



**Sibun v Odhiambo & another (Suing as the Legal Representatives
of the Estate of Eddy Ochieng Kiche - Deceased) (Civil Appeal
E013 of 2023) [2025] KEHC 5171 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E013 OF 2023**

OA SEWE, J

APRIL 3, 2025

BETWEEN

BENJAMIN CHELULE SIBUN APPELLANT

AND

MILLICENT AKOTH ODHIAMBO & ANOTHER RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF EDDY
OCHIENG KICHE - DECEASED**

*(Being an appeal from the Judgment and Decree of Hon. N.N.
Mosei, Resident Magistrate, delivered on 1st March 2023 in the
Chief Magistrates Court at Mbita in MCCC No. E048 of 2021)*

JUDGMENT

1. The respondents were the plaintiffs in Mbita MCCC No. E048 of 2028: Millicent Akoth Odhiambo & Kiche Oguma (suing as the legal representatives of the estate of Eddy Ochieng Kiche (deceased) v Benjamin Chebule Sibum. They had sued the appellant claiming general and special damages following the tragic death of the deceased in a road traffic accident on 28th October 2021. The accident occurred along the Homa Bay – Mbita Road.
2. The parties agreed on liability and a consent order was duly recorded by the lower court on 31st August 2022 at the ratio of 20:80. Evidence was then taken for purposes of assessment of damages payable. Having heard the parties, the lower court awarded damages in the total sum of Kshs. 5,476,000/= computed as follows:
 - (a) Pain and Suffering - Kshs. 50,000/=
 - (b) Loss of expectation of life - Kshs. 150,000/=



- (c) Loss of dependency - Kshs. 6,480,000/=
 - (d) Special damages - Kshs. 300,000/=
 - Total Kshs. 6,845,000/=
 - Less 20% contribution - Kshs. 1,369,000/=
3. Being aggrieved by the decision of the lower court, the appellants filed this appeal on 20th March 2023 on the following grounds:
- (a) That the learned magistrate misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to the wrong conclusion on the same.
 - (b) That the learned magistrate misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the appellant, and failed to totally consider the appellant's submissions and authorities.
 - (c) That the learned magistrate proceeded on the wrong principles when assessing damages to be awarded to the respondent if any and failed to apply the relevant precedents and tenets of the law.
 - (d) That the learned magistrate erred in awarding a sum of Kshs. 50,000/= under the head of pain and suffering by failing to apply precedent and circumstances of this particular case, hence arriving at an excessive award under this head of damages.
 - (e) That the learned magistrate erred in awarding the sum of Kshs. 6,480,000/= in respect of loss of dependency by failing to apply the correct principles in determining the same hence arrived at an erroneous assessment or estimate of damages.
 - (f) The learned magistrate erred in failing to appreciate that dependency is a matter of fact, pegged on the dependant's life.
 - (g) That the learned magistrate erred in awarding a sum of Kshs. 300,000/= in respect of special damages which was never proved. [h] That the learned magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
4. Hence, appellants prayed for orders that their appeal be allowed and that the judgment of the lower court in Mbita MCCC No. E048 of 2021 be set aside and that the respondents be ordered to pay the costs of the appeal.
5. The appeal was urged by way of written submissions, pursuant to the directions given herein on the 28th October 2024. Accordingly, the appellant relied on his written submissions dated 2nd December 2024. In respect of pain and suffering, the appellant submitted that since the deceased died on the spot the conventional award of Kshs. 20,000/= would have been sufficient. He relied on *Kimunya Abednego alias Abednego Munyao v Zipporah S. Musyoka & another* [2019] eKLR where the deceased died shortly after the accident and the sum awarded for pain and suffering was Kshs. 20,000/=.
6. On loss of dependency, the appellant faulted the decision of the lower court and contended that the respondents did not avail a pay slip or any letter from the deceased's employer to confirm that he used to earn Kshs. 30,000/= per month as alleged. He also impugned the evidence of the respondents in failing to avail a Certificate of Birth to prove the allegation that the 1st respondent had a child with the deceased who was 3 years old at the time of his demise. The appellant relied on Section 107 of the [Evidence Act](#), Cap 80 of the Laws of Kenya and the cases of *Mbugua David & another v Joyce Gathoni*



- Wathena & another [2016] eKLR and Abdalla Rebeya Hemed v Kayuma Mvurya & another [2017] eKLR, among others, for the proposition that he who alleges must prove.
7. Further to the foregoing, the appellant submitted that the circumstances of the case did not lend themselves to the applicability of the multiplier method, granted that there was no proof of the deceased's earnings per month. He also pointed out that the respondent's also alleged that the deceased was a farmer. He therefore submitted that under such circumstances, the multiplier method was inappropriate. He relied on Moses Mairua Muchiri & Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, Mary Khayesi Awalo & another v Mwilu Malungu & another [1999] eKLR and Eston Mwirigi Ndege & another v Patrick Gitonga Mbaya [2018] eKLR to buttress his submission that a global award of Kshs. 600,000 would be appropriate.
 8. On the special damages component of the award, the appellant submitted that no proof by way of receipts were availed to prove car hire or the payment of catering services during the funeral. He was of the view that an expenditure of Kshs. 225,000/= for catering services at a funeral is quite high and that he should not be saddled with such excesses. In his submission, Kshs. 125,000/= would suffice as special damages.
 9. In sum, the appellant summarized his submissions as follows:
 - (a) that the award by the lower court for pain and suffering be set aside and substituted with an award of Kshs. 20,000/=
 - (b) That the award by the lower court for loss of dependency in the sum of Kshs. 6,480,000/= be set aside and substituted with an award of Kshs. 600,000/= using the global approach.
 - (c) That the award by the lower court for special damages in the sum of Kshs. 300,000/= be set aside and be substituted with an award of Kshs. 125,000/= only.
 10. On behalf of the respondents written submissions were filed herein dated 14th February 2025 by their counsel, Ms. Kuke. She reiterated the facts of the matter as well as the Grounds of Appeal and proposed the following issues for determination:
 - (a) Whether the award of general damages awarded to the respondents herein was manifestly and inordinately excessive in the circumstances.
 - (b) Whether the learned magistrate acted in error by failing to evaluate the evidence on record.
 - (c) Whether the learned magistrate misapprehended the principles applicable to assessment of damages in personal injury claims.
 - (d) Whether the learned magistrate relied on extraneous issues as the basis for determination of liability.
 11. In response to the appellant's submission that the award of Kshs. 50,000/= for pain and suffering was excessive, the respondent urged the Court to note that the authority relied on by the appellant in support of this argument, namely Kimunya Abednego alias Abednego Munyao v Zipporah S. Musyoka & another (supra) cannot be an accurate gauge considering that it was decided in 2019; taking into account the inflationary trends. In her view, Kshs. 50,000/= was quite reasonable in the circumstances.
 12. The respondents relied on Hyder Nthenya Musili & another v china Wu Yi Limited & another [2017] eKLR, among other authorities, as the basis for their submission that it has been the practice by the courts over the last 20 years to award sums ranging between Kshs. 10,000/= to Kshs. 50,000/= for



nominal cases; and between Kshs. 50,000/= to Kshs. 100,000/= in extreme cases where the pain was considerably prolonged.

13. On loss of dependency, the respondents defended the decision of the lower court, contending that credible evidence was presented by them before the lower court to prove that the deceased was employed as a security guard; and that, in addition he was a farmer and was therefore earning Kshs. 30,000/= per month. The respondents also submitted that proof of dependency was demonstrated vide a letter dated 2nd November 2021 from the area chief. They further submitted that since it was proved that the deceased was 23 years old at the time of his demise, he would have worked for 37 more years.
14. The respondents relied on *Jacob Ayiga & another v Simon Abayo* (suing as the personal representative of the Estate of Thomas Ndaya Abayo) [2005] eKLR in which the Court of Appeal held that it is not mandatory for one to produce documents to justify their earning. In their submission, the lower court cannot be faulted for using the multiplicand of Kshs. 30,000/=. They urged the Court to note that the Regulation of Wages (General) (Amendment) Order, 2018 which was in force in March 2022 provided for a monthly income of Kshs. 27,024 for Grade I Artisan; which in their view is the category in which the deceased would ordinarily fall in the absence of evidence in proof of income.
15. Therefore, the respondents defended the multiplier approach taken by the lower court to arrive at the impugned award of Kshs. 6,480,000/= for loss of dependency. In the alternative, they submitted that, in the event the Court does not find favour with the multiplier approach, the respondents urged for an award of Kshs. 3,000,000/=. They relied on *Third Engineering Bureau of China City Construction Group Limited v Momanyi* (suing as the legal representative of the estate of Elick Ombasa Momanyi (Deceased) (Civil Appeal E039 of 2023) [2025] KEHC 655 (KLR 30 January 2025 in which the court awarded a sum of Kshs. 2,000,000/= only to the estate of the deceased who was a 24-year-old boda boda rider where no evidence was tendered in proof of monthly income.
16. Lastly, the respondents defended the lower court's award under the head of special damages, contending that it is common place that in any funeral, there must be expenses incurred on transport and catering services. They relied on *Premier Dairy Limited v Amarjit Singh Sagoo & another* [2013] eKLR and urged the Court to find that the award of Kshs. 300,000/= was well justified. They consequently urged for the dismissal of the appeal with costs.
17. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. This is in line with *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 wherein it was held that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

