Okello & another (Suing as the Legal Representatives of the Estate of Ann Mbugua (Deceased)) v Koech (Civil Appeal E009 of 2024) [2025] KEHC 5479 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5479 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL E009 OF 2024

JN KAMAU, J

APRIL 24, 2025

BETWEEN

RICHARD OKUMU OKELLO ..... 1ST APPELLANT

PATRICK MBUGUA NJOROGE ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ANN MBUGUA (DECEASED)

AND

ALFRED KIPSIELE KOECH ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. M. Ndombi (PM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No 213 of 2019 on 22nd February 2024)

JUDGMENT

Introduction

1. In her decision of 22nd February 2024, the Learned Trial Magistrate, Hon R. M. Ndombi, Principal Magistrate, struck out the Appellant's suit with costs to the Respondent for want of locus standi.

2. Being aggrieved by the said decision, on 6th March 2024, the Appellants herein filed a Memorandum of Appeal dated 5th March 2024. They relied on three (3) grounds of appeal.

3. Their Written Submissions were dated 14th August 2024 and filed on 16th August 2024. The Respondent's Written Submissions and List and Bundle of Documents were both dated 20th February 2025 and filed on 24th February 2025. The Judgment herein is based on the said parties' Written Submissions which they relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the issues that had been placed before this court for determination were as follows:-

    i. Whether or not the Appellants had the locus standi to institute the suit;

    ii. Whether or not the Learned Trial Magistrate erred in failing to make a finding on liability and quantum which would have otherwise been awarded to them had their claim succeeded.

7. The court deemed it prudent to address the issues under the following distinct heads.

I. Locus Standi

8. Grounds of Appeal Nos (1) and (2) were dealt with under this head as they were both related.

9. The Appellants cited Section 2(1) and 80(2) of the *Law of Succession Act* Cap 160 (Laws of Kenya) and Section 2(3) of the *Law Reform Act* Cap 26 (Laws of Kenya) and admitted that they lacked locus since they had pleaded their claim under the *Law Reform Act* and that they obtained the Limited Grant of Administration Ad Litem on 21st September 2023 after the Plaint had been filed on 16th September 2022.

10. They pointed out that other than pleading their claim under the *Law Reform Act*, they had also pleaded the *Fatal Accidents Act* which aspect the Trial Court should have considered before dismissing the entire suit. They cited Section 4(1) and 7(1) of the *Fatal Accidents Act* and argued that Section 2(1) of the *Law of Succession Act* allowed a person wishing to proceed without the grant to do so in the administration of the deceased estate as long as the same was expressly embedded in another law.

11. They were emphatic that the *Law Reform Act* had complemented the requirements of Section 2(1) of the *Law of Succession Act* but had not deterred the application of the provisions of Section 4 and 7 of the *Fatal Accidents Act*, hence, the requirement of obtaining a grant of representation prior to representing the deceased's estate was not requisite under Section 7 of the *Fatal Accidents Act* but it was only a requisite under the *Law Reform Act* whose provisions supplanted those of the *Law of Succession Act*.

12. They placed reliance on the cases of Troustik Union International & Another vs Jane Mbeyu & Another [1993]eKLR, Roman Hintz vs Mwang'ombe Mwakima[1948]eKLR, Meshack Kamau vs Edward Kinyanjui Gathandi & Another[2008]eKLR and Waceke Wakinya (Suing as the dependant of the Estate of Peter Gathii Wahinya) vs Kenya Tea Development Authority(Makomboki Tea Factory) [2016]eKLR where the courts therein made awards under the *Fatal Accidents Act* even where the claimant had no capacity to sue under the *Law Reform Act*.

13. They pointed out that in consonance with the provisions of Sections 4 and 7 of the *Fatal Accidents Act*, they had pleaded that they were suing as the husband and father and the legal and personal

representatives of the estate of the deceased and had brought the action for their benefit and that of the estate of the deceased under the *Law Reform Act* and *Fatal Accidents Act*. They added that a husband, a parent and child were listed as beneficiaries under the *Fatal Accidents Act* and were allowed to bring a suit under *Fatal Accidents Act* without letters of administration Ad-Litem.

