



**Owino & another v Kengen Company Limited (Civil Appeal E193 of 2023)  
[2024] KEHC 10631 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E193 OF 2023  
RE ABURILI, J  
SEPTEMBER 12, 2024**

**BETWEEN**

**BONFACEODHIAMBO OWINO ..... 1<sup>ST</sup> APPELLANT**

**MARGARET AWINO OWINO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KENGEN COMPANY LIMITED ..... RESPONDENT**

*(An appeal arising out of the Judgment & Decree of the Honourable  
M.I. Shimenga in the Chief Magistrate's Court at Kisumu delivered  
on the 19th October 2023 in Kisumu CMCC No. 308 of 2019)*

**JUDGMENT**

**Introduction**

1. The appellants instituted suit vide a plaint dated 10<sup>th</sup> June 2019 in which they sought general damages under the *Law Reform Act* and *Fatal Accident Act* as well as special damages, interest on the same and costs of the suit.
2. The appellants' case was that on or about the 26<sup>th</sup> July 2017, the deceased, a lawful walking pedestrian, who was walking along the Kisumu –Busia road when at Yala township area the respondent's driver so negligently and recklessly drove, managed and or controlled motor vehicle registration number KBL 869G Mitsubishi Lancer that he lost control of the said vehicle thereby causing an accident that resulted in the deceased's fatal injuries.
3. The respondent entered appearance and filed its defence dated 14<sup>th</sup> November 2021 in which it denied being the appellants' claims putting them to strict proof and instead blamed the deceased for negligence leading up to the alleged accident.



4. The respondent never took part in the trial despite notice of the hearing. In her judgement, the trial magistrate found that based on the evidence on record, which was not controverted, the respondent was 100% liable for causing the accident.
5. The trial magistrate awarded the appellants quantum of damages as follows: Pain & Suffering – Kshs. 10,000, Loss of expectation of life – Kshs. 100,000 and Loss of dependency – Kshs. 438,188 bringing it to a total of Kshs. 548,188. The trial magistrate however deducted the award for loss of expectation of life giving the appellants a total award of Kshs. 448,188 as the appellants failed to prove special damages. The trial magistrate further awarded the appellants interest on the award at court rates from the date of judgement till payment in full.
6. Aggrieved by the said decision, the appellants filed a memorandum of appeal dated 3<sup>rd</sup> November 2023 on the quantum awarded by the trial court raising the following grounds of appeal;
  - a. That the learned trial magistrate erred in law and fact in making an award in respect of pain and suffering thereby arriving at an erroneously low award.
  - b. That the learned trial magistrate erred in law and in fact in making awards for loss of expectation of life and loss of dependency thereby arriving at an erroneously low award.
  - c. That the learned trial magistrate erred in law and in fact in failing to make an award for special damages.
  - d. That the learned trial magistrate erred in law and in fact in making a deduction of the award under loss of expectation of life from the total sum of general and special damages awarded.
  - e. That the learned trial magistrate erred in law and fact in failing to consider the appellants' submissions thereby arriving at an erroneous and low award in respect of general and special damages.
  - f. That the learned trial magistrate erred in law and fact in failing to completely evaluate the appellants' evidence on general damages and special damages.
  - g. That the award by the learned trial magistrate on general and special damages goes against established and prevailing judicial precedents.
7. The appeal was canvassed by way of written submissions however the respondent did not take part in the suit nor file any submissions.

### **The Appellant's Submissions**

8. The appellant submitted that on the award under pain and suffering, had the trial magistrate appreciated the evidence and submissions presented then she would have made a higher award under this head. It was submitted that the award of Kshs. 10,000 which was too low and that the same should be enhanced to Kshs. 50,000. Reliance was placed on the case of *Acceler Global Logistics v Gladys Nasambu Waswa & Another* [2020] eKLR and that of *Sukari Industries Limited v Clyde Machimbo Juma*, Homa Bay HCCA No. 68 of 2015 [2016] eKLR where an award of Kshs. 50,000 was awarded under this head.
9. It was submitted that the trial court erred in its award of loss of expectation of life of Kshs. 100,000 and that the same ought to be enhanced to Kshs. 300,000 as was upheld in the case of *Letayoro & Another v JK (Suing as the Legal Representative of the Estate of the CK(Deceased))* Civil Appeal 13 of 2020 [2022] KEHC 10309 (KLR) (28 June 2022) (Judgement) as well as the case of *Daniel Kuria Nganga v Nairobi City Council* [2013] eKLR where Kshs. 300,000 was awarded on the same head.



10. On loss of dependency it was submitted that in the absence of the parameters necessary to adopt the multiplier approach, a global award would have been the best in the circumstances as was held in the case of *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR.
11. It was submitted that in adopting the multiplier approach and basing it on salary that was not supported by evidence on record, the trial court failed to take cognisance of the fact that the deceased was 78 years at the time of his death, well beyond retirement age thus rendering the multiplier approach unsuitable and had no anchor in law.
12. The appellants thus submitted that an award of Kshs. 700,000 ought to have been made under this award. Reliance was placed on the case of *Samuel Nyoro & Another v Joyce Wanjiku & Another (Suing as legal representative of the Estate of Kamau Muturi [Deceased])* 2020 eKLR where a global award of Kshs. 600,000 was upheld where the deceased was 74 years old.
13. It was submitted that the trial court erred in law in deducting the award of loss of expectation of life from the sum total of awards made under pain and suffering as was held by the Court of Appeal in the cases of *Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another v Lubia & Another* (No. 2) [1978] KLR 30 and *Hellen Waruguru Waweru (Suing as the Legal representative of Pete Waweru Mwenja [Deceased]) v Kiarie Shoe Stores Limited* [2015] eKLR.
14. On special damages it was submitted that the same was specifically pleaded and proved and that the trial court erroneously disregarded the foregoing.

### **Analysis and Determination**

15. 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 *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-
 

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-
 

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
17. In the instant case, the liability is not contested. The only issue for consideration is whether the award of general and special damages was inordinately low as to warrant this court’s interference.



18. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730, Kneller J.A. stated:

“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. See *Ilango v Manyoka* [1967] E.A. 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited v Kalovoto* [1970] E.A. 414, 418, 419. This court follows the same principles.”

19. The principles espoused in the above Court of Appeal decision have stood the test of time and continue to be applied by all appellate courts.
20. In the case of *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

## **Damages Under the Law Reforms Act**

### **Pain and Suffering**

21. Damages for pain and suffering are recoverable by the estate of a deceased person as compensation for the pain suffered before death which results from an accident. In *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR, Majanja J. observed thus:

“...it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.”

22. In the instant case, PW2 was the only eye witness to the accident. He adopted his testimony filed in court on the 14th September 2021. PW2 testified that the deceased was hit by a car that was speeding. From his testimony, it was evident that the deceased died instantly. PW1 the deceased’s wife also testified that she received information that the deceased had been hit by a car and died on the spot.
23. Given that the sums awardable under this head have ranged from Kshs 10,000/- to Kshs 100,000/- from past precedents, the sum of Kshs 10,000/- awarded by the trial court is not inordinately low or unreasonable as to warrant interference. See *Sukari Industries Limited* supra. I therefore decline to upset it.



## Loss of Expectation of Life

24. The conventional award for loss of expectation of life is Kshs 100,000/=, see the case of *Hyder Nibhenya Musili & another v China Wu Yi Limited & another* [2017] eKLR. The trial magistrate's award of Kshs 100,000/- is therefore not so unreasonable as to present an erroneously low estimate. It is thus upheld.

## Damages Under the Fatal Accidents Act

### Loss of dependency

25. The evidence presented before the trial court that was not controverted was that the deceased was aged 78 years old, married and had been survived by 3 sons and 1 daughter, a total of 4 children. PW1 further testified that the deceased was a farmer who used to provide for his family and even pay school fees for his children. There was no evidence of the deceased's earnings produced before court.
26. The trial court in its calculation of quantum under this head used the multiplier approach being guided by the minimum wage of an unskilled employee as an employee. In their submissions, the appellants faulted the trial courts use of the multiplier approach on the grounds that the same was not based on any evidence presented before court.
27. In *Mwanzia v Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa v Gichumu Githenji* Nku Hcca No.15 of 2003 [2007] eKLR, the court made the following observation;
- “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 the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the 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.”
28. In the same breath, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR, held as follows-
- “It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”
29. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased)* [2020] eKLR where the court was dealing with a similar issue, it stated:
- “(23). In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.



[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

30. From the above, it is clear, therefore, that the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the court, but of course, as dictated by the circumstances of the case.
31. In the present case, it is my opinion that the circumstances of the case warranted that the trial magistrate use the global approach in calculating award for loss of dependency. This is because there was no evidence of specific earnings by the deceased, even from his alleged farming activities which were not stated to be on commercial or just subsistence farming. The trial court thus erred in law and fact in using the multiplier method in arriving at loss of dependency. Taking into consideration the aforementioned, I am satisfied that this is a case where it is more appropriate to adopt the global award approach and I thus proceed to do so.
32. The appellants proposed a global award of Kshs. 700,000 for loss of dependency.
33. In the case of *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 the appellate court awarded the deceased's representative Kshs. 400,000 for loss of dependency where the deceased was 64 years old.
34. In the case of *Samuel Nyoro & another v Joyce Wanjiku Kamau & another (Suing as Legal Representatives of Estate of Kamau Muturi (Deceased))* [2020] eKLR where the deceased was 78 years old, the appellate court upheld the lower court's award of Kshs. 600,000 for loss of dependency.
35. Accordingly, taking into consideration the circumstances of this case as well as acknowledging the recent awards made in the *Samuel Nyoro Case (supra)* and the effects of inflation, it is my view that a global award of Kshs. 650,000 is a reasonable one. I award the same under this head.

**Whether the award for loss of dependency ought to be reduced by the amount awarded for loss of expectation of life.**

36. The trial court in its final calculation for the award of quantum deducted the award for loss of dependency ought to be reduced by the amount awarded for loss of expectation of life. The appellants have argued that the same was an error of fact and law on the part of the trial magistrate.
37. In the case of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR it was held *inter alia* that there is no legal requirement for the court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*.
38. In my view, the issue of double compensation does not arise because the two statutes independently provide for award of damages. This was the view taken by the Court of Appeal in *Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another (suing as Administrators of the Estate of Philip Musyoka Muthoka* [2020] eKLR.
39. accordingly, I find and hold that the deduction was unjustified. I set it aside.



**Special damages**

- 40. The trial court declined to grant the appellants special damages on the grounds that the same had not been proven and this was faulted by the appellant who submitted that they specifically pleaded and provided receipts of the special damages claimed.
- 41. It is trite that special damages have to be specifically pleaded and proven. In the instant case, special damages were specifically pleaded in paragraph 10 of the plaint dated 10<sup>th</sup> June 2019 and proven through the production of receipts. I shall thus award the appellants special damages of Kshs. 44,200.
- 42. The upshot of all the above is that this appeal is partially successful to the extent that the trial court’s award vide its judgement dated 19<sup>th</sup> October 2023 is set aside and substituted with the following awards on quantum of damages under each head:

Loss of dependency .....	Kshs. 650,000
Pain & Suffering .....	Kshs. 10,000
Loss of expectation of life .....	..Kshs. 100,000
Proved Special Damages.....	Kshs. 44,200

Total Kshs. 804,200

- 43. Each parry shall bear their own costs of the appeal as the respondent did not contest the appeal and the appeal is only partially successful.
- 44. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

