



**Njau & another v Kibui & another (Suing as Legal Representatives
of the Estate of Rhoda Wangechi Kariuki - Deceased) (Civil Appeal
E010 of 2024) [2025] KEHC 10774 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E010 OF 2024
AK NDUNG’U, J
JULY 22, 2025**

BETWEEN

JOHN KAMAU NJAU 1ST APPELLANT

REBECCA WAMBUI GICHUNJU 2ND APPELLANT

AND

RAHAB WACHUKA KIBUI 1ST RESPONDENT

JOHN KARIUKI WANGECHI 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF RHODA
WANGECHI KARIUKI - DECEASED**

*(Appeal from original Decree passed on 04/04/2024 in
Nanyuki CM Civil Case No E080 of 2023 – V. Masivo, SRM)*

JUDGMENT

1. This is an appeal in respect of quantum of damages and more specifically on award on loss of dependency awarded in the decree of the lower court. The trial court awarded the Respondent Kshs.6,400,000/- for loss of dependency.
2. Being dissatisfied with the trial court assessment of damages, the Appellant filed the memorandum of appeal dated 22/04/2024 and raised the following grounds of appeal;
 - i. The learned magistrate erred in adopting the multiplier approach which method was not applicable in the circumstances and thereby arrived at an award for loss of dependency that was inordinately excessive.



- ii. The learned magistrate erred by adopting a multiplicand of Kshs.50,000 which amount was not proved and was not applicable in the circumstances and thereby arrived at an award for loss of dependency that is inordinately excessive.
 - iii. The learned magistrate erred by awarding damages for loss of dependency in the sum of Kshs.6,400,000/- which award was inordinately excessive considering that the deceased died at the age of 38 years and income was not proved.
 - iv. That the judgment of the learned magistrate with regards to the award for loss of dependency is against the law and weight of the evidence on record.
3. The Appellant prays that award on loss of dependency be set aside and be substituted with a reasonable award.
 4. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that the evidence by the Respondent failed to prove that the deceased operated any bar and was earning approximately Kshs.80,000/- as no license of the alleged bar was produced considering that the deceased needed a license from Kitui County *Alcoholic Drinks Control Act*. That since the Respondent was not the author of monthly sales and stock counter book and the fact that she was not the author or present during the signing of Pexhibit 6a and 6b, her evidence had no probative value. That the source of the said documents was unclear and the person who handed them over to the Respondents was not called as a witness as he/she could have provided nexus between the said documents and the alleged business. He urged the court to find that the deceased's earnings were not therefore proved and hold that the trial court erred in adopting the multiplicand approach.
 5. He submitted that the global award was more appropriate as the deceased's earnings were never proved. Reliance was placed on the case of *John Wamae & 2 others v Jane Kituku Nziva & another* (2017) eKLR where court held that the multiplier approach is only useful where age of the deceased, the amount of annual or monthly and expected length of dependency are known without speculation and *Mary Khayesi Awalo & another v Mwilu Malungu & Another* (1999)eKLR where court observed that it was proper to opt for a lumpsum instead of estimating the deceased's income in absence of proper accounting books. Counsel urged the court to adopt an award of Kshs.900,000/- as sufficient and reasonable award for loss of dependency and he placed reliance on the case of *Elvina Nyevu & another v Samson Kabindi kitsao & another* (2020) eKLR among other cases.
 6. In rejoinder, the Respondents' counsel argued that the record of appeal was fatally defective for want of compliance with Order 42 Rule 13(4)(f) of the *Civil Procedure Rules* for the decree appealed from was not attached. He submitted that a record of appeal that does not contain a copy of the decree appealed from rendered such a record incompetent and should be struck out.
 7. He submitted that the Respondents' evidence before the trial court remained uncontroverted as the Appellant opted not to call any witness to rebut their evidence. That the respondent discharged the burden by providing the evidence that she obtained from the deceased's workplace whereas the Appellant failed to produce any evidence in rebuttal. Further, the Respondent confirmed during cross examination that the deceased's business had a license and if the Appellant wished to challenge this fact, they should have called a witness from Kitui Liquor Licensing Board to controvert this fact. Further, the witness was deceased's mother so she was in a position to know the kind of business her daughter was engaged in and reliance was placed on the case of *Ngugi v Karanja & another* (Civil Appeal 161 of 2018) [2023] KEHC 2368 (KLR).
 8. He submitted that the trial court adopted the multiplier approach since the income was ascertainable from business record and the court had discretion to adopt the multiplier approach. That as was



