



Njoroge & another v Ombima (Suing as the Administrators of the Estate of the Late Robert Nyongesa Ombina) (Civil Appeal E012 of 2023) [2025] KEHC 4984 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E012 OF 2023
RB NGETICH, J
APRIL 23, 2025**

BETWEEN

PETER MUNGAI NJOROGE 1ST APPELLANT

MBUKINYA BUS LIMITED 2ND APPELLANT

AND

BOAZ NYONGESA OMBIMA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE ROBERT NYONGESA OMBINA) RESPONDENT

(Being an appeal from the judgment of the Honourable A. Towett (SRM) delivered on 8th May 2023 Eldarna Ravine CMCC No. 5 of 2017)

JUDGMENT

1. This appeal arises from Respondent filed suit through plaint dated 20th January 2017 seeking general damages under *law reform Act* and *fatal accidents Act* plus costs of the suit as a result of the death of Robert Nyongesa Obina who was travelling in the 2nd Appellants vehicle driven by the 1st Appellant on 22nd November 2015 when the said vehicle registration number KCA 698E ramped into a stationery lorry registration number KBM145P. Upon hearing, the trial court by judgment delivered on 8th May 2023 in Eldama Ravine CMCC No. 5 of 2017 found the appellants liable and entered judgment in favor of the of the respondent.
2. Being aggrieved by the said judgment, the Appellant instituted this appeal vide a Memorandum of Appeal dated 2nd June, 2023. The grounds of appeal are as follows: -
 - i. That the trial magistrate erred in law and in fact by awarding damages under the *Law Reform Act* that were manifestly excessive under the circumstances.



- ii. That the trial magistrate erred in fact and by law by awarding damages under the *Fatal Accidents Act* that were manifestly excessive under the circumstances.
 - iii. That the learned magistrate erred in fact and in law in failing to consider or disregarding the Appellant's submissions and the Authorities cited.
 - iv. That the learned magistrate erred in fact and in law on finding that the Respondent was entitled to General damages of Kshs. 2,435,083.33/= which is inordinately high in the circumstances.
 - v. That the learned magistrate erred in law and in fact when he relied on erroneous principles of law in arriving at an excessive award on quantum.
 - vi. That the learned magistrate erred in fact and in law in failing to apply the relevant and pertinent judicial principles, precedents and trends regarding the award of quantum.
3. When the matter came up for directions, the court directed that the Appeal be canvassed by way of written Submissions.

Submissions by the Appellant

4. The appellant relied on submissions before the trial court and submit that the award of damages is a discretion vested on the courts in conformity with awarding of damages principles highlighted in the case of *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003* (UR) which was cited in the case of *Francis Odhiambo Nyunia & 2 others v Josephine Malala Owinyi* (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) 120201 eKLR where the court stated as follows:-
- “We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs. Musila* [19841 KLR 2571])”
5. The appellant submits that due to the lack of proof of the deceased's salary, it was prudent for the learned trial magistrate to apply the global sum approach and the award of Kshs. 2,435,083.00 for loss of dependency was inordinately high considering the deceased was 45 years old and no proof of earnings or employment was adduced at the trial which means the trial magistrate erred in applying the multiplier approach. They rely on the case of *Moses Muthuri v Mercy Nkirote* (suing as the legal representative of the Estate of Luka Kirimi (Deceased) [2021] eKLR.
6. The appellants submit that this honourable court should adopt the global sum approach and propose that a sum of Kshs. 800,000.00 be awarded under the head of loss of dependency and relied on the following cases: -
- a. *Rishi Hauliers Limited vs Josiah Boundi Onyancha* [2015] eKLR where the court awarded a global sum of Kshs. 500,000/- to a 50 year old.
 - b. *Gilbert Kimatare Nairi & another* (suing as personal representatives of the Estate of Lemayian Richard Kimatare (Deceased) v *Civiscope Limited* [2021] eKLR. The respondent submitted that the deceased, 42 years old, was said to be a farmer but there was no evidence that he was making Kshs. 150,000/= a month. Under the head of loss of dependency, the trial court made a



global award of Kshs. 600,000, holding that there was no evidence of earning and dependency. The High Court did not find any reason to interfere with the trial court's award.

- c. Moses Wetangula & another v Eunice Titika Rengetiang [20181 eKLR. The Respondent/Plaintiff submitted in lower court that the deceased died at the age of 42 years and was a retired officer of the Kenya Defence Forces earning a pension of Kshs. 8,536/= Kshs. 500,000/= under this head subject to liability will be sufficient.
7. On the issue of costs the appellant submit that it is trite practice that costs follow the event and prays for costs of this Appeal based on Section 27(1) of the *Civil Procedure Act*. He prayed that this appeal be allowed as prayed and the Appellant be awarded costs of this Appeal.

