



Kinyua (Suing as the Legal Representative of the Estate of Michael Ngotho Mambo) v Watoi & another (Civil Appeal E030 of 2024) [2025] KEHC 12902 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E030 OF 2024
DKN MAGARE, J
SEPTEMBER 18, 2025**

BETWEEN

LAWRENCE MACHARIA KINYUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MICHAEL NGOTHO MAMBO) APPELLANT

AND

JOSEPH NDIANGUI WATOI 1ST RESPONDENT

JOYCOT GENERAL CONTRACTORS LTD 2ND RESPONDENT

(Being an appeal from the Judgment and decree given in Karatina Civil Case No. E098 of 2022 delivered on 18.12.2023 by Hon. E. Kanyiri – PM)

JUDGMENT

1. This is an appeal from the judgment and decree given in Karatina Civil Case No. E098 of 2022 delivered on 18.12.2023 by Hon. E. Kanyiri [PM]. The Appellant is the legal representative of the estate of Michael Ngotho Mambo [deceased] who was the plaintiff. After hearing the parties the court entered judgment as follows:
 - a. Liability - against the Respondents at 100%
 - b. Pain and suffering – Kshs. 100,000/=
 - c. Loss of expectation of life – Kshs. 100,000/=
 - d. Damages under *Fatal Accidents Act* – Nil
 - e. Special damages – Kshs. 229,300/=
 - f. Costs and interest of the suit



2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal on 04.07.2024. The appeal is on the lower court's finding on its judgment and is based on 4 grounds, to wit:
 - a. That the lower court erred in law and in fact by holding that loss of dependency was not proved.
 - b. That the lower court erred in law and in fact in failing to consider the Appellant's evidence and submissions on the deceased's family and thus reached the wrong conclusion on loss of dependency.
 - c. That the lower court erred in law and in fact in disregarding the fact that the deceased had a wife who was solely dependent on him.
 - d. That the lower court erred in law in failing to appreciate the fact that the deceased was informally employed thus no evidence available from his farming activities.
3. In summary the appellant posited that the court erred both in law and fact by wrongly finding that loss of dependency was not proved. The court failed to consider the Appellant's evidence and submissions regarding the deceased's family and consequently reached an erroneous conclusion. The court was said to have disregarded the fact that the deceased had a wife who solely depended on him. Further, the court failed to appreciate that the deceased was informally employed in farming, hence documentary proof of income was unavailable.
4. In empirical terms the appeal is on loss of dependency. The dependents pleaded there were a wife and 5 children. All the children were adults.

Pleadings

5. The Appellant filed suit via plaint dated 04.11.2022, claiming for damages arising from a fatal traffic accident involving motor vehicle registration number KAS 223E on 06.03.2020 along the Karatina-Sagana road.
6. He claimed under the Fatal Accident Act and *Law Reform Act*, where he stated that the deceased had a wife and five children listed by name under paragraph 5 of the Plaint. The Appellant contended that the deceased was 74 years of age. The suit was defended by a defence dated 11.11.2022.

Evidence

7. PW1, Lawrence Macharia, adopted his witness statement and relied on exhibits P.Exh2-7. He testified that he was not present at the scene of the accident but learnt of it later that night. He stated that he was the deceased's son and could prove the relationship through a chief's letter. He mentioned having five siblings, that is: James [43], veronica [41], Charles [48], and Jane [39]. He stated that they were unemployed and dependent on the deceased. He testified that the deceased, aged 73, was a farmer earning about Ksh. 30,000 monthly, though he had no documentary proof. He further stated that police investigations placed fault on the driver.
8. On re-examination, he clarified that the grant of letters of administration listed the deceased's children as dependents, noting that all, except himself, were unemployed. The mother was said to have no job as well as 4 of the appellant's siblings.
9. PW2, No. 53220 Cpl. Charles Kario produced a police abstract regarding a traffic accident reported vide OB 43.6.03.2020.
10. DW1 Joseph Ndiangui testified on behalf of the Respondent on liability, which is not in issue in this appeal.



Impugned Judgment

11. The lower court did not award on loss of dependency as the same was not proved. The other limbs were awarded but they are not in issue in this appeal.

Submissions

12. The Appellant submitted that the deceased left behind a wife and children as shown at pages 58–59 of the record of appeal. He relied on Section 4[1] of the *Fatal Accidents Act*, emphasizing that the deceased was the sole breadwinner and that his wife and five children had consequently lost their means of support. In support of this position, the Appellant cited the authority of *China Civil Engineering & Another v Mwanyoha Kazungu Mweni & Another* 2019 eKLR and *Moses Maina Waweru v Esther Wanjiru Githae* [Suing as the personal representative of the estate of the late David Githae Kiriro Taiti [2022]] eKLR.
13. The Respondents submitted that loss of dependency was not proved and no evidence was tendered to show that the dependants depended on the deceased before his death. They contended that the deceased would have been dependent on his children given his age. Reliance was placed on the case of *Leonard O. Ekisa & another v Major K. Birgen* [2005] KEHC 2214 [KLR]. They submitted that dependency is a matter of fact and must be proven. [The court must at this stage declare that it acted for the defendant in the said matter over 2 years ago].
14. The respondent submitted rather erroneously that in the African setting it is the adult children who support the elderly and not vice versa. This fact is not true, otherwise, we could not be having contested successions where children are adults. In the said case the court stated as follows:

“Though Mr. Magare for the defendant has argued that dependency was proved on only one person, that was the wife of the deceased, I differ from his contention. 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 dependants. 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.”

