



Wanjiru & another (Suing as the Legal Representative of the Estate of Benjamin Kariuki Wanjiru - Deceased) v Kamau (Civil Appeal 181 of 2023) [2025] KEHC 8906 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 181 OF 2023
FN MUCHEMI, J
JUNE 19, 2025**

BETWEEN

STEPHEN KAMAU WANJIRU & EDWARD KINYANJUI WANJIRU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN KARIUKI WANJIRU - DECEASED) APPELLANT

AND

PETER MAINA KAMAU RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Wangeci Ngumi (SPM) delivered on 15th May 2023 in Gatundu SPMCC No. E121 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Gatundu Senior Principal Magistrate in SPMCC No. E121 of 2022 arising from a road traffic accident whereby the court found the respondent fully liable and awarded the appellants general damages for pain and suffering at Kshs. 50,000/-, loss of expectation of life at Kshs. 100,000/- and special damages at Kshs. 80,000/-.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 6 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in failing to award damages for lost years.
 - b. The learned trial magistrate erred in law and in fact in failing to award costs of the suit to the appellants.
 - c. The learned trial magistrate erred in law and in fact by failing to exhaustively award damages under the [Law Reform Act](#) as sought and pleaded.



3. Directions were issued that parties do exchange submissions. The record shows that the appellants complied on 24th May 2024 while the respondent failed to do so.

The Appellants' Submissions

4. The appellants submit that they did not claim damages for loss of dependency but claimed damages under the Law Reform Act for pain and suffering, loss of expectation of life and lost years. The appellants argue that since they are brothers to the deceased ss such, they could claim for damages for loss of dependency but claimed for damages lost years which are the deceased's lost earnings less his living expenses at a sum of Kshs. 1,260,000/-. The appellants submit that the trial court did not award damages for lost years despite their submissions on the same.
5. The appellants argue that their submissions were not considered as in the judgment, the trial magistrate stated that parties did not file submissions. The appellants submit that they filed their submissions on 10th March 2023 which was done prior to the judgment date 15th May 2023.
6. The appellants rely on Section 2 of the Law Reform Act and the case of Pickett vs British Rail Engineering [1980] AC 136 as cited in the case of Civil appeal No. 59 of 2004 Roger Dainty (as administrator of the Estate of the late James George William Campell) vs Mwinyi Omar Haji & Another and urges the court to award lost years under the Law Reform Act. The appellants refer to the case of Jacob Ayiga Maruja & Another vs Simeon Obayo, Civil Appeal No. 167 of 2002 [2005] eKLR and Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 Others [2022] eKLR and submit that the deceased was working as a businessman and earned Kshs. 15,000/- per month. Further, the deceased was 39 years at the time of his death and the appellants urge the court to adopt a multiplier of 21 years. To support their contentions, the appellants refer to the cases of Kimunya Abednego alias Abednego Munyao vs Zipporah S. Musyoka & Another (2019) eKLR; Abdimana Abdulwahab & Another vs Janet Njeri Wambui & Another (Suing as the legal representatives for and on behalf of the Estate of Jane Wambui Kiragu (deceased) (2021) eKLR and Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 Others [2022] eKLR. The deceased was unmarried and had no children and thus propose 1/3 for lost years. Thus the claim for lost years ought to work out as follows:- Kshs. 15,000/- x 12 x 21 x 1/3 = Kshs. 1,260,000/-.
7. The appellants argue that the trial magistrate erred by failing to award them costs. The appellants submit that their claim was unliquidated and went to full hearing and thus pursuant to Section 27 of the Civil Procedure Act, they are entitled to costs. To support their contentions, the appellants rely on the cases of Joseph Muchiri Mbugua vs Gatimu Ndirangu [2019] eKLR and Stanley Kaunga Nkarichia vs Meru Teachers College & Another [2016] eKLR.

Issues for determination

8. The main issues for determination are:-
 - a. Whether the trial magistrate erred by failing to award lost years.
 - b. Whether the appellants are entitled to costs of the lower court suit.



The Law

9. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

10. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the trial magistrate erred by failing to award lost years.

12. The appellant argues that the trial magistrate did not consider their submissions despite filing them before the judgment date. I have perused the court record and noted that in the judgment of the lower court, the magistrate stated that although she directed that both parties file their submissions, none of the parties had filed their submissions as of 4th May 2023 when she retired to write the judgment. On further perusal of the record, there is a copy on record of the appellants’ submissions which bear a court stamp of 10th March 2023. Further from the court proceedings, the appellants informed the court that they had filed their submissions on 27th February 2023. Thus, it is my considered view that the appellants did file their submissions before the matter was scheduled for judgment.

