



Waweru (Suing as the legal representative & administrator of the Estate of Brian Waweru Mwaura (Deceased) v Bonfide Clearing & Forwarding Co Ltd & another (Civil Suit 140 of 2015) [2023] KEHC 17308 (KLR) (Civ) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 140 OF 2015

CW MEOLI, J

MAY 4, 2023

BETWEEN

**SAMUEL MWAURA WAWERU (SUING AS THE LEGAL REPRESENTATIVE
& ADMINISTRATOR OF THE ESTATE OF BRIAN WAWERU MWAURA
(DECEASED) PLAINTIFF**

AND

BONFIDE CLEARING & FORWARDING CO LTD 1ST DEFENDANT

DAVID LAWRENCE KIGERA 2ND DEFENDANT

JUDGMENT

1. Samuel Mwaura Waweru, (hereafter the Plaintiff) brought this suit in his capacity as the legal representative of the estate of Brian Waweru Mwaura, (hereafter the Deceased). Bonfide Clearing & Forwarding Co. Ltd and David Lawrence Kigera (hereafter the 1st & 2nd Defendant(s) were named as Defendants. The suit arose from a road traffic accident that occurred on 12.03.2012 in which the Deceased sustained fatal injuries. The claim was for damages under the [Law Reform Act](#) and the [Fatal Accidents Act](#).
2. It was averred that at all material times, the 1st Defendant was the registered owner of motor vehicle registration number KBA 111E and which at the material time was being driven by the 2nd Defendant as the owner's employee, servant and or agent. That on the date of the accident the Deceased was a lawful passenger in motor vehicle KAH 500Y travelling along James Gichuru Road, Nairobi; that the 2nd Defendant so carelessly, negligently and or recklessly drove managed and or controlled the 1st Defendant's motor vehicle registration number KBA 111E that he permitted or caused a head on



- collusion with the motor vehicle KAH 500Y ; and that the accident resulted in fatal injuries to the Deceased.
3. On 21.05.2015 the Defendants filed a joint statement of defence denying the key averments in the plaint and liability and negligence on the part of the Deceased and driver of motor vehicle KAH 500Y as the cause of the accident. The Defendants thereafter instituted Third Party proceedings against Ms. Otieno Gladwell being the registered owner of motor vehicle KAH 500Y, claiming indemnity and or contribution pleading that the negligence of the driver of her vehicle's driver caused its violent collision with motor vehicle registration number KBA 111E.
 4. The Third Party on her part filed a statement of defence on 09.09.2015 equally denying the key averments in the plaint and liability. She too averred that the accident was wholly or substantially contributed to by the negligence of the Plaintiff 's and 1st Defendant's drivers, servants and or agents. The Plaintiff thereafter filed replies to both the Defendants and Third-Party statements of defence denying the key averments.
 5. Liability was determined in the test suit appointed in respect of other related causes whereas special damages in the instant suit were equally agreed upon by consent. By consent of the parties the question of general damages was canvassed by way of written submissions.
 6. The Plaintiff's advocate cited the decisions in *Ainu Shamsi Hauliers Limited v Moses Sakwa & Another (suing as the Administrators of the estate of Ben Siguda Okach (deceased))* [2021] eKLR, *Hyder Nthenya Musili & Another v China Wu Yi Ltd & Another* [2017] eKLR, *Joseph Muthuri v Nicholas Kinoti Kibera* [2022] eKLR and *Mercy Muriuki & Another v Samuel Mwangi & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR in urging the court to award Kshs. 300,000/- for loss of expectation of life and Kshs. 400,000/- pain and suffering. Pointing out that the Deceased succumbed to his injuries several days after the accident.
 7. Under the *Fatal Accidents Act*, counsel anchored his submissions on several decisions. Including *Grace Kanini v Kenya Bus Services Nairobi* HCCC No. 4708 of 1989 as cited in *David Mwaniki Waitibera & Another v Jeremiah Mwikali Moto* [2020] eKLR and *Peter Kibogoro Wanjobi v Christine Wakuthi Muriuki & Another* [2009] eKLR regarding the applicable principles. He urged the court to adopt a multiplier of 44 years, citing *J.O.O & 2 Others v Praxedes P. Mandu Okutoyi & 2 Others* [2018] eKLR, *Kenya Airways Limited v Kenya Airline Pilots Association* [2017] eKLR, *Lillian Osundwa & Another (suing as the administrator of the estate of James Obinda Itindi (Deceased)) v Flex Air Cargo Limited* [2017] eKLR and *Sammy Kuria Ndungi v Ruth Kamene Kilonzo & Another* [2020] eKLR. He pointed out that the Deceased at the time of his untimely demise was aged 21 years and about to complete his training as a licensed private pilot, was in good health and would have lived a full life until the retirement age of 65 years.
 8. Submitting on the applicable earnings, counsel cited the decisions in *Kenya Airways Limited v Kenya Airline Pilots Association* [2017] eKLR, *Leonard Ochar Otieno v Mathews Mwanza Wanga (suing as the administrator of the estate of Kennedy Owino Wanga (Deceased))* [2020] eKLR and *Joshua Mungania & Another v Gregory Omondi Angoya* [2018] eKLR to urge the court to base the award on Kshs. 1,200,000/- as the monthly earnings of the deceased. And further a dependency ratio of ½ as the deceased was unmarried. In summation, the court was urged to make a total award of Kshs. 316,800,000/- calculated as follows Kshs. 1,200,000/- x 12 x 44 x 1/2. Special damages were agreed at Kshs. 600,032/-. Cumulatively, the court was urged to award Kshs. 317,500,032/- with costs of the suit.
 9. Counsel for the Defendants on his part supported his submissions on the decision in *Wangai Thairu v H. Ezekiel Barngetuny & Another* HCCC No. 1638 of 1988 as cited in *Kenya Wildlife Services v*



Geoffrey Gichuri Mwaura [2018] eKLR to reiterate the principles applicable in assessment of general damages in fatal accident claims. In response to the Plaintiff submissions under the Fatal Accidents Act, counsel called to aid the dicta in Mwanzia v Ngalai Mutua & Kenya Bus Ltd as cited in Albert Odawa v Gichumu Gitbenji [2007] eKLR to contend that the multiplier approach is not applicable in the instant matter and hence urged the court to exercise its discretion and adopt the global award approach in awarding a sum of Kshs. 5,000,000/- under this head.

10. Submitting on damages under the Law Reform Act, the court was urged to award Kshs. 20,000/- for pain and suffering, as the Deceased succumbed to his injuries 3 days after the accident whereas an award of Kshs. 100,000/- was urged for loss of expectation of life. The decisions in Ainu (supra), Hyder (supra) and Omar Sharif & 2 Others v Edwin Matias Nyonga & Maxwell Musungu (suing as legal representative and administrator of the estate of Enos Nyonga (deceased)) [2020] eKLR were cited in that regard. Counsel therefore proposed a total award on damages for Kshs.5,720,032/-.
11. The court has considered the pleadings as well as the submissions filed by the respective parties. As stated earlier in this judgment, the question of liability was settled. Nairobi Milimani HCCC No. 192 of 2013 was selected by consent as a test suit for purposes of ascertaining the issue of liability in respect of several related causes including Nairobi Milimani HCCC. 140 of 2015, Nairobi Milimani HCCC. 138 of 2014 and Nairobi Milimani HCCC No. 192 of 2013. On 25.07.2022 the parties adopted a consent the effect of which was to apply to this suit the finding on liability in the test suit, wherein the court found and entered judgment on liability at 100% against the Defendants jointly and severally.
12. Consequently, the sole question for determination relates to awardable damages. The award of damages is ordinarily based on evidential material placed before the court and upon established principles. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that



the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

13. The Plaintiff by his plaint averred at paragraph 9 and 10 that: -

“9. The Plaintiff further states that as a result of the said accident, the deceased who was healthy and academically bright adult aged 21 years and studying to be a commercial pilot and aviation management and would have grown to support his mother and father and the Plaintiff claims general damages for the anticipated lost dependency. ...

10. By reason of the matter aforesaid, the dependents of the deceased have suffered loss and damages as the deceased had a very promising future and consequently, they have lost their future means of livelihood as support.” (sic)

14. Under the *Law Reform Act*, the Plaintiff urged the court to make an award of Kshs. 300,000/- for loss of expectation of life and Kshs. 400,000/- for pain and suffering as the Deceased succumbed to his injuries some days after the accident. He cited several authorities in buttressing that submission. The Defendants on their part while relying on some decisions also cited by the Plaintiff, including *Ainu* (supra) and *Hyder* (supra) urged the court to award Kshs. 20,000/- for pain and suffering, as the Deceased succumbed to his injuries 3 days after the accident whereas an award of Kshs. 100,000/- was urged for loss of expectation of life.

15. The peculiar difficulty encountered by this Court in preparing this judgment is that the parties’ consent dated 28.02.2023 and adopted as an order of this court was silent on the admitted pleaded facts or filed documentary evidence pertinent to the question of quantum. The court must do its best in the circumstances and assume where appropriate that certain basic facts were admitted.

16. From the pleadings and submissions, it appears that the deceased died some three (3) days after the occurrence of the accident, hence he must have endured a great deal of pain prior to his demise. Therefore, the Plaintiff’s submissions on the quantum of damages under the *Law Reform Act* are not entirely misplaced despite the proposed award being on the higher side. On the other hand, the Defendant’s proposal appears too low. I will award the sum of Kshs. 200,000/= for pain and suffering and the conventional sum of Kshs. 100,000/= for loss of expectation of life (See *Sitati J in Eshapaya Olumasayi & Another v Minial H. Lalji Koyedia & Anor.* [2008] eKLR). The Court also awards the agreed sum of Kshs. 600,032/- as special damages.

17. The submissions on damages in respect of loss of dependency presented a major legal difficulty to this court because the awards proposed therein were not based on evidence before the Court. Nor were any of the parties’ filed lists of documents specifically included in the parties’ consent as admitted without calling the makers. Even if the Court were to rely on the undated letter contained in the Plaintiff’s documents showing that the deceased was at the time of death training to become a pilot, no evidence of his possible salary upon qualifying was tendered.

18. What counsel for the Plaintiff sought to rely on in that regard were decisions made in other cases involving possible salaries of qualified pilots. Legal authorities arising from unrelated disputes cannot be used herein as a form of evidence or factual basis for determining factual issues disputed in the pleadings, unless parties consent to be bound by findings of fact in such authorities. No such consent was recorded by the parties herein and the fact that they agreed to canvass the issue of quantum through submissions cannot supplant the requirements of sections 107, 108 and 109 of the *Evidence Act* and the host of existing judicial pronouncements thereon.



19. In urging a multiplier approach based on a salary of Kes.1,200,000/-, a multiplier of 44 years and ½ dependency ratio, counsel for the Plaintiff relied on the decisions outlined earlier in this judgment. The Defendants on their part proposed a global award of Kshs. 5,000,000/- under this head, citing the decision in *Mwanzia Ngalai Mutua v Kenya Bus Ltd (Msa) & Another as cited in Albert Odawa v Gichumu Gichenji* [2007] eKLR. In the latter case, the Court rejected the proposal to assess lost dependency using the multiplier method, and instead made a global award, observing that no proof of the earnings of the deceased had been tendered.
20. The Court in so holding cited Ringera J (as he then was) in the former case as follows:

“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.”

See also *Marko Mwenda v Bernard Mugambi & Another Nairobi* HCCC No. 2343 of 1993 where Ringera J reiterated the above views.

21. With respect, legal authorities cited by the Plaintiff while useful as guides in the correct assessment quantum cannot substitute material proof of income in respect of the deceased herein or even expected dependency. The multiplier approach urged by the Plaintiff's counsel appears unsuited for the case before the court where there is hardly any material tendered to establish the key elements commonly used in the multiplier approach, and especially the earnings of the deceased. Thus, the proposed sum of Kshs. 1,200,000/- as the likely income of the deceased herein appears excessive and to have been literally plucked from the air.
22. Further, although at 21 years of age the deceased may well have been undergoing some professional training like many young men of his age, the proposed likely salary seems speculative in the absence of firm evidence. Moreover, although unmarried at death, the deceased would most likely have married in later years had he survived. Hence the ½ dependency ratio proposed is not justified.
23. Equally, the years of lost dependency could only be assessed against the possible life span or expected years of dependency by his dependents who, being the deceased's parents were possibly aged about 45-50 years at the time he died. A dependency of 44 years for such parents would seem somewhat unrealistic. Thus, while the principles enunciated in *Kenya Breweries v Saro* [1991] eKLR as espoused by the Plaintiff's advocate apply in this case, the dependency ratio of ½ and multiplier of 44 years appear untenable. The Court of Appeal held in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92]2KAR 288 regarding the 2/3 dependency ratio that it was not a rule because dependency was a question of fact.
24. The court is however willing to accept, based on the parties' submissions that the Deceased was prior to death training to become a pilot. Assessment of damages for lost dependency is not a precise science but an exercise based on settled principles and sensible estimates based on evidence. The Court of Appeal



in *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] eKLR cited with approval the decision in *Gammel v Wilson* [1981] 1 ALLER where it was held that:-

“[I]f sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation, it is the balance of probability which matters...”

25. Given the dearth of evidence to assist assessment of lost dependency in this case, the Court finds it prudent to apply a global award for lost dependency. The approach was affirmed by the Court of Appeal in *Chabhadiya Visram v Agnes Nafula Wakoli* [2019] eKLR where the income of the deceased had not been proved, the Court observing that:-

“(19) On the assessment of damages, the evidence was that the deceased was a trader with an income which he used to maintain his family including paying school fees for his children. Although there was no specific evidence adduced regarding the actual amount of income, it was open to the learned judge given the evidence that was available, to assess the amount of damages doing the best that he could. We are not persuaded that the approach of a global award as adopted by the learned judge was wrong. We find the awards made reasonable and have no reason to interfere.”

26. In assessing damages, the Court is alive to the exhortation issued by the Court of Appeal in *Kigaragari v Aya* [1982-1988] 1 KAR 768 and reiterated in *Mbaka Nguru & Another v James George Rakwar* [1998] eKLR :-

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees.”

27. By their submissions on this issue, the Defendants’ advocates concede that indeed the Plaintiff is entitled to an award of at least Kshs. 5000,000/- as lost dependency. On the other hand, the Plaintiff’s proposal seeking Kes.316,800,000/- is on the face of it manifestly excessive, while unsupported by evidence. Such an award is likely to be found a perverse and erroneous estimate given the facts of this case. The wide difference between the figures proposed by the parties renders the task of finding a middle ground difficult but the Court cannot abdicate its duty to assess damages as best it can. Doing its best in the circumstances, the Court is persuaded to improve slightly on the Defendants’ offer of Kes. 5000,000/- and to grant what it considers a reasonable global award in the sum of Kes. 5,500,000/- (Five Million Five Hundred Thousand) as general damages for lost dependency.

28. Judgement is therefore entered for the Plaintiff against the Defendants, jointly and severally, as follows:-

- a. General Damages for pain and suffering- Kes.200,000/-
 - b. General damages for loss of expectation of life- Kes.100,000/-
 - c. General damages for lost dependency 5, 500,000/-
 - d. Special damages – Kes.600,032/-
- Total- Kes. 6,400,032/- (Six million Four Hundred Thousand and Thirty-Two).



29. The Plaintiff is awarded the costs of the suit and interest.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023.

C. MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Kirika

For the Defendants: Mr. Ochieng

C/A: Carol