14. It was their contention that the Respondent adversely relied on the cases of Julius Adoyo & Another vs Francis Kiberenge Bondeva and Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & Omolo Siranga (eKLR citations not given) in his submissions at the Trial Court. They urged this court to uphold their suit under the *Fatal Accidents Act* where they had capacity, bearing in mind that *the Constitution* of Kenya had not envisaged blanket condemnation as was wrongly demonstrated in the case of Julius Adoyo & Another vs Francis Kiberenge Bondeva (Supra).

15. On his part, the Respondent submitted that the Trial Court was correct when it determined that the Appellants had no capacity to institute the suit. He further relied on the submissions that he filed at the Trial Court and placed reliance on the case of Josephine Ndunge Nzusyo vs Housing Finance Company of Kenya Limited [2007] eKLR where it was held that it was mandatory to obtain letters of administration for persons seeking to step into the shoes of the deceased persons. He also relied on the case of Hawo Shanko vs Mohamed Uta Shanko[2018]eKLR where it was held that a party lacked the locus standi to file a suit if it had not obtained a grant limited for that purpose.

16. He further cited the case of Julian Adoyo Ongunga vs Francis Kiberenge Abano Civil Appeal No 119 of 2015 (eKLR citation not given) where it was held that the issue of locus standi in a civil matter was so cardinal since it ran through the heart of the case and that a party without it lacked the right to institute and/or maintain that suit even where a valid cause of action subsisted.

17. He pointed out that during cross-examination, the Appellant told the court that he had not obtained Letters of Administration at the time of filing suit, but took them out at a later stage.

18. Notably, the Appellants had admitted in their submissions herein that they had no locus standi to file suit under the *Law Reform Act* for want of a Limited Grant of Letters of Administration Ad litem. As this was the correct position of the law, this court thus proceeded to determine whether or not they had the locus standi to institute the suit under the *Fatal Accidents Act*.

19. Section 7 of the *Fatal Accidents Act* Cap 32 (Laws of Kenya) states as follows:-

> "If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator(emphasis court)."

20. It therefore followed that an action could be maintained under the *Fatal Accidents Act* without letters of administration as long as the action was brought by a person for whose benefit the action could have been brought by an administrator or executor if letters of administration were issued.

21. Section 4 of the *Fatal Accidents Act* set out the persons for whose benefit an action under the Act could be brought. It provides as follows:-

> " 4(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused(emphasis court), and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deduction of the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
>
> Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person."

22. In the Plaint dated 12th September 2022 and filed on 16th September 2022, the Appellants had indicated that they were suing in their capacity as husband and father Ann Mbugua (hereinafter referred to as "the deceased"). The 2nd Appellant testified that he was the father of the deceased while the 1st Appellant said that he was her husband. They produced two (2) letters from their areas' Assistant chiefs to that effect. That evidence was not rebutted. They were therefore, in accordance with Section 4(1) of the *Fatal Accidents Act*, qualified to be persons for whose benefit the action was brought.

23. The action under the *Fatal Accidents Act* was thus maintainable for the benefit of the Appellants. In the circumstances, this court agreed with them that the Trial Court misapprehended the law in dismissing their suit under the *Fatal Accidents Act*. However, it did not err when it dismissed their suit under the *Law Reform Act* as the Appellants had not taken out the Grant of Letters of Administration Ad Litem before filing suit in the lower court.

24. In the premises, Grounds of Appeal Nos (1) and (2) were merited and the same be and are hereby allowed.

II. Liability

25. As this court had found that the Appellants had the locus standi to institute this suit under the *Fatal Accidents Act*, it proceeded to make its determination on liability as it had both original and appellate jurisdiction. It was its view that directing another trial court in the magistracy to render its decision on apportionment of liability and the quantum that was payable would only delay the determination of the dispute between the parties herein. The question of liability under Ground of Appeal No (3) was thus dealt with under this head.

