Wachira & another v Njoroge & another (Suing as the Administrators of the Estate of Morris Wandaja Mburu (Deceased)) (Civil Appeal 107B of 2019) [2025] KEHC 8750 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8750 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 107B OF 2019

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

EZEKIEL MURAYA WACHIRA ..... 1ST APPELLANT

WHITE SKY INVESTMENT LIMITED ..... 2ND APPELLANT

AND

SAMUEL MBURU NJOROGE ..... 1ST RESPONDENT

WANJIKU NJOROGE ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF MORRIS WANDAJA MBURU (DECEASED)

(Appeal from the Judgment dated 2/07/2019 delivered in Eldoret Chief Magistrate's Court Civil Case No. 412 of 2017 by Hon. N. Wairimu – Principal Magistrate)

JUDGMENT

1. This Appeal is against the quantum of damages awarded in the said lower Court suit as compensation for the death of a 32-year-old adult male that occurred as a result of a fatal road accident. In the trial Court, the Appellants were the Defendants and the Respondents were the Plaintiffs. The Appellants now seek reduction of the amount of compensation awarded claiming that the same was manifestly excessive.

2. The Appellants are represented by Messrs Kimaru Kiplagat & Co. Advocates, while the Respondents are represented by Messrs Keter Nyolei & Co. Advocates.

3. Before delving further into this matter, it is important to state that the trial Court file could not be traced for purposes of this Appeal, as efforts made to locate it at the trial Court proved futile. I summoned the Officer in-charge of the Civil Registry, Eldoret Chief Magistrates' Court to shed light

on the issue of the missing Court file but still the same bore no fruit. Eventually, the Certificate dated 27/10/2022 confirming loss of the file was issued. Under these circumstances, I invited the parties to address the Court on their proposed way forward, which they did. While the Appellant proposed that a retrial be ordered, the Respondent proposed that the Appeal be marked as withdrawn. Upon hearing the parties, I delivered a Ruling thereon dated 4/10/2024, in which I found both proposals untenable, and instead, held and ruled as follows:

> " 15. In the instant case, it is clear that the lower Court file is "lost" and may never be recovered. It is however not in dispute that the Appeal is only against the quantum of damages awarded by the trial Court which quantum the Appellant deems to have been inordinately too high and ought to be reduced. There is also no dispute on the awards made by the trial Court. According to the Appellant, liability was agreed by consent at 75:25 in favour of the Respondents, a fact which was not challenged by the Respondent. I believe that it is in view of that consent that the issue of liability is not a subject of this Appeal. I also believe that each of the parties is in possession of the pleadings and documents relied upon in the trial Court during the hearing of the lower Court suit. In the circumstances, I believe that if this Court is supplied with such pleadings, including the written closing Submissions, and documents, even in the absence of the typed proceedings, this Court will be in a position to rely on the same and determine the Appeal on merits upon analyzing comparable awards on quantum.

.....

"

> " 18. In the premises, I will direct the parties to compile whatever pleadings and documents that they filed at the trial Court and supply the same to the Court.
>
> Final Orders
>
> "19. In the end, I hereby order as follows;
>
> i. The Appellant shall within 21 days from the date hereof, file and serve upon the Respondents, a Record of Appeal containing copies of pleadings and documents that were filed in Eldoret CMCC 412 of 2017 by both parties and which the Appellants deem to be necessary and relevant for determination of this Appeal.
>
> ii. Upon service, the Respondents, should they deem that any necessary and/or relevant pleading or document filed in the trial Court has been omitted in the Record of Appeal to be filed by the Appellant, shall have 14 days within which to file their own Supplementary Record of Appeal containing such omitted pleadings or documents.
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> iii. The parties shall thereafter appear before this Court on a date to be fixed, for the purposes of determining or taking directions on whether the respective Records of Appeal filed are correct and whether the same are capable of sufficiently guiding the Court to determine the Appeal on merits on the issue of quantum which is the subject of the Appeal, and for further directions."

4. Pursuant to the above Ruling, the Appellant filed and served the Record of Appeal dated 15/10/2024. The parties thereafter appeared in Court and the Respondent's Counsel confirmed that the Record was correct and acceptable, and confirmed that the Court could proceed to determine the Appeal on the basis thereof.

