



**Karimi & another (Suing as the legal representatives of the Estate
of David Kiere Ndiritu (Deceased) v King'ori (Civil Appeal
E004 of 2021) [2024] KEHC 6884 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E004 OF 2021
DKN MAGARE, J
MAY 13, 2024**

BETWEEN

**ANN WANGARI KARIMI & PHILIP KING'ORI NDERITU (SUING AS THE
LEGAL REPRESENTATIVES OF THE ESTATE OF DAVID KIERE NDIRITU
(DECEASED) APPELLANT**

AND

JOSEPH KABUGI KING'ORI RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable P. Mutua SPM delivered on 27/11/2018 in Nyeri CMCC 371 of 2015.
2. The Appeal was filed out of time pursuant to leave granted on 22/1/2021. The Appellant raised the following grounds of Appeal.
 - a. That the learned trial magistrate erred in law in holding that negligence had not been proved against the respondent yet the same had been proved.
 - b. That the learned trial magistrate erred in law in dismissing the suit instead of apportioning liability accordingly.
 - c. That the learned trial magistrate erred in law in holding that the respondent was not to blame yet there was enough evidence in proof of the same.
 - d. That the learned trial magistrate erred in law in failing to consider the evidence adduced in totality hence arriving at the wrong conclusion.
 - e. That the learned trial magistrate erred in law in not finding that the doctrine of res ipsa loquitor was applicable in this matter.



- f. That the learned trial magistrate erred in law in delivering a judgment that was wrong.
3. The appeal is argumentative and does not give effect to Order 42 Rule 1 of the Civil Procedure Rules which provides as doth: -

“ 1. Form of appeal –

1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

5. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the Court of Appeal observed that: -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”



6. 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.
7. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where 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.”
8. The duty of the first appellate Court was settled long ago by *Clement De Lestang, VP, Duffus and Law JJA*, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“.. this court is not bound necessarily to accept the findings of fact by the. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
9. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
10. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, 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: it is not enough that the appellate court might have come to a different conclusion...”
11. In *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
12. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.



13. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

14. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

15. The Court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. 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.

16. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

17. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

18. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
- c. The award is simply not justified from evidence.

19. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.



20. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

21. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.
22. The Appellant was the Plaintiff in the lower court vide a plaint dated 26/7/2014 and filed on 1/12/2015 the Appellant sought damages for an accident involving motor vehicle Registration No. KAP 947T Passat on 21/1/2013. The accident resulted in the demise of the Deceased David Kiere Ndiritu. The Appellant sought humongous amount of funeral expenses.
23. The deceased left behind 3 dependants namely 2 daughters and a son. They sought damages for the 43 year old man who was described as enjoying good health.
24. The plaintiffs who are siblings of the deceased filed this claim for the benefit of the estate and or dependants after obtaining letters on 16/1/2014.
25. The defendant filed defence and denied occurrence of the account and particulars of negligence. They stated, rather in a bizarre manner that if the accident occurred then it is thereto the negligence of the plaintiff. Parties must settle issues in pleadings and not have evasive pleadings such pleadings obfuscate issues and result in unnecessary costs of litigation. Those are proper defences or striking out.
26. A party must elect on the occurrence of the accident. The Respondent denied in being the lawful owner of motor vehicle Registration No. KAP 947T Passat but did not indicate or rule out any other relationship.
27. Ann Wangari Karami testified that the deceased was a passenger aboard Motor vehicle registration KAP 947T. She stated that the deceased was hardworking. They incurred 60,000/= as funeral expenses. She was recalled and identified. A police officer 33382 PC Wilson Gitonga testified and confirmed occurred of the accident. He noted that he could not tell the cause of the accident. On cross examination, he stated that the accident occurred at 12:05 am. He could not tell whether the weather caused the accident. The police file could not be traced. The defence closed its case without calling evidence.
28. The court after agonizing found that there was no prove of the cause of the accident. He dismissed the suit. The court unfairly criticized the prosecution of the case.

Analysis

29. The accident happened at midnight unless we call night runners, there is no other witness. The investigating officer will not help us. This is because no other witness was there. It does not however



mean that when an accident occurs at dead of night, the plaintiff will have an onerous task. That is why in Civil matters that are certain presumptuous that must be made.