26. The Appellants submitted that they tendered evidence to prove that an accident occurred on 19th July 2022 wherein the deceased and her two (2) year old son sustained fatal injuries while they were passengers in Motor Vehicle Registration Number KCR 653V (hereinafter referred to as "the subject Motor Vehicle"). They argued that the Respondent did not call any witness to rebut their allegations or the contents of the Police Abstract Report dated 21st July 2022.

27. They were categorical that the accident was self-involving and that as the deceased and her son were passengers, they could not have contributed to its occurrence whatsoever and that even if no eye-witness testified, only the driver of the subject Motor Vehicle could have explained how the said accident occurred. They added that as they pleaded the doctrine of res ipsa loquitor, the onus of proof

shifted to the Respondent to avail evidence to prove that he was not liable for the negligence in relation to the accident.

28. They further submitted that it had been held over time no eye witness was required to be called in a self-involving accident because there was only one vehicle for which apportionment of liability did not arise. In this regard, they placed reliance on the case of Sally Kibii & Another vs Francis Ogaro[2012]eKLR where it was held that the doctrine of res ipsa loquitor would apply where the subject matter was entirely under the control of one party and something happened while under the control of that party, which would not in the ordinary course of things not happen without negligence.

29. They also relied on the case of Sammy Ngugi Mugo vs Mombasa Salt Lakes Ltd & Another [2014] eKLR where it was held that where an accident occurred and no explanation was given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitor and hold the defendant liable in negligence.

30. They also cited the case of Beatrice Kanini Mutua vs Titus Mulinge Kativanga & Another [2019] eKLR where the court found the Respondent wholly liable in negligence where the appellant was a passenger and the accident in issue was self-involving. They urged this court to hold the Respondent wholly vicariously liable for the negligence of his driver, agent and/or servant. They were categorical that they had proved their case on a balance of probability.

31. The Respondent did not call any witnesses and/or submit on the issue of liability. As it dismissed the Appellant's case, the Trial Court did not also address itself on the issue of apportionment of liability herein.

32. Notably, according to the aforementioned Plaint, the deceased and her son were lawful passengers in the subject Motor Vehicle which was being driven along Busia-Kisumu Road at Kefri area on 19th July 2022 when the driver and/or servant or agent of the subject Motor Vehicle negligently drove, managed and/or controlled it causing it to lose control and roll several time as a result of which the deceased and her son sustained fatal injuries. They both died on the spot.

33. In their evidence, the Appellants pointed out that they did not witness the accident but were only informed after it had happened. They produced the Death Certificates and Police Abstract Report in support of their case. The Police Abstract Report confirmed that the accident involved the subject Motor Vehicle which belonged to the Respondent herein.

34. As the deceased was a fare-paying passenger in the Respondent's Motor Vehicle, she was not in control of the said subject Motor Vehicle and was thus under no duty to exercise caution to avoid the accident. As the accident was self-involving and the Respondent did not call any eye witness to explain exactly what may have happened or if the deceased contributed to the causation of the said accident so that this court could determine the issue of contribution on liability on his part, this court found and held that the Respondent was wholly vicariously liable for the accident herein.

35. In the premises foregoing, Ground of Appeal No (3) regarding the apportionment of liability was merited and the same be and is hereby allowed.

III. Quantum under the *Fatal Accidents Act*

36. The aspect of quantum under Ground of Appeal No (3) was dealt with under this head.

37. The Appellants submitted that the Trial Court failed in not assessing the quantum of damages which they would have been entitled to had they succeeded in their claim.

38. In Andrew Mwari Kasaya vs Kenya Bus Services [2016] eKLR, it was observed that the rationale or otherwise of assessing damages, even where they were withheld by the trial court was because they were not courts of last resort. Secondly, it was to avoid the superior/appellate courts sending matters back to the trial courts to carry out that noble exercise.

39. While it was this court's view it was prudent for courts of first instance to assess quantum even if they were dismissing a claim, there was no directive that was cast in stone in the case of Andrew Mwori Kasaya (Supra), to suggest that it was mandatory that a court assess such damages. It was simply a matter of good practice. It did not therefore take away the discretion of a trial court to consider each case on its own set of facts. The Trial Court's failure to assess damages that would have been awarded to the Appellants in the event that their claim succeeded was therefore not prejudicial to their case despite it being dismissed.

