Rono v Kipserem (Suing as the Administrator & Legal Representative of the Estate of Ruth Jepkorir Kiplagat - Deceased) (Civil Appeal 9 of 2023) [2025] KEHC 8550 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8550 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL 9 OF 2023

E OMINDE, J

JUNE 18, 2025

BETWEEN

VINCENT KIBIWOTT RONO ..... APPELLANT

AND

DOUGLAS KIPSEREM (SUING AS THE ADMINISTRATOR & LEGAL REPRESENTATIVE OF THE ESTATE OF RUTH JEPKORIR KIPLAGAT - DECEASED) ..... RESPONDENT

(Being an appeal from the judgment and decree in Iten Senior Principal Magistrates Court Civil Case No. 8 of 2020 delivered on 27/04/2022 by Hon. C. Kutwa (SPM)

JUDGMENT

1. By way of a Plaint dated 18/12/2019, the Respondent sued the Appellant for general damages under both the *Law Reform Act* and the *Fatal Accidents Act*, Loss of Consortium, Special Damages of Kshs.76,000/= and costs of the suit plus interest.

2. The accident was stated to have occurred on 24/01/2019 along the Eldoret- Eldama Ravine Road wherein the deceased, Ruth Jepkorir Kiplagat is stated to have been a lawful passenger aboard motor vehicle registration number KBG 035L Toyota Hiace Matatu when at Maji Mazuri area the Appellant's driver and or agent drove the said motor vehicle in a negligent manner and causing it overturn and as result of which the deceased sustained fatal injuries.

3. The Appellant filed his Statement of Defence dated 5/11/2020 denying the occurrence of the accident. Alternatively, he blamed the deceased for the occurrence of the accident.

4. In his judgement delivered on 27/04/2022, the Learned Trial Magistrate entered judgement in favour of the Respondent and against the Appellant as follows:

a. Liability 100%

b. Pain and Suffering.....Kshs.50,000/=

c. Loss of expectation of life .....Kshs.60,000/=

d. Loss of dependency .....Kshs.1,800,000/=

e. Special damages .....Kshs.68,550/=

f. Total.....Kshs. 1,978,550/=

g. Plus costs and interest.

5. Aggrieved by the said decision, the Appellant on 9/05/2022 filed a Memorandum of Appeal dated 7/05/2022 citing the following grounds:

1. That the learned trial Magistrate erred in law and in fact by proceeding on wrong principles when assessing the damages payable to the Respondent for loss of dependency under the Fatal Accident Act.

2. That the learned trial Magistrate erred in law and in fact in applying the wrong principles in law and or misapprehending the evidence on record while assessing the damages payable to the Respondent.

3. That the learned trial Magistrate erred in law and in fact in using the multiplier approach in awarding damages for loss of dependency under the *Fatal Accidents Act* instead of applying the global sum award approach in view of the evidence on record and or adduced during trial.

4. That the learned trial Magistrate erred in law and fact by awarding Kshs. 1,978,550/= as general damages which award was inordinately high in the circumstances thus representing an entirely erroneous estimate of an award of general damages vis-à-vis the Respondent's claim and thus the ward constituted a miscarriage of justice.

5. That in the alternative and without prejudice to the foregoing if at all applying the multiplier approach was proper, the learned trial Magistrate erred in law and in fact by adopting a multiplicand of Kshs. 9,000/= without any lawful justification instead of adopting the minimum wage of Kshs. 7,240.95/= in accordance with the Regulation of Wages (General) (Amendment) Order, 2018.

6. That the learned trial Magistrate erred in law in fact by adopting a multiplicand of Kshs. 9,000/= which is speculative given that the deceased's earnings were not proved during trial.

7. That the learned trial Magistrate erred in law and fact by applying a multiplier of 25 years without any justification and which multiplier is erroneously high in view of the authorities cited by the Appellant in his written submissions.

8. That the learned trial Magistrate erred in law and fact by adopting a dependency ratio of 2/3 instead of a dependency ratio as the deceased was not the sole breadwinner in view of the evidence adduced during trial.

9. That the learned trial Magistrate erred in law and fact by failing to consider the Appellant's written submissions on quantum more specifically on the issue of loss of dependency thereby arriving at a determination on quantum which is wholly erroneous.

Submissions

6. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 14/05/2025 while the Respondent filed 24/03/2024.

