



**Cheriyot & another v Wachiuri & another (Suing as Legal Representatives
of the Estate of Jeff Wachiuri Mbau - Deceased) (Civil Appeal
E112 of 2024) [2025] KEHC 4701 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E112 OF 2024
FN MUCHEMI, J
APRIL 3, 2025**

BETWEEN

DAVID KIPROTICH CHERIYOT 1ST APPELLANT

PHYLISS NYAMBURA IRUNGU 2ND APPELLANT

AND

FRANCIS MBAU WACHIURI 1ST RESPONDENT

FLORENCE MUNINI NGIMBI 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JEFF WACHIURI
MBAU - DECEASED**

*(Being an Appeal from the Judgment and Decree of Hon. J. Were
(CM) delivered on 3rd May 2024 in Ruiru CMCC No. E192 of 2023)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Chief Magistrate in CMCC No. E192 of 2023 arising from a road traffic accident whereby the trial court apportioned liability at the ratio of 80%:20% in favour of the respondents as against the appellants and awarded the respondents general damages of pain and suffering at Kshs. 100,000/-, loss of expectation of life at Kshs. 120,000/-, loss of dependency at Ksh. 2,855,455/- and special damages of Kshs. 317,550/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-



- a. The learned trial magistrate erred in law and in fact for awarding excessive damages for pain and suffering without considering the circumstances of the accident and comparable judicial awards.
 - b. The learned trial magistrate erred in law and in fact in adopting a dependency ratio of $\frac{1}{2}$ without taking into account the fact that the deceased was unmarried and without children.
3. The respondents filed a cross appeal being dissatisfied with the court's decision citing 6 grounds of appeal which can be summarized as follows:-
- a. The learned trial magistrate erred in law and in fact by failing to judiciously consider the actual net earnings of the deceased as at the time of the accident to enable the court calculate the loss of dependency.
 - b. The learned trial magistrate erred in law and in fact by finding that the net salary of the deceased was Kshs. 19,036/- as at the time of the accident by failing to put into account deductions to wit Kenya Commercial Bank Loan of Kshs. 12,588/- and contributions to Magereza Sacco of Kshs. 2000/- which ought to have been part of the income used to calculate the loss of dependency.
4. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

5. The appellants submit that from the evidence of the respondents and the post mortem form dated 7/5/2022, the deceased was involved in a road traffic accident along Ruiru Kiambu road near Rubis Petrol Station and died on the spot. As such, the appellants argue that the sum of Kshs. 100,000/- awarded by the trial court is inordinately high. The appellants rely on the cases of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR; James Gakinya Karienyne & Another (Suing as legal representative of the Estate of David Kelvin Gakinya (Deceased) vs Perminus Kariuki Githinji [2015] eKLR and Harjeet Singh Pandal vs Hellen Aketch Okudho [2018] eKLR and submit that the deceased did not suffer a long drawn out and painful death and thus the sum of Kshs. 10,000/- is sufficient compensation.
6. The appellants submit that the deceased was 24 years old at the time of his demise but the respondents did not provide any proof of the deceased's dependants though they have been pleaded in paragraph 4 of the Plaintiff. Furthermore, the respondents produced a payslip that shows that the deceased had a net salary of Kshs. 19,036.30/- working at Ruiru Prison, which the trial court adopted as a multiplicand and which the respondents currently challenge in the cross appeal. The appellants argue that the trial magistrate erred in adopting a dependency ratio of $\frac{1}{2}$ without taking into account the fact that the deceased was unmarried and without children. The deceased's dependants being his parents only, it is unlikely that he used $\frac{1}{2}$ of his income to support them.
7. The appellants refer to the cases of Dismas Muhami Wainarua vs Sapon Kasirimo Maranta (Suing as administrator/personal representative of the Estate of Partinini Supon (Deceased) [2021] eKLR and Mbithuka Benson vs Nzuki Muthama & Another [2020] eKLR and submit that the appropriate dependency ratio is $\frac{1}{3}$.
8. The appellants submit that in adopting a multiplicand of Kshs. 19,036.30/- the trial magistrate took into account the element of taxation, the applicable statutory deductions and the loans taken by the deceased which were for his own benefit as he was not married and had no children. Thus the appellants pray that the multiplicand should not be disturbed. Thus, loss of dependency should work out as follows:- $Kshs. 19,036.30 \times 25 \times \frac{1}{3} \times 12 = Kshs. 1,903,630/-$.



