



**Lumula v Wanjera & another (Suing as Legal Representative of the Estate of Max Mario Odhiambo) (Civil Appeal E008 of 2024) [2025] KEHC 12064 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 12064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E008 OF 2024**

**F WANGARI, J**

**JUNE 9, 2025**

**BETWEEN**

**EVAN LUNALO LUMULA ..... APPELLANT**

**AND**

**MARY WANJERA ..... 1<sup>ST</sup> RESPONDENT**

**JUSTIN MOSES ODHIAMBO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF MAX MARIO  
ODHIAMBO**

*(Being an appeal from the Judgement of Hon. Harrison Adika Musa Sajide delivered on 15th day of November, 2023 in Mombasa CMCC No. 287 of 2023)*

**JUDGMENT**

1. The Respondents who were the Plaintiffs in the lower court filed a suit against the Defendant/Appellant through the Plaint dated 13/03/2023, seeking for General Damages under the *Fatal Accident's Act* and lost years under the *Law Reform Act*. They also prayed for Special Damages and costs of the suit.
2. The Plaintiffs who were parents to the deceased son aged 4 years, pleaded that their son was playing with other children off the road when the Defendant's driver carelessly and negligently drove motor vehicle registration no. KBK 893A causing it to make a U-turn off the road to where the deceased was playing and hit him. The driver then reversed and ran over the deceased and drove off. The deceased sustained fatal injuries, hence the filing of the suit.
3. The Defendant filed a Statement of Defence dated 03/05/2023 denying the allegations by the Plaintiffs and put them to strict proof thereof. The Defendant took the defence of volenti non fit injuria blaming the deceased for the accident. He prayed that the suit be dismissed with costs.



4. The Plaintiff called 2 witnesses. The traffic police officer and the 1<sup>st</sup> Plaintiff. The Defendant closed his case without calling any witness. The Trial court upon considering the evidence entered judgment in favour of the Plaintiffs as hereunder;
  - a. Loss of dependency Kshs. 1,000,000/=
  - b. Loss of expectation of life Kshs. 50,000/=
  - c. Pain and suffering Kshs. 30,000/=
  - d. Funeral expenses Kshs. 30,000/=
  - e. Obtaining grant Kshs. 30,000/=Total Kshs. 1,140,000/=
5. Being dissatisfied with the said judgment, the Defendant filed this appeal through the Memorandum of Appeal dated 15/01/2024 on grounds inter alia that the trial court erred in fact and in law by failing to consider the Defendant's submissions on liability, failing to consider conventional awards in similar cases while awarding damages, thus leading to miscarriage of justice. The appeal is both on liability and quantum.
6. Directions were taken to have the appeal disposed off by way of written submissions. None of the parties complied with the directive

### **Analysis**

7. This Court has carefully considered the Record of Appeal. The issues for determination are;
  - a. Whether the appeal has merits
  - b. Who bears the costs
8. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence and consider arguments by parties and apply the law thereto, and, make its own determination of the issue or issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. (see *Selle & Another v. Associated Motor Board Company Ltd.* [1968] EA 123)
9. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred in its findings.
10. On liability, the Plaintiffs blamed the driver of the Defendant for making a U-turn off the road hitting and then running over the deceased. The deceased was playing at the time under the watch of his mother who was running a business next to where the son was.
11. On the other hand, the defendant blamed the deceased for the accident stating that he bought it upon himself. It was pleaded that the deceased was negligent by plunging himself into the middle of the road while in a drunken stupor, and failed to heed to the hooting of the vehicle.
12. The Plaintiff called the eye witness to the accident, the 1<sup>st</sup> Plaintiff who is the mother to the deceased. She gave an account of how her son was playing and the vehicle made a U-turn off the road hitting the son. The driver also reversed running over the son thus causing fatal injuries. The traffic police officer Sgt. Abdulahi gave evidence that the driver of the vehicle was to blame. He was charged with the offence of causing death by dangerous driving. As at the time of the hearing, the matter was still pending in court.



