



Bismark Carriers Limited v Mukhwana & another (Suing as the Administrator and Personal Representative of the Estate of Nixon Nmasi Mukhwana (Deceased)) (Civil Appeal E029 of 2024) [2025] KEHC 10925 (KLR) (22 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E029 OF 2024
REA OUGO, J
JULY 22, 2025**

BETWEEN

BISMARK CARRIERS LIMITED APPELLANT

AND

JOHN CHIVULI MUKHWANA 1ST RESPONDENT

FLORENCE NAMENGE SIFUNA 2ND RESPONDENT

**SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF
THE ESTATE OF NIXON NMASI MUKHWANA (DECEASED)**

(An Appeal from the judgment and decree in Sirisia Principal Magistrate's Court in Civil Suit No. E086 of 2023 delivered by Hon J.O. Manasses on the 9th February 2024)

JUDGMENT

1. The appellant herein, being dissatisfied with the judgment and decree of the trial magistrate delivered on 9th February 2024, has filed this appeal against quantum on the following grounds;
 - i. That the learned trial magistrate erred in awarding a multiplier of 29 years without taking into consideration the vicissitudes of life.
 - ii. That the learned trial magistrate erred in law and in fact in awarding a multiplicand of Kshs. 14,026/- when there was no basis to do so.
 - iii. That the learned trial magistrate erred in law and in fact in awarding a loss of expectation of Kshs. 300,000/- which was excessive.
 - iv. That the trial magistrate erred in law and fact in awarding pain and suffering of Kshs.100,000/- which was excessive.



- v. That the trial magistrate erred in law and in fact in awarding special damages that were not pleaded and strictly proved.
 - vi. That the trial magistrate erred in law and in fact for failing to appreciate fully or ignoring the submissions put before him by the appellants.
 - vii. That the learned trial magistrate erred in law and in fact in awarding general damages that were excessive in the circumstances, occasioning a miscarriage of justice.
2. The appellant requests that the judgment and decree be set aside, a proper finding be made, and the appeal be allowed with costs.
 3. The plaintiff states that on or about the 3rd of June 2023, the deceased was riding a motorcycle along Bungoma-Malaba Road. At Mayanja Bridge, the appellant's agent, servant, or driver negligently drove or managed Truck Reg. No. KBN 136 N, hauling Trailer Reg. No. ZF 5406, which violently knocked the motorcycle carrying the deceased, resulting in serious injuries that led to his death. A consent was entered by the parties on 14 December 2023 regarding liability in the ratio of 80:20 in favour of the respondent against the appellant.
 4. The Trial Magistrate entered judgment as follows;
 - i. Liability80:20%
 - ii. Pain and sufferingKshs 100,000/-
 - iii. Loss of expectation of life.....Kshs. 300,000/-
 - iv. Loss of dependencyKshs. 3,254,032/-
 - v. Special damages.....Kshs 387,700/-

Total Kshs. 4,041,732/-

Less 20% contribution Kshs. 3,233,386/-

The respondent was also awarded costs of the suit and interest on damages at court rates.

5. Parties canvassed the appeal through written submissions. The appellant submitted as follows: regarding the multiplier of 33 years, according to the death certificate, the respondent died at the age of 31, and his occupation was a businessman. It was argued that, considering the nature of his work and life's uncertainties, applying the multiplier of 29 was erroneous. The appellant referred to the case of *Crown Bus Services Ltd & 2 Others v Jamilla Nyongesa and Amida Nyongesa* [legal representative of Alvin Nanjala] [2020] eKLR, where the court held that a multiplicand of 39 years for a deceased aged 21 was incorrect, as it did not account for other life vicissitudes, such as ill health, that could have shortened her working life. The respondent contended that the deceased was 31 years old, he was a businessman and a farmer, living a healthy life and was expected to continue working until beyond the age of 60 years, which connotes that he still had 29 years remaining in her active business career. Reliance was placed on the cases of *Phoebe Wambui Waweru v Armed Forces Canteen Organisation* [2010] eKLR, where an 8-year multiplier was used for a deceased who died at 62, and *Florence Gathegi Miano v Mary Boniface Musyoka & Another* [suing as the legal representative and administrators of Boniface Musyoka Wambua's estate] [2014] eKLR, where a 10-year multiplier was applied for a deceased aged 57. The appellant failed to provide any evidence contradicting the age of the deceased.
6. Regarding a multiplicand of Kshs. 14026/-, the appellant contends that there is no clear evidence of the deceased's earnings as a businessman. The respondent stated in the plaintiff that the deceased was a driver



at West Kenya, a businessman and farmer earning Kshs. 50,000/- monthly without any proof. It is submitted that income is a special damages claim that must be pleaded and proven. Reliance was placed on the case of *Auren v Director of Police and Another* [Civil case 274 of 2016] [2023] KEHC 2931 [KLR]. The appellant argued that since there was no proof of earnings, the court should apply a lower amount, such as Kshs. 8109.90 being the sum proved as earnings in Regulation of Wages [General] [[Amendment] Order 2022. The respondent submitted that the trial court applied the Minimum Wage of Kshs. 14206/- in line with the Kenya Gazette Legal Notice No. 125 dated 1st July 2022, which was the applicable minimum wage for unskilled labour as at the date of the deceased's death.

7. On the award for loss of expectation of life, the appellants argued that the sum of Kshs. 300,000/- was excessive without any legal basis, and the deceased died immediately after the accident; therefore, the award should be a minimum sum. They relied on the cases of *West Kenya Sugar Co. Limited v Philip Sumba Julaya* [suing as the administrator and personal representative of the estate of James Julaya] [2019] eKLR and *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, where the court held that very nominal damages are awarded under loss of expectation of life if the death follows immediately after the accident. The respondent relied on the case of *Daniel Kuria v Nairobi City Council* [2013] eKLR, where this court awarded Kshs. 300,000/- to the deceased's estate for loss of expectation of life. Further reliance was placed on the case of *Susan Letayoro & Another v JK [suing as the legal representative of the estate of CK [deceased]]*, *Kabarnet HCCA No. 13 of 2020*, where the court upheld a sum of Kshs. 300,000/- for loss of expectation of life. Therefore, the award was not excessively high.
8. Regarding the award for pain and suffering, it was submitted that the sum of Kshs. 100,000/- was excessive as the deceased died on the spot on the same day; there was no evidence that the pain was prolonged. The respondent did not submit on this.
9. On the award on special damages, it was submitted that they must be specifically pleaded and proved. The appellant submitted that the Respondent pleaded and proved the following special damages: Kshs 45000/- for Grant ad Litem, Kshs 8,100/- for Mortuary Bill, Kshs 6,000/- for mortuary fees at Lugulu Mission Hospital, Kshs 550/- for copies of Motor vehicle Records, Kshs 40,000/- for transport, Kshs 53,000/- for the coffin, Kshs 70,000/- for catering services, and Kshs 50,000/- for tents and chairs, amounting to Kshs 272650/-. The Respondent pleaded Kshs.114,500/- for 3 animals but there was no receipt produced to support the claim, what was produced was a livestock sales permit which is not a receipt. The trial court unjustifiably awarded Kshs.387700/-. The Respondent submitted that they had proved special damages of Kshs 412,700/-, which was pleaded and proved.
10. The appellant further submitted that the trial court erred in awarding general damages that were excessive by using a wrong multiplier and multiplicand that were excessive. The Respondent argued that the damages awarded by the trial court were not inordinately high as the same were fair and reasonable and supported by the relevant law and binding decisions.

Analysis And Determination

11. The duty of an appellate court is to reconsider the evidence, evaluate it independently, and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. [See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR].



12. The Court of Appeal outlined the principles for challenging the award of damages in *Kemfro Africa Ltd v Meru Express Service*. A.M Lubia & Another 1957 KLR 27, as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.”

13. I have considered the submissions and the evidence presented before the trial court. It is not disputed that the deceased was 31 years old at the time of his death; the death certificate confirms his age. The appellant contends that a multiplier of 29 years was excessive. In the case of *General Cargo [Transport] Limited v Ndeme [Suing as administrator of the estate of Mwadingo Mkama Beja - Deceased]* [2023] KEHC 27244 [KLR], the court applied a multiplier of 30 years for a deceased who was 27 years old. In the case of *Clinton Nyadieka Mose & another v Susan Nelima* [Civil Appeal No. 33 of 2022] [2025]KEHC eKLR for a deceased who was 27 years old, the court applied a multiplier of 33 years. The deceased was a businessman; considering the nature of his work and the uncertainties of life, I find that a multiplier of 29 years is not unreasonable.
14. Regarding the deceased’s earnings prior to his death, the respondent stated that the deceased was her husband. He was survived by herself and their 3 children. Pw1 testified that her husband was a commercial driver, driving a tractor and was employed by the government of Kenya. She did not know how much he was earning; he used to give her 2000/- per month. The deceased also did some farming. There was no evidence adduced on the deceased’s earnings or that he was employed as a driver. I therefore find that he was an unskilled worker and rely on the Regulation of Wages [General] [[Amendment] Order 2022. The minimum wage for a casual worker / general labourer for one doing business within all former municipalities is KShs. 14025.40. The death certificate produced indicates he was a resident of Kimangeti- Kakamega North, which is within Kakamega County.
15. The deceased was a man with a wife and three children, they all depended on him. I find that a dependency ratio of 2/3 is appropriate. The appellant did not suggest any ratio. The amount under these heads is awarded as follows: $14025.40 \times 12 \times 29 \times 2/3 = \text{Kshs. } 3,253,892.80$.
16. On pain and suffering, the appellant has contended that the amount awarded was excessive. The respondent maintains that the award is sufficient. The fact that the deceased died instantly was not disputed. It is likely that the deceased experienced some pain before his death. In the case of *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No 68 of 2015* [2016] eKLR, the award of Kshs 50,000/- was upheld for a deceased who died immediately after the accident. The court stated:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs. 10,000 to Kshs. 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”



In this case, I find that the award of Kshs. 50,000/- fair and appropriate.

17. On the loss of expectation of life, the trial court awarded a sum of Kshs 300,000/-. The circumstances in the case of Daniel Kuria Nganga [supra] were different; the plaintiff in that case provided detailed evidence to justify the sum of Kshs 300,000/-. Each case must be considered based on the evidence presented. In my view, this sum of Kshs 300,000/- is excessive; a sum of Kshs 100,000/- is adequate.
18. Special damages must be pleaded and proved, as is a well-known principle in law. The appellant claimed special damages of Kshs. 412700/- as stated in paragraph 5 of the plaint. The respondent proved the following: Kshs. 45000/- paid to Mukusu Advocates for processing a grant ad litem; Kshs. 8100/- paid to Bungoma County Referral Hospital; Kshs. 6000/- paid to Lugulu Mission Hospital; Kshs. 53000/- for the casket; Kshs. 70,000 for catering services; Kshs. 50,000/- for tents and chairs; Kshs. 40,000/- paid to Bakosi Funeral Services on 10/8/2023; and Kshs. 550/- for a motor vehicle copy of records dated 9/6/2023. Additionally, Kshs. 114,500/- was paid for livestock, totalling Kshs. 388,250/-. All payment receipts were submitted to the court.
19. The appeal partly succeeds, the lower court judgment on quantum is set aside, and an award is made to the Respondent as hereunder:
 - a. Pain and Suffering Kshs. 50,000/-
 - b. Loss of expectation of life Kshs. 100,000/-
 - c. Loss of dependency Kshs. 3,253,892.80.Total Kshs 3,403,892.80
Less than 20% Kshs. Kshs. 680,778.56
Total Kshs. 2,723,114.24
Special damages Kshs. 388250/-
Total award Kshs. 3,111,364.24
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 22ND DAY OF JULY 2025.

R.E.OUGO

JUDGE

In the presence of:

Mr. Wanjala For the Appellant

Miss Masakhalia h/b for Mr. Mukisu For the Respondent

Wilkister C/A