The Respondents' Submissions.

9. The respondents submit that from the post mortem report dated 7/5/2022, the deceased died on the spot following the road traffic accident. It was further argued that although it is not disputed that the deceased died on the same day and on the spot, the degree of pain and suffering he experienced even on the fleeting moments of his life after the collision ought to be taken into consideration. The severe head injuries, including to the brain stem and other parts of the nervous system, which are the body's pain receptors. The trauma the deceased felt directly to its core system of moving all five senses including feeling pain. To support their contentions, the respondents rely on the cases of Sukari Industries Limited vs Clyde Machimbo Juma [2016] KEHC 8728 (KLR) and Retco East Africa Limited vs Josephine Kwamboka Nyachaki & Another [2021] KEHC 5773 (KLR) and submit that higher amounts have been granted by courts provided they are in the range of Kshs. 10,000/- to Kshs. 100,000/-.
10. The respondents refer to the cases of Timsales Limited vs Peter Mbaluka & Kilau Peter (Both sued on their own behalf and as legal representatives of the Estate of Geoffrey Mumi Peter (Deceased) & Another [2020] KEHC 8717 (KLR) and Henry Waweru Karanja & Another Teresiah Nduta Kagiri (suing as the legal representative of the Estate of Francis Wainaina Ng'ang'a (Deceased) [2017] KEHC 7700 (KLR) and submit that the trial magistrate's use of the dependency ratio of $\frac{1}{2}$ was correct as the deceased was contributing the family bills and school fees for his brother. The respondents argue that although the deceased did not have a wife and children he had his own responsibilities to his family as the first born thus justifying using half of his income to meet those obligations.
11. The respondents submit that the trial magistrate erred in using a multiplicand of Kshs. 19,036.30/- despite having pleaded and proved that the deceased was a prison warder and was earning an average of Kshs. 38,000/- vide his letter of appointment and payslip for the month of April 2022. The respondents argue that the trial court erred in using net salary of Kshs. 19,036.30/- which included deductions on savings and loans which are rightfully due to an employee. It is only statutory deductions such as PAYE, contributions to NHIF and NSSF which ought to be deducted from the gross salary. The respondents argue that the trial magistrate erred in including deductions such as Kenya Commercial Bank loan Kshs. 12,568/-, Magereza Sacco loan deduction Kshs. 2,000/- and Magereza Sacco savings deduction Kshs. 200/- which sums up to Kshs. 14,768/- which are optional and belong to the deceased. The respondents argue that the multiplicand of Kshs. 33,804.30/- ought to be applied as being the net salary since the gross salary is Kshs. 39,910/- less statutory deductions of Kshs. 6,105.70/-. To support their contentions, the respondents rely on the cases of Kerongo (Suing as the legal representative of the Estate of Evans Kerongo Ayoti (Deceased) vs Kenya Power and Lighting Company (Civil Appeal E033 of 2023) [2024] KEHC 6598 and Hellen Waruguru Waweru (Suing as the legal representative of peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] KECA 318 (KLR). Thus, the respondents submit that loss of dependency should work out as follows:- $Kshs. 33,804.30/- \times \frac{1}{2} \times 12 \times 25 = Kshs. 5,070,645/-$.

Issues for determination

12. The main issues for determination are:-
 - a. Whether the award on pain and suffering was inordinately high.
 - b. Whether the trial court erred in using a dependency ratio of $\frac{1}{2}$
 - c. Whether the trial court erred in adopting a multiplicand of Kshs. 19,036.30/-.



The Law

13. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

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.

15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the award on pain and suffering was inordinately high.

16. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”



17. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

18. The Court of Appeal in *Chunibhai J. Patel & Another vs P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

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 dependents, 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 dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

19. In the case of *Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another* [2017] eKLR the court stated:-

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 the higher damages being awarded if the pain and suffering was prolonged before death.

20. In the instant case, it is not disputed that the deceased died on the spot. The trial magistrate awarded a sum of Kshs. 100,000/-relying on both the advocates proposal of Kshs. 100,000/-. I have perused the trial court record and noted that the parties recorded a consent of liability and filed submissions on quantum. On perusal of the respondents' submissions, they proposed a sum of Kshs. 100,000/- as general damages for and pain and suffering to be awarded by the trial court. The appellants proposed a sum of Kshs. 10,000/- as an award for pain and suffering. I have further perused the post mortem report and noted the fatal injuries sustained by the deceased and the cause of death was severe head and cervical injury due to blunt force trauma consistent with a motor vehicle accident. Relying on the cases of *Kimunya Abednego alias Abednego Munyao vs Zipporah S. Musyoka & Another* [2019] eKLR and *Mumias Sugar Company Limited vs Henry Olukokolo Ashuma (Suing as the legal representative in the Estate of Patrick Kweyu Ashuma (Deceased) & Another* [2018] eKLR and given that the injuries were severe and the deceased died on the spot. It is my considered view that the sum of Kshs.100,000/- was on the higher side. Courts have in the past awarded between Kshs.10,000/- and Kshs. 100,000/- with the higher sums being Kshs.100,000 where the pain and suffering was prolonged. Therefore, it is my considered view that an award of Kshs. 50,000/- is reasonable compensation. I hereby set aside the award of Ksh.100,000/= and substitute it with 50,000/=.



Whether the trial court erred in using a dependency ratio of ½.

21. In the instant case, the appellants are faulting the trial court for adopting a dependency ratio of ½ yet the deceased was not married and neither did he have children. Dependency is a matter of fact and must be proved by evidence as was held in *Abdalla Rubeya Hemed vs Kayuma Mvurya & Another* [2017] eKLR as follows:-

Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.

22. According to the respondent, the deceased was a healthy 24 year old with a promising career as a prison warden earning Kshs. 38,000/-. The respondent further stated that the deceased was the first born in the family and he had started helping out with family bills and supporting his brother by helping his parents pay for his school fees. In the plaint filed by the respondents dated 13th April 2023, the respondents and the deceased's brother are listed as the dependents which was not disputed.
23. Courts have tended to lower the dependency ratio where the deceased is unmarried and the claimants are his parents. In the persuasive decision of *Henry Waweru Karanja & Another vs Teresia Nduta Kagiri* (Suing as the legal representative of the Estate of Francis Wainaina Ng'ang'a (Deceased) [2017] KEHC 7700 (KLR) the court held as follows:-

I have looked at our decisional law on this point. It would appear that our courts tend to lower the dependency ratio when the deceased is an unmarried child and the claimant the parent. This is due to the presumption that can be rebutted by actual evidence. Hence in *Mary Kerubo Mabuka vs Newton Mucheke Mburu & Others* (2006) eKLR the court used a multiplier of 20 years on a 26 year old unmarried lady and a dependency ratio of ½. Similarly in the case of *Alice O. Alukwe vs Akamba Public Road Services Ltd* (2013) eKLR the court used a dependency ratio of ½ on an unmarried lady aged 24 years. In *Lucy Wambui Kihoro* (Suing as personal representative of deceased Douglas Kinyua Wambui) vs *Elizabeth Njeri Obuong* [2015] eKLR, the court similarly used a dependency ratio of ½ on an unmarried son aged 30 years. The principle emerging from these cases is that the court will use a lower dependency ratio where the deceased was unmarried and therefore less inclined to spend his or her earnings at home. Given this emergent practice, I would agree that the use of the dependency ratio of two-thirds here was high. I would in consonance with the emerging judicial practice, go with a ratio of ½ in the circumstances of the case.

