



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wachira & another v Shikamili & another (Suing as the Personal Representatives  
and on behalf of the Estate of Wemtsy Chakamali Mulwale - Deceased) (Civil  
Appeal E054 of 2023) [2025] KEHC 6040 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E054 OF 2023**

**AM MUTETI, J**

**MAY 7, 2025**

**BETWEEN**

**JOHN GICHERU WACHIRA ..... 1<sup>ST</sup> APPELLANT**

**EVERLENE NYABOKE AGUKO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SHELDON MULWALE SHIKAMILI ..... 1<sup>ST</sup> RESPONDENT**

**MAUREEN MUTHONI MULWALE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVES AND ON BEHALF OF THE  
ESTATE OF WEMTSY CHAKAMALI MULWALE - DECEASED**

*(Appeal arises out of a Judgment entered by Hon. F. Rashid  
(P.M) in Winam Magistrate's Court Civil Case No. E147/2021)*

**JUDGMENT**

**Introduction**

1. The arises out of a Judgment entered by Hon. F. Rashid (P.M) in Winam Magistrate's Court Civil Case No. E147 /2021 in which the learned Honorable Magistrate awarded the estate of the deceased the sum of Kshs. 1,569,600 in a fatal accident claim.
2. The appellant aggrieved by the decision of the court on quantum has appealed to this court on the following grounds:
  - a. The quantum of general damages for pain and suffering and loss of expectation of life and dependency is inordinately high erroneous, oppressive and punitive and amounts to miscarriage of justice.



- b. The Learned trial Magistrate ignored the Appellant's submissions, paid lip service and made no reference to all the precedent on general damages cited before her, thus coming to a wrong decision on the quantum.
  - c. The Learned trial magistrate erred in fact and in law by using the ratio of 2/3 when calculating the dependency ratio, instead of 1/3 when it was clear that the deceased was never married.
  - d. The Learned trial magistrate erred in law and in fact in making an award of Kshs 100,000/- for loss of expectation of life and failed to deduct it from the final tally thereby rewarding the deceased estate twice.
  - e. The Honorable Magistrate's decision is plainly wrong and is against the weight of evidence.
3. The appeal raises the following issues :-
- i. Whether the damages assessed for pain and suffering, loss of expectation of life and dependency are inordinately high erroneous and oppressive.
  - ii. Whether the learned Honorable Magistrate was correct in applying the 2/3 ratio when calculating dependency ratio when the evidence was clear that the deceased was unmarried.
  - iii. Whether the award of Kshs. 100,000 for loss of expectation of life was justifiable.
4. The appellant has urged this court to consider setting aside the judgment of the trial court and make its own findings on quantum.

#### **Duties of the First Appellate Court**

5. On a first appeal this court's role is well enunciated in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA 212 where the court of appeal stated:

inter alia: -"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

6. The court is thus restricted to the reconsideration of the matter purely on the basis of the evidence presented before the Lower Court and the Law.
7. The issue of assessment of damages is a matter of exercise of judicial discretion. The court must not therefore whimsically interfere with the finding of the Lower Court unless the decision by the court is shown to have been plainly wrong and or the court erred in the consideration of the principles applicable in assessment of damages. See Mbogo Vs SHAH (1968) EA Page 93 in which De Lestang VP (as he then was) observed at Page 94 :

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. The court therefore is left to examine whether the Lower Court erred in its assessment of damages.



9. The appellants concede that the sums of Kshs. 100,000 for loss of expectation of life and Kshs.20,000 for pain and suffering under the Law Reform Act are reasonable and thus uncontested. The submission by the appellant therefore effectively renders ground 4 in the memorandum of appeal redundant. It is the same set of figures that the Lower Court took into account in the final assessment.
10. This court agrees with the submission by the respondent that all that the court has to do in the assessment of damages under the Fatal Accidents Act is to take into account the award made under the Law Reform Act. The understanding of this court is that the aspect of taking into account does not mean deducting the sum. The court should simply bear in mind that the figure in issue has been granted thus proceed to determine the figures under the Fatal Accidents head with that in mind. See *Kemfro Africa Ltd T/a Merv Express & Another Vs. A.m Lubia & Another* (1982-88), KAR 727
11. The court of Appeal in *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja (deceased) Vs. Kiarie Shoe Store Ltd. NYR CA Civil Appeal No.22 of 2014 [2015] eKLR stated :

This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise."

