



**Etyang ( Suing as the legal rep of the Boniface Adeke Olaba (Deceased) v  
Board of Governors Nambale Secondary School & 3 others (Civil Appeal  
E002 of 2022) [2024] KEHC 7215 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL APPEAL E002 OF 2022  
RB NGETICH, J  
JUNE 13, 2024**

**BETWEEN**

**MAURICE OLABA ETYANG ( SUING AS THE LEGAL REP OF THE BONIFACE  
ADEKE OLABA (DECEASED) ..... APPELLANT**

**AND**

**THE BOARD OF GOVERNORS NAMBALE SECONDARY  
SCHOOL ..... 1<sup>ST</sup> RESPONDENT  
PASKAL DINDI MUSA ..... 2<sup>ND</sup> RESPONDENT  
PASKAL DINDI OMUSA ..... 3<sup>RD</sup> RESPONDENT  
NYOTA TISSUE PRODUCTS ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the decision of the Honourable Richard  
K.Koech Senior Principal Magistrate Eldama Ravine delivered  
EldamRavine Cmcc No.86 of 2013 on the 9<sup>th</sup> October, 2023)*

**JUDGMENT**

1. This appeal arises from suit filed by the appellant who is a legal representative of Deceased Boniface Adeke Olaba who was a student in the 2<sup>nd</sup> defendant school and was travelling as a passenger in the 1<sup>st</sup> Respondent/Defendant's motor vehicle Registration number KBG 200C driven by the 2<sup>nd</sup> Respondent/defendant which collided with 3<sup>rd</sup> Respondent's/Third party's Motor Vehicle KBU 186 H on 26<sup>th</sup> April, 2013 along the Nakuru-Marigat Road. The deceased died as a result of the said accident.
2. Parties recorded consent on liability dated 25<sup>th</sup> January 2021. By consent, liability was apportioned at 50%: 50% as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 3<sup>rd</sup> Respondent/Third Party. The trial court



assessed damages and by judgment delivered on 9<sup>th</sup> December 2021, the trial court assessed damages as hereunder: -

- a. Pain and suffering.....Kshs.30,000.00
- b. Loss of expectation of life .....Kshs.100,00.00
- c. Loss of dependency.....Kshs.1,029,000.00
- d. Special damages.....Kshs.100,000.00
- Total..... Kshs.1,259,600.00

3. The appellant being dissatisfied and aggrieved by damages awarded by the trial court, filed memorandum of appeal dated the 7<sup>th</sup> January, 2022 challenging quantum of Kshs.1,259,600.00 for being manifestly low. The appeal proceeded by way of written submissions.

### **Appellant's Submissions**

- 4. The appellant filed submissions dated 28<sup>th</sup> February, 2024. On Funeral Expenses, the appellant submit that it is not in dispute that the Deceased suffered fatal injuries and the plaintiff did not produce any documents but the Plaintiff expended an amount to cover the funeral expenses considering that the body had to be ferried from the scene of accident.
- 5. That with hardships and difficulties faced by deceased's mourning families, it has now become necessary and trite to allow, without strict prove, reasonable funeral expenses and relied on the case of Jacob Ayiga Maruja & another v- Simeon Obayo (2005) eKLR and in JNK (Suing as the Legal representative of the Estate of MMM(deceased) Chairman Board of Govenors[.....] Boys High School [2018] eKLR,
- 6. That applying the principles in the foregoing cases, the appellant reiterates their position in their submissions filed at the trial court on (page 145 of the record of Appeal) and humbly urge this court that a sum of Kshs. 200,000/= is just and reasonable for burial expenses and that it ought to be awarded.
- 7. Under pain and suffering, the appellant submits that Kshs.30,000.00 awarded by the trial court is on a lower side; that as per PW1's evidence during cross examination, the deceased died on the spot and as per postmortem report, there was massive hemorrhage from multiple organ trauma which show the deceased suffered excruciating pain before he succumbed to his injuries and relied on the case of Alice O. Alukwe vs Akamba Public Road Services Limited & 3 Others [2013] eKLR.
- 8. That due to unprecedented circumstances, the prevailing harsh economic time and factors of inflation, the appellant earnestly submit that an award of Kshs.100,000/= under this head is sufficient and fair compensation and urge this court to enhance the award to Kshs.100,000.00.
- 9. On loss of expectation of life, the appellant is satisfied with Kshs.100,000.00 awarded by the trial court.
- 10. On the issue of loss of dependency, the appellant argues that Justice Mwera in Grace Wairimu Mwangi Vs Joseph Mwangi Gitundu Nairobi HCCC No. 162 of 1994 held that Loss of dependency is a matter of hard pounds and shillings the deceased was earning at the time of his death and consideration under the Fatal Accidents Act therefore are 3 issues namely Multiplicand, Multiplier and Dependency ratio. On multiplicand, the appellant submit that the deceased was a form four student aged 20 years and was not engaged in any financial enterprise at the time of the alleged accident and his estate has suffered loss as a result of his death.