Respondent's Submissions

8. The Respondents submit that the record of appeal is defective for want of a decree being appealed against and it should be struck off; that it is a mandatory procedure for one to extract a decree arising from any judgment that he or she is appealing against but was not done in this case.
9. Further that the Appellants have misconstrued the fact of the case by terming the deceased herein as a pedestrian when in reality the deceased was a fare paying passenger in motor vehicle registration number KCA 698E a Hino Bus and it appears the Appellants just copied and pasted submissions of another appeal.
10. The Respondent further submit that Respondents were not awarded Kshs 2,435,000/- and the record speaks of itself and secondly, the deceased's son testified in emotional moving tears about the following:-
 - i. His father's age
 - ii. What his father did for a living
 - iii. Told court the number of employees that the father had employed
 - iv. Told court how much his father was making on daily basis
 - v. The deceased was aged 45 years at the time of meeting his death.
11. The Respondent submit that the deceased was a business man to be exact a blacksmith and urged this court to take judicial notice that not all businessmen keep documentary evidence of their business dealings; that a person in business makes profit and failure to get payslip does not disadvantage him.
12. The Respondent further submit that miscarriage of justice has not been exhibited nor amplified by the Appellants in any way whatsoever and in the court's own wisdom, a minimum wage of Kshs 5,844.20/= was awarded hence $5,844.20 \times 2/5 = 2,435,083$.
13. On liability, the Respondent submits that the Appellants were held 100% liable and added that the bus herein was travelling at night when the government had then banned night travels. Further that Kshs 100,000/- under loss of expectation of life was way below for loss of life and dependency and proposes a sum of Kshs 300,000/-.
14. In conclusion, the Respondent submits that the Appellant has not informed the court how they arrived at a figure of Kshs 800,000/- and urged this court to consider the number of dependants left behind who were school going children and having been left behind as orphans, the only safe and strong tower of justice that they can run to and seek refuge from is to this honorable court.



Analysis and Determination

15. This being the first appeal, I have the duty of subjecting the evidence adduced before the trial court to a fresh analysis and make independent determination giving allowance for the fact that I did not get the advantage of seeing and hearing the witnesses first hand as held by the court in the case of *Peters Vs Sunday Post Ltd.* [19581 EA 424 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.”

16. In view of the above, I have perused and considered the trial court record together with submissions herein and find that the issue for determination here is whether the award of Kshs. 2,435,083.00 under the head of loss of dependency was inordinately high to warrant interference by this court.

17. It is trite law that the appellate Court can only interfere with the sum awarded where an appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment, the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. In the case of *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR the court of appeal stated as follows-

“We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in *Butt v Khan* [1981] KLR 349 where the court stated 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...”

18. I note that the Appellants have not contested the award assessed under pain and suffering and loss of expectation of life. The contention is in regard to the multiplicand applied by the court, the dependency ratio and multiplier used by the court. In *Butt vs Khan* [1981] KLR 349, where the Court (Law. J.A), 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.”



19. Similarly, in *Kemfro Africa limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] eKLR, Kneller. J.A, stated as follows: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”

20. Record show that the deceased was 45 years old. The trial court applied multiplier of 25 years. That will take the age the deceased would have stopped working to 70 years. Retirement age in Kenya is 60 years and for a person doing business or casual work, the work life may extend beyond 65 years but that may be limited by other vulgarizes of life. I also take note of the fact that the life expectancy for the year 2025 63.8 years against a global average of 73.7. In view of the expected life expectancy and other factors that may affect quality of life, I am of the view that a person may be active up to the age of about 55 to 60 years depending on health condition at the time. I therefore find that multiplier of 25 years is on the higher side and I am inclined to interfere with that and replace with 15 years. In respect to multiplicand, the court adopted minimum wage at the time of deceased's death and I see no reason to interfere. On dependency ratio, the deceased left behind dependants and two third will apply as a ratio. The calculations will therefore be as hereunder:-

Kshs. $5,844.20 \times 12 \times 15 \times 2/3 =$ Kshs 701,304. In respect of awards under the other heads, I find the awards reasonable and will not interfere with the same.

21. Final Orders: -

1. The appeal partly succeeds in respect to multiplier under award under head of loss of dependency. The multiplier is reduced to 15 years therefore reducing the award under loss of dependency to kshs 701,304.00.
2. Awards under the other heads remain as assessed by trial court
3. Each party to bear own costs of appeal.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 23RD DAY OF APRIL 2025.

RACHEL NGETICH

JUDGE

In the presence of:

Momanyi – Court Assistant.

Mr. Simiyu for the Respondent

No appearance for the Appellant

