Nyamu & another v Aloo & another (Suing as Legal Representatives and Administrator of the Estate of Walter Onyango Oloo (Deceased)) (Civil Appeal E530 of 2021) [2025] KEHC 6148 (KLR) (Civ) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6148 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E530 OF 2021

JM OMIDO, J

MARCH 20, 2025

BETWEEN

MARY MUTHONI NYAMU ..... 1ST APPELLANT

CHARLES OKOTH ONYANGO ..... 2ND APPELLANT

AND

SAMSON ODONGO ALOO ..... 1ST RESPONDENT

MAURINE AKINYI ..... 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES AND ADMINISTRATOR OF THE ESTATE OF WALTER ONYANGO OLOO (DECEASED)

(Being an Appeal from the Judgement and Decree of Hon. A.N. Makau Principal Magistrate delivered on 4th December, 2020 in Milimani Commercial Courts CMCC No. 6605 of 2019)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. A.N. Makau, Principal Magistrate, delivered on 4th December, 2020 in Milimani Commercial Courts CMCC No.6605 of 2019.

2. The grounds of appeal presented by the Appellants vide the Memorandum of Appeal dated 12th August, 2021, upon which they seek to upset the judgement and decree of the lower court, are as follows:

    i. The learned Magistrate erred in law and misdirected herself when she failed to consider the Applicant's (sic) submissions on both points of law and fact.

ii. The learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

iii. The learned Magistrate erred in law and misdirected herself when she failed to consider the provisions set out in the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.

iv. The learned Magistrate erred in law and in fact in awarding the estate of the deceased a sum of Ksh.20,000/- for pain and suffering while not considering that the deceased passed on on the same day.

v. The learned Magistrate erred in law and in fact by awarding the estate of the deceased a sum for loss of expectation of life when it was not entitled to the same and/or the same was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

vi. The learned Magistrate erred in law and in fact in awarding the estate of the deceased a sum of Ksh.3,024,396.60/- for loss of dependency that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

vii. The learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions on quantum and legal authorities relied upon in support thereof. (Same ground as (i) above?).

viii. The learned Magistrate erred in law and in fact by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstances of the case.

ix. The learned Magistrate erred in law and in fact in failing to consider conventional awards in cases of similar nature.

3. The Appellant proposes that the Appeal be allowed and the awards made under the different heads of damages be set aside and be substituted with an order dismissing the suit before the trial court; or alternatively, this court proceeds to reassess the awards made under the different heads of damages.

4. The suit before the lower court was one based on tortious liability arising out of a fatal road traffic accident that is said to have occurred on 22nd June, 2017 in which the deceased met his demise. The matter was defended and went to full trial.

5. It is noteworthy from the grounds of appeal reproduced above that what the Appellants are challenging is the trial court's findings on quantum and the respective awards made under the different heads of damages. The trial court's finding on liability is not challenged.

6. In her judgement delivered on 4th February, 2020, the learned trial Magistrate entered judgement in favour of the Respondents (the Plaintiffs before the lower court) and against the Appellants (the Defendants) jointly and severally as follows:Liability – at 100%.Pain and suffering – Ksh.20,000/-.Loss of dependency – Ksh. 2,903,846.40/-.Special damages – Ksh.550/-.

7. The Respondents were also awarded costs of the suit and interest thereon at court rates and on the awards of damages.

8. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions. Both parties filed their respective submissions.

9. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Sielle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

10. In Sielle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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."

11. The Respondents pleaded in the plaint that the suit was filed by the two in their capacity as the administrator's and beneficiaries of the estate of the deceased.

12. In that respect and in so far as the matter relates to quantum, the relevant evidence is that of the 1st Respondent Maurine Akinyi Okumu who testified before the trial court as PW1. The 1st Respondent adopted the contents of her statement that she recorded on 25th July, 2019, in which she stated that the accident in question occurred on 22nd June, 2017 and that the deceased met his demise on the same day of the misfortune at Kenyatta National Hospital, where he had been rushed for treatment.

13. The witness explained that the deceased was her husband and a brother to the 2nd Respondent/ Administrator. She stated that before his demise, the deceased worked as a mechanic and earned about Ksh.40,000/- monthly from which he wholly provided for his family – the 1st Respondent and their three children aged between 2 months and 12 years, two of whom were school-going.