40. As this court had both original and appellate jurisdiction, it proceeded to determine the quantum that would have been payable under the *Fatal Accidents Act* under the following distinct and separate heads.

A. Multiplier

41. The Appellants asserted that the deceased was twenty-two (22) years old, in private employment as a hawker within Naivasha Town and its environs and would have therefore surpassed the retirement age of sixty (60) years and continued with her work as opposed to if she was in public employment.

42. To buttress their point, they relied on the case of Kenya Power & Lighting Company vs Pauline Mutisya (Suing as the Administrator of the Estate of the Late Benard Wambua Mutisya [2019]eKLR where the court upheld the multiplier of thirty (30) years where the deceased was twenty-four (24) years old as at the time of death and the case of Lucy Kanini Irungu vs Chege Wahome & 2 Others [2017]eKLR where the court upheld a multiplier of thirty-two (32) years for a deceased who was twenty-four (24) years old.

43. This court had due regard to the case of Kenya Wildlife Services vs Geoffrey Gichuru Mwaura [2018] eKLR where it was held that there was no clear-cut approach to ascertain a multiplier but that courts took into consideration the vagaries of life. In determining the multiplier applicable in this case, this court considered the following cases:-

    1. Board of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku & Another [2014] eKLR where a multiplier of twenty-five (25) years was applied where the deceased was twenty-seven (27) years old at the time of death.

    2. In Xh White Water Ltd vs Joseph Kimani Kamau & Another [2017] eKLR, the court adopted a multiplier of thirty (30) years upon considering vagaries of life for a deceased, a nurse who died at twenty-one (21) years.

    3. In Ruth Wangechi Gichuhi vs Nairobi City County [2013] eKLR, the court applied a multiplier of thirty (30) years for the deceased aged twenty-two (22) years at the time of death.

44. The Appellants' proposal of the multiplier of thirty-three (33) years was not unreasonable in the circumstances. However, based on the above-cited cases among others, a multiplier of thirty (30) years was applied for deceased persons who were aged twenty-one (21) to twenty-two (22) years old at the time of death.

45. As courts are guided by comparable cases so to arrive at conclusions that are not so wide apart as to cause inconsistency and confusion to those relying on the decisions, this court found and held that a multiplier of thirty (30) years was fair and reasonable in the circumstances of the case.

B. Multiplicand

46. The Appellants submitted that the deceased would make between Kshs 15,000/= and Kshs 20,000/= per month from her hawking business but that just like the majority of Kenyans in casual employment, she did not have records of her earnings or bank account records that could have proven her earnings.

47. They pointed out that courts had consistently held that it was not mandatory for documentary evidence to be produced to prove income especially where there were none and that in their absence, the court was bound to fall back on the statutory minimum wage for the year of the deceased's death.

48. To buttress their point, they relied on the case of Crown Bus Services Ltd & 2 Others vs Jamila Nyongesa & Amida Nyongesa (Legal representatives of Alvin Nanjala (deceased)[2020]eKLR and Petronila Muli vs Richard Muindi Sari & Catherine Mwende Mwindu [2021]eKLR where the common thread was that the legal position in regard to assessing earnings where there was no such proof was to adopt the minimum wage guideline. They pointed out that the deceased's place of residence and work was Naivasha which was a former municipality and hence, the minimum wage applicable for Naivasha as at 2022 was Kshs 14,025.40.

49. To determine the appropriate multiplicand in this matter, this court had due regard to the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It was emphatic that it did not subscribe to the view that the only way to prove the profession of a person was by producing certificates or that the only way of proving earnings was by production of documents as this would occasion grave injustice to very many Kenyans who were illiterate and kept no records yet they earned their livelihood in various ways.