11. That in view of the fact that there is no evidence of the deceased's future prospects and ambitions, the court should adopt the minimum wage of a general worker as provided under the relevant Regulation & Wages Order as the Trial Court did and relied on the case of Philip Mutua v Veronicah Mule Mutiso Civil Appeal No 108 of 2008 [2013] eKLR.
12. That given that the deceased died on 26<sup>th</sup> April, 2013 and the Minimum Wages General (amendment) order, 2013 came into force on 1<sup>st</sup> May, 2013, the trial court (page 158 on the Record of Appeal) applied the Regulation of Wages (General) (Amendment) Order, 2012 under the 1<sup>st</sup> schedule for applicable minimum wage of Kshs.8,579.80. The appellant urged this court apply the multiplicand as determined by the trial court
13. On multiplier, the appellant submitted that the deceased died at the age of 21 years old and urged this court to consider that the retirement age is 60 years but in view of the deceased's performance, he would have worked in informal sector and would have worked beyond 60 years and relied on the case of Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR) which set out the guidelines applicable in assessment of damages under the Fatal Accident's Act. The appellant urged this court to adopt multiplier of 40 years as the deceased was 20 years old at the time of the accident and he would have worked up to 60 years and reiterate submissions before the trial court.
14. On dependency ratio, the appellant submits that PW1 the Deceased's father testified and produced a letter from the Chief marked as P.Exh. 3 during Examination in Chief that the Deceased was survived by himself, the deceased's step mother and siblings and relied on the case of Rahab Wanjiru Nderitu vs Daniel Muteti & 4 Others [2016] eKLR.
15. That the trial court however despite acknowledging that the deceased left behind both parents still applied a dependency ratio of 1/3. That the court also failed to consider that the deceased was the only son and even while a student, he was supporting his family as his father was not in any gainful employment and most of the deceased's earnings would have been expended in supporting his parents and relied on the case of the Administrator Estate Gladstone Keith Richardson (deceased) vs Fitzroy Thomas, darissa & Richard Clemetston Suit No. 1988/181 UR.
16. And submit that dependency Ratio of 2/3 is reasonable in the circumstance; He urged this court to adopt dependency ration of 2/3, multiplier of 40 years and a multiplicand of Kshs.8,580.00/=. The appellant for awards as award as hereunder: -
  - (i) Special Damages: -
    - a) Funeral expenses Kshs.200,000.00
  - (ii) Damages under the Law Reform Act: -
    - a) Pain and Suffering Kshs.100, 000.00
    - b) Loss of Expectation of life Kshs.100, 000.00
 Total Kshs.200, 000.00
  - (iii) Damages under the Fatal Accidents Act: -
 