13. The appellants further argue that they are entitled to damages for lost years under the [*Law Reform Act*](#).

14. In *Nyota Tissue Products vs Benjamin Obonyo Mukati & 4 Others* [2020] eKLR, Mureithi J expounded on the award of lost years as follows:-

Lost years refers to damages for loss of prospective earnings recoverable by a person who is injured in such a way to shorten his earning capacity, recoverable by the person during his



shortened life and upon his death, by the estate under the Law Reform Act as damages for lost years.

15. The appellants testified that the deceased was a businessman trading in buying and selling vegetables and used to earn a monthly income of Kshs. 15,000/-. I have perused the record and noted that the appellants did not prove with certainty that the deceased used to earn Kshs. 15,000/- monthly. Considering that it was impossible to ascertain from the evidence the deceased's actual income, it is my considered view that the multiplier approach in the assessment of damages for loss of dependency was not appropriate or suitable in the case. The evidence in this case was more facilitative of the global or lump sum approach rather than the multiplier approach.
16. In the case of *Moses Mairua Muchiri vs Cyrus Maina Macharia* (Suing as the personal representative of the Estate of Mercy Nzula Maina) (deceased) [2016] eKLR Ngaah J held:-

It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.
17. In view of the foregoing, the deceased was 39 years and thus it is my considered view that a global sum of Kshs. 600,000/- is reasonable compensation which I hereby award to the appellants.

Whether the appellants are entitled to costs of the lower court suit

18. It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. However, this discretion of the court must be exercised judiciously bearing in mind that a party should not be denied costs unless it can be shown that they acted unreasonably.
19. Section 27(1) of the Civil Procedure Act provides:-
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge for good reasons otherwise order.
20. Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously. It is trite law that where the court denies costs to a party who is successful in a suit, reasons for such decision must be clearly stated.
21. In the case of *Supermarine Handling Services Ltd vs Kenya Revenue Authority Civil Appeal No. 85 of 2006* the Court of Appeal stated:-

Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise



must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge to decide, and the Court of Appeal will not interfere with his discretion in that instance.

22. The matter in the trial court arose from a road traffic accident between the deceased as a pedestrian and motor vehicle registration number KAN 368R along Nembu Mitikenda Road. The respondent was served with summons and entered appearance and filed his defence together with his list of documents and witnesses. The matter proceeded for pre-trial conference and it was certified ready for hearing. The respondent did not call any witnesses but his advocates participated in the hearing by cross examining the appellants. The defence counsel on two instances requested and was granted more time to file his submissions. The court rendered its judgment on 15th May 2023 whereas the counsel attended the judgment and asked for 30 days stay of execution. Therefore, from the record, it is evident that the respondent defended his matter to the very end.
23. Judgment was entered in favour of the appellants for the sum of Kshs. 230,000/-. The nature of the claim by the appellants was a fatal injury claim which was not quantifiable at the onset and needed the trial court to determine the issue of damages at the very end.
24. The magistrate relied on paragraph 53 of the Advocates Remuneration Order to decline the award of costs on the basis that the appellant did not serve the respondent with the intention to sue. Paragraph 53 of the Advocates Remuneration Order provides:-

If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate's costs shall be allowed except on a special order of the judge or magistrate.

25. The above provision relates to liquidated claims whereby a defendant can pay the plaintiff part of the claim before or during the trial to avoid the filing of the suit. The general rule is that costs follow the event. As such, the trial court in relying on paragraph 53 of the Remuneration Order and finding that the appellant was not entitled to costs as she did not serve the respondent with a demand notice was misguided and erroneous.
26. The trial court in finding so failed to consider that the respondent defended his suit until the very end and that the appellants were the successful parties in the suit. As such, the trial court did not exercise her discretion judiciously and this is a case where this honourable court is justified to interfere with the trial court's discretion. The court finds that the appellants were entitled to costs of the suit in the lower court and that that the magistrate erred in declining to award costs. The costs of the suit in SPMCC No. E 121 of 2022 are hereby awarded to the appellant.
27. As regards the costs of this appeal, the court notes that it is appropriate that each party meets its own costs for the reason that the appeal was not necessitated by any of the parties herein. Each party will therefore, meet their own costs.
28. Thus, I find the appeal merited and is hereby allowed in the foregoing terms.
29. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF JUNE 2025.

HON. F. MUCHEMI
JUDGE