held in the case of Francis Odhiambo Nyunja, nolland Engineering & Construction Co Ltd & Nafas World Auto Ltd v Josephine Malala Owinyi (suing as the legal administrator of the Estate of Kevin Osore Rapando [2020] KEHC 964 (KLR), the global sum approach is applied in instances where the deceased was a minor and a deceased adult with no records to prove their income prior to their death. That where some form of records are produced to show the earnings, multiplier approach is adopted. He submitted that the authorities relied by the Appellant were distinguishable from this case since there were no documentary evidence that were produced to prove their income.

9. He maintained that the deceased had an ascertainable business from her bar and restaurant business known as A&J Gardens and sales counter book was produced. That the average monthly income was Kshs.92,236/- but the trial court reduced the said amount to Kshs.50,000/-. That her income was about Kshs.80,000/- having bought assets worth Kshs.1,130,000/- in a span of 30 months and at the same time paying rent, food and school fees for her children. That in adopting Kshs.50,000/-, the trial court was guided by several authorities on how the courts have assessed the monthly income for sole proprietorship business where records are not kept. He further placed reliance on the case of Abdimana Abdulwahab & another v Janet Njeri Wambui & another (suing as the legal representatives for and on behalf of the estate of Jane Wambui Kiragu [2021] eKLR and the case of Isaak Kimani Kanyingi & another (suing as the legal representative of the Estate of Loise Gathoni Mugo (deceased) v Hellen Wanjiru Rukanga [2020] eKLR. He urged the court to take judicial notice that small business may not keep business record and as was held in Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR that it is wrong to subscribe to the view that the only way to prove earnings is by way of production of documents and that that kind of stand will do injustice to many Kenyans who do not keep records and yet earn their livelihood in various ways.
10. The Appellant filed supplementary submissions in response to the Respondents' contention that the appeal was defective. As to whether the deceased had ascertainable income, he maintained that the 1st Respondent did not even know the name of the bar or presented registration documents. She confirmed that she was not an employee or the author of Pexhibit5 hence her evidence had no probative value.
11. I have considered the submissions filed by the parties herein together with the authorities relied thereon. The Respondent raised a preliminary point of law to wit, the appeal was fatally defective for want of compliance with Order 42 Rule 13(4)(f) since the Appellant failed to attach the decree appealed from.
12. It is to be noted that the supplementary record of appeal containing the decree was admitted by this court on 14/5/2025 and it was deemed as regularly filed. This puts that matter to rest.
13. This is an appeal on assessment of damages on loss of dependency. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of Butt v Khan Civil Appeal No. 40 of 1997 thus: -

“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 arrive at a figure which was either inordinately high or low.”
14. While awarding damages on loss of dependency, the trial magistrate adopted the multiplicand approach. The learned magistrate stated that he had no doubt that the deceased was running a bar and restaurant business as the Plaintiff produced counter book illustrating the monthly net profit



varying between 86,260/-, 78,190/-, 61,400/-, 101,851/- and 133,480. That each monthly expense was indicated as Kshs.20,000/-. That this expense was not outlined or particularised for the court to consider its truthfulness. The tax was also not recorded. That the deceased's business was certainly doing well as she had purchased a land worth Kshs.250,000/- and motor vehicle at Kshs.880,000/-. He also considered that the deceased was educating her children single-handedly and providing for her parents. Considering the case laws on the question of income that is not proven by documentary evidence and inflationary trends over the years and considering the nature of her business, the trial magistrate stated that he was persuaded that the deceased's income was Kshs.50,000/-.

15. The trial magistrate findings were based on several authorities including the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] KECA 202 (KLR) whereby the court frowned upon the contention that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents.
16. The trial court also found guidance in the Court of Appeal decision in *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga* [2020] eKLR where it was reiterated that:-

“We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case... We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin because the deceased being a business lady carrying out a timber and furniture business, she must at least have employed a carpenter for the business and was unlikely to earn less than the carpenter. In our view given the evidence before the trial Judge including the bank statement showing monies going into and out of the deceased's account, a sum of Kshs 30,000/= would have been appropriate as the net monthly income of the deceased.”

