averred that the court did not account the uncertainties of life and/or vicissitudes of life hence an excessive award in the circumstances.

34. In West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] eKLR the court substituted the trial court's multiplier of 35 years with 33 years. The deceased was 21 years. In Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another [2017] eKLR the court held that a multiplier of 30 years was reasonable for a 21-year-old fatal claim. Similarly, in Kenya Power & Lighting Co. Ltd v Benard Kilonzo (suing as the administrator of the Estate of the late Maurice Mutinda Kilonzo [2012] eKLR the court adopted a multiplier of 25 years for a deceased of 21 years.

35. Regarding the multiplier, after careful consideration of the circumstances and relevant jurisprudence, I find the trial court's application of a 29-year multiplier for a deceased aged 21 years to be reasonable and adequately justified. When determining an appropriate multiplier, courts must balance the deceased's potential working lifespan against the inherent uncertainties of life. While the appellant argues that the trial court failed to account for life's vicissitudes, this contention overlooks the fact that a reduction from the theoretical maximum of 39 years (from age 21 to standard retirement at 60) to 29 years already incorporates a significant adjustment for such uncertainties. This approach aligns with established judicial practice in comparable cases involving similarly aged deceased individuals, where courts have consistently applied multipliers ranging from 25 to 33 years. The 29-year multiplier strikes an

appropriate balance as it acknowledges the deceased's youth and substantial earning potential while still incorporating a meaningful discount for life's unpredictability. Furthermore, given that the deceased operated in the private sector where formal retirement constraints are less rigid, the multiplier reflects a reasonable estimate of his working life expectancy. I therefore find no compelling reason to interfere with the trial court's determination on this point, as it falls squarely within the range of reasonable judicial discretion.

36. On pain and suffering, the trial court made an award of Kshs. 50,000/= under this head. Learned Counsel for the Respondent maintained that such an award was reasonable in the circumstances. In West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR the court observed that-

> " 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."

37. In view of the above cited authority it is clear that when death followed immediately after the incident very nominal damages should be awarded. From the pleadings it came out that the deceased was rushed to the hospital and died while undergoing treatment. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows-

> " 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.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

38. In view of the above decisions and bearing in mind that this court has been invited to exercise its discretion when considering the award made by the Trial Court, I find that the award made in the sum of Kshs. 50,000/= for pain and suffering was high. I would therefore review the said award to Kshs. 30,000/= which in my opinion is sufficient and within the required range as stipulated above.

39. In the end, the appeal partially succeeds only on the award on pain and suffering which is substituted with an award of Kshs. 30,000/=.

Judgement is therefore entered in the following terms;

a. General Damages for pain and suffering..... Kshs. 30,000/=

b. Damages for loss of life ..... Kshs. 100,000/=

c. Loss of dependency ..... Kshs. 4,872,000/=.

d. Special damages ..... Kshs. 65,000/=.

e. Total ..... Kshs. 5,067,000/=

f. Less 30% ..... Kshs. 1,520,100/=

g. Total ..... Kshs. 3,546,900/=

It is ordered so.

SIGNED, DATE AND DELIVERED VIA CTS AT ELDORET THIS 11TH DAY OF MARCH 2025.

In the Presence of:

.....

R.NYAKUNDI

JUDGE