



**Onsongo & another v Mutisya & another (Both suing as the legal representatives of the Estate of Mutisya Mwalavu - Deceased) (Civil Appeal E126 of 2022) [2024] KEHC 9163 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9163 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E126 OF 2022  
JM NANG'EA, J  
JULY 23, 2024**

**BETWEEN**

**NAOMI BOSHERE ONSONGO ..... 1<sup>ST</sup> APPELLANT**

**DENIS OSIEMO OMANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MUENI MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**BENARD MWALAVU MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF  
MUTISYA MWALAVU - DECEASED**

*(Being an appeal from the Judgement of the Chief Magistrate's Court at Kangundo (Hon. Martha Opanga- SRM) delivered on 12th July 2022 in Kangundo CMCC NO. 115 OF 2020)*

**JUDGMENT**

1. The appellants herein are challenging the said learned trial magistrate's judgement in which she granted reliefs for the respondents, the plaintiffs in the suit before the lower court, as hereunder:

Judgement on liability- 80% : 20 % in favour of the respondents

Damages for pain & suffering under  
the Law Reform Act- Kshs. 50,000.

Damages for loss of expectation of life  
under the Law Reform Act- Kshs. 100,000.

Damages for loss of dependency under



the Fatal Accidents Act — Kshs. 1,600,000.

Special damages- Kshs. 19,050

Grand Total---- Kshs.1,769,050,000

Less 20%... ...- (Kshs. 353,810)

Net award— Ksh 1,415,240

2. The respondents were also granted the costs of the suit and interest.
3. The summary of the case before the trial court is that the respondents sued the appellants for general damages, special damages of Ksh.54,250, the costs of the suit and interest following a road traffic accident that occurred on 2<sup>nd</sup> December 2019 in which the above named Mutisya Mwalavu ( “hereinafter referred to as ‘the deceased’”) died. The 1<sup>st</sup> appellant was accused of negligently driving the 2<sup>nd</sup> appellant’s motor vehicle registration number KCT 290 R as a result of which it lost control and knocked down the deceased who was going about his lawful activities thereby occasioning him fatal injuries.
4. The appellants filed a joint defence traversing all the material particulars of the suit putting the respondents, who sued as a legal representatives of the deceased’s estate, to strict proof of the allegations. In the alternative, they attribute any accident that may be proven to have occurred to negligence on the part of the deceased.
5. The appellants’ Grounds of Appeal as stated in the Memorandum of Appeal filed on 26<sup>th</sup> August 2022 may be condensed as hereunder:
  - a. That the learned trial magistrate erred in law and fact in assessing and awarding to the respondents manifestly high sums of damages against the weight of evidence adduced.  
And
  - b) That the learned trial magistrate erred in law and fact by failing to consider the appellants’ submissions on the quantum of damages awardable.
6. The appellants therefore pray for varying of the lower court’s judgement on quantum of damages as per their submissions and the costs of the appeal.
7. The parties filed written submissions vide the court’s e filing platform which I have perused against the record of this appeal.
8. It is trite law that the appellate court can only interfere with the finding and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision ( see the case of [Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd](#) ( 1997) eKLR Civil Appeal No. 198 of 1995). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle v. Associated Motor Boat Co.* ( 1968) EA 123.
9. I will consider all the Grounds of Appeal together as they all challenge the quantum of general and special damages awarded to the respondents. The deceased was aged 81 years and a businessman said to have been earning not less than Kshs. 30,000 per month. No evidence of the earnings was, however, placed before the court. He succumbed to his injuries on the same day of the accident that gave rise to the cause of action. The appellants rely on the record which includes their submissions filed in the lower court on 27th April 2022. They had submitted regarding damages for pain and suffering that the



respondents do not deserve these damages for the reason that the deceased died on the same date of the accident. With respect to the respondent's claim for damages for loss of expectation of life, the court was told that a sum of Kshs. 60,000 is sufficient reliance being placed on the judicial determinations in *Joseph Kabiga Gathii & Paul Mathaiya Kabiga V. World Vision & 2 Others* (2014).

10. Concerning the claim for loss of dependency, the appellants suggested use of the multiplier method. As there was no evidence of the deceased's earnings from a retail shop he was said to operate, the appellants proposed a multiplicand of Kshs. 6,000 and a multiplier of 4 years. In support of these submissions the court was referred to case law in *Stephen Kiarie Muruguru v. Seleman Hamadi Koi and Subira & Another* (2018) eKLR and *John Wamae & 2 Others V. Jane Kituku Nziva & Another* (2017) eKLR in which the multiplier method of assessing damages was adopted.
11. The respondents on their part submit that the lower court's awards should not be disturbed. Citing various decisions, I have perused, Counsel for the respondents state that the trial court was guided by relevant principles in arriving at her decision.
12. Merely because the deceased died on the same date of the accident is no reason to deny his estate damages for pain and suffering. He must have nevertheless endured considerable pain and suffering before his demise. There is therefore no ground on which to fault the trial court on the award she gave which I find to be reasonable.
13. Regarding the award for loss of expectation of life, the award of Kshs. 100,000 is a conventional sum in such claims. The case of *Joseph Kabiga Gathii supra* relied upon by the appellants is very old having been decided in 2014, about 10 years ago, and therefore not quite relevant. Accordingly, the sum of Kshs. 100,000 was properly assessed by the trial court.
14. It is common ground that there was no proof of the deceased's income from his said business. The trial court was therefore right to adopt a global sum/lump sum method of assessing damages in the circumstances as held in many superior courts' decisions including the case of *Dennis Maosa Kibegwa V. Ochieng'I Mosero Joyce and Another* (2019) eKLR relied upon by the learned trial magistrate. In that case the dependants of a 40 years old deceased person were granted a global award of Kshs. 1,000,000 for loss of dependency in 2019.
15. In the case of *Moses Maina Waweru v. Esther Wanjiru Githae (suing as the personal representative of the estate of David Githae Kiririo Taiti)* (2022) eKLR, a lump sum of Kshs. 800,000 in loss of dependency was awarded, the deceased therein having died at the age of 68.
16. I agree with the appellants that the trial court's award for loss of dependency is on the higher side going by the decisions cited above. Considering all the relevant factors including the incidence of inflation regard being had to the ages of the cited judicial authorities, I will instead award the respondent Kshs. 1,200,000 under this head.
17. There seems to be no challenge mounted against the special damages award and the same will remain as assessed in the lower court.
18. In the result, the lower court's award of Kshs. 1,600,000 for loss of dependency is set aside and substituted with a sum of Kshs. 1,200,000. The appeal therefore succeeds to this extent only. The parties will bear their own costs of the appeal.
19. Judgement accordingly.

**JUDGEMENT DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF JULY 2024 IN THE PRESENCE OF :**



The Appellants' Advocate,  
The Respondents' Advocate,  
The Court Assistant,  
**J. M NANG'EA**  
**JUDGE.**