15. Further reliance was placed on the case of *Joshua Muriungi Ng’anatha v Benson Kataka Lemureiyani* [2016] KEHC 2367 [KLR] where the court stated as follows;

“54. In the case of *Kenya Breweries Ltd v Saro* [1981] KLR 408, the Court of Appeal sitting in Mombasa stated as follows:-

“In the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a variable asset which the parents are proud of and are entitled to keep intact.”

55. Kneller, JA [as he then was] in *Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 made similar observation when he stated that:-

“The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as a system of genontocracy [sic]at its worst.”



16. The Respondents further submitted that the Appellants failed to prove the income of the deceased. Reliance was placed on the case of *Arthur Nyamwate Omutondi & Others v United Millers Limited & 2 Others* [2009] KEHC 2492 [KLR], where the court stated as follows:

Proof of income is basic to a claim of loss of dependency under the *Fatal Accidents Act* because one can only be supported financially by what was earned in hard pounds and cents. If income is not proved then no award of dependency can issue.

Analysis

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another v. Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the lower court that has observed the demeanor of those witnesses. In the case of *Peters v Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution.”

19. There was no dispute in the defence related to the relationship between the Appellant and the children. The children were not disputed as children of the deceased. The appellant definitely knew the mother and father. The chief confirmed the relationship between the deceased and the wife. There was death that occurred and the evidence tendered showed that a 74-year-old died. He had a wife and 5 issues with the said wife. There was thus no dispute that Alice was the wife of the deceased.

20. By finding that the deceased could only have depended on the children, the court adopted a cavalier approach. In failing to award damages for a 74-year-old, the court in effect concluded that the deceased's life had no value and that he was better off dead. This is not the position in the *Fatal Accidents Act*. The Appellant tendered evidence that there was a wife. There may have been no evidence of the actual earnings. However, there was evidence that the deceased was a farmer. The death certificate so indicates and there is no evidence to the contrary. In *Fidelity & Commercial Bank Ltd v Kenya Grange vehicle Industries Ltd* [2017] eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

“Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document [extrinsic evidence], such as the circumstances surrounding its writing or the history of the party or parties signing it.”



21. In *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* [5th edn.] at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”

22. There was thus evidence that the wife was dependent on the deceased. However, given that the deceased was a farmer, there may be no evidence of the actual amounts earned. But we must remember that this is Africa and Africa is our business. It is not expected that Africans will keep records of every earning that is made. This was the same position held by Kneller, JA [as he then was] in *Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [Supra]. Given a scenario where we have a 74 year old, nominal global awards will suffice. The deceased was at the tail end of his life, with 6 years remaining to 80 years.

23. We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles [see *Manga v Musila* [1984] KLR 257].”

24. While addressing the question of global award, the court of appeal [Masime JJ A & Omolo Ag JA] in the case of *Kenya Breweries Ltd v Saro* [1991] KECA 12 [KLR], posited as follows;

“In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution. The High Court authorities which were cited to us, such as *Abdullahi v Githenye* [1974] EA 110, *Maurice Miriti v Feroze Construction Co Ltd* HCCC No ... 1979, NRB, [unreported] and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In *Abdullahi v Githinye*, supra, the deceased girl was only 7 years old. Kneller, J [as he then was] awarded shs 8,000/- in 1974. In *Miriti v Firoze*, supra, the boy was in a nursery school. Nyarangi, J [as he then was] awarded a total of Shs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the *Fatal Accidents Act*. The respondent was entitled to do so under section 3 and 4[1] of that Act and under the authorities to which we have referred.”

25. In my view by failing to award damages for a 74 year old is to posit that the deceased was so useless, that his death was a good riddance. In cases where pecuniary contribution cannot be proved, especially for a farmer, the court must assess based on the surrounding factors. In this case, the widow was the only dependant and was left without the support from the husband. Even in his late years, he could provide support that may not even be bought. It could be priceless.

26. Doing the best I can, a global award of a sum of Ksh. 800,000/= for loss of dependency would have sufficed. Therefore, I set aside the order dismissing the award under loss of dependency and substitute it with an award of Ksh 800,000/= . Being the only issue in the appeal, the appeal succeeds.

27. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:



- [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 purposes 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 shall for good reason otherwise order.
- [2] The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
28. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 [KLR] had this to say:
- “It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
29. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”
30. The Appellant is thus entitled to costs. A sum of Ksh. 80,000/= will suffice. The Appellant will also have costs in the lower court.

Determination

31. The upshot of the foregoing is that I make the following orders:
- a. The appeal is allowed.
 - b. I set aside the order dismissing the award under loss of dependency and substitute it with an award of Ksh. 800,000/=.



- c. Costs of Ksh. 80,000/= to the appellant.
- d. Liability is still maintained at 100% and remains undisturbed as in the lower court.
- e. Loss of expectation of life of Kshs. 100,000/= remains undisturbed as in the lower court.
- f. Other damages under *Fatal Accidents Act* remains undisturbed as in the lower court.
- g. Special damages of Kshs. 229,300/= remains undisturbed as in the lower court.
- h. Costs and interest of the suit in the lower suit shall go to the Appellant.
- i. 30 days stay of execution.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

Represented by:-

Mercy Kabethi & Co. Advocates for the Appellant

Munene Wambugu & Kiplagat Advocates for the Respondents

Court Assistant – Michael