Loss of Dependency Kshs.8,580 x 40 x 12 x 2/3 =2,745,600/00

 Grand Total Kshs.3,145,600/00



## 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Submissions

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' wholly support the trial court's Judgement and submit that the trial court did not err nor misdirect himself in the assessment of damages and urged this court to dismiss this appeal.
18. The Respondents submit that as per paragraph 8 of the plaint, the deceased was 20 years old, enjoying robust health and a student at Nambale Boys High School with high prospects in life and paragraph 8 of the plaint gave the particulars of the deceased's dependants.
19. That it was the evidence of the appellant that the deceased was a student at the time of his demise and was assisting the appellant with work and he had a tree nursery and had a great passion for tree planting.
20. Further that it was the evidence of the appellant that he spent Kshs.207, 000.00 in funeral expenses during the interment of the deceased and on cross examination by the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, he said the court that the deceased died on the spot after the accident which occurred on 26<sup>th</sup> April,2013.
21. The Respondents submit that the court's assessment of the damages payable was commensurate with the comparable injuries and for a student aged 20 years which the deceased was and the award of Kshs.1,259,600.00 was a sufficient award; was neither too high nor too low as to amount to an erroneous estimate of damages and urged this court being first appellate court to re-analyze the case and re-evaluate the evidence on record and uphold the trial court award of damages above.
22. On Pain & suffering, the appellant testified that the deceased died instantly and was confirmed by death certificate and support award of Kshs.30,000.00 and placed reliance in the case of Stanley Muriu Njuguna & Another vs SK [2019] eKLR.
23. On Loss of expectation of life, the Respondent submit that the trial court awarded the convention sum of Kshs.100,000.00 and urged this court not to disturb the award.
24. On Loss of dependency, the appellant submits that the deceased having been 20 years old and being a student, the court applied minimum wage of Kshs.8,579.80 and on dependency ratio, the respondents submit that the dependants listed in the plaint were not depending on the deceased and submit that the deceased was still a student and had no wife or children; that the only dependants were his parents though as the appellant's witness testified, they were not depending on the deceased; that the dependency ratio applicable in the instant case is the 1/3 and there is no evidence on record that upon completing school the deceased would have ended up working in the Informal Sector of employment; and there is no evidence that he would have worked up to 60 years or until retirement and that the deceased would have lived up to the retirement age considering the realities of life. The Respondents urged this court to adopt the trial court multiplier of 30 years.
25. On funeral expenses, the Respondent submit that the appellant provided no receipts as a proof of funeral expenses and the trial court was circumspect that there was no question that funeral costs were incurred. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent proposed Kshs.40,000 as reasonable funeral expenses and the trial court awarded Kshs.100,000.00; and urged this court to retain award of Kshs.100,000
26. The Respondents further submit that this appeal was filed out of time and Memorandum of Appeal dated the 7<sup>th</sup> January, 2022 was not served nor has any evidence of service been filed in court and the record of appeal was filed on the 21<sup>st</sup> September, 2023 a period over 21 months after the Judgement of the trial court and no Certificate of Delay was filed; and urged this court to find that this appeal is irregularly on record, null and void.



27. On costs, the Respondents submit that it is fundamental to state that 1<sup>st</sup> and 2<sup>nd</sup> Respondent's insurance Company had long ago settled in full the 50% of the decretal amount being their share of liability together with all the party and party costs with nothing outstanding and therefore ought not to suffer any further costs as they fully complied with the trial court's judgement immediately after it was rendered.

### 3<sup>RD</sup> Respondent's Submissions

28. The 3<sup>rd</sup> Respondent opposes the Appeal and argue that the appellant failed to produce receipts to prove the funeral expenses he incurred and evidence adduced did not support the appellant's argument that the deceased aspired to be a doctor as the report Forms produced showed that the deceased performed poorly in school and the trial magistrate did not therefore overlook any evidence; and urged his court to dismiss this appeal.
29. On award under pain and suffering under the *law Reform Act*, the 3<sup>rd</sup> Respondent submit that the death certificate produced by the Appellant confirmed that the deceased died on the spot and award of Kshs.30,000 is not manifestly low but is appropriate in the circumstances of this case ;and relied on the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another* (suing as the Legal Administrators of the estate of the late Robert Mwangi) [2019] eKLR, *Antony Njoroge Ng'ang'a* (legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v *James Kinyanjui Mwangi & 2 others* [2022] eKLR and in *Mwangangi & another v FKM (Suing as Legal Representative of the Estate of the Late AMK) (Civil Appeal E11 of 2021)* [2021] KEHC 291 (KLR) (22 November 2021).
30. On loss of expectation of life, the 3<sup>rd</sup> Respondent submit that the deceased was a high school student aged 21 years and the Appellant proposed a figure of Kshs.100, 000/= under this header and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' counsel proposed a similar figure to that of the Appellant while the 3<sup>rd</sup> Respondent proposed a figure of Kshs.50,000, under this head being a conventional global figure ordinarily awarded by court. The trial court awarded Kshs.100,000 under this head which they agree is sufficient.
31. Under the *Fatal Accidents Act*, on Multiplicand, the 3<sup>rd</sup> respondent urged the trial court not to award damages for lost years based on the multiplier method and instead award a lump sum global award of Kshs.200,000/= basing reliance on the decision in *Kwanzia vs Ngalali Mutua & Another* and *P I vs Zena Roses Ltd & Another*; but the trial court adopted a multiplier of 30 years and applied the basic minimum wage (general amendment) Order, 2012 which was Kshs.8,580/=-, and also applied (1/3) dependency ratio noting that as per the Appellants pleadings, the only notable dependent the deceased left behind were his parents; the 3<sup>rd</sup> Respondent agrees with the learned magistrate's findings under this head and urged this court to affirm.
32. On special damages, they submit that the appellant pleaded Kshs.1,400/- as special damages; that he also pleaded Kshs.200,000/= as funeral expenses but he however failed to produce receipts to prove this and the trial court awarded Kshs,100, 000/= as funeral Expenses and did not award the pleaded special damages as the same was not proved in court. The state that they are in agreement with the findings of the learned magistrate's award under this head as the same is reasonably adequate compensation.
33. On who is entitled to costs, the 3<sup>rd</sup> Respondent submit that costs usually follow the event and are granted at the discretion of the court. 3<sup>rd</sup> respondent submit that this appeal lacks merit, urge this court to dismiss and award costs to the 3<sup>rd</sup> Respondent.



## Analysis And Determination

34. This is a first appeal. The duty of a first appellate court was captured in *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123 as follows:-

“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 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 witness and should make due allowances 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

35. In view of the above, I have perused and considered the record of appeal together with submissions herein. Liability is not being challenged in this appeal as parties recorded consent on the same. What is left for court’s determination is whether the trial magistrate applied the correct principles in assessing the quantum on damages.

36. In *Catholic Diocese of Kisumu v Tete* [2004] eKLR the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages as follows:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

37. Again, in *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457, the Court of Appeal stated that:

“This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

- (a) proceeded on a wrong principle; or
- (b) Misapprehended the evidence in some material respect.

38. On the issue of pain and suffering, the appellant’s contention is that the award of Kshs.30,000/= for pain and suffering was not based on proper evaluation of evidence, parties’ submissions and all materials on record and the same was manifestly low. 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 observed that-

“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

39. Evidence adduced confirm that the deceased died on the spot and in view of the above cited authority, it is clear that nominal damages should be awarded when the victim dies on the spot. I am of the view that an award of Kshs.30,000 is reasonable in the circumstances herein.

40. In respect to loss of expectation of life the court in the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, stated as follows-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... 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 Kshs.100,000/= while for pain and suffering the awards range from Kshs.10,000/= to Kshs.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.” (emphasis added).

41. In view of the above I find that an award of Kshs.30,000/= under pain and suffering and Kshs.100,000/= under loss of expectation of life are reasonable in the circumstances.

42. On the issue of dependency ratio, the Appellant argue that the court should have applied ratio of 2/3. The guiding factor in determining the dependency ratio where the deceased is unmarried is the re-statement by the Court of Appeal in Dickson Taabu Ogutu that:

“The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation.”

43. I however take note of the fact that the deceased was not married and had no children. From the plaint, the deceased left behind a father, mother and 6 siblings. He was not married. I do agree that the deceased's father would have expected support from him being an African family. However, there is no doubt that if the deceased had continued to live, he would have married and a bigger percentage of his earnings would have gone to his nuclear family leaving a lesser percentage to his extended family. I am of the view that a ratio of  $\frac{1}{3}$  is appropriate as support that the deceased herein would have given to his extended family. From the foregoing the trial magistrate did not err in adopting a ratio of  $\frac{1}{3}$ .

44. On the issue of the multiplicand, all the parties herein agree that having no evidence of the Deceased's future prospects and ambitions, it follows that the court should adopt the minimum wage of a general worker as provided under the relevant Regulation & Wages Order as the Trial Court did.



45. And given that the deceased died on 26<sup>th</sup> April, 2013 and the Minimum Wages General (amendment) order, 2013 came into force on 1<sup>st</sup> May, 2013, the trial court on (page 158 on the Record of Appeal) applied the Regulation of Wages (General) (Amendment) Order, 2012 under the 1<sup>st</sup> schedule for applicable minimum wage of Kshs.8,579.80. The multiplicand therefore remains undisturbed.

46. On the issue of multiplier, I take note of the fact that the deceased was a student aged 20 years old. If he completed college and got employed in formal sector, the retirement age is 60 years old. However, there is no guarantee that an employee would live to retirement age as there are many factors that affect the quality of life. There is no doubt that the life span keeps going down due to many factors. However, having adopted minimum wage as multiplicand, in my view such earnings would extend beyond retirement age. The deceased having died at the age of 20 years, I am of the view that 30 years is a bit on the lower side and a Multiplier of 35 years will be reasonable and sufficient in the circumstances herein. Calculations under this heading will therefore be as hereunder: -

$$\text{Kshs.8,580} \times 35 \times 12 \times 1/3 = 1,201,200/=$$

47. On special damages, the Appellant has complained that the amount of Kshs.100,000/= awarded by the trial court was too low and asks that this Honourable court enhances the same to Kshs.200,000/=. Record show that the stated that he spent Kshs 207,000/= as funeral expenses. No receipts were availed. However, in the case of Jacob Ayiga & Anor vs. Simion Obayo (2005) eKLR, the court awarded funeral expenses despite lack of proof by way of receipts, on grounds that funeral expenses must be incurred in every case where someone died.

48. The Court of Appeal, in Premier Diary Limited vs. Amarjit Singh Sagoo & Another [2013] eKLR, said as follows on the issue:

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs.400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs.150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

49. Similarly, the Court of Appeal, in Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR, said:

“We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.”



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50. In JNK (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR, said:

“In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”

51. In the instant suit, the Appellant pleaded funeral expenses of Kshs.207,000.00. The Appellant did not avail receipts but there is no doubt that the appellant incurred expenses to bury the deceased. The trial court awarded a sum of Kshs.100,000/= . I am however of the view that the amount awarded as funeral expenses incurred is on the lower side. I am inclined to disturb the award and enhance the award for funeral expenses to Kshs.150,000.

52. From the foregoing the appeal herein partly succeeds in respect to award for funeral expenses and under loss of dependency by allowing multiplier of 35 years. Calculations are as hereunder: -

- a. Pain and suffering.....Kshs 30,000
- b. Loss of expectation of life ..... Kshs 100,00
- Loss of dependency..... Kshs=1,201,200/=
- c. Special damages.....Kshs150,000
- Total..... Kshs 1,481,200

53. Final Orders: -

- 1. This appeal partly succeeds on quantum.
- 2. Judgment is entered for appellant against the Respondents for Kshs.1,481,200.
- 3. The award to be subjected to liability consented to by parties herein.
- 4. Each party to bear own costs of appeal.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence o

\* Court Assistant: Elvis

\* Ms.Chelule for the Appellant

\* Ms.Martin holding brief for Mr.Arusei for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

\* Ms.Odhiambo for the 3<sup>rd</sup> Respondent