17. In *Priscilla Mwachimba v Simon Kaibunga & Another* Meru CA 132 of 2008, the Court opined that:-

“While the Appellant did not produce evidence of earnings of Kshs. 30,000.00 per month, it was not disputed that the deceased had a business and was also farming. The trial court did not give reasons why it chose a sum of Kshs. 5,000.00 as the deceased's monthly earnings and not any other sum. There was unchallenged evidence before court that the deceased had a wife and six children...can both a shop and farming be producing only Kshs. 5,000.00 per month? This court finds it's unreasonably low to sustain such a family. It is quite clear that in rural Kenya, people rarely keep books of accounts nor do they file returns. They however do live and cater for their own livelihood. They pay for their food, clothing, other bills (including hospital) and pay school fees for their children. This is a fact of life. To expect them to meticulously keep records of their income and expenditure would in my view be expecting too much and by itself unreasonable. It would not only be unfair but outright unjust in such a situation to deny such rural folks compensation for reason that there are no proper records of income.”



18. In *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR, the Court of Appeal dealing with paucity of evidence of loss of income observed as follows:

“We appreciate the expectation of Mr. Inamdar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there is dicta in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult.”

19. And in *Wambua v Patel & Anor* [1980] KLR 336 Apaloo J stated:

“I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is, the Kenya Meat commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods.”

20. The Respondent produced a Counter book for A&J Gardens showing the sales and profits from the month of September 2022 to December 2022. The Respondents evidence was not controverted by the Appellant. The court in *Regina Wanjiku & Another v Kanju Trading Ltd & Another* [2012] eKLR observed that;

“All the crucial evidence was unchallenged, notwithstanding the defence pleadings which denied everything pleaded by the Plaintiff. It is, in addition, trite law, that mere pleadings in the plaint or defence, not supported by evidence, unless admitted, or conceded, amount to no evidence and has little evidentiary value. In the circumstances, and in the face of the plaintiff’s uncontroverted evidence, her case clearly stands proven on the balance of probabilities. In the finding of this court, the plaintiff’s evidence carried no substantive contradictions which the trial magistrate could have relied on to reject the same.

21. No doubt the respondent bore the burden of proving the earnings of the deceased to set a basis for the court’s adoption of the multiplier approach in the assessment of damages. She testified on oath that, in her lifetime, the deceased a teacher who had resigned to do business, ran a bar and restaurant business. She produced a Counter book which was a record of the monthly net profit varying between 86,260/-, 78,190/-, 61,400/-, 101,851/- and 133,480. The record showed a monthly expense of Kshs.20,000/-. There was evidence that the deceased was not a person of straw as agreements for the purchase of land at Kshs. 250,000/- and a motor vehicle at Kshs.880,000/- were tendered.

22. In *Ngugi v Karanja & Another* (Civil Appeal No. 161 of 2018) 2023 KEHC 2368(KLR) the court cited with approval the decision in *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others*[2012]eKLR where it was stated;

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”



23. Noting the incidence of the burden of proof, I would tweak the above holding by adding a rider that that such a statement would be the truth subject to its veracity passing muster after cross examination or surmounting any other legal challenge as may apply. This is based on the requirement that a party is bound to prove their claim even where a defence is not substantiated by way of evidence
24. In the case of *Kirugi and Another v Kabiya & 3 others* [1987] KLR 347 the Court of Appeal held that;
“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”.
25. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard. In *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held that;
“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
26. In the instant appeal, the evidence by the Respondent on earnings by the deceased was not controverted. The deceased was the Respondent’s daughter. The Respondent certainly knew what the deceased was doing for a living and she got access to the Counter Book and Sale Agreements which confirmed that the deceased was making a tidy sum every month.
27. In any event, it is not in dispute that the deceased was a teacher before she resigned to engage in business. It would thus be totally unjustified in her case to adopt the global sum approach since at 38, the deceased could still have fallen back to her profession and earned for another 22 years.
28. I find no grounds upon which to fault the trial court’s assessment of damages as the court clearly appreciated and applied the relevant principles of law.
29. It is therefore clear that the trial court’s findings were based on clear set principles by courts and hence cannot be faulted for its findings on the award of damages under the head of loss of dependency.
30. With the result that the appeal herein lacks merit and is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JULY 2025.

A.K. NDUNG’U

JUDGE