5. Regarding the background of the Appeal, the cause of action arose from a road traffic accident that occurred on 01/02/2017 in which the deceased, a pedestrian along Eldoret-Nakuru road was hit by the motor vehicle Registration No. KAX 033P/ZD 2443 allegedly driven by the 1st Appellant, occasioning the deceased fatal injuries. The parties recorded a consent whereof liability was entered at the proportion of 85:15 in favour of the Respondent. The trial Court then subsequently assessed and awarded damages to the Respondent as follows:

Pain & suffering	Kshs 20,000.00
Loss of expectation of life	Kshs 150,000.00
Loss of dependency	Kshs 3,200,000.00
Special damages	Kshs 71,2500.00
Total	Kshs 3,441,250.00
Less 15 per cent in liability	Kshs 516,187.50
Net award payable	Kshs 2,925,062.50

6. The award for "loss of dependency" at Kshs 3,200,000/- (computed as Kshs 20,000/- for 12 months x 20 years x 2/3) was based on the following parameters:

Multiplicand (monthly earning)	Earning years (multiplier)	Dependency ratio
20,000/-	20	2/3

7. Aggrieved with the award, the Appellant instituted this appeal vide the Memorandum of Appeal dated 18/07/2019. The same is premised on the following grounds:

   i. That the Learned Magistrate erred in law and fact in awarding Kshs. 3,441,250/= as general damages an amount which was not consistent with the injuries sustained, submissions of the Counsels for all parties and the legal precedents.

   ii. That the Learned Magistrate erred in law and in fact in arriving at the said general damages a decision on amount not supported by the evidence on record.

   iii. That the Learned Magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages contrary to the evidence on record.

   iv. That the Learned Magistrate erred in law' and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.

v. That Learned Magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant.

vi. That the Learned Magistrate erred in law and in fact in failing to consider the submission tendered by the Appellant.

vii. That the Learned Trial Magistrate erred law on arriving at said general damages in law and in applying the wrong principles of law on arriving at the said general damages.

8. The parties canvassed the Appeal by way of written submissions. The Appellants filed their Submissions dated 10/12/2024 while the Respondent filed the Submissions dated 10/02/2025.

Appellants' submissions.

9. Counsel for the Appellants cited the case of Southern Engineering Co. Ltd vs Musungi Mutia [1985] KLR 730 as guidance on the principles to be applied by an appellate Court when dealing with the issue of assessment of quantum of damages.

10. Regarding the damages assessed under the head of "pain and suffering" under the *Law Reform Act*, he cited the case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) 2019 eKLR and the case of Clement Ochieng v Ruth Atieno Ombogo (suing as personal representative and Administrator of the estate of Nolise Otieno Mwalo (Deceased) Robert Gitai [2020] eKLR. He then submitted that in the present case, PW2 having testified that the deceased died on the spot, he suffered less pain after the accident, and as such the Magistrate erred in awarding Kshs 20,000/-. He submitted that an award of Kshs 10,000/- would have sufficed.

11. Under the limb of "loss of expectation of life", he submitted that the Magistrate failed to consider the stare decisis rule when she awarded Kshs 150,000/-. According to him, the Courts have settled that the conventional award under this head is Kshs 100,000/=. He cited the case of Mercy Muriuki, Hyder Nthenya Musili & Another v China Wu Yi Limited & Another (2017) eKLR.

12. On claims under the Fatal Accident Act, under the limb of "loss of dependency", Counsel urged that PW3 testified that the deceased was 32 years old and used to earn between Kshs 1,500/- and Kshs. 2,000/- daily and that the trial Court applied a multiplicand of Kshs 20,000/. He pointed out that however, in cross-examination, PW3 indicated that he had nothing to show how much the deceased used to earn. According to him therefore, the deceased's source of earnings was not discernable. He urged that by the Death Certificate, the deceased died on 01/02/2017 and therefore the Regulation of Wages (General) (Amendment) Order, 2017 should be applied. He submitted that Citation 1 thereof provides that the wage of a general laborer, including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, or messenger in Nairobi, Mombasa, and Kisumu cities is Kshs 12,926.55/- per month, for Municipalities, namely, Mavoko, Ruiru and Limuru Town is Kshs. 11,926.40/, while in all other arrears it is Kshs 6,896.15.