12. The appellant is basically inviting this court to fall into the same error that the Court of Appeal pointed out in the Waruguru Case.
13. The figures are not to be deducted from the final award. The appellants submissions in this regard must fail.
14. The second issue of contention in this appeal is the adoption of 2/3 ratio in calculating dependency.
15. The appellant contends that since the deceased was not married at the time of his death, the court ought to have adopted the 1/3 ratio.
16. The respondents do not deny that the deceased was not married at the time of the accident but maintain that he maintained his mother at the time as per the evidence of PW1 thus the ratio adopted should not be disturbed.
17. The appellant referred this court to the case of *DISMAS MUHAMI WAINARWA Vs SOPON KASIMIRO MARANTA* (Suing as Administrator and Personal Representative of the estate of Partinini Supon (deceased) (2021) eKLR where the court held:-

“The deceased left behind parents. He must have supported them in some way. In that regard the ratio could not have been 2/3. The respondent’s counsel agreed that the dependency ratio of 2/3 was on the higher side and suggested a ratio of 12. Although the deceased was not married, it would be difficult to assume without evidence that he gave 1/2 of his income towards his parents’ support. The ratio of 1/3 would be appropriate.”



18. The court in the above cited decision stated:

“the deceased left behind parents. He must have supported them in some way.”

It does appear to this court that the judge in the case of Dismas did not receive evidence of the deceased having been supporting the parents during his lifetime thus the use of the words” he must have supported them in some way”

19. In the instant case PW1 testified and adopted her statement in evidence in chief. The statement partly reads:-

“At the time of the deceased death he was aged 27. He was at the time trained and practising as a mechanic cum turn boy as well as farming and from which business he used to make a monthly profit of kshs.15,000, which he used in supporting his dependants in terms of their daily upkeep and basic needs, and which support is lost with his sudden death. He enjoyed an active and healthy life style, with normal expectations of life. By his death his expectations of healthy life was considerably shortened. With his untimely death, his estate has thus suffered losses and damages which is claimed herein both under the Fatal Accident Act cap 32 and Law Reform Act cap 26 of the Laws of Kenya.”

20. The statement does indicate that the deceased supported his dependants though the witness did not name them. it would obviously mean that he was depended on by some people who included the plaintiffs.

21. Dependency is a matter of fact and the party seeking to be compensated for loss of dependency must be able to establish that he depended on the deceased in some way and to what extent.

22. The respondents though they gave evidence that the deceased supported dependants with his salary they did not go ahead to state to what extent. See Abdalla Rubeya Hemed Vs. Kayuma Mvurya & Another [2017] eKLR where it was held 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.”

23. The evidence as to the extent of support would have helped this court to determine whether a 1/3, 1/2 or 2/3 ratio would have been the most appropriate.

24. The issue of the ratio to be applied by courts in cases of unmarried persons is still debatable. In Rodgers Kinoti Vs. Linus Bundi Murithi & Another (2022)eKLR the court discussed the applicable dependency ratios in different instances as follows :

“It is clear that opinion is divided among High Court judges on whether dependency ratio where the deceased is unmarried ought to be ½ or 1/3. I have reviewed other cases where dependency ratio for unmarried persons were considered. In Joseph Ndirangu Thuo & Another v Kamau Ngugi (Suing as legal representative and administrator of the estate of Peter Waweru (2019)eKLR Mwongo J. used a dependency ratio of ½ for an unmarried lady and cited the cases of Mary Kerubo Mabuka v Newton Mucheke Mburu & 3 others (2006)eKLR where the court used a dependency ratio of ½ on a 26 year old unmarried lady; Alice O. Alukwe v Akamba Public Road Services Ltd (2013) eKLR where the court used



a dependency ratio of 1/2 on an unmarried lady aged 24 years and Lucy Wambui Kihoro (Suing as Personal Representative of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR where the Court similarly used a dependency ratio of ½ on an unmarried son aged 30 years.”

25. The court therefore finds that there is no settled principle on the issue of applicable ratio for unmarried persons. As such the learned Honorable magistrate was within the law in relying on the 2/3 ratio. In any event other courts have applied the same ratio in the case of unmarried persons. See Chania Shuttle Vs. Mary Mumbi [2017] eKLR.
26. It is important to mention that the issue of dependency is a very fluid one. The society is a wash with married individuals who do not support their families and to the contrary there exists another whole lot of unmarried fellows who are the bread winners in their families and carry some immeasurable dependency burden.  
  
That is not uncommon in our society. The duty on litigants in my view is to ensure that in their evidence, they remain as precise a one can be on the extent of dependency and level of support offered to them by the deceased in cases of this nature.
27. In the end since this court has found that there is no hard and fast rule about the ratio applicable to a claim in relation to an unmarried person, the court finds that the exercise of discretion by the magistrate in adopting 2/3 ratio was proper and within the law.
28. The court therefore finds that the appeal by the appellant has no merit and it is hereby dismissed with costs to the respondents.
29. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2025.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Nyangano for the Appellant