The Appellant's Submissions

7. Counsel for the Appellant submitted that the trial court erred when it applied a multiplier of 25 years, being the full remaining years that the deceased had until her retirement at 60 years. Counsel faulted the trial court for not taking into account life's uncanny and unpredictable circumstances the same being the vagaries of life that would lower the chances of survival for the deceased. Counsel submitted that the Appellant proposed the application of a multiplier of 15 years while relying on the case of Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma-Deceased) [2019] eKLR where the learned Musyoka J at relying on Chunibhai J Patel and Another vs. PF Hayes and Others (1957) EA 748, 749 where the Court of Appeal stated in the manner of assessment of damages under the Fatal Accident's Act that –

> " .... The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children.... It has also been submitted by the defendant that the deceased would retire at age 55 and that there was no guarantee that he would remain in active employment in the private sector. It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire.' In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life ..."

8. Counsel also relied on the case of Bayusuf Freighters Limited vs Patrick Mbatha Kvengo [2014] eKLR where the Court applied a multiplier of 20 years in respect of a deceased person who died aged 27 years old. Additionally, Counsel relied on John Kola Ajode vs Peter Mwangi & Another [2010] eKLR where a multiplier of 20 years was adopted in respect of a deceased person who died while aged 27 years old. Counsel urged the Court to adopt a multiplier of 15 years.

9. Counsel further submitted that Respondent was the Claimant and beneficiary of the awards under the *Fatal Accidents Act*. Counsel urged that an award under this statute is usually made to compensate the Dependents of the deceased prior to the deceased passing on pursuant to the provisions of Section 4(1) of the *Fatal Accidents Act*. Counsel added that under this statute, an award is usually made for loss of dependency. Counsel submitted that dependency being a question of fact, the Plaintiff was under an obligation to marshal evidence to prove how the dependants depended on the deceased. Counsel further submitted that the trial Court applied the multiplier approach hence finding as follows; Kshs.9000x12x25x2/3= Kshs. 1,800,000/=.

10. Counsel urged the Court to make a lump sum award for loss of dependency for the reason that whereas the Respondent in their pleadings pleaded that the deceased was a business woman, no business and/or trading licenses were produced in evidence to prove that and that further

    to the foregoing, whereas it was pleaded that the deceased used to earn net wages of Kshs. 30,000/=per month, no documentary evidence to this effect was adduced, no bank statements and/or the deceased's personal records were produced as evidence to prove that the deceased would make Kshs. 30,000/=monthly income from the business it is alleged, she was involved in. Counsel contended that the deceased's income was therefore not proved during trial and thus in making an award of loss of dependency the Appellant had called on the court to adopt the global award approach. Counsel relied on the case of Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR where Majanja J. was of the view where income was not proved, then courts opt to adopt a global award approach as opposed to the multiplier approach which would be speculative at best.

11. Counsel further submitted that the multiplicand of Kshs.9, 000/, applied was not backed and/or supported by any document. That it is equally safe to conclude that the Minimum wage as at the time of the deceased's passing was Kshs. 7,240.95/-. Counsel maintained that given the paucity of evidence in respect of the suit, the evidence adduced was not enough to warrant the court exercising its discretion by applying the multiplier approach to make an award for loss of dependency under the *Fatal Accidents Act*.

12. Counsel relied on the holding of Ringera J., in Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted with approval by by Koome J (as she then was) in Albert Odawa v Gichimu Gichenji NKU HCCA No.15 of 2003[2007] eKLR in submitting as therein held that the multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. That where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do.

13. In view of the above, Counsel thus submitted that a lump sum award of Kshs. 600,000/=will suffice for Loss of Dependency under the *Fatal Accidents Act*. Counsel relied on the decision in Gilbert Kim tare Naira & another (Suing as personal representative of the Estate of Jackline Sein LeMay Ian (Deceased) v Civico Limited [2020] eKLR where a lump sum award for Kshs. 600,000/= was made in respect of a deceased person aged 31 years old where income was not proved and on Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014I eKLR (supra) where a global award of Kshs. 700,000/= was made for loss of dependency in respect of a deceased person aged 28 years old since income was not proved.

14. In conclusion, Counsel urged the Court to vary the trial Court's judgment and make an award based on the global sum approach being Kshs. 600,000/= and or in the alternative if the Court hold that the multiplier approach applies, then loss of dependency should be calculated as follows; Kshs. 7,240.95x1/3x12x15= Kshs. 434,457/=.

Respondent's Submissions

15. On pain and suffering, Counsel for the Respondent submitted that the law is that damages for pain and suffering in fatal accident claims are designed to compensate the deceased's estate for the pain and suffering the deceased endured before death and that is why courts as a matter of practice award a conventional sum of between Kshs. 10,000 to Kshs. 100,000 in cases where the deceased died either on the spot or moments after the accident. Counsel cited the Court in Jecinta Ruguru v Beatrice Muthoni

Muthike (Suing as the Legal Representative of the Estate of the Late Isaac Muthike Nyaga)[2021] KEHC 8358 (KLR).