50. In the absence of proof of income of the deceased as a business woman and/or hawker, this court could then safely revert to the appropriate Regulation of Wages Order. In this case, the appropriate provisions were the Regulation of Wages (General) (Amendment) Order, 2022 which came into effect on 1st May 2022 as the deceased died on 19th July 2022. She fell under the category of General labourers within the Municipalities since Naivasha was a municipality where the monthly income was Kshs 14,025.40 as submitted by the Appellants.

51. In the premises foregoing, this court found a multiplicand of Kshs 14,025.40 was reasonable in the circumstances of the case.

C. Dependency Ratio

52. The Appellants proposed a dependency ratio of 2/3 as the deceased was married at the time of the accident. They were emphatic that she left behind a husband who tendered evidence that she assisted with settling the outgoings of their house from her earnings. Their computation proposal was as follows:

    33 x 12 x 14,025.40 x 2/3= Kshs 3,702,705.6

53. Notably, the extent of dependency was a question of fact. In the case of Leonard Ekisa & Another vs Major Birgen [2005] eKLR, the court held that there was no rule of law that 2/3 of the income of a person was to be taken as available for family expenses but that the extent of dependency was a question of fact that was to be established in each case.

54. There was no evidence that the deceased was the sole bread winner of her family. It, however, emerged from the evidence on record that both the deceased and her husband used to help each other take care of the family.

55. Taking into account that the deceased was said to be assisting the 1st Appellant fend for the family as his wife, this court found and held that a dependency ratio of 1/3 was appropriate in the circumstances of this case.

IV. Special Damages

56. The Appellants submitted that they had pleaded special damages in the sum of Kshs 94,300/= which was proved.

57. A perusal of the aforesaid Plaint showed that the Appellants specifically pleaded Special Damages totaling Kshs 94,300/= made up of funeral expenses in the sum of Kshs 44,300/= and fees for Demand Letter and Grant of Letters of Administration Ad litem in the sum of Kshs 50,000/=.

58. Notably, the Appellants did not produce the receipts to prove payment of Kshs 50,000= for the Demand Letter and the Grant of Letters of Administration Ad litem. Indeed, it was trite law that special damages had to be specifically pleaded and specifically proven. However, it did not mean that the Appellants did not incur advocate costs because it was not in dispute that they obtained the Grant of Letters of Administration Ad Litem after the suit in the lower court was instituted. To this extent, this court allowed a sum of Kshs 20,000/= to cater for the advocates' costs.

59. The Appellants adduced receipts which amounted to about 71,150/= to prove funeral expenses. Notably, there were some receipts that were duplicated. Be that as it may, the Appellants only pleaded for Kshs 44,300/= for funeral expenses.

60. This court noted that in African customs, funerals were a community affair and that although the family incurred some monies in arranging for the funeral, the bulk of the contributions came from extended family members and the community. Even so, a sum of Kshs 44,300/= was not unreasonable amount for funeral expenses as the family still incurred some expenses.

61. In view of the fact that there were more receipts than the amount that was pleaded, this court found it prudent to award a global figure of Kshs 70,000/= which was inclusive of the advocates costs for issuing the Demand Letter and obtaining a Grant of Letters of Administration Ad Litem.

Disposition

62. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal that was lodged on 5th March 2024 was partially merited. The effect of this is that the Judgment of dismissal of suit that was entered by the Learned Trial Magistrate in Vihiga PMCC No 213 of 2022 on 22nd February 2024 in favour of the Respondent herein against the Appellants herein be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Appellants herein against the Respondent herein on a hundred (100%) per cent basis for the sum of Kshs 1, 753,048/= made up as follows:-

    Loss of Dependency Kshs 1,683,048/=

    1/3 x 14,025.40 x 12 x 30

    Special Damages Kshs 70,000/=

    Kshs 1,753,048/=

    Plus costs and interest thereon. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit while damages under the *Fatal Accidents Act* Cap 32 (Laws of

Kenya) will accrue interest at court rates from the date of judgment of the lower court until payment in full.

63. As the Appellants were partly successful in their Appeal, this court hereby directs that each party will bear its own costs of the Appeal herein.

64. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF APRIL 2025

J. KAMAU

JUDGE