



**Mbare v Olero (Suing as the Legal Representative on behalf of the
Estate of Lydia Awino Otieno (Deceased)) (Civil Appeal E055 of 2022)
[2024] KEHC 12823 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E055 OF 2022
DK KEMEL, J
OCTOBER 25, 2024**

BETWEEN

FREDRICK OCHIENG MBARE APPELLANT

AND

JOSEPH OTIENO OLERO RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE ON BEHALF OF THE ESTATE OF
LYDIA AWINO OTIENO (DECEASED)**

*(Being an Appeal from the Judgment and decree of the Hon. L. Sarapai,
SRM, Ukwala in Civil Suit No. 63 of 2021 delivered on 17/11/2022)*

JUDGMENT

1. The Respondent herein Joseph Otieno Olero, suing as legal representative of the estate of Lydia Awino Otieno (deceased), sued the two appellants Fredrick Otieno Mbare and Rai Cement Limited before the Lower Court in the above case. The Respondent's claim was for General Damages under both the *Fatal Accident's Act*, and the *Law Reform Act*, Special damages, costs of the suit and interests. The defendants duly filed a joint statement of defence. The case progressed to hearing and in the judgment of the trial court, delivered on 17/11/2022, the court entered judgment in favour of the plaintiff (Respondent herein) against the Defendants in the following terms: -
 - a. Under the *Law Reform Act*: -
 - i. Kshs 20,000/= for pain and suffering
 - ii. Kshs. 150,000/= for loss of expectation of life.
 - b. Under Fatal Accidents' Act



Dependency ration 2/3
Multiplier – 26 years
Multiplicand – 12,522.70/=

$$\text{Total} = \frac{2}{3} \times 26 \times 12522.70 \times 12$$
$$= 2,604,721.60/=$$

The court also awarded the Respondent costs of the suit together with interests at court rates from the date of the judgment.

2. The appellants have appealed to this court against the said judgment. In the memorandum of appeal dated 13/12/2022, the appellants have raised the following grounds of appeal: -
 1. That the learned trial magistrate grossly misdirected herself treating the evidence and submissions on quantum superficially and consequently coming to a wrong conclusion on the same.
 2. That the learned trial magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
 3. That the learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of the law applicable.
 4. That the learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-a-vis the Respondents claim.
 5. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

The appellant has prayed that this appeal be allowed with costs and that the judgment of the learned trial magistrate be set aside with costs. The Respondent has opposed this appeal.

3. This matter is before this court as a first appellate court. As directed in *Selle v Associated Motor Boat Co. & others*(1968) EA 123, the duty of the first appellate court is;

“...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 witnesses and should make due allowance in this respect.”

This appeal is on a matter of law i.e. quantum of damages. However, it is important that this court considers the evidence that was laid before the trial court. From the record of proceedings, only the Respondent, Joseph Otieno Olero (Plaintiff) gave evidence. This witness relied on his statement recorded on 1/9/2021. I have perused the said statement. In the said statement, it was the evidence of the Respondent that the deceased was his wife. That the deceased was a fish monger earning an average of Kshs20,000/= per month and used to support her family of four children. From the certificate of death annexed, the deceased died at the age of 28 years. The Appellants did not call any witness.

The record also shows that on 8/9/2022, the parties recorded a consent apportioning liability at 80:20 in favour of the Respondent as against the Appellants’ jointly and severally.



4. This appeal has been canvassed by way of written submissions. On the appellants' side, it was submitted that damages should represent fair compensation but should not be excessive i.e. *Osman Mohamed & another v Saluro Bundit Mohamed*, Civil Appeal No 30 of 1991 and *Millicent Atieno Ochuonyo v Katola Richard* (2015) eKLR.

Regarding the award under the *Law Reform Act*, on the limb of pain and suffering it was noted that deceased died on the spot and that a conventional figure of Kshs.10,000/= be awarded on this head (*kakiki v Abdo & 2 others* (1990) KLR, and *In the Estate of Susan Mboga Mandu (Deceased)* 2011 eKLR). It was submitted that the sum of Ksh20,000/= awarded be set aside.

On loss of expectation of life, the appellants urged for Kshs.80, 000/= based on *Coast Bus Mombasa Ltd v Susan Mboga Mandu*, Kisumu HCCA No 42/2010.

Under the *Fatal Accidents Act*, it was noted that deceased was 28 years old but that the claim of Kshs 20,000 as monthly income was not proved. That in the circumstances, the minimum wages for labourers should apply. That the Regulation of Wages (General) Amendment Order 2018 provides for a minimum of Kshs7,240.95/=.

Counsel relied on *Vincent Kipkorir Tanui v Mugogosiek Tea Factory Co. Ltd* (2018) eKLR and *Abdalla Rubeiya Hemed v Kajumwa Muvrya & another*, Mombasa Civil Appeal No 53 of 2013.

The appellant proposed a multiplier of 20 years in view of the statutory retirement age of 60 years. Dependency was proposed to be at 2/3.

Thus, the Appellant proposed as follows: -

$7,240.95 \times 12 \text{ months} \times 2/3 \times 20 \text{ years} = 1,158,552/=$.

And that the award under the *Law Reform act* be subtracted from the award under *Fatal accidents Act* to avoid double compensation.

Special damages were agreed at Kshs.115,900/= as proved.

5. The Respondent, on the other hand, submitted that the general principles on appeal against an award of damages are: -
- i. That assessment of damages is an exercise in judicial discretion by the trial court.
 - ii. That an appellate court is not justified in substituting a figure of its own simply because it would have awarded a different figure if it had tried the case.
 - iii. That an appellate court can only interfere with an award of damages made by the trial court if it is satisfied that the trial court applied the wrong principles or misapprehended the law.
 - iv. That the award is so inordinately high or low as to represent a wrong estimate of the damages sustained *Henry Ngila v H/A Machakos* HCCA No 81 of 2019.

It was submitted that the award of pain and suffering of Kshs 20,000/= was not inordinate (*West Kenya Sugar Co. Ltd v Philip Sumba*, Kakamega HCCA 7 (2017), *Sukari Industries Ltd v Clyde Machimbo Juma*, Homa Bay HCCA 68/2015 and *Joseph Njoroge Karanja v John Okumu SoitA & another.*, Eldoret HCCA 172/2019).

On loss of expectation of life, it was submitted that the award of Kshs.150,000/= was conventional as the normal awards range between Kshs100,000/= and Kshs.200,000/=.

Regarding loss of dependency, it was noted that the dependency ratio of 2/3 is applicable. On the multiplier applicable, counsel relied on *Mercy Muturi v Robert Baraza & another* Nai, HCC 326/2011,



in which a multiplier of 35 years was applied for deceased who died at 20 years, and *Berly Beth Malowa Were v Kenya Ports Authority, Mombasa HCCC 246/2009* in which a multiplier of 31 was used for a 29 year old man. And that the multiplier of 26 used was within range.

On the issue of the multiplicand, it was conceded that the minimum wage guidelines is applicable since there was no evidence of real income. That since the deceased died on 6/10/2020, the applicable guidelines were in [Legal Notice No 2 of 2019](#) dated 19/12/2019 with minimum wages of Kshs.12,522.70/=

Special damages of Kshs.115,900/= was conceded. On double compensation, the Respondent maintained that the awards at both *Law Reform Act* and *Fatal accidents Act* are proper and not deductible *Henry Waruguru Waweru v Kiarie Shoe Stores Ltd, Nyeri Civil Appeal No 22/2014*. The Respondent urged that this appeal be dismissed.

6. I have considered the submissions made by the parties and also the authorities relied on. This appeal is basically on quantum of damages awarded. Counsel for the Respondent has referred this court to the case of *Henry Ngila v HK*. (Seen above on what to consider where this court to interfere with the award of the trial court. I am guided by the same authority and i find as follows: -

a. Damages Under the *Law Reform Act*.

i. Pain and suffering.

On this heading, it is noted that he deceased died on the spot. The sum awarded of Ksh 20,000/= is reasonable. I award it.

ii. Loss of Expectation of Life

Courts have awarded figures of between Ksh 100,000/= and Kshs 200,000/= on this heading (authorities cited). The sum awarded of Kshs. 150,000/= is reasonable in the circumstances. I award the same.

b. Damages Under the *FATAL ACCIDENTS ACT*

It is agreed by both sides that the deceased passed on at the age of 28 years. The plaintiff never showed any proof of her income. And the parties herein are agreed that in the circumstances, the minimum wage regulation at the material time would be appropriate to be applied. She died on 6/10/2020 and that the Respondents have proved that the applicable minimum wage were as contained in [Legal Notice No 2 of 2019](#) dated 19/12/2018 and which came into force on 1/5/2018. Apparently, before the trial court, the appellants had conceded that the applicable part was the one to cover municipalities and towns. It is not explained why the appellants have now changed to adopt wages for agricultural industry. Having conceded the same before the trial court, the appellants should not and cannot be heard to change positions as the principle of estoppel must kick in. I consequently find that the applicable regulations are as per [Legal Notice No 2 of 2019](#), covering municipalities and towns, which fix the deceased's wages at Ksh12,522.70/=.

The deceased was married with three young children who depended on her. On this heading therefore, i find as follows: -

i. Multiplier:

The deceased died at 28 years. She was in informal employment. I find a multiplier of 25 years to be reasonable and i award the same.

ii. Dependency ratio:



Parties are agreed on the conventional 2/3 dependency ratio. I adopt the same.

iii. Multiplicand

As already observed, Legal Notice No 2 of 2019 fixed the wages of the deceased at kshs.12,522.70. I find this proper and adopt the same.

In all, I award the Respondent damages on this heading as follows: -

$12,522 \times 12 \times \frac{2}{3} \times 25 = 2,504,400/=$.

c. Special Damages were assessed, proved and agreed at Kshs.115,900/=. I award the same.

In all, I award the Respondent and enter judgment against the appellants jointly and severally in the following terms: -

- a. Pain and suffering.....Kshs. 20,000/=
 - b. Loss of expectation of life.....Kshs. 150,000/=
 - c. Loss of Dependency.....Kshs.2,504,400/=
 - d. Special DamagesKshs. 115,900/=
- Total Kshs. 2,790,300/=
- Less 20% contribution Kshs. 558,060/=
- Grand Total Kshs. 2,232,240/=

7. The Respondents shall also get costs of the case and costs of this appeal and interests at court rates from the date of the judgment at the trial court. To that extent, the appellants' appeal lacks merit and is dismissed.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF OCTOBER, 2024.

D. KEMEI

JUDGE

In the presence of :

.....for Appellants

.....for Respondent

.....Court Assistant

