



REPUBLIC OF KENYA



West Kenya Sugar Co Ltd & another v Wanjiah (Suing as Widower and legal representative of the Estate of Mercy Nelima Simiyu - Dcd) & another (Civil Appeal E040 of 2023) [2025] KEHC 2609 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E040 OF 2023
REA OUGO, J
MARCH 13, 2025**

BETWEEN

WEST KENYA SUGAR CO LTD 1ST APPELLANT

JUSTINE WAMALWA KHARINDA SHIKUKU 2ND APPELLANT

AND

JAMES WANJIAH (SUING AS WIDOWER AND LEGAL REPRESENTATIVE OF THE ESTATE OF MERCY NELIMA SIMIYU - DCD) 1ST RESPONDENT

JOHN AYUKO OLUCHO 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon Gladys Adhiambo [SPM] delivered on 13/4/2023 in Kimilili CMCC No E49 of 2020)

JUDGMENT

1. This is an appeal against the decision of the trial magistrate on quantum. The background to the appeal is that Mercy Nelima Simiyu (the deceased) was involved in a road traffic accident on 25/5/2018 and sustained fatal injuries. Liability was entered in the ratio of 90:10 as against the appellants.
2. The trial magistrate entered judgment in favour of the 1st respondent as against the appellants as follows:
 1. Pain and suffering Kshs 100,000/-.
 2. Loss of expectation of life Kshs 100,000/-
 3. Loss of dependency Kshs 4,712,000/-
 4. Special Damages Kshs 1,650/-



5. Loss of consortium Kshs 950,000/-
Sub-total Kshs 5,863,650/-
Less 10% contribution Kshs 586,365/-
Net Award Kshs 5,277,285/-
3. The appellant aggrieved by the award of damages, has lodged this instant appeal on the following grounds:
 1. That the learned trial magistrate erred in law and fact in adopting the wrong principles in the assessment of damages payable to the respondent both under the *Fatal Accidents Act* and the *Law Reform Act*.
 2. That the learned trial magistrate erred in law and fact in awarding excessive damages for pain and suffering in view of the evidence on record.
 3. That the learned trial magistrate erred in law and fact by failing to take into account relevant factors/issues in making award for loss of consortium.
 4. That the learned trial magistrate erred in law and fact by failing to take into account the vagaries and vicissitudes of life in adopting a multiplier of 31 years.
 5. That the learned trial magistrate erred in law and fact in awarding excessive damages payable to the respondent in the circumstances.
 6. That the learned trial magistrate erred in law and fact in failing to take into account the appellant's submissions thereby awarding excessive damages in the circumstances.
4. The appellant urges this court to allow the appeal and the subordinate court's judgment and or award be set aside. The damages for pain and suffering be re-assessed downwards, the multiplicand be set aside, the multiplier be discounted, the dependency ratio be set aside and the dependency ratio of 1/3 be adopted, the award on loss of consortium be set aside in its entirety and the costs of the appeal be awarded to the 2nd and 3rd appellants.
5. The appeal was canvassed by way of submissions. The appellant submits that the death certificate and the post-mortem report indicate that the deceased died on the spot. It is a generally accepted principle that very nominal damages will be awarded for pain and suffering if death is followed immediately after the accident. (See *Hyder Nthenya Musila & Another v China Wu Yi Limited & Another* [2017] eKLR). The appellant maintains that an award of Kshs 10,000/- would be sufficient under this head.
6. On the multiplier, they urged the court to consider a multiplier in the range of 16 to 18 years. They cited the case of *Siyaram Enterprises & Another v Samuel Nyachani* [2015] eKLR, where the court adopted in the trial court with a multiplier of 16 years where the deceased died at the age of 29 years old. The appellant also faulted the trial magistrate for adopting a multiplicand of Kshs 19,000/-. In *Kimilili Hauliers Limited v Maurice Msiando Musungu* (suing as dependent of Jackson Okoth (deceased) [2021] eKLR, the court observed that in the absence of evidence of proof of income, the government minimum wage guideline for unskilled labourer set by the ministry of labour be applied. The appellant submits that an award of Kshs 7,240.95/- minimum wage for general labourer as per regulation of wages (general amendment) order 2018 would be reasonable. They also submitted that dependency ratio is a fact which must be proved. In this case the 1st respondent is the only dependent of the deceased but testified that she used to provide for the deceased. Therefore, a dependency ratio of 1/3 is reasonable in the circumstance.



7. On loss of consortium, it was submitted that once a spouse dies the right of the surviving spouse to recover damages for consortium becomes extinguished (see *Acceler Global Logistics v Gladys Nasambu Waswa & Another* [2020] eKLR and *Jeremiah Nguguna & Another v Anagleta J. Yator & Edel J. Biwott* (suing as the administrators of the estate pf the late Paul K. Kiplagat [2016] eKLR).
8. The respondent in opposing the appeal submitted that the deceased was earning a monthly income of Kshs 19,000/- and was 29 years old. They urged the court not to interfere with the multiplicand of 31 years. The deceased, at the age of 29 was at her prime and the award made under loss of expectation of life should not be disturbed. It was also submitted that the ratio of 2/3 applied was correct as the 1st respondent testified that he was unemployed and depended on the deceased. They submitted that since the deceased passed on after several hours, an award of Kshs 100,000/- was reasonable and appropriate.
9. On the award made under the head loss of consortium, it was submitted that the deceased and the 1st respondent were married at the time of the demise of the deceased, therefore, the 1st respondent suffered loss of consortium. They cited the case of *Salvatore De Luca v Abdullahi Hemed Khalil & Another* [1994] eKLR where the court awarded damages for loss of consortium after noting that the appellant therein lost his wife's companionship and there was an impairment in the social life of the appellant and his young children who too lost the care and devotion of their mother.