24. Thus, it is my considered view that the respondents proved dependency and find that the dependency ratio of ½ was reasonable.

Whether the trial court erred in adopting a multiplicand of Kshs. 19,036.30/-.

25. The respondents in their cross appeal argue that the trial court erred by applying the wrong multiplicand of Kshs. 19,036.30/- thus the award of loss of dependency was inordinately low. In assessment of damages for loss of dependency, the trial court applied a multiplicand of Kshs. 19,036.30/- as the deceased's net pay based on the pay slip as at the time of the accident. It is on record that the respondents attached a pay slip for the deceased for the month of April 2022. A perusal of the said pay slip reveals that the deceased's basic salary was Kshs. 21,410/- with rental house allowance of Kshs. 5,500/-, commuter allowance of Kshs. 3,000/-, housing supplementation of Kshs. 3,000/- and



police/prison allowance of Kshs. 7,000/- which totals to Kshs. 39,910/-. The statutory deductions as contained in the pay slip are P.A.Y.E at Kshs. 4,035.20/-, GOK PSS-Sche at Kshs. 1,070.50/-, Swas Kshs. 50/- and NHIF at Kshs. 950/- which comes to a total of Kshs. 6,105.70/-. The other deductions are Magereza Sacco at Kshs. 2,200/- and Kenya Commercial Bank loan of Kshs. 12,568/- which total to Kshs. 14,768/-. These deductions do not amount to compulsory statutory deductions as they are either in the form of savings or loan repayments, which ought not to be factored in when determining a multiplicand. This was enunciated by the Court of Appeal in the case of Mary Osano (personal representative of Charles Otworu Ogechi (Deceased) vs Simon Kimutai [2020] eKLR where the Court of Appeal stated:-

This Court is therefore tasked to consider whether the learned Judge erred by using the figure of Kshs. 40,000/- as the multiplicand instead of the Kshs. 70,000/-. We appreciate the principle behind this finding is that courts must factor in statutory deductibles prior to arriving at the appropriate figure to use as a multiplicand. The same was held by this Court in Rosemary Mwasya vs Steve Tito Mwasya & Another [2018] eKLR:-

The figure chosen of Kshs. 118,546/- took into consideration yearly increments had the deceased followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as the multiplicand which would work out as Kshs. 118,546/- X 1/3 = 39,512/-.

Counsel for the appellant submitted that the deceased's net pays as evidenced by a copy of his pay slip was Kshs. 53,550/- per month, with house allowance of Kshs. 45,000/- per month which totals to Kshs. 98,550/-. The statutory deduction as contained in the pay slip are: P.A.Y.E at Kshs. 23,947/-, NHIF at Kshs. 320 and NSSF at Kshs. 3,748/- which totals to Kshs. 28,015/-. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.

28. As outlined, the total statutory deductions amount to Kshs. 6,105.70/- which when deducted from the gross pay would amount to Kshs. 33,804.30/-. All the foregoing considered, the correct multiplicand is Kshs. 33,804.30/-. Therefore the award under loss of dependency will work out as follows:-

Kshs. 33,804.30/- x $\frac{1}{2}$ x 12 x 25 = Kshs. 5,070,645/-.

28. Thus the award by the trial court under the head of loss of dependency of Kshs. 2,855,445/- is hereby set aside and is substituted with an award for Kshs. 5,070,645/-.

28. It is therefore my considered view that the appeal partly succeeds in regard to the award on pain and suffering and the cross appeal on the multiplicand. The test of the awards remains undisturbed.

Conclusion

28. In view of the foregoing, I find that the appeal partly has merit the same case applies to the cross appeal both of which are allowed to the extent enumerated herein.

28. The appellant and the cross-appellant shall have half costs of the appeal.

28. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF APRIL 2025.



F. MUCHEMI
JUDGE