16. Counsel maintained that when giving awards the court ought to also look at inflation and passage of time as was held in Melbrimo Investment Company Limited v Dinah Kemunto &Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange [2022] KEHC 738 (KLR) where the court held that:

> " Having said so, this court is enjoined to consider passage of time and the inflationary trends when considering an award under this head when a deceased had died on the spot. As the sum of Kshs.10, 000/= proposed by the Appellant was awarded in the 1980s and the 1990s, the same did not reflect the current awards. In this respect, this court found and held that an award of Kshs. 50,000/= for pain and suffering was not only fair but the same was reasonable. The award under that head is therefore hereby upheld."

17. Counsel submitted that in this case the duration it took for the deceased to pass on after the accident is unknown but nonetheless it does not negate the nature of someone who suffers injuries as a result of an accident to suffer some form off pain which entitles compensation to the estate of the deceased. Counsel maintained that the award of Kshs. 50,000 awarded by the trial Magistrate is not unreasonable and should be upheld.

18. On loss of expectation of life, Counsel submitted that Rose vs Ford (1937) AC 826 it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Counsel further submitted that in Feaham vs Gambling (1941) AC 157 it was further held that only moderate awards should be granted under this head for the following reasons;

> " In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not for loss of future pecuniary prospects."

19. Counsel observed that the generally accepted principle for awarding loss of expectation of life is that very nominal damages will be awarded if the death followed. Counsel submitted that deceased died after the accident, she had no history of ill health and as such the learned trial magistrate awarded Kshs. 60,000/-as that was not inordinately high in comparison to other awards made by different courts.

20. On loss of dependency, Counsel submitted that the multiplicand and dependency ratio ought to be determined to be able to award damages for loss of dependency and also cited the observations of Ringera J in Mwanzia -Vs- Ngalali Mutua Kenya Bus Ltd and quoted in Albert Odawa -Vs-Gichumu Githenji Nku HCCA No.15 Of 2003 [2007), KLR

21. Counsel added that the age of the deceased is not in contention. In as much as the amount of money earned is the point of contention and in this regard, he cited the decision of the Court of appeal in Jacob Ayiga Maruja & Francis Karani v Simeon Obayo (Suing as the Administrator of the Estate of Thomas Ndaya Obayo) [2005] KECA 202 (KLR) in which the court stated thus;

> " We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings 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."

22. Counsel therefore submitted that the deceased was married and had a child and as such the dependency ratio ought to be as the trial magistrate calculated together with the multiplicand of 25 years and as such the award of Kshs. 1,800,000 is justified.

23. In regard to special damages, Counsel submitted that the law is settled that they must not only be specifically pleaded but they must also be strictly proved. Counsel contended that if they are not pleaded, any evidence thereon is inadmissible and ought to be excluded from the record. Counsel further submitted that the Respondent produced receipts summing up to the pleaded amount of Kshs. 68,550/- and as such the trial Magistrate relied on this to come up with the award of Kshs. 68,550/- as the award for special damages.

24. Lastly, Counsel, relying on Bashir Ahmed Butt v. Uwai Ahmed Khan Civil Appeal No. 40 of 1997 urged that this court should not disturb the lower court award and should associate itself with the holding therein 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 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. 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages.

25. In conclusion, Counsel submitted that the awards have all been justified and not inordinately high or low and s such this Honourable Court should not find any reason to disturb the award by the trial court of Kshs. 1,978,550.

Determination

26. This being a first appeal, the duty of this Court as the first appellate Court, is to reassess, re-evaluate and reconsider the evidence afresh and come to its own conclusion but bearing in mind that it did not see the witnesses testify and give due allowance for that as was held in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the the Court of Appeal stated;

> " This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

27. In this regard, I have considered this appeal and the attendant submissions as well as the authorities cited and relied upon by each Counsel. I have also perused the trial Court's record and considered the impugned judgment.

Liability:

28. The Learned Trial Magistrate apportioned liability at 100% against the Appellant. This liability was adopted from the liability as apportioned in the test suit being Iten Civil Suit No.05 of 2020 in which

the Appellant was found to be 100% liable to compensate the Plaintiff therein in a judgment delivered on 6th October 2021. The court needs to point out that because this finding on liability is not the subject of this Appeal, then it follows that it is not disputed and it is therefore the one that shall be applicable to the subsequent finding on quantum. Further, the court notes that the Appeal is solely centred on the issue of Loss of Dependency. The Presumption therefore is that the Appellant is satisfied with these awards as given by the Learned Trial Magistrate and the court shell therefore not disturb the said awards.

Quantum:

29. On whether or not an Appellate Court should disturb a Trial Court's finding on quantum, the he Court of Appeal in Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 (Supra) expressed itself thus: -

> 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 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.