30. Further parties are bound by their pleadings Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

“

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

31. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that:-

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered



to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

32. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

33. The Defence blamed not a third party but a passenger. He is said to have destructed the driver and also caused the accident. The respondent’s driver did not testify. This means that particulars of negligence became useless. It is true that there was no eye witness. However, none could be expected. From the police to record this was self-involving accident. The court notes that vehicles when driven carefully do not get into accidents on their own. In case of a collision one of the other driver be blamed. Unless explained, a self-involving accident cannot in any manner attributed to the passenger. The Respondent blamed third parties. They are nt party to the suit. A court cannot hold nonparties liable. In the case of EN v Hussein Dairy Limited & 3 others [2020] eKLR, Justice P J O Otieno stated as follows: -

“

“17) I agree with the Appellant’s submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,

[T]he defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.”

34. In a self-involving accident, only two people knew the truth, the deceased and the driver. The driver chose not to give evidence. The Appellant provided the best available evidence. The police confirmed the occurrence of a self-involving accident. At some stage the Respondent was shifting blame to weather. That may be so. However, to shift blame to weather the Respondent need to tender evidence to that effect. The Appellant denied the application of the doctrine of res ipsa loquitor and pleaded roleri moa fit injuria. This is to say that the Appellant assumed risk by boarding a vehicle they knew to be dangerous. Evidence needed to be tendered to the said effect.
35. I am unable to agree that in situations where a vehicle is involved in a self-involving accident., the Appellant has a duty to prove what actually caused the Accident. He only needs to lead evidence that proved Res Ipsa Loquitor. In this case, a passenger was settled in the Respondent’s vehicle and ended up dead with the vehicle in an accident. It is the Respondent to prove that the accident occurred free of negligence.



36. The deceased or any other passenger may have as well been asleep. The driver must explain that an accident occurred free from his fault. This is not shifting the burden of proof. The legal burden is on whosoever alleges. However, in cases like this where the doctrine of *res ipsa loquitur*, applies, it is the driver's duty to displace it. The driver chose not to tender evidence. The net total of the evidence given laid basis for *Res Ipsa Loquitur*.
37. The court is therefore obligated to dismiss the defence and make a negative inference. The inference in this case was that the deceased died from the negligence of the driver. Had the driver been called to give evidence his evidence will be an abuse of the Respondent. I am unable to agree with the Appellant that the court will apportion liability. Their admission of *Nolenti non fit injuria* adds salt to injury. None should place a dangerous vehicle on the road in a vain hope that the passengers will not take the risk of boarding the same.
38. I therefore come to the inevitable conclusion that the court was plainly wrong in dismissing the Appellants case. Consequently, I set aside the same. In lieu thereof I find that given the accident was self-involving the respondent was 100% to blame. I therefore set aside judgment on liability and substitute the same with a finding that the respondent is 100% liable for the said accident.
39. On quantum. The court erroneously was under a mistaken impression that he should not assess damages where he did, he did on a perfunctory manner.

Special Damages

40. The plaintiff pleaded special damages of Ksh. 519,524. The court indicated that 65,000/= was proved but he awarded what came out of the mouth of a witness. I thought the age-old principle that parole evidence cannot alter documentary evidence is still in force. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR*, the Court of Appeal, Ouko, Kiage and Murgor JJA held as follows:-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called 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 reversed...”

41. Special damages must be strictly proved after being particularly pleaded. The degree of proof depends on circumstances of the kind of damages. In the case of *David Bagine Vs Martin Bundi [1997] eKLR*, the court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681* at page 684: “...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177* thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”



42. The court had already found that Ksh. 65,000/= was proved. I am of the view that the same is proper for funeral expenses. A sum of Ksh. 10,000/= was pleaded for Ad litem. The same is reasonable. I award the same. I therefore set aside amounts of special and award Ksh. 25,000/=.
43. On pain and suffering the court awarded Ksh. 50,000/=. The same is reasonable. In *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another* [2021] eKLR, the court awarded 100,000/- for a deceased who died 30 minutes later. It stated as doth: -
- “The court heard that the deceased died after 30 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another* (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed: -
- “The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
44. In Civil Appeal No. 42 of 2018 *Joseph Kivati Wambua vs SMM & Another* (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J observed: -
- “The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis mine).
45. In *Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir* (Suing as admin of the estate of Benard Soita Nyongesa (DCD) [2022] eKLR, Justice E K Ogola stated as doth: -
- “50. In the cases of *Patrick Kariuki Muiruri & 3 Others vs Attorney General* [2018] eKLR Sergon J. made an award of Ksh. 200,000/= under this heading. In *Vincent Kipkorir Tanui* (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) vs *Mogogosiek Tea Factory Co. Ltd & Another* [2018] eKLR an award of Ksh. 200,000/= was made.
51. Furthermore, in *Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu* (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR, the court found an award of Kshs 100,000 as reasonable and not excessive and upheld the same.