13. He further pointed out that the Death Certificate also indicates that the deceased hailed from Kondoo Farm and that PW3 testified that the deceased used to stay at Kondoo Farm. According to him, Kondoo Farm is not a Municipality and therefore can be categorized as "other places" and that the trial Magistrate ought to have applied the figure of Kshs. 6,896.15/- as multiplicand, and not Kshs 20,000/-. Regarding the multiplier of 20 years adopted by the Court, Counsel conceded that it was reasonable and acceptable. He thus proposed award of "loss of dependency" as follows:

Kshs 6,896.15 x 20 years x 12 months x 2/3 = Kshs 1,103,384/-

14. Counsel then submitted that it is now settled law that awarding damages both under the *Law Reform Act* and the *Fatal Accidents Act* amounts to double compensation, that damages awardable under the two legal regimes, though meant for different purposes, in reality it happens that the Administrators of the estate double up as heirs to the deceased. He urged that the Courts have therefore over time developed the practice of putting that fact into consideration to avoid awarding double compensation. He cited Civil Appeal No. 91 of 1997, South Nyanza Company Limited vs James Martin Matoke, and also Civil Appeal No. 4 of 2013 David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & Another.

Respondents' Submissions.

15. On his part, in respect to the Appellant's contention that "pain and suffering" should have been awarded at Kshs 10,000/-, Counsel for the Respondent submitted that the award of Kshs 20,000/- was fair and just, the deceased having died on the spot. He cited the case of Malindi High Court Civil Appeal No. 39 of 2020, FM (Minor suing through mother and next friend MWM vs JNM and another (2020) eKLR. He submitted that a difference of Kshs. 10,000/- cannot said to be inordinately high.

16. On "loss of expectation of life", he submitted that the award of Kshs 150,000/- was appropriate as the deceased was aged 32 years at the time of death, had a whole life ahead of him and his legitimate expectations in his life were dashed.

17. On "loss of dependency", he reiterated that the deceased died at the age of 32 years and added that he was married with a young family, that he was employed as a conductor and he died in the line of duty. He submitted further that evidence was adduced that the deceased was in gainful employment earning on average a sum of Kshs 1,000/- a day from his employment with Leisure Investment, that on average therefore, the deceased earned a sum of Kshs 30,000/- per month. He submitted that daily worksheets from Leisure Investment were filed and produced in evidence and that the trial Court considered Kshs 20,000/- as the proper multiplicand and the ratio of 2/3. He also submitted that at age 32 years, the deceased would have reasonably worked gainfully up to the age of 60 years. On whether the "minimum wage" method is what should have been adopted, he urged that the same would only apply when the means of income for the deceased cannot be ascertained and that in this case, evidence was tendered that the deceased was gainfully employed earning a daily wage of Kshs 1,000/-.

18. On the allegation of "double compensation", Counsel cited the case of Nakuru HCCA No. 96 of 2017, Crown Petroleum Co. Ltd & Another vs James Kinyanjui and also the case of Hellen Wangu Waweru vs Kiarie Scores Ltd [2015] eKLR in which, he submitted, it was ruled that there is no requirement nor is it mandatory that an award under the *Law Reform Act* be deducted from the award under Fatal Accident Act.

Determination.

19. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusion. For instance, in the case of Kenya Ports Authorityvs Kuston (Kenya) Ltd. [2009] 2 EA 212, the said principle was highlighted as follows:

> " On a first Appeal from the High Court, the Court of Appeal should 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 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"

20. It is evident that the sole issue arising for determination in this Appeal is: "whether the trial Court erred in its award of damages under the heads of pain and suffering, loss of expectation of life, and loss of dependency

21. The principles guiding an appellate Court in determining whether to interfere with an award for damages were set out in the celebrated case of Butt v Khan [1981] KLR 470 as follows;

> " An appellate Court will not disturb an award for damages unless it is 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".

22. To therefore successfully persuade this Court to interfere with the award for damages made by the trial Court, the Appellant must satisfy this Court that the trial Court acted on wrong principles or that the award was manifestly excessive in the circumstances.

a.Pain and Suffering

23. On the award of "pain and suffering" at Kshs 20,000/-, it is not in dispute that the deceased died instantly. My review of awards for "pain and suffering" in instances where the deceased dies on the spot reveals that the majority of the recent awards given by the Courts range in the region of about Kshs 20,000/- to 40,000/-. This is in consideration of the fact that there would be no prolonged distress or torture on the part of such deceased before death. I do not therefore find the award of Kshs 20,000/- to be too excessive or so "inordinately high" to merit a review by this Court. I therefore decline to interfere with the award made under this head.

