



**Gathirwa v Murimi (Suing as legal representative of the Estate of the Late Florence Wangari Murimi) (Civil Appeal 82 of 2019) [2024] KEHC 16756 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 82 OF 2019  
NIO ADAGI, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**JAMES GATHIRWA ..... APPELLANT**

**AND**

**GEORGE GITAU MURIMI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE FLORENCE WANGARI MURIMI) ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. G. Omodho (PM)  
in Thika CMCC. No. 101 of 2014 delivered on 15/5/2019)*

**JUDGMENT**

1. The Respondent instituted a suit as the legal representative of the Estate of the late FLORENCE WANGARI MURIMI (deceased) for damages, costs and interest for fatal injuries sustained in a motor vehicle accident that occurred on 18/10/2011.
2. The Trial Court found the Appellant 100% liable and awarded the Respondent damages as follows:-
  - a. Loss of expectation of life .....Ksh. 100,000
  - b. Loss of dependency .....Ksh.2,470,936
  - c. Pain and Suffering .....Ksh. 20,000
  - d. Special damages .....Ksh. 187,170Total.....Ksh.2,778,106
3. The Appellant is aggrieved with the Judgment of the Trial Court and has now appealed to this Court basically challenging both liability and quantum.



This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* {1968} EA 123. {1958} E.A. page 424.

In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that: -

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

4. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion
5. I have perused the Record of Appeal, considered and weighed the rival submissions on the appeal and also taken into consideration the judicial decisions cited and attached.

### **Liability**

6. The Appellant submitted that there was no eye witness availed to court as to the accident and the only strong testimony of how it occurred was from PW2, the police officer and on this faulted the trial Magistrate for finding that the Respondent had proved his case against the Appellant. He cited the case of *Karugi & Another v Kabiya & 3 others* (1983) eKLR as quoted in *Benter Atieno Obonyo v Ann Nganga & Another* (2021) eKLR where the court opined that it is the duty of Plaintiff to prove his case.
7. The Appellant ultimately submitted that the judgment of the trial court be disturbed on the above account as regards liability.
8. The Respondent has submitted that the Appellant's submissions refer to statements made by witnesses during the hearing conducted at the trial court and particularly of statements by the Respondent and PW2, the Police officer and places heavy reliance on the statements made in open court and recorded by the trial magistrate but the Record of Appeal filed by the Appellants lacks a copy of the typed proceedings from the trial court. However, the Respondent seems not to have been interested in submitting further on the missing certified copy of the trial court proceedings.
9. Nevertheless, the Respondent has submitted that PW2, the Police Officer testified that he was not at the scene of the accident but later when the public reported the accident to Ruiru Police Station and police officers went to the scene they established through their investigations that motor vehicle registration



KBE 288U Toyota had hit a female pedestrian Florence Wangari Murimi who died on the spot. She was hit on the right side of the road. The area where the accident occurred had no zebra crossing but had a pedestrian path walk. The driver one Henry was recklessly driving the said motor vehicle when the accident occurred. He had applied brakes to avoid hitting the deceased but he was not successful.

10. That the Appellant did not call a witness and at page 6 of the judgment it is conformed that the Appellant closed his case without calling a witness.
11. The Respondent cited the case of [\*Linus Nganga Kiongo v Town Council of Kikuyu Nairobi \(Milimani\) HCC No. 79 of 2011\*](#) where the decision of Lady Justice Lessit was cited in the case of *Motex Knitwear Ltd v Gopitex Knitwear Ltd Nairobi (Milimani) HCCC No. 834 of 2002* stated as follows:

“Although the defendant has denied liability in the amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the Ist plaintiff’s case stand unchallenged but also the claims made by the defendant in his defence and counterclaim are unsubstantiated. In the circumstances, the counterclaim must fail.”

It also stated as follows:

“Again, in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No 1243 of 2001* the learned judge citing the same decision stated that it is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statement of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

It further stated while citing the decision of Ali - Aroni J in *Janet Kaphine Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007*.

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the plaintiff and that of the witness remain uncontroverted and the statement in the defence remains mere allegations...Sections 107 and 108 of the [\*Evidence Act\*](#) are clear that he who asserts or pleads must support by way of evidence”.

12. In essence, I agree with the Respondent that the Appellant’s strategic decision to not call witnesses leaves his accusations unsubstantiated, rendering them mere allegations with no supporting evidence. Therefore, given the weight of unchallenged evidence against the Appellant and the precedent set in the Respondent’s cited cases, this court finds that the Respondent proved her case against the Appellant and liability was rightly apportioned at 100% against the Appellant.

### **Quantum:**

13. This court is alive to the fact that in an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a Meru Express Services (1976) & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing



the damages took into account an irrelevant factor, 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 the damage”.

14. The Respondent in the trial court testified that the deceased was 37 years at the time of her death and the deceased's death certificate was produced as Plaintiff's Exhibit 3. The Respondent further testified that the deceased was working at Nairobi Institute of Business Studies and she was earning Kshs.20,000/= per month (and a net salary Kshs.13,429/=). A payslip from the employer was produced as Plaintiff's exhibit 5. The trial court in its judgment notes at page 67 of the record of appeal that, a payslip showing the deceased was earning a gross salary of Kshs.20,000/= was produced. It was the Respondent's testimony at the trial court as recorded at page 67 of the record of appeal that the deceased took care of the needs of the Respondent and their elderly mother.
15. This court will consider whether the award made by the trial court on quantum was inordinately high and wholly erroneous estimate of loss and damages suffered by the Respondent. On loss of dependency the trial court awarded Ksh.2,470,936 calculated based on a monthly net salary of Ksh.13,429, applying a ratio of 2/3 and a multiplier of 23 years per annum.
16. This court is guided by the principles applicable to an assessment of damages under the *Fatal Accidents Act* which were enunciated in the case of *Odera v Adoyo & another (Suing as the Legal Representatives of the Estate of Vincent Ochieng Adoyo - Deceased) (Civil Appeal 13 of 2020)* [2023] KEHC 17962 (KLR) (30 May 2023) (Judgment) which referred to the case of *Richard Matheka Musvoka & another v Susan Aoko & (suing as the administrators ad litem of Joseph Onyango Owiti (Deceased))* (2016) eKLR where J. Ringera stated as follows:-

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants.”

17. Therefore, the trial magistrate was right to use the 2/3 dependency ratio for calculating damages under the *Fatal Accidents Act* in this case. See *Crown Bus Services Ltd & 2others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased))* [2020] eKLR in which justice Edward M. Muriithi states as follows:

“As regards the fraction income which is spent on the dependants in the case of an unmarried woman who supports a child (and in this case her mother) I consider that in the absence of evidence that the child or children are also supported by their father pursuant to parental responsibility, or by any other person in filial or other guardian relationship to the child or children, the single female parent's dependency ratio should be equal to that of a married man who maintains his family household at 2/3 of his income. Both occupy the same position of family breadwinner and provider, and I do not see why an unmarried woman's support of her family should be at a lower fraction of her income than that of her male counterpart. The court, therefore, approves the use of the dependency ratio of 2/3 in the computation of the applicable damages for dependency under the *Fatal accidents Act*.”



18. It is this court's finding that the trial court took into consideration the factors it ought to consider in arriving at the award of Kshs.2,470,936/=. The amount awarded for loss of dependency by the trial court was not excessive in the circumstances and the same is upheld.
19. On pain and suffering, the trial court awarded Ksh.20,000/= which was submitted by the Appellant. I don't think the Appellant has an issue with this award and I will therefore not interfere with it.
20. On loss of expectation of life, the Appellant proposed Ksh.80,000/= while the Respondent proposed Ksh.120,000/=. The trial court awarded Ksh.100,000/= and I agree with it. I am persuaded by the finding in the case of *Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another* (suing as the Legal Administrator of the estate of the late Robert Mwangi) [2019] eKLR referred to in *Odera v Adoyo & another* (supra) where Muchemi J. stated: -

“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”.

21. The trial court also awarded Ksh.187,170/= in special damages. The court relied on the case of *Capital Fish Kenya Limited v The Kenya Power & Lightening Company Limited* (2016) eKLR and proceeded to award the said amount which was proved by receipts for mortuary and burial expenses. I will not disturb this award.
22. On the question of double award under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA). I agree with the Respondent that the LRA covers non-pecuniary losses experienced by the deceased's estate, such as pain and suffering, while the FAA deals with the financial impact on dependents due to the death. So, claiming under both Acts doesn't duplicate compensation since they address distinct losses.

See *Crown Bus Services Ltd & others vs Jamila Nvongesa* (supra) where justice Edward M. Muriithi referenced KBT HCCA No. 1 of 2018, (Formerly Nakuru HCCA No. 147 of 2015) *David Kenei Julius Cheretei v. Zipporah Chepkonga* (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii-Deceased), affirming that there is no requirement for deduction of the one award under *Law Reform Act* from the other under the *Fatal Accidents Act* as follows:

“6. In *Hellen Wanguru Waweru* (Suing as the legal representative of Peter Waweru Mwenga (deceased) v. *Kiarie Shoes Stores Limited* (2015) eKLR, the Court of Appeal (Waki, Nambuye & Kiage JJA.) explained the principle of double compensation under the *Law Reform Act* and the *Fatal Accidents Act* as follows:

23. Turning to the multiplier on the farming income, both courts used a multiplier of 1 year which coincided with the retirement of the deceased from salaried employment. Hellen however argues, and we think she is right, that the retirement of the deceased from his teaching job at 55 did not mean he would have retired from farming too. If anything, he would have been more useful to the dependants, as he would have had more time to concentrate on the farming business. In the premises a multiplier of 1 is manifestly on the low side and we revise it to 5 years.
24. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation



since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.

25. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.
26. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-
- “ 6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.
  7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.
  8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”
26. Considering the above comprehensive analysis on assessment of damages under the Fatal Accidents Act and the Law Reform Act, I find that the trial Magistrate rightly assessed and awarded damages under the two Acts and the same did not amount to double compensation. I have no reason to interfere with the same.
27. Accordingly, I find that the appeal lacks merit and is dismissed with costs.

**DATED, SIGNED & DELIVERED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2024**

**NOEL I. ADAGI**

**JUDGE**