Analysis And Determination

10. I have considered the grounds of the appeal, the appellant's submissions in support of the appeal, the respondents' rival submissions, and the only issue before the court is whether the damages awarded by the trial magistrate was excessive. I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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.”
11. On the award of loss of dependency, the appellant argues that the court should adopt the minimum wage calculating the award. The respondent, on the other hand, supports the finding of the trial court.
12. It was established by the 1st respondent that the deceased held a diploma in Medical Laboratory Sciences and had qualified as a Medical Laboratory Technologist and had a practicing licence. The respondent however, failed to produce his employment contract as it was merely marked as PMFI 20. The trial magistrate noted that the same was not produced but nonetheless applied the amount of Kshs 19,000/-. James Wanjiha (Pw1) testified that it was the deceased's salary, however, there was no evidence before the court that the deceased was earning a monthly salary of Kshs 19,000.
13. Therefore, in the circumstance, I agree with the observations of the appellant that the trial magistrate ought to have applied the Regulation of Wages (General) (Amendment) Order, 2018. However, the deceased was not a general labourer as per the appellant's submissions. The evidence show that he was a laboratory technician and the trial magistrate ought to have applied the income of a grade I Artisan (Kshs 27,024/-). In the case of *Ngania & 2 others v Adulu (Suing as the Legal Representative of the Estate of Clinton Morgan Kiprotich) (Civil Appeal E005 of 2023)* [2024] KEHC 4005 (KLR) (25 April 2024) (Judgment) the deceased was working as a laboratory technician and the court observed as follows:

“Further, the trial Court cannot be faulted for using the multiplicand of Kshs. 30,000/= since even the Regulation of Wages (General) (Amendment) Order, 2018 [which was in force in



March 2022] provided for monthly earnings of around Kshs. 27,024/= for a Grade I Artisan which category the deceased would ordinarily fall had there been no evidence of income.”

14. This means that the trial magistrate ought not to have applied the multiplicand of Kshs 19,000/- but of Kshs 27,024/-. Therefore, the submission that the award was excessive on this account is meritless.
15. In this case, it is not in dispute that the deceased was 29 years old and married. The appellant argues that a multiplier of 16 ought to have been applied and dependency ratio of 1/3. In *Ngania & 2 others v Adulu* (supra) the deceased was similarly 29 years old and a multiplicand of 20 was applied. However, the court in *Ngania & 2 others v Adulu* (supra) noted that a multiplier of 1/3 was too low for the deceased who was not married. In this case the deceased was married and therefore I find no fault in the trial magistrate applying the dependency ratio of 2/3. Pw1 testified that the deceased used to provide for the family as she was the breadwinner. Therefore, the award of loss of dependency will be calculated as follows: $(19,000 \times 20 \times 12 \times 2/3)$, therefore amounting to Kshs 3,040,000/-.
16. The appellant also challenged the award made under the heads pain and suffering and loss of expectation of life. This court is guided by the decision in *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR where 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.”

17. In *Mosonik & another v Cheruiyot* (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment) the court observed as follows:

“44...I note that *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR, Hon Emukule J, reasoned that:...In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death....”

18. It is not in dispute that the deceased died at the scene of the accident, therefore, an award of Kshs 50,000/- would be sufficient for pain and suffering. However, considering the above decisions of this court, I find that damages for loss of expectation of life was reasonable.
19. On loss consortium, I am guided by the holding of the Court of Appeal in *Mbaaru & another v Kenya Bus Services Limited* also known as *Stage Coach Bus International & another* [2024] KECA 432 (KLR):

“This Court in the case of *Salvatore De Luca vs. Abdullahi Hemed Khalil & Another* [1994] eKLR awarded loss of consortium in a fatal accident claim; the Justices of Appeal held thus:



“So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re- married. No doubt, he had lost his wife’s companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs.40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgement in the superior court until payment in full.”

71. We cite the above case to show that loss of consortium is a recognised claim in law, and to show the principles that apply. We know that the award in the cited case was granted in a fatal accident case. The instant case was not a fatal accident. It is nevertheless an appropriate case for such an award. The principles to be considered include proof that the appellant loved the spouse before the accident. Loss of consortium means loss of any or all of the following; companionship, love and affection, comfort, mutual services and sexual intercourse.”

20. In this case, the deceased’s husband testified that he lost his lover, companionship, love, affection and conjugal rights. He was therefore entitled to damages for loss of consortium. In *Mbaaru & another v Kenya Bus Services Limited* (supra) the deceased therein left a spouse and 3 children and the court made an award of Kshs 300,000/- for loss of consortium. The trial magistrate’s award of Kshs 950,000/- was therefore excessive. Having considered the circumstances of this case, I find that an award of Kshs 200,000/- would be sufficient.

21. In conclusion, I find the appeal partly successful and the award of damages by the subordinate court is set aside. I hereby substitute it with the following award in favour of the 1st respondent:

1. Pain and suffering Kshs 50,000/-.
 2. Loss of expectation of life Kshs 100,000/-
 3. Loss of dependency Kshs 3,040,000/-
 4. Special Damages Kshs 1,650/-
 5. Loss of consortium Kshs 200,000/-
- Sub-total Kshs 3,391,650/-
Less 10% contribution Kshs 339,165/-
Net Award Kshs 3,052,485/-

22. The appellant shall have 2/3 the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH 2025.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Miss Wanyama h/b Mr. Bw’Onchiri -For the Respondent



