



**Barasa v Naliaka & another (Suing as the Legal Representatives
of the Estate of Robert Wangila Barasa - Deceased) (Civil Appeal
107 of 2022) [2024] KEHC 15915 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 107 OF 2022
REA OUGO, J
OCTOBER 22, 2024**

BETWEEN

ALICE BARASA APPELLANT

AND

LILIAN SALOME NALIKA 1ST RESPONDENT

CHRISTINE NASIMIYU MUTORU 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ROBERT
WANGILA BARASA - DECEASED**

*(Being an appeal from the judgment delivered by C.A.S. MUTAI
(SPM) on 5th August 2022 in Bungoma CC No 100 of 2016)*

JUDGMENT

1. The respondents are administrators in the estate of Robert Wangila Barasa (deceased) who died in a road traffic accident involving motorcycle registration number KMCY 454M and the appellant's vehicle KBF 596W. The trial magistrate entered judgment in the ratio of 80:20 in favour of the respondents and made the following award on damages:

- a. Pain and suffering Kshs 35,000/-
- b. Loss of dependency Kshs 2,000,000/-
- c. Special damages Kshs 130,000/-

Subtotal Kshs 2,171,000/-

Less Discount Kshs 50,000/-



Less 20% contribution Kshs 424,310

Balance Kshs 1,697,240/-

2. The respondents were also awarded the costs and interest of the suit.
3. The appellant is dissatisfied with the finding of the trial magistrate and has filed a memorandum of appeal on the following grounds:
 - I. The learned trial magistrate erred in law and in fact by entering judgment against the appellant when the evidence before the trial court showed that the offensive motor vehicle was in the hands of party not enjoined in the suit.
 - II. That in holding the appellant liable for acts of omission and/or commission of an undisclosed driver/agent, and in the absence of pleading vicarious liability, the trial court erred in attaching negligence to the appellant.
 - III. That the learned trial magistrate erred in law and in fact in awarding a global sum of Kshs 2,000,000/- for loss of dependency, which is inordinately high and without any explanation in law and fact of law how the assessment was arrived at.
 - IV. The learned magistrate erred in law and in fact by applying wrong principles of law while assessing damages under the various heads and so doing arrived at an erroneous decision which is manifestly high and excessive in the circumstances.
 - V. The learned magistrate erred in fact and in law by failing to consider the appellant's submissions and judicial authorities on pleadings thereby arriving at an erroneous decision on liability.
 - VI. In arriving at his decision, the trial magistrate did so in a speculative and cursory manner not guided by law or any set of legal principles and failed to exercise his discretion within the applicable principles of law and the failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
4. The appellant seeks that the judgment of the subordinate court be set aside and the suit dismissed. In the alternative, she urged this court to re-assess the quantum under the various heads on the loss of expectation of life, pain and suffering and loss of dependency and reduce the awards under the set principles of the law.
5. The appeal was canvassed by way of written submissions and both parties have filed their respective submissions
6. The appellant submits that the sole issue in the appeal is the award of damages. She submits that the respondent was required to prove the deceased's age, the nature of the deceased's business and health. There was no evidence of the nature of the deceased's business. They relied on the case of *Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita & Another*, Kisii Civil Appeal No 68 of 2005 (2011) eKLR where the court held that in the absence of proof of income, the trial magistrate ought to have reverted to Regulation of Wages (General) (Amendment) Order 2005.
7. The appellant submits that the deceased died along Lugulu – Kwa Dina junction at Park Villa Hotel in Webuye and was buried at Marakaru. There was no evidence showing the deceased was a municipality resident and the applicable monthly income is Kshs 5,218/- based on the Regulation of Wages (General) Amendment Order 2013. They submit that the award on the loss of dependency ought to have reduced significantly to Kshs 1,043,600/-.



8. The respondent submitted that the multiplier approach is not the only way of assessing damages and cited the case of *Mwanzia v Ngalali Mutua Kenya Bus Ltd* and quoted in *Albert Odawa v Gichumu Githenji NKU HCCA NO 15 OF 2003 92007*) KLR. They urged the court not to interfere with the findings of the trial court as it was based on the correct interpretation and applicable law therefore the award of Kshs 2,000,000/- was reasonable. The deceased was a young person with two wives and children and the evidence shows that they depended on him.

Analysis And Determination

9. The primary issue the appeal raises is whether the deceased's income was known or ascertainable. In a nutshell, the appeal challenges the award of loss of dependency. In an appeal against the 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.”

10. According to the plaint, the deceased was aged 30 years old and a businessman. The deceased's second wife Lilian Salome Naliaka (Pw3) testified that she depended on the deceased as he was the breadwinner. However, she did not testify as to the deceased's business and the nature of his business. In this case, the income of the deceased was unknown. In *Mwanzia vs 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.”

11. Similarly, in *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the court 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.”

12. In this case the trial magistrate cannot be faulted for making a global award. The respondent presented evidence that the deceased had two wives and two children who depended on him. According to the



death certificate he was 30 years at the time of his death. In *Ainu Shamsi Hauliers Limited v Moses Sakwa & another* (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) [2021] eKLR, the court on appeal upheld an award of Kshs. 2,000,000/= for loss of dependency where the deceased was 40 years old and had left behind a wife and two young children. Therefore, given the circumstances of this case, I do not find that the award of Kshs 2,000,000/- as the global award was excessive.

13. The net result is that the appeal is without merit and is hereby dismissed. The respondent shall have $\frac{1}{2}$ the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF OCTOBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Mr Onkangi h/b Mr. Alubala -For the Respondent

Kizito - C/A