52. Finally, in *West Kenya Sugar Co. Limited v Philip Sumba Julaya* (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR, the court held that an award of Kshs 200,000 was not excessive.
53. The above case law indicates that there exist authorities that support the award made by the learned trial magistrate. In any case, it has not been shown that the trial court used the wrong principles in making the award for loss of expectation of life and in the absence of the same, there is no reason to interfere with the award of the lower court. It is therefore my considered view that the award of Ksh. 150,000/= for loss of expectation of life was not excessive and the same is hereby upheld.”
46. The court awarded Ksh. 150,000 on loss of expectation of life. The same is within range. I allow the same.
47. On loss of Dependency the court gave a figure of 960,000/=. The court was pliantly wrong on this. The Deceased died traveling. His occupation is indicated as self employed. He was taken to Nyeri hospital wherein he died. Where the court got the idea that being self-employed is the same as unskilled labour, is beyond me. It is an attitudinal imbroglio that raises employment beyond the necessary pedestal. Part of the deceased’s documentation is a receipt from Nation media for advertisement. Where a sum of Ksh. 50,000/= was spent.
48. There were further announcement in citizen TV. The deceased was clearly not an unskilled labourer. I am of the view that even where we are to use minimum wage, it is not 10,000/=. A minimum wage is not apt for the Appellant. These are cases where a lump sum is proper.
49. The Court of Appeal in *Mariga vs Musila*, Civil Appeals Nos. 66 of 1982 and 88 of 1983 (1984) KLR as follows: -
- “The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles.”
50. In the case of *Sarah Naitore M’ikunyua v Geoffrey Mwangi Bor & another* [2021] eKLR, Justice E muriithi stated as doth: -
21. The Appellant urges that the trial Court ought to have adopted a lump sum amount. As pointed out by the Respondent, the Appellant in the trial Court submitted on both the question of lump sum and on the multiplier approach. In the submissions before this Court, the Appellant has also urged for both. When a court adopts a multiplier approach, then it cannot adopt a lump sum award and vice versa. One is adopted in the alternative of the other. It is thus misplaced for the Appellant to urge that the trial Court erred in failing to adopt a lump sum award when by her own submissions, she was inviting the Court to pick which of the two would be applicable to her case.
51. Though used for young children. Lump sum s also a method of estimation, which is used where the court can accurately exercise its discretion judiciously. This can even be seen from the manner of burial and other surrounding circumstances.



52. In Ringera J (as he then was) in the case of Kwanzia Vs Ngalali Mutua & another that:

“The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

53. In the circumstances of this case, an award of Ksh. 2,000,000/= will suffice for loss of dependency. I therefore set aside the award of Kshs. 960,000/= and substitute with Ksh. 2,000,000/=

54. Further other that the expresses indicate as spent, three are reasonable expenses expected in burial.

55. Though a sum of 519,000/ was prayed for a sum of Ksh. 120,000/= will properly cover funeral expenses. A sum of Ksh. 10,000/= for succession and 550 for search and 100/= for Death certificate making a total of Ksh. 130,560/=

56. I therefore set aside Ksh. 60,000/= and and in lieu therefore award a sum of Ksh. 130,560/=

Determination

57. The upshot of the foregoing, I make the following orders: -

- a. I set aside the order dismissing the suit. In lieu thereof I enter judgment for the Appellant at 100% liability against the Respondent.
- b. I award Ksh. 50,000/= for pain and suffering.
- c. I award Ksh. 150,00/= as damages under the Law Reform.
- d. I award Ksh. 130,560 s funeral expenses and special damages
- e. General Damages for loss of dependency of Ksh. 2,000,000/=
- f. The appellant will have costs of Ksh. 195,0000/= for this appeal
- g. The appellant will have costs of the court below.
- h. 30 days stay of execution.
- i. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 13TH DAY OF MAY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Achieng for the Respondent

No appearance for the Appellant

Court Assistant- Brian/Winnie