18. I have given careful consideration to the evidence placed before the lower court in the light of the Grounds of Appeal filed herein, as well as the written submissions filed herein by learned counsel. There is no dispute that the deceased, Eddy Ochieng Kiche, died in a road traffic accident on the 28th October 2021. The evidence presented before the lower court confirms that he died on the spot



at about 22:30 hours. There is no dispute on liability, the parties having entered into a consent to apportion liability at 80:20% in favour of the respondents. Accordingly, the appeal is limited to the aspect of quantum. Therefore, the single issue for determination is whether the lower court erred in assessing the quantum of damages payable under the heads of pain and suffering, loss of dependency and special damages.

19. It is trite that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In *H. West & Son Ltd v Shephard* [1964] AC 326, for instance, it was held that:

“...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

20. Similarly, in *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal held that:

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages.” (Also see *Butt v Khan* [1981] KLR 349)

21. As has been pointed out herein above, the lower court’s total award of the lower court awarded damages in the total sum of Kshs. 5,476,000/= computed as follows:

- (a) Pain and Suffering - Kshs. 50,000/=
 - (b) Loss of expectation of life - Kshs. 150,000/=
 - (c) Loss of dependency – Kshs. 6,480,000/=
 - (d) Special damages - Kshs. 300,000/=
- Total Kshs. 6,845,000/=
- Less 20% contribution - Kshs. 1,369,000/=

22. In respect of awards for pain and suffering and loss of expectation of life, the guiding principle, was well captured in *Sukari Industries Limited vs. Clyde Machimbo Juma* [2016] eKLR thus:

“... it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.



According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years..."

23. Similarly, in *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR 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."

24. I am not convinced that the award of Kshs. 50,000/= is so high as to represent an entirely wrong estimate on this particular head. I therefore find no reason to disturb that award.

25. On loss of dependency, the approach taken in *Chunibhai J. Patel and Another v P.F. Hayes and Others* [1957] EA 748, by the Court of Appeal for East Africa, and which I find useful, was that:

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

26. Under this head, the appellant disputed the multiplicand of Kshs. 30,000/= adopted by the lower court. The appellants were of the view that that sum was not based on evidence; and that the learned magistrate ought to have applied the global approach in the circumstances.

27. A perusal of the proceedings and judgment of the lower court confirms that, indeed, no evidence was adduced by the 1st respondent in proof of the deceased's income with exactitude. Nevertheless, there was no dispute that at the time of his death, the deceased was 23 years old; and that, apart from farming, the he worked as a security guard. It was not out of place for him to earn Kshs. 30,000/= per month. I have no reason to fault the lower court's decision in the circumstances bearing in mind the words of the Court of Appeal in *Hellen Waruguru Waweru* (supra) that:

"This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of *Jacob Ayiga Maruja & Another v Simeone Obayo* CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court observed:-

'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.'

28. On funeral expenses, I am guided by the Court of Appeal decision in *Premier Dairy Limited v Amarjit Singh Ssagoo & another* [2013] eKLR that and therefore find no reason to disturb the award on this head of Kshs. 300,000/=. Here is what the Court of Appeal had to say:

"We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when the primary concern to a bereaved family



is that a close relative has died and the body needs to be interred according to the custom of the particular community involved.”

29. In the result, the appeal fails and is hereby dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 3RD DAY OF APRIL
2025**

OLGA SEWE

JUDGE