b.Loss of expectation of life

24. It is also not in dispute that the deceased was aged 32 years at the time of his death and that he therefore had a long life ahead of him. The trial Court awarded Kshs 150,000/- for "loss of expectation of life". From my review of comparable recent authorities, I have established that the Courts are awarding figures in the region of about Kshs 80,000/- to Kshs 150,000/-. The trial Magistrate having therefore awarded Kshs 150,000/-, that figure, although a bit higher than in most cases, is still within the margins ordinarily awarded. It, too, cannot therefore be described as being so "inordinately high" so as to be deemed "manifestly excessive". I do not therefore find any fault on the part of the Magistrate in awarding that amount.

c.Loss of dependency

25. Regarding "loss of dependency", the trial Court's adoption of the proportion of 2/3 as the "dependency ratio", and also the adoption of 20 years as the "multiplier" are not disputed.

26. Regarding "multiplicand" however, in which the trial Court adopted the sum of Kshs 20,000/- as an acceptable estimate of the monthly earnings that the deceased used to make, Counsel for the Appellant urged that no evidence was adduced to prove the allegation. However, Counsel for the Respondent countered that the deceased's father testified that the deceased earned between 1,500/- and 2,000/- daily and that evidence was adduced that the deceased earned an average monthly income of Kshs 30,000/- as a transport conductor with Leisure Investments. The Appellant's Counsel urged that the trial Court should have applied the "minimum wage" method and that the deceased having died on 01/02/2017,

the provision that was applicable was the "Regulation of Wages (General) (Amendment) Order, 2017" whereof the wages for a "general labourer" in areas that are outside cities and municipalities, which category the deceased belonged to, was Kshs 6,896.15/-, which is the amount that should have been adopted as the multiplicand.

27. It is true that proof of the earnings made by the deceased was not foolproof or watertight. However, the Respondent advanced the position that the deceased was a transport/matatu conductor. This, he pleaded in the Plaint and repeated in his testimony at the trial. He also produced "Daily Worksheets" said to be from the said Leisure Investments in which the deceased is indeed indicated to be a conductor. It was also pleaded that the deceased left behind 2 children whom unless controverted, it means that he used to cater for their financial needs. While Counsel for the Appellant has correctly pointed out that no payslips or employment letter was produced in evidence, I take judicial notice of the fact that in this country, many "employment" arrangements, including matatu driving or turnboy services as alleged herein, are entered into informally with no official documentation or contract of any kind. In many cases, the arrangement is never reduced into writing. Most are short-term arrangements terminable at will. This, though undesirable, is the reality of the matter which this Court cannot purport to close its eyes to. The allegation of earning having been pleaded and advanced at the trial, and not having been controverted by contrary evidence, I am satisfied that the same was proved on a balance of probabilities. I therefore have no reason to fault the trial Magistrate.

d.Alleged "double compensation"

28. The issue of "doublecompensation" regarding awards made under the *Law Reform Act* and the *Fatal Accidents Act* has been debated extensively. In my understanding however, the "confusion" was finally laid to rest by the Court of Appeal in the case of Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] eKLR in which the following was it held:

> " 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 dependents 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. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -
>
> "An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the

same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the Judgement of the lower Court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. ....."

29. Mabeya J in the case of Peres Wambui Kinuthia & Anor vs S.S Mehta & Sons Ltd [2015] eKLR correctly in my view, interpreted the holding in Kemfro Africa vs Meru Express Services & Anor vs Lubia & Anor (1976) No. 2 (1987) as follows:

> " Accordingly, what is required in order to avoid double compensation is for the Court to have in mind and therefore take into account the award under the *Law Reform Act* when making an award under the *Fatal Accidents Act*. In [his] view, this is the better way of construing Section 4 (2) of the *Fatal Accidents Act* & Section 2(5) of the *Law Reform Act*. Otherwise there [would] be no need of having to bring the suit under both statutes only for the award to be deducted from the award made in the other.

30. In light of the foregoing, although there is no express indication that the trial Magistrate took the above issue "into account", I do not find that such omission amounts to an error on principle on the part of the trial Court.

e.Special damages

31. The award of Kshs 71,000/- under the head of Special damages was not disputed.

Final Orders.

32. The upshot of my findings above is that this Appeal is dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for any of the parties

Court Assistant: Edwin Lotieng