



Mutwiwa & another v Kinyua & another (Sing on behalf and as Personal Representatives of the Estate Francis Njoroge Wamai) (Civil Appeal E048 of 2024) [2025] KEHC 9478 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E048 OF 2024
JK NG'ARNG'AR, J
JULY 3, 2025**

BETWEEN

MWELU MUTWIWA 1ST APPELLANT

JOSEPH NGINDU KINGWAA 2ND APPELLANT

AND

EUNIE WAIRIMU KINYUA AND JOSEPH KINYUA KINARO (SING ON BEHALF AND AS PERSONAL REPRESENTATIVES OF THE ESTATE FRANCIS NJOROGE WAMAI) RESPONDENT

JUDGMENT

1. The appellant being dissatisfied with the decision of the lower Court at Baricho by Hon. D.M Ileri, Senior Resident Magistrate delivered on 2nd August, 2024 filed a memorandum of appeal dated 19th April, 2024. The respondent was involved in a road traffic accident (RTA) on 30th November, 2024 along Sagana – Karatina Road when the appellants' motor vehicle registration no. KCK xxxL collided with motor cycle registration no. KMFV xxxE where the respondent was riding as a pillion passenger causing the respondent serious injuries.
2. The respondent filed Baricho SPMCC No. E105 of 2023 seeking special damages, general damages and costs and interest for injuries he sustained as a result of the road traffic accident.
3. After hearing the respondent's evidence, the trial court assessed and awarded damages as follows
 1. General damages
 - a. Loss of dependency - Kshs. 3,000,000/=
 - b. Loss of expectation of life –Kshs. 100,000/=



- c. for pain & suffering and loss of amenities - Ksh. 50,000/=
 - d. Loss of consortium - Kshs. 150,000/=
 - e. Special damages Kshs. 66,450/=
- Total Kshs. 3,366,450/=

4. The appellant has appealed to this court on the following grounds;

- a. That the learned magistrate erred in law and in fact in finding 100% liability against the appellant.
- b. That the award of Kshs. 50,000/- for pain and suffering is excessive in all the circumstances and ought to be reduced.
- c. That the global award of Kshs. 3,000,000/- for loss of dependency is excessive in all the circumstances and ought to be reduced.
- d. That the learned magistrate erred in law and in fact when he failed to consider the Appellant's submissions and dismissed the same without giving any reason at all.
- e. That the learned trial magistrate erred by awarding the respondent's estate under both the Law Reforms Act and Fatal Accident Act.

5. The parties filed written submissions as follows; the appellant submitted that the award of Kshs. Kshs. 3,000,000/= as general damages were inordinately high. The appellant proposed an award of Kshs. 300,000 and relied on the following cases;

- a. Dora Mwawandu Samuel (Suing on her behalf and on behalf of the Estate of Samuel Muweliani Jumamosi - Deceased) v Shabir M. Hassan [2021] eKLR where the court awarded a global sum of Kshs 400,000/= for loss of earning capacity being a 59 year old farmer.
- b. Peter Wainaina & another v Lucia Ndulu Muindi & another [2021] KEHC 1986 (KLR) the deceased was 65 years old at the time of death and had the last born child at 18 years, and was awarded a global sum of Kshs. 500,000/= for loss of dependency.
- c. John Wamae & 2 others v Jane Kituku Nziva & another [2017] KEHC 1111 (KLR), the award given was Ksh. 400,000/- for a 61 years old who was since deceased.

6. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In Selle v Associated Motor Boat Co. [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally. 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. 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 account of particular circumstances or



probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

7. The issues for determination in this appeal are whether the general damages for pain and suffering awarded by the trial court were inordinately high and whether the apportionment of liability was proper.

8. In *Buyala v Amwayi ((Suing as the Legal Representatives in the Estate of Shem Kokonya - Deceased))* (Civil Appeal 63 of 2022) [2024] KEHC 618 (KLR) (19 January 2024) (Judgment)

“According to the witness statement of Floice Ochieka Amwayi, the deceased was a boda boda rider while in cross examination she said the deceased was a trader in omena and cabbage who would make about Kshs.3,000 per day but she conceded having no proof of such income. It was thus not clear how much the deceased earned on a monthly basis and 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.

9. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR where the court that where there is no satisfactory proof of the monthly income by salary proved or employment, so that it is not possible to determine the multiplicand, 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. It said: -

“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.”

10. I have considered the authorities relied on by the trial court. I have also considered the following comparable cases where injuries were similar.

a. In *Roba Doti Guyo v Jiang Zhongmei Engineering Company* [2015] eKLR, the plaintiff, therein suffered a crushed hand which was amputated leaving him with an ugly stump. In 2015 the plaintiff was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities.

b. In *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015] eKLR, the Respondent therein suffered an amputation of the left hand below the elbow. In 2015, he was awarded Kshs 2,200,000/= as general damages for his pain and suffering which sum was upheld on appeal.

c. In *Kurawa Industries Ltd v Dama Kiti & Another*, Malindi HCCA No. 37 of 2015 where an award of Ksh. 2,000,000/= was upheld for amputation of the left leg at the knee joint.

11. This court can only interfere with an award of the trial court if the same is inordinately high or low as to warrant interference of where the trial court applied the wrong principles. In *Butt v Khan* [1982] 1 KAR. 5, the court correctly said;

“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”.

12. In terms of liability the motor cycle was hit from behind after entering the road.
 13. I find no liability to apportion to the respondent. There was no proof of earning hence the given mode of award of damages ought to have been global approach. The mere fact of exhibiting on the business permit did not establish the earnings or income. For the reason I am inclined to adopt the global approach and award a sum of Kshs 1,500,000/=. For pain and suffering I award the amount of Kshs 20,000/=. For loss of expectations of life I award Kshs. 100,000/=
 14. In the end I do enter judgement in favour of the respondent as follows;
 - a. Liability 100% against the appellant
 - b. Loss of dependency of Kshs. 1,500,000/=
 - c. Pain and suffering of Kshs. 20,000/=
 - d. Loss of expectation of life Kshs 100,000/=
 - e. Special damages of Kshs. 65, 450/=Total Kshs. 1,685,450/=
- Each party to bear their own costs.
- Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY 2025

In the presence of:

Ombachi for the Appellants

Lumumba holding brief for the Respondents

Siele/Mark (Count Assistants)

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J. NG'ARNG'AR

JUDGE

