



**Kidiga & another v Onguna & another (Suing as the Administrator
of the Estate of Elvis Omondi Otieno – Deceased) (Civil Appeal
E100 of 2024) [2025] KEHC 10523 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E100 OF 2024**

**A MABEYA, J
JULY 21, 2025**

BETWEEN

OTIENO JACOB KIDIGA 1ST APPELLANT

SAMORA MACHEL OUKO 2ND APPELLANT

AND

HELLEN ANYANGO ONGUNA 1ST RESPONDENT

BIDO OTIENO OJUNGA 2ND RESPONDENT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF ELVIS OMONDI
OTIENO – DECEASED**

*(Being an appeal from the judgment and decree of Hon. V. Ogutu RM delivered on the
16/5/2024 in Ksm CMCC No. E098 of 2023, Hellen Anyango Onguna & Anor (Suing as the
administrator of the estate of Elvis Omondi Otieno – DCD) v Otieno Jacob Kidiga & Anor)*

JUDGMENT

1. The respondents filed the primary suit before the trial court vide a plaint dated 30/03/2023 for general damages and special damages of Kshs. 53,950/- for fatal injuries to the deceased following a road traffic accident.
2. The appellants entered appearance and filed a statement of defence dated 19/04/2023 in which they denied the respondent's claim contending that the respondent's suit disclosed no claim against them.
3. The matter proceeded to trial and by a judgment delivered on 16/5/2024, the trial court decreed that: -
 - a. Liability in the ratio of 70:30 in favour of the plaintiffs as against the defendants.



- b. Pain and suffering Kshs. 20,000/-
 - c. Loss of expectation Kshs. 100,000/-
 - d. Loss of dependency Kshs. 3,000,000/-
 - e. Special damages Kshs. 53,950/-
 - f. Total = Kshs. 3,173,950 less 30% contribution = Kshs. 2,221,765/-.
4. Being dissatisfied with the said Judgment/decree, the appellants lodged this appeal vide the Memorandum of Appeal dated 18/10/2024 and raised three (3) grounds of appeal as follows: -
- a. That the learned trial magistrate erred in law and in fact in awarding the respondents Kshs. 3,000,000/- under the heading loss of dependency which award was too excessive in the circumstances.
 - b. That the learned trial magistrate erred in law and in fact in awarding loss of dependency to beneficiaries who are not qualified for provisions as per section 4 of the Fatal Act (sic).
 - c. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases.
5. The appeal was disposed off by written submissions that were highlighted on the 16/6/2025. The appellants submitted that the deceased was 27 years, a graduate but that there was no prove that he was earning Kshs. 40,000/- per month.
6. That the deceased was not married and no birth certificate was adduced to prove that he had a child and based in the premises, the trial court ought to have awarded him Kshs. 1,500,000/- under the head of loss of dependency.
7. The appellant relied on the case of Zachary Magomo v Julius Asiajo Ogeto & Anor [2020] KEHC 1302 eKLR where an award of Kshs. 2,000,000/- was reduced to Kshs. 1,500,000/-.
8. On the other hand, the respondents submitted that the award was not excessive as the court took into account all the relevant factors. That the deceased died aged 27 years, was a graduate with a degree from Maseno University and was survived by one child, his mother and 2 brothers as proven by the Chief's letter that was produced.
9. That the trial court was correct in using the global sum method in awarding Kshs. 3,000,000/- for loss of dependency as this is the best approach where there is no proof of income. Reliance was placed on the case of Franklin Kimathi & Anor v Phillip Akungu Mitu & Anor [2020 eKLR].
10. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial afresh and come to its own independent findings and conclusions. See Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.
11. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held that: -
- “This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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 allowances in this respect.”

12. Before the trial court, the 1st respondent testified as PW1. She was the mother to the deceased. She was informed of the deceased’s death by his friend. She told the court that the deceased was a trained graduate and a part time teacher earning Kshs. 40,000/- per month. That he was survived by herself, his fiancée, daughter and 3brothers all who were dependent on him.
13. PW2, Thomas Muiyienda Sagero witnessed the accident and testified that the deceased was hit while crossing the road and that he died on the spot.
14. The 2nd appellant testified as DW1. He told the court that he hit the deceased as he was crossing from left to right in the middle of the road. This testimony was corroborated by that of DW2, No. 62810 PC Dickson Wutoyi who testified that the 2nd appellant was to blame for the accident.
15. From the foregoing, the grounds of appeal may be summarized into two as follows: -
 - a. That the trial court erred in giving an award for loss of dependency that was excessive.
 - b. That the trial court erred in sustaining a claim for loss of dependency for persons not proved to be one.
16. The first ground was that the trial court erred in awarding Kshs.3,000,000/- for loss of dependency which was excessive. On whether the assessment was appropriate, the general rule is that assessment of damages lies in the discretion of the trial court and an appellate court will only interfere with the award of damages where it is inordinately high or low as to represent an erroneous estimate.
17. In *Butt v Khan* (1977) I KAR, the Court of Appeal held that: -

“ An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely represent an 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.”
18. In the present case, the trial court relied on the case of *County Government of Kitui & another v Mutinda & another* (Sued as the Administrators of the Estate of Samson Kyalo) [2023] KEHC 19406 (KLR). In that case, the court reduced an award of Kshs. 4,000,000/- for loss of dependency to Kshs. 3,000,000/- where the deceased was aged 29 years old.
19. In giving the award of a global sum of Kshs. 3,000,000/- as damages for loss of dependency, the trial court considered the age of the deceased, the fact that he left a fiancé with a 1-year-old child and his parents and a family which he was supporting. The deceased was said to have been earning Kshs. 40,000/- per month from part time teaching. However, PW1 could not provide proof of the same.
20. In awarding damages for loss of dependency, the trial court had the option of applying the multiplier-multiplicand method or to take the global sum approach.
21. The appellants submitted that a global sum of Kshs. 1,500,000/- ought to have been granted for loss of dependency. The global sum is not a figure given arbitrarily but rather, it is an award based on the circumstances of the case and similar decisions by courts in the past.



22. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased (2020) eKLR, when dealing with a similar issue the court stated that: -

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

23. In the present case, in awarding the sum of Kshs. 3,000,000/-, the trial court was guided by the holding in *County Government of Kitui & another v Mutinda & another* (Sued as the Administrators of the Estate of Samson Kyalo) [2023] KEHC 19406 (KLR). Therefore, the sum was not just plucked from the air. At least there was a basis.

24. It is the general rule that similar cases should attract as much similar awards as possible for consistency and certainty. There was nothing to show that the trial court arbitrarily made the award. It was also not shown that the amount was too excessive to amount to an inordinately high award that was out of proportion. Accordingly, that ground fails.

25. On the second ground, it was contended that the trial court erred in making an award to strangers who are not recognized as dependents under the *Fatal Accidents Act*.

26. Section 4(1) of the *Fatal Accidents Act*, Cap 32 Laws of Kenya provides that: -

“Every action brought
.....”

27. Dependency is a matter of fact and should be proved through evidence. PW1 testified that the deceased had a fiancé and child and that he used to support her. This was corroborated by the letter from the area Chief, PExh 10 which showed the deceased’s dependents.

28. In cross-examination, although PW1 admitted that she had not produced the birth certificate of the child, she remained firm that the deceased did leave behind a daughter. This evidence was not seriously challenged or displaced by the appellant’s witnesses.

29. When the court is faced with a matter of fact, it is imperative that evidence be adduced by the party alleging the facts and, in this case, on a balance of probabilities. In my view, the respondents discharged the burden of proof as required to the satisfaction of the court. Additionally, the respondents produced a limited grant of letters of administration ad litem for purposes of this suit. This means that the respondents were rightly appointed as administrators of the estate of the deceased.

30. Dependency in the strict meaning of section 4(1) of the *Fatal Accidents Act* has been demystified by the courts as to also mean persons beyond the nuclear family, so long as they can prove that they depended on the deceased immediately prior to their death.

31. In *Leonard O. Ekisa & another v Major K. Birgen* (2005) eKLR, it was held: -

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social



welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”

32. Further, in *Gordon Ouma Sunda & Another v Adan Abdikadir Omar & Another* [2019] eKLR, court stated as follows: -

“Appreciably, it is reasonable to expect that as an African man, the deceased financially supported his wife and three children. This court finds and holds that it was also reasonable to have expected that deceased would have to spend a large chunk of his income on his dependents...”

33. Further, on dependency, in the case of *Ursular Mulandi v Kyalo Mutunga & Others* (2017) eKLR the court awarded damages for loss of dependency to a brother of the deceased.

34. In view of the foregoing, it is this court’s view that, apart from the 1st respondent who was indisputably the Mother of the deceased, the respondents proved dependency on the deceased prior to her death. In this regard, I hold and find that the trial court rightly held them as dependents. The trial court considered all the necessary factors in making the award. As such I find no basis of interfering with the award.

35. On the last ground that the trial court failed to consider the appellants’ submissions and authority, it was not demonstrated that this was the case or that what part was neglected and that if considered it would have changed the position.

36. Accordingly, I find the appeal to be without merit and dismiss the same with costs.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