13. Though the Defence did not adduce any evidence, it appears that the Defendant was just denying liability for the sake on it. It blamed a 4 year old child for suddenly dashing in the road in a drunk stupor and failing to heed to the hooting of the car, hence the defence of volenti non fit injuria.
14. It is high time that the parties contextualize their pleadings to reflect the allegations pleaded as against them by the opposite side. In the present case, it is totally absurd that a party pleads that a 4 year old child walked into the road in a drunken stupor. This is to say the least, is a lazy counsel who just adopts a copy and paste approach without putting the pleadings into context. On liability, the appeal has got no merits.
15. On quantum of damages, for this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself or herself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there had been a miscarriage of justice.
16. In *Ken Odondi & 2 Others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* (2013) eKLR, the Court of Appeal stated: -
 

“...The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice...”
17. Under the head of pain and suffering, the Trial Magistrate awarded a sum of Kshs. 30,000/=. This court will, hence, be guided by *Hyder Nthenya Musili & Another - v- China Wu Yi Limited & Another* [2017] eKLR, where the Court stated as follows: -
 

“...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 higher damages being awarded if the pain and suffering was prolonged before death...”
18. It is not in dispute that the deceased was pronounced dead on arrival to hospital. It is alleged that the fatal injuries were sustained after the vehicle ran over him. This is after hitting the child. I thus find the award of Kshs. 50,000/= to be reasonable.
19. On loss of expectation of life, the Trial Court made an award of Kshs. 50,000/=. If the Respondent had cross-appealed on the award, the same would have been enhanced to Kshs. 100,000/=. in conventional and I see no reason to disturb it. The award under this head stands.
20. On loss of dependency, this is a claim that arises from the *Fatal Accidents Act*. Section 4 (1) of the *Fatal Accident Act* which provides: -
 

“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, 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 to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.”

21. The deceased was 4 years and the court proceeded to award Kshs. 1,000,000/= under this head. I do agree with the Appellant that the trial court did not give reasons for granting the award. In the lower court submissions, the Appellant proposed a global sum of Kshs. 500,000/= under the head. It is generally settled in law that global/lump sum damages are awarded in instances where the court is left with no choice since there is absolutely no proof of the deceased’s earnings.
22. The factors to be considered in determining an award for loss of dependency for a deceased person leaving behind dependents is the number of dependents, the age of the dependents and the level of dependency. The age at which the deceased died is also a relevant factor in my view.
23. Nevertheless, this court has pronounced itself on the award of loss of dependency where the deceased are minors. In *Daniel Mwangi Kimemi & others v Representative of the estate of N.K(deceased)* (2016) eKLR, the court made an award of Kshs1,000,000 for loss of dependency where the deceased was 9 years old. Also in *China National Aero-Technology International Engineering Corporation v RL (Suing as the legal representatives of the estate of the late SL)* (2020) eKLR, the award of Kshs. 1,400,000 by the lower court was upheld where the deceased was aged 13 years.
24. From the above authorities, and the loss of value for money over time, the deceased in this case being 9 years old, I find the award of Kshs. 1,000,000/= is not exorbitant hence not erroneous. I find no basis for interfering with the award as granted by the trial court.
25. I find the award on special damages to be well founded and I thus see no reason to disturb it. Furthermore, there was no appeal lodged on the item.
26. On costs, the same follows the event. This court reserves its discretion as to the award of costs. The appeal having no merits, costs are awarded to the Respondent.
27. The upshot of the foregoing is that the court renders itself as hereunder: -
  - a. The Appeal has no merits and is hereby dismissed.
  - b. Costs to the Respondent.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF JUNE, 2025.**

.....  
**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellant;

N/A by the Respondents;

Ms. Getrude, Court Assistant

NB: Judgment released to the registry. Parties be notified.