14. The witness produced the following documents in support of her case:Limited grant of letters of administration ad litem.Letter from the Chief Mowlem Sublocation.Certificate of death.Burial permit.Certificates of birth for the deceased's children.Copy of records and receipt.Demand letter and notice to insurers.

15. Upon being cross-examined, the 1st Respondent told the trial court that she had no evidence of the deceased's earnings. She stated that the deceased's dependents were listed in the chief's letter.

16. The Respondents called Chege Waigwa and Police Constable George Oduor who testified as PW2 and PW3 respectively. Their evidence was in regard to the issue of liability, which is not challenged in this appeal.

17. The Appellants, who were the Defendants in the trial court, did not call any witnesses.

18. I have considered the grounds of appeal as set out in the Memorandum of Appeal dated 12th August, 2021, the submissions by the parties herein and the record of the lower court. Although the Appellants listed 9 grounds of appeal in their Memorandum of Appeal, only one ground was pursued in the submissions they filed. The single issue for determination, as discernible from the submissions is whether the trial court erred when it failed to adopt a global sum approach in making the award under the head of loss of dependency.

19. From the issue set out above, what is effectively challenged is the findings of the trial court on the award of loss of dependency under the *Fatal Accidents Act* Cap 32, Laws of Kenya.

20. With regard to the identified issue, the learned trial Magistrate made the following findings:

> " The Plaintiffs claim for loss of dependency of Ksh.3,909,024/= using 35 as the multiplier and argued that the deceased was 34 years old and would have enjoyed life beyond 60 years' retirement age.
>
> On earnings, the Plaintiff urged the court to use Ksh.13,960/-, a pay for unskilled labourer in Nairobi. The deceased having died at 34 years of age and would have lived and earned maybe for another 26 years. (sic). Considering the exigencies of life I will use 26 as a multiplier as opposed to the proposed 35 years. The evidence was that he was a family man with wife (sic) and children. They all depended on him and as such 2/3 ratio is justified".

21. With that, the trial court went on to determine the award under the head of loss of dependency, thus:

Ksh.13,960.80 x 26 x 12 x 2/3 = Ksh.2,903,846.40/-.

22. It is the said award under the head of loss of dependency that the two Appellants are challenging in this appeal, urging that the multiplier/multiplicand approach in determining loss of dependency was not apt in the circumstances as the Appellant's income was, undisputably not known, as no evidence on the same was tendered.

23. In the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...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. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.
>
> It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
>
> "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."

24. Thus then the question that abounds is whether the learned trial Magistrate correctly applied the multiplier/multiplicand formula, or whether the trial court ought to have applied the global sum approach.

25. The answer to this question, gladly, is to be found in the decision of Albert Odawa v Gichimu Githenji; Nakuru HCCA No. 15 of 2003 where Ringera J (as he then was) expressed himself 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 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."

26. Following the dicta above, the multiplier approach was not suitable in the case before the trial court for the simple reason that there was no evidence to prove the deceased's income. It is then my persuasion that the learned trial Magistrate, in employing the multiplier/multiplicand approach in a situation where the income of the deceased could not be ascertained, applied the wrong principle in addressing the claim under the head of loss of dependency.

27. The global sum approach was the correct formula, in the circumstances of the case before the trial court.

28. Under Section 4(1) of the *Fatal Accidents Act*, Cap 32 Laws of Kenya, an action brought by virtue of the provisions of the statute shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.

29. Considering the age at which the deceased met his demise, which as per the certificate of death was 34 years, the fact that he left behind a spouse and three young children between the ages of 2 months and 12 years, it is my considered view that a global sum of Ksh.2,500.000/- under the head of loss of dependency would be suitable in the circumstances.

30. Being of the foregoing persuasion, the appeal succeeds in part to the extent that the trial court's award of Ksh.2,903,846.40/- on the head of loss of dependency is set aside and substituted with a global sum of Ksh.2,500,000/- under the said head. All the other awards shall remain as per the findings in the judgement of the trial court.

31. Each party shall bear their own costs of this appeal in view of the fact that it is the trial court that erred.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 20TH DAY OF MARCH, 2025.

JOE M. OMIDO

JUDGE

For Appellant: Mr. Kabita for Mr. Njuguna.

For Respondent: Ms. Kisiangani.

Court Assistant: Mr. Ngoge & Mr. Juma.

Court: By consent, 30 days stay of execution.

JOE M. OMIDO

JUDGE