



**Osanya (Suing as the legal representative/administrator of the Estate of John Wanjala Wafula (Dcd) & another v West Kenya Sugar Co Ltd (Civil Appeal E75 of 2021) [2023] KEHC 2345 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E75 OF 2021  
DK KEMEL, J  
MARCH 22, 2023**

**BETWEEN**

**MOSES WAFULA OSANYA (SUING AS THE LEGAL REPRESENTATIVE/  
ADMINISTRATOR OF THE ESTATE OF JOHN WANJALA WAFULA  
(DCD) ..... 1<sup>ST</sup> APPELLANT**

**JANEPHER AKWIRI IKWAMONG (SUING AS THE LEGAL  
REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF JOHN WANJALA  
WAFULA (DCD) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WEST KENYA SUGAR CO LTD ..... RESPONDENT**

*(Being an Appeal against the judgement and decree of the Hon. Dennis Ogal Senior Resident Magistrate delivered on November 17, 2021 in Kimilili PMCC No 80 of 2020)*

**JUDGMENT**

**Background**

1. This appeal is against the award of quantum of damages by the trial Court in respect of an accident that occurred on May 25, 2018, where the deceased was a lawful passenger in motor vehicle registration number KBL 324 B Toyota Hiace Matatu along Kitale-Webuye Road at Maliki area when the Respondent's motor vehicle KTCB 190M/ZA 630 Mahindra was so negligently and without any due care was driven by the Respondent's agent and/or servant that it lost control and caused an accident in the which it collided with motor vehicle registration KBL 324 B Toyota Hiace Matatu and resulted in the deceased sustaining severe bodily injuries resulting to his instant death. The accident was attributed to the negligence of the Respondent, his agent and/or servant to which the defendant is vicariously liable.



2. On February 3, 2021, the parties recorded a consent order before the trial Court agreeing on liability at 80:20 in favour of the Appellants herein which the trial Court duly endorsed and proceeded to receive evidence on assessment of quantum of damages.
3. According to PW1, Moses Wafula Osanya, he told the trial Court that he was the father of the deceased and that the 2<sup>nd</sup> Appellant is his widow. It was his evidence that the deceased died and left one daughter and that he was employed at Nalondo Global Health Centre. According to him, the deceased used to earn Kshs 20,100/=. He produced in Court the following as his exhibits:
  - i. Receipt of mortuary fee-3,600/= (exhibit 8a)
  - ii. Discharge summary
  - iii. *Ad litem*- 45,000/= (exhibit 8c)
  - iv. Kshs 26,000/= for coffin-receipt (exhibit 8d)
  - v. Transport receipt for Kshs 15,000/=
4. He told the Court that the deceased used to send him Kshs 3,000/= per month and that he was 32 years at the time of his demise. The deceased was survived with a wife and a child. He prayed for the Court to grant him damages and costs.
5. On cross examination, he told the Court that the deceased died on May 25, 2018 and that he died on the spot. At the point of his demise, the deceased was of normal health and had a wife and a child. He told the Court that he had no document to prove his allegations and that he had no evidence that he was working at Global Health at the time of his demise and earning Kshs 20,000/=.
6. PW2 was Jennipher Akwiri who told the Court that she was married to the deceased for eight years and that she was currently not working. She produced in Court the birth certificate of the daughter of the deceased, Zipporah Nekesa, who was aged 10 years as exhibit 9. According to her, the deceased worked at Global Health in Nalondo Kitale and she produced in Court a letter from Global Home care dated July 1, 2019 which showed that he worked there as a nurse and that he used to earn Kshs 23,000/=. She told the Court that she had original documents that they still owed Kitale KMTC Kshs 32,000/= and that she prayed for costs and damages.
7. On cross-examination, she told the Court that she did not have a certificate of marriage and failed to produce any document to show that the deceased was a qualified nurse and that she did not produce the deceased's pay slip and a letter from the employer. It was her evidence that she did not witness the accident but was well aware that he died on the spot.
8. On re-examination, she told the Court that they did not marry in church.
9. PW2 was later recalled and she produced the deceased's KCSE certificate as exhibit 10; the leaving certificate as exhibit 11; the letter of employment as exhibit 12 and the certificate of nursing as exhibit 13. That was the close of the Appellants' case and subsequently, the Respondent proceeded to close its case.
10. The trial Court issued a judgment on quantum and which was as follows:

Pain and suffering Kshs 30,000/=

Loss of expectation of life Kshs 100,000/=

Loss of dependency Kshs 2,640,000/=



Special damages Kshs 90,500/=

Total Kshs 2,860,500/=

Less 20% Kshs 572,100/=

Amount payable Kshs 2,288,400/=

Costs on the above figures and interest at Court rates from the time of judgement.

11. Aggrieved by the judgment of the trial court, the appellant filed its memorandum of appeal dated December 15, 2021. The grounds are essentially that:
  - i. That the learned trial magistrate erred in law and fact in holding that the deceased was not a professional medical practitioner with a diploma in community nursing.
  - ii. That the learned trial magistrate erred in law and fact in holding that the deceased did not earn a salary of Kshs 20,000/= per month.
  - iii. That the learned trial magistrate erred in law and fact when it applied a salary pf Kshs 15,000/= which was not pleaded and/or submitted.
  - iv. That the learned trial magistrate erred in law and fact in applying a multiplier of 22 years for the deceased aged 32 years.
  - v. That the learned trial magistrate after considering the submission before him arrived at a wrong decision resulting in miscarriage of justice.
12. The appellant prayed for: the appeal be allowed; that the decision of the lower Court on earning and multiplier be set aside and/or vacated; that this Honourable Court do proceed to award and assess the earning and multiplier applicable and that the Appellants be awarded costs of the appeal.
13. Vide the directions of this Honourable Court dated July 26, 2022 the appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
14. The appellant through their submissions dated August 1, 2022 submitted that the Appellant's contention with the trial Court judgement is mainly on the award of earnings of Kshs 15,000/=yet it was not disputed that the deceased was a qualified community Nurse holding a diploma from Kenya Medical Training Institute in Kitale.
15. It was therefore submitted that the trial Court opting to rely on the Regulations of Wages award 2018 and awarding Kshs 15,000/= to a qualified professional was in error as the proper sum subject to the salary scale of a community nurse would have been Kshs 46,000/= per month. They urged this Court to set aside the award of earning and have the same substituted with Kshs 20,000/= per month.
16. It was submitted that as per the death certificate of the deceased, he died at the age of 32 years and with his profession he would have worked up-to the age of 60 years. He urged this Court to adopt a multiplier of 28 years.

### **Analysis and determination**

17. This is the first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am duty-bound to re-evaluate and reconsider the evidence adduced before the trial court in order to draw my own independent conclusions remembering that, unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due to allowance for that disadvantage.



See *Selle V Associated Motor Boat Company ltd* (1968) EA 123; *Williamson Diamond Ltd V Brown* (1970) EA 1.

18. In this appeal, it is clear from the appellants' submissions that the appellant is only challenging the quantum of damages to be specific under the head of loss of dependency. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate).”

19. It was therefore held by the same court in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

20. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

21. I have considered the evidence tendered before the trial Court, the learned trial magistrate's brief judgment, the grounds of appeal, the submissions filed by the parties and all the authorities cited.

22. This being an appeal challenging the trial magistrate's decision on quantum of damages under the multiplicand part only, it is important to set out the principles that guide an appellate Court in deciding whether or not to interfere with the damages awarded by the trial court. In the celebrated case of *Kemfro Africa Limited t/a Meru Express Services (1976) & Another V Lubia & Another* (No 2) (1985) eKLR, the Court of Appeal expressed itself as follows; -

“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 to be that; it must be



satisfied that either that 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...”.

23. In *Mariga V Musila* (1984) KLR 251 the same court also stated as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles...”.

24. It is the law in Kenya that general damages must be compensatory. When one looks at the impugned Judgment, it must be fair in the sense of what the claimant suffered. In my view whether at the trial Court or on appeal, claimants should not aspire to a perfect compensation. They should take what has reasonably been found by the court as a fair compensation since the said award cannot by any chance replace a damaged part of a human body but that the same suffices as the tortfeasor’s earnest response (sorry for the accident).
25. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in the assessment of earnings and the multiplier under the loss of dependency awarded to the Appellants in view of the evidence on record. I will start with the damages awarded under the *Law Reform Act*. It is important to point out at this juncture that general damages under the *Law Reform Act* are awarded for the benefit of the deceased’s estate in two categories only namely for pain and suffering and secondly, for loss of expectation of life.
26. At this stage, I wish to point out in passing that only dependants recognized under the *Fatal Accidents Act* are supposed to benefit from damages awarded for loss of dependency. Section 4(1) of the *Fatal Accidents Act* defines dependants as the wife, husband, parent and child of the deceased person.
27. I do stand guided by the principle that there is no golden rule in the assessment of damages in respect of a deceased. The heads, global or mixed approaches have been applied in the superior Courts. What is beyond doubt is that irrespective of the age of a deceased, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents.
28. Under the heading of pain and suffering, the trial Court held that the deceased died on the spot and made the award of Kshs 30,000/= and relied on the case of *Lilian Muthoni Kinyua and others vs Julius N Kinuthia and 2 others*. I do note that the Appellants had no contention with this award. I, therefore, uphold the award by the trial magistrate.
29. Under the heading of loss of expectation of life, it was held that the Courts have been awarding conventional figures of between 10,000/= and Kshs. 100,000/=. Relying on the case of *Chabhadiya Enterprises Ltd & Another vs Sarah Alusa Mwachi (suing as the legal administrator and personal representative of the estate of the late Faiz Musa (Deceased))* (2018) eKLR. I do note that the appellant had no contention with this award. I, therefore, uphold the award by the trial magistrate of Kshs. 100,000/= under this head.
30. Under the heading of loss of dependency, the trial Court held that a dependency ration of 2/3 was appropriate. Taking into account that PW2 testified that she was married to the deceased and that they were blessed with one issue age 10 years and a birth certificate was produced to that effect. PW1 told the Court that the deceased used to help assist him financially and there was evidence that the deceased was the sole bread winner for the family. I therefore uphold the Court’s dependency ratio of 2/3. On the



multiplier, the trial Court adopted 22 years and was guided by the decision of Nancy Marigu Gabriel (suing as the legal representative of the estate of Linus Njeru (deceased) vs David Kimani (2015) eKLR.

31. On the multiplier, the Appellants submitted that a multiplier of 28 years was appropriate in this context. The deceased aged 32 years could have worked under Government Regulations up-to 60 years, a difference of 28 years. Bearing in mind the vicissitudes of life to potentially curtail such working period a multiplier of 25 years would be reasonable.
32. On the multiplicand, the trial Court considering the letter of employment of the deceased to guide it on the earning component further noted that the same was gross pay that ought to be subjected to statutory deductions thus the necessity of a payslip to ascertain the deceased net pay. The Trial Court relying on the case of Oyugi Judith & Another vs Fredrick Odhiambo Ongongo & 3 others (2014) eKLR opted to rely on the Regulations of Minimum Wages General Amendment Order 2018 where a general skilled labourer earns Kshs. 13,000/= . Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on his dependants. Due to the lack of the payslips to guide the trial Court on the net income aspect and in the absence of a letter confirming employment and wages, the Court would still be entitled to adopt, without proof pursuant to section 60 of Evidence Act, under the statutory minimum wage guidelines, the minimum wage for the year. In this particular appeal there is a letter confirming employment and wages, and the same was a consolidated pay of Kshs 20,000/= . I duly note that the Respondent and even the Court did not cross-examine the Appellants on this document as produced in Court and thus the trial Court erred in applying the 15, 000/= earnings award without certainty of the same, in accordance with the principles of Mbogo v Shah (1968) EA 93 which would entitle this Court to interfere as follows:

“ A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

33. In the premises the award for loss of dependency ought to have been as follows:  
Kshs  $20,000 \times 25 \times 2/3 \times 12 = 4,000,000$ .
34. On special damages, it is trite law that they should be specifically pleaded and strictly proved. The Appellants claimed a sum of Kshs 145,600/= but only Kshs 90, 500/= was proved vide attached receipts. As regards to the other expenses, though alluded to in the plaint, there was no specific plea for what was spent. The same was not specifically pleaded and proved as required by law. I do note that the appellant had no contention with this ward. I, therefore, uphold the award by the trial magistrate.
35. In the premises the total award should be as follows:
  - (1) Pain and Suffering.....Kshs 30,000.00
  - (2) Loss of Expectation of Life..... Kshs 100,000.00
  - (3) Loss of Dependency.....Kshs 4,000,000.00
  - (4) Special damages.....Kshs 90, 500.00
  - Sub-total.....Kshs 4,220,500.00
  - (5) Less 20% contribution..... Kshs. 844,100.00



Net Damages.....Kshs.3, 376,400.00

36. Accordingly, the appellants' appeal herein on quantum of damages succeeds and is allowed in the terms proposed. Each party shall bear their own costs of this appeal while the Appellants shall have full costs plus interest on the awards from the date of judgement in the lower court.

37 It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 22<sup>ND</sup> DAY OF MARCH, 2023**

**D KEMEI**

**JUDGE**

**In the presence of:**

Ogutu for Appellants

No appearance Onkangi for Respondent

**Kizito - Court Assistant**