30. It should be noted that assessment of damages is at the discretion of the trial Court, this Court cannot interfere with the exercise of this discretion except where the court is satisfied that the said assessment is contrary to the principles enunciated in Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 (Supra) in that the trial Court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages.

31. In Ezekiel Barng'entuny –vs-Beatrice Thairu HCC No. 1638 of 1988 where Justice Ringera (as he then was) held thus; -

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The Court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the Court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."

32. On the issue of Loss of Lependency, the Trial Court assessed the same as provided under the provisions of Section 4 of the *Fatal Accidents Act*. It utilized the multiplicand approach as opposed to the global/ lump sum approach. The court however notes that even though there were no documents availed to support the averment that the Respondent was a business lady, in his judgement, the Learned Magistrate relying on the dictum in Jacob Ayiga Maruja v Simeon Obayo[2005]eKLR, in adopting a multiplicand of Ks. 9000/- did not explain the basis upon which he reached this amount.

33. On the submission by the Appellant that the Trial Court ought to have used the Global Approach as opposed to the multiplicand approach, this court is persuaded by the holding of Ringera J herein cited in the case of Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another. In the instant

case, even as there was no evidence adduced to support the fact that the Respondent's monthly earning was Ks. 30,000/- per month, the court notes that there evidence that she was gainfully employed as a business lady was not rebutted controverted or denied. For this reason, in view of the fact that the nature of her employment is known, her income then can easily be ascertained from the Minimum wage guidelines and so there would be no need therefore for the Trial Court to have employed the lump sum approach. in the circumstances. I am satisfied that the multiplicand approach adopted by the Learned magistrate was appropriate and I therefore uphold the same.

34. However, because the Learned Magistrate did not explain how determined the amount of Ks. 9000/- to be the multiplicand, I find that this amount was arrived at arbitrarily and for this reason, the same is now hereby set aside.

35. By way of LEgal Notice No. 2 issued on 8th January, 2019, by way of The Regulation Of Wages (general) (amendment) Order, 2018, The Regulation of Wages (General) Order, the minimum wage was amended by the (General) (Amendment) Order, 2018 which came into force on the 1st May, 2018.

36. As a consequence, the wage of a General labourer was set at Ks. 7240.95 outside of the cities of Nairobi, Kisumu and Mombasa. The court notes that Eldoret had not acquired city status by then for the higher wage of Ks. 13572.90 to be applicable. The court finds that this is the more rational and ascertainable mode of determining the Respondent's income and therefore multiplicand. This then is the guide that the court will adopt to determine the Damages due to the Respondent under the head on Loss of Dependancy.

37. Further, the court will place the Respondent under the earnings of a General Labourer because there was no evidence that she was qualified in any field even as she was a business lady. It is noted that the evidence is that the Respondent died on 24/01/2019. It follows then that the herein cited amendment of 2018 is applicable and the minimum wage therein provided shall be used as the multiplicand.

38. On the multiplier and dependency ratio, the uncontroverted evidence is that the deceased died at the age of 27 years and was survived by a husband and one child. The learned Magistrate applied a multiplier of 25 years and a dependency ratio of 2/3. In light of the government retirement age is 60 years, by the Learned magistrate adopting a multiplicand of 25 years, he placed the Respondent who was a business lady at a retirement age of 52 years and this is my view that this is a reasonable guide and I therefore find no basis for interfering with the finding of the learned Magistrate in this regard. The same is accordingly upheld.

39. In light of the above therefore the damages awardable to the Respondent under this head shall be assessed as hereunder:

    Ks. 7,240.95x 25 x 12 x 2/3 = Ks. 1,448,190/=

40. Lastly, Special damages are those damages which are ascertainable and quantifiable at the date of the action. They must not only be pleaded, but the must also be proved. I have considered the pleadings and the proceedings of the Trial Court. I am satisfied that both conditions were met. For this reason, I uphold the Learned Magistrate's award on Special damages.

41. The upshot of the above Judgement in favour of the Respondent and against the Appellant is upheld and the Appellant's Appeal is partially allowed as follows;

    a. Liability is upheld at 100%

    b. The award of Ks. 50,000/- for Pain and Suffering is upheld.

    c. The award of Ks. 60,000/- for Loss of expectation of Life is upheld

d. The award of Ks. Ks. 68,550/- for Special damages is upheld

e. The award of Ks. 1,800,000/ for Loss of Dependency is now hereby set aside and the same substituted with an amount of Ks 1,448,190/-

f. The award for costs and interest is upheld and it is so ordered.

g. The Appellant is to pay the costs of the Appeal.

READ DATED AND SIGNED AT ELDORET ON 18TH JUNE 2025

E. OMINDE

JUDGE